Court of Appeal
Supreme Court

New South Wales

Case Name:	The Owners – Strata Plan No 91322 v Trustees of the Roman Catholic Church for the Archdiocese of Sydney
Medium Neutral Citation:	[2019] NSWCA 89
Hearing Date(s):	24 April 2019
Decision Date:	24 May 2019
Before:	Gleeson JA at [1]; Leeming JA at [2]; McCallum JA at [3]
Decision:	Grant leave to appeal, if required; dismiss the appeal; the appellant to pay the respondents' costs.
Catchwords:	LAND LAW – strata title -– leasehold strata scheme – enforcement of statutory warranties – whether holder of a 99-year lease a "successor in title" under the Home Building Act 1989 (NSW)
Legislation Cited:	District Court Act 1973 (NSW), s 127 Home Building Act 1989 (NSW), ss 3A 18B, 18C, 18D, 99(1)(b) Strata Scheme Developments Act 2015 (NSW), s 24, Sch 8, cl 4 Strata Schemes (Freehold Development) Act 1973 (NSW), s 7 Strata Schemes (Leasehold Development) Act 1986 (NSW) Strata Schemes Management Act 2015, s 254 Supreme Court Act 1970 (NSW), ss 101(1), 101(2)(e), 103, s 127 Uniform Civil Procedure Rules 2005 (NSW), rr 14.28, 28.2, 28.4, 36.11(2), 36.12
Cases Cited:	Ace Woollahra Pty Ltd v The Owners – Strata Plan 61424 & Anor (2010) 77 NSWLR 613; [2010] NSWCA

	101 Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27; [2009] HCA 41 CIC Insurance Limited v Bankstown Football Club Ltd (1997) 187 CLR 384; [1997] HCA 2 Gardez Nominees Pty Ltd v NSW Self Insurance Corporation [2016] NSWSC 532 Mount Bruce Mining v Wright Prospecting (2015) 256 CLR 104; [2015] HCA 37 Plymouth Brethren (Exclusive Brethren) Christian Church v The Age Company Ltd; Plymouth Brethren (Exclusive Brethren) Christian Church v Fairfax Media Publications Pty Ltd (2018) 97 NSWLR 739; [2018] NSWCA 95 Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28 Taite v Gosling (1879) 11 Ch D 273 Tulk v Moxhay (1848) 2 Ph 774 Younan v Nationwide News Pty Ltd [2013] NSWCA 335
Category:	Principal judgment
Parties:	The Owners - Strata Plan 91322 (appellant) Trustees of the Roman Catholic Church for the Archdiocese of Sydney (first respondent) Spring Cove Developments Pty Ltd (second respondent)
Representation:	Counsel: B Coles QC, B DeBuse (appellant) MA Ashhurst SC, S Duggan (respondents) Solicitors: Watson & Watson Solicitors (appellant) Corrs Chambers Westgarth (first respondent) BCP Lawyers & Consultants (second respondent)
File Number(s):	2018/347376
Publication Restriction:	None
Decision under appeal:	
Court or Tribunal:	District Court of New South Wales
Jurisdiction:	Civil

Date of Decision:	19 October 2018
Before:	Cowdroy ADCJ
File Number(s):	2017/331337

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

The appellant is an owners corporation holding a 99-year leasehold interest in the common property of a leasehold strata scheme. The freehold title in the land is held by the first respondent, the trustees of the Roman Catholic Church for the Archdiocese of Sydney. The trustees granted development rights to the second respondent for the construction of 16 luxury townhouses and apartments. The owners corporation alleged that there were defects in the development and brought proceedings in the District Court seeking to enforce statutory warranties under the *Home Building Act 1989* (NSW).

At first instance, it was common ground that, for the purposes of the *Home Building Act*, the residential building work was taken to have been done by the trustees as developer. The owners corporation contended that it was "the immediate successor in title" to the trustees and was entitled to the benefit of the statutory warranties. The primary judge agreed to determine those issues by reference to separate questions.

The primary judge held that, as the trustees retained the right of reversion in respect of the leases of each lot and in respect of the common property leased to the owners corporation, none of the holders of those leaseholds was a successor in title to the trustees. His Honour accordingly dismissed the proceedings.

The appeal gave rise to a preliminary question as to whether leave was required where the proceedings were dismissed following the determination of a separate question.

The central issue on appeal was whether the primary judge erred in determining that the holder of a 99-year lease was not a successor in title within the meaning of the *Home Building Act*. The principal arguments advanced by the appellant were:

1. that the *Strata Schemes Development Act 2015* (NSW) displaced the 1986 legislation under which the strata scheme was created and that, pursuant to s 24 of that Act, the common property has vested in the owners corporation;

2. that, based on the decision in *Mount Bruce Mining v Wright Prospecting* (2015) 256 CLR 104; [2015] HCA 37, on a broad view of the events that occurred between the parties, the owners corporation became the successor in title to the trustees and that no instrument was necessary for that purpose; and

3. that, by analogy with the reasoning of Fry J in *Taite v Gosling* (1879) 11 Ch D 273, the long-term lease of property by the holder of the fee simple having the benefit of statutory warranties in its favour should be recognised as a form of assignment carrying the benefit of those warranties.

The Court held per McCallum JA (Gleeson JA and Leeming JA agreeing), dismissing the appeal unanimously:

In relation to leave

(i) Leave is not required as the order under appeal dismissing the proceedings is not interlocutory but, if required, should be granted having regard to the importance of the point of construction raised: [4]-[5].

In relation to the first argument

(ii) The repeal of the 1986 legislation could not effect a retrospective vesting of the common property in the owners corporation or otherwise alter the title acquired by the owners corporation pursuant to the lease: [33]-[34].

In relation to the second argument

(iii) The decision in *Mount Bruce* concerned the construction of a mining royalty agreement rather than a statute and was not of assistance. Instead that case emphasised that the phrase "successor in title" is ordinarily understood in a formal sense and does not generally include a lessee. A more creative approach must be rejected: [39].

In relation to the third argument

(iv) The reasoning of Fry J in *Taite v Gosling* concerned the proper construction of a different word in a different context (the operation of a negative covenant) and is unhelpful in the present case: [44].

JUDGMENT

1 **GLEESON JA:** I agree with McCallum JA.

2 **LEEMING JA:** I agree with McCallum JA.

3 **McCALLUM JA:** This appeal raises an interesting question as to the entitlement of an owners corporation holding a 99-year leasehold interest in the common property of a leasehold strata scheme to enforce statutory warranties under the *Home Building Act 1989* (NSW). The primary judge determined that issue by reference to separate questions, as allowed under r 28.2 of the Uniform Civil Procedure Rules 2005 (NSW). The effect of his Honour's answers was that, since the owners corporation had acquired only a leasehold interest from the holder of the freehold interest in the common property, it was not a successor in title and so was not entitled to enforce the warranties to recover damages in respect of alleged defects in the strata development. Its claim brought in the District Court was accordingly dismissed, presumably under r 28.4 of the UCPR. The owners corporation appeals from that decision.

Whether leave is required

4 The owners corporation contended, and the respondents were content to accept, that the appeal lies as of right pursuant to s 127 of the *District Court Act 1973* (NSW) for the reasons explained by Basten JA in *Plymouth Brethren (Exclusive Brethren) Christian Church v The Age Company Ltd; Plymouth Brethren (Exclusive Brethren) Christian Church v Fairfax Media Publications Pty Ltd* (2018) 97 NSWLR 739; [2018] NSWCA 95 at [120]-[124]. Justice

Basten's conclusion in that case rested on the proposition that, whatever the position in respect of the answer to the separate question, the order under appeal was the order under r 28.4 of the UCPR dismissing the proceedings and that that order did not face a requirement for leave because it was not interlocutory.

5 Justice Basten noted that the decision of this Court in *Younan v Nationwide News Pty Ltd* [2013] NSWCA 335 at [5] held otherwise (describing an order for dismissal under r 28.4 as interlocutory). His Honour was not inclined to follow that decision, for the reasons stated at [123]. His Honour was in dissent in that case and the point was not decided by either of the other two members of the Court, one of whom was a member of the Court in *Younan*. However, as his Honour noted, the conclusion that leave is not required where proceedings are dismissed following the determination of a separate question is supported by other, long-standing authority (I also note that s 127 of the *District Court Act* does not specify a separate requirement for leave to appeal against the determination of a separate question; cf s 103 of the *Supreme Court Act 1970* (NSW)). I would respectfully agree with the analysis of Basten JA on this issue. However, for abundance of caution (noting that the point was not argued), leave, if required, should be granted having regard to the importance of the point of construction raised.

Circumstances in which the separate questions arose

6 The proceedings in the District Court concerned a property development which saw the construction of 16 luxury townhouses and apartments at Spring Cove, a harbourside bay located in Manly. The freehold title to the land the subject of the development is owned by the trustees of the Roman Catholic Church for the Archdiocese of Sydney, a body corporate established by s 4 of the *Roman Catholic Church Trust Property Act 1936* (NSW). The trustees granted development rights to Spring Cove Developments Pty Ltd which entered into a construction contract with SX Projects Pty Ltd. SX Projects is now in liquidation.

7 The proposed strata scheme was governed by the *Strata Schemes (Leasehold Development) Act 1986* (NSW) (now repealed). The prospective lots were sold

"off the plan", in each case on the terms contained in a tripartite agreement between the trustees, the developer and the prospective unit holder. The tripartite agreement contemplated that, upon completion of the development and registration of the strata plan, the trustees would sell the leasehold interest in the relevant lot to the purchaser.

8 The strata plan was registered on 25 August 2015. Prior to registration of the plan, the trustees agreed to create a leasehold interest in each lot by leasing it to themselves with effect from 25 August 2015. There were 16 such leases and it was common ground that each was effective. The trustees also agreed to lease the common property directly to the owners corporation with effect from 25 August 2015. All 17 leases had a term of 82 years commencing on 25 August 2015 with an option to renew for a further 17 years.

9 The owners corporation alleges that the apartments and areas of the common property have a number of defects. It brought proceedings in the District Court claiming damages for breach of the statutory warranties implied into the construction contract pursuant to s 18B of the *Home Building Act*. The pleading alleged that the residential building work was taken to have been done by the trustees, citing ss 3A and 18C(2) of the *Home Building Act* and further alleged that the owners corporation was "the immediate successor in title to the [trustees]" and was "entitled to the benefit of the statutory warranties", citing s 18C(1) of the *Home Building Act*.

10 The defendants in the proceedings were the trustees (first defendant) and Spring Cove Developments Pty Ltd (second defendant). They moved to have the statement of claim struck out pursuant to r 14.28 of the UCPR on the grounds that no reasonable cause of action was disclosed (because the owners corporation was not entitled to enforce the warranties). The plaintiff in turn sought leave to file an amended statement of claim.

11 When the two motions came on for hearing before the primary judge the parties proposed, and his Honour agreed, that the issue of standing to enforce the warranties could appropriately be determined as a separate question. The separate questions ultimately formulated were:

(1) Is the plaintiff a successor in title and immediate successor in title to the first defendant (the trustees) for the purposes of ss 18B, 18C and 18D of the *Home Building Act 1989*?

(2) Are the individual leaseholders successors in title to the trustees for the purposes of ss 18B and 18D of the *Home Building Act 1989?*

(3) If yes to question (2), does the plaintiff have standing to bring the claim as pleaded in the amended claim at paras 22A to 22I on behalf of each lot holder in regard to the common property by virtue of s 254 of the *Strata Schemes Management Act 2015*?

12 No order for the separate decision of those questions appears to have been entered in the manner contemplated by r 36.11(2) of the UCPR but it is convenient to determine the appeal on the premise that that is what occurred.

13 The primary judge held that the first two questions must be answered in the negative and that question (3), in that circumstance, did not arise for determination. As was common ground, it followed that the proceedings should be dismissed and that is the order his Honour made. Again, that order does not appear to have been entered in the manner contemplated by the rules. However, it may be inferred that it was pronounced by the Court when judgment was delivered and it is found on the sealed and certified copy of the judgment. Had the appellant sought to include the order from which an appeal is brought (as opposed to the reasons for judgment) for inclusion in the appeal books, a sealed copy of the order could have been obtained from the Registrar under UCPR r 36.12. On the view I take of the merits of the appeal, it is not necessary to consider these procedural points further.

The primary judge's reasoning

14 As reflected in the separate questions, the entitlement of the owners corporation to enforce the statutory warranties turned on the proper construction of the phrase "successor in title" for the purposes of part 2C of the *Home Building Act*. Section 18B specifies warranties that are implied into every contract to do residential work. For present purposes, it is convenient to describe them as warranties by the contractor that undertakes the building work.

15 Section 18C extends the benefit of the statutory warranties to the immediate successor in title to, among others, a developer who has done residential

building work. The section operates as if the developer were the contractor and the successor in title were the owner. It was common ground at the hearing before the primary judge that the trustees were the developer within the meaning of s 3A of the *Home Building Act*.

16 Section 18C of the Act provides:

> (1) A person who is the immediate successor in title to an owner-builder, a holder of a contractor licence, a former holder or a developer who has done residential building work on land is entitled to the benefit of the statutory warranties as if the owner-builder, holder, former holder or developer were required to hold a contractor licence and had done the work under a contract with that successor in title to do the work.
>
> (2) For the purposes of this section, residential building work done on behalf of a developer is taken to have been done by the developer.

17 Section 18D extends the benefit of the statutory warranties to a person who is a successor in title to a person entitled to the benefit of the warranties (to the extent that it has not been availed of by the predecessor in title). That section provides:

> (1) A person who is a successor in title to a person entitled to the benefit of a statutory warranty under this Act is entitled to the same rights as the person's predecessor in title in respect of the statutory warranty.
>
> (1A) A person who is a non-contracting owner in relation to a contract to do residential building work on land is entitled (and is taken to have always been entitled) to the same rights as those that a party to the contract has in respect of a statutory warranty.
>
> (1B) Subject to the regulations, a party to a contract has no right to enforce a statutory warranty in proceedings in relation to a deficiency in work or materials if the warranty has already been enforced in relation to that particular deficiency by a non-contracting owner.
>
> (2) This section does not give a successor in title or non-contracting owner of land any right to enforce a statutory warranty in proceedings in relation to a deficiency in work or materials if the warranty has already been enforced in relation to that particular deficiency, except as provided by the regulations.

18 As submitted by the trustees before the primary judge, the effect of those provisions is to impose warranties as to the quality and manner of construction of residential building works the benefits of which run with the title when transferred to a subsequent purchaser.

19 It was common ground in the proceedings before the primary judge that the interest acquired by the owners corporation was a leasehold interest. The trustees contended that the statutory warranties imposed by the *Home Building*

Act were accordingly not able to be enforced by the owners corporation. The argument was simple. It was noted that the trustees had at all material times been the registered proprietors of the land on which the strata scheme was developed; that the relevant title for consideration was the trustees' freehold title in the land and that that freehold interest was not transferred by the granting of a lease to the owners corporation in relation to the common property or by the sale of the individual leasehold interests in each lot to the purchasers of those leasehold interests.

20 The owners corporation argued that the effect of s 18C is to render the trustees, as a deemed developer, liable under the implied warranties to their successors in title. So much may be accepted. The critical question was whether the owners corporation was the immediate successor in title to the trustees in respect of the common property. The owners corporation argued that that question should be considered within the prism of the *Home Building Act* as consumer protection legislation and that the Court should interpret the terms "successor in title" in both s 18C and s 18D in a way that would advance the purpose of the Act of protecting purchasers who have unequal bargaining power with builders and developers, in accordance with the principles stated in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 and *CIC Insurance Limited v Bankstown Football Club Ltd* (1997) 187 CLR 384; [1997] HCA 2.

21 The owners corporation acknowledged in its written submissions to the primary judge that, from the perspective of conveyancing law, a lessee would not generally be treated as a successor in title to the lessor. However, it was submitted that the features of the arrangements between the parties relied upon in the owners corporation's statement of claim were adequate indicia of succession. The features relied upon were the very long leasehold ownership term, the absence of any specified rent, the responsibilities to repair and maintain the property at the expense of the owners corporation and the fact that the owners corporation was to have the same responsibilities as if it were the registered proprietor.

22 It was submitted that, from a practical and commercial perspective, the common property had been transferred by the trustees to the owners corporation as an adjunct to the sale of the apartments by the trustees to each of the lot holders. To a degree, the submission begged the question. It appeared to assume that the "sale" of the apartments by the trustees to each of the lot holders conveyed something akin to a freehold interest, reasoning from that premise that there must have been transmitted to the owners corporation a correlative interest such as to sustain its entitlement to enforce the warranties for the benefit of those putative owners. With respect, the primary judge was right not to adopt that reasoning.

23 The owners corporation further submitted that the Court should favour a construction of the Act that would avoid the owners corporation being left without a remedy. It was submitted that, if the trustees' argument was correct, the owners corporation would be left to bear the burden of the cost of repairs or remain "the owner" of a defective building. It was submitted that the phrase "successor in title" was apt to capture the interest of a person who had taken possession of land under a long lease not requiring the payment of rent and under which the rights and entitlements of the lessee were comparable to those of an owner in the strict sense.

24 The primary judge did not accept those arguments. In accepting the position contended for by the trustees, his Honour placed some reliance on the decision of Hammerschlag J in *Gardez Nominees Pty Ltd v NSW Self Insurance Corporation* [2016] NSWSC 532. In that case, the party claiming to be entitled to the benefit of the statutory warranties as a "successor in title" was a mortgagee in possession. Justice Hammerschlag noted at [52] that, whether or not it is the owner that has contracted with the building contractor, the mechanism for transmission of the benefit of the warranties under s 18D (and insurance under s 99(1)(b)) is transmission of the owner's title to the successor. His Honour held that determination of the question whether a party was the successor in title to another requires, first, identification of the relevant title held by the first party at the time of the warranties and secondly assessment of whether that title passed to the second party.

25 Applying the same approach, the primary judge concluded that, as the trustees retained the right of reversion in respect of the leases of each lot and in respect of the common property leased to the owners corporation, none of the holders of those leaseholds was a successor in title to the trustees. The primary judge said at [68]:

> "Those entities have a title, which is leasehold and it gives them a right to possession: but it could not be said that such interest constitutes them 'successors in title' to the trustees. Their interest falls short of title to the fee simple which is an essential requirement for the invocation of the statutory warranties for a 'successor in title' to the trustees."

The argument on appeal

26 The argument on appeal was developed in different terms.

27 By way of preliminary observation the appellant noted, uncontroversially, that the meaning of the expression "immediate successor in title" in s 18C and "successor in title" in s 18D is to be determined by reference to the ordinary and grammatical sense of the statutory words having regard to their context and the legislative purpose (in particular, the mischief it seeks to remedy): *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27; [2009] HCA 41 at [4] (French CJ); [47] (Hayne, Heydon, Crennan and Kiefel JJ). It was submitted that the *Home Building Act* is what might be termed beneficial legislation and that it should attract "a generous or fair and open or non-technical or constrained meaning".

28 Applying that approach, it was submitted that the primary judge erred in holding that the holder of a 99-year lease was not a successor in title under legislation which provides the benefit of statutory warranties. Mr Coles QC, who appeared with Mr DeBuse for the appellant, contended that the primary judge went so far as to hold that nothing short of fee simple would endow the appellant with title such as to give it the benefit of the warranties. Those are the terms in which the judge's conclusion was framed but the critical aspect of that conclusion was that nothing short of transmission of the title held by the trustees would achieve that end. As already explained, the approach his Honour took, adopting the approach articulated by Hammerschlag J in *Gardez*, was first to identify the title of the party with the benefit of the warranties (in this case, fee simple) and then to consider whether that title was transferred to the party claiming to be entitled

to enforce the warranties. It is not clear, and not necessary to determine, whether his Honour went so far as to hold that only a holder of fee simple can transfer title carrying the benefit of the statutory warranties.

29 The owners corporation submitted that the error in the primary judge's conclusion could be analysed in one or a combination of three ways.

The vesting point

30 The first argument was based on the provisions of the *Strata Schemes Development Act 2015* (NSW) (legislation to which, so it appears, the primary judge had not been directed). The burden of the submission was that, whereas the primary judge's conclusion would discriminate between purchasers of lots in newly constructed strata schemes depending upon whether their title was freehold or leasehold, the *Strata Schemes Development Act* deals indifferently between the two.

31 The argument rested on s 24 of the *Strata Schemes Development Act* which, regardless of the kind of strata scheme in question, provides that upon registration of the strata plan the common property "vests" in the owners corporation of the strata scheme.

32 Mr Coles submitted that the effect of the section is that the very process of causing a strata plan to be registered divests the owner of the fee simple and vests it in the freshly-created owners corporation. It was submitted that the proper construction of the phrase "successor in title" in the *Home Building Act* is informed by that operation of the *Strata Schemes Development Act* which, in providing for the vesting of the common property, suggests a broader notion of succession in title.

33 Mr Coles submitted that the *Strata Schemes Development Act* repeals and "in effect displaces" the 1986 legislation and that its effect is to specify the characteristics of the owners corporation for the purpose of determining whether it is a successor in title within the meaning of the *Home Building Act*. The burden of the argument appeared to be that, although at the time the strata plan was registered a leasehold interest was created, that interest is now swollen by force of s 24 such that the common property "vested" in the owners corporation prior to the commencement of the proceedings. I do not accept that

submission. It may be accepted that the scheme is now governed by the 2015 Act (in accordance with the transitional provision in Sch 8, cl 4) but the nature of the title held by the owners corporation must be determined according to the legislation in force as at the date on which the strata plan was registered (25 August 2015). As at that date, strata schemes were governed by two statutes which, relevantly, did distinguish between freehold and leasehold title: the *Strata Schemes (Freehold Development) Act 1973* (NSW) and the *Strata Schemes (Leasehold Development) Act 1986* (NSW). The scheme with which these proceedings are concerned was, obviously, governed by the latter. The repeal of the two previous statutes could not effect a retrospective vesting of the common property in the owners corporation or otherwise alter the title acquired by the owners corporation pursuant to the lease.

34 The 1986 Act (the *Strata Schemes (Leasehold Development) Act*) contained no equivalent provision to the vesting provision in s 24 of the *Strata Schemes Development Act*. As submitted by Mr Ashhurst SC, who appeared with Mr Duggan for the trustees, the registration of the strata plan was governed by s 7 of that Act, which contemplated that the relevant owners corporation would take its interest in precisely the manner that occurred in the present case, namely, by the registration of leases from the proprietor of each of the lots and a lease of the common property.

35 For those reasons, the first argument must be rejected.

The Mount Bruce point

36 Secondly, the owners corporation argued that, viewed from a broader survey of the events that occurred in the dealings between the parties, one can find a process whereby the owners corporation became the successor in title to the trustees and that no instrument was necessary for that purpose. The argument was based on the decision of the High Court in *Mount Bruce Mining v Wright Prospecting* (2015) 256 CLR 104; [2015] HCA 37.

37 I do not think that decision assists the owners corporation's argument in the present case. It concerned the construction of a mining royalty agreement, not a statute. An issue arose in the proceedings as to whether joint venturers in the mining operation had derived title "through or under" Mount Bruce Mining. The

Court considered the relevance of events, circumstances and things external to the contract in construing that phrase.

38 The owners corporation relied in particular on the judgment of Kiefel and Keane JJ at [99] where their Honours said:

> "In the present case, the Court of Appeal framed the issue as whether 'the Joint Venturers acquired title to the subject land (Channar A) *from* MBM' (emphasis added). Given the considerations of text and context which are material here, it is tolerably clear that the reference in cl 24(iii) to title derived 'through or under' MBM cannot be taken to require a title acquired from MBM via an 'unbroken chain of "title" over Channar A linking the present owners … to MBM.' Clause 24(iii) expressly includes in the meaning of the phrase 'the Purchaser' two categories of persons. It speaks, first, of the 'successors and assigns' of MBM, and, secondly, of other persons, being 'all persons' who derive 'title through or under' MBM. The second category cannot sensibly be confined to those persons who derive their title by succession or assignment from MBM: the words creating the second category of 'Purchaser' are not to be disregarded as being otiose. As the primary judge rightly observed, the expression in question 'clearly goes beyond formal succession, assignment or conveyance'."

39 In my respectful opinion, rather than supporting the argument put by the owners corporation, those remarks emphasise the formal sense in which the phrase "successor in title" is ordinarily understood. As noted on behalf of the trustees in oral argument in the appeal, the owners corporation acknowledged before the primary judge that a lessee would not generally be treated as a successor in title to the lessor. The argument sought to be developed by the owners corporation in the appeal invited a more creative approach which, in my view, must be rejected.

The Justice Fry submission

40 The third argument developed by the owners corporation in the appeal was based on the reasoning of Fry J in the English decision of *Taite v Gosling* (1879) 11 Ch D 273. The issue in that case was whether, where mutual covenants had been given by the purchasers of adjacent lots to bind themselves, their heirs and assigns, the covenant could be enforced against a subsequent purchaser by the occupier of an adjacent lot who was not a successor in fee simple but only a tenant under a 99-year lease.

41 The lots were originally sold under an indenture of conveyance which included in each case a covenant to observe a stipulation that "the trade of an innkeeper, victualler, or retailer of wine, spirits, or beer, is not to be carried on

upon any lot". Mr Gosling, who had purchased a lot from an original purchaser, was carrying on a retail liquor trade in breach of the covenant. Mr Taite was the lessee under a 99-year lease from the original purchaser of an adjacent lot that carried the benefit of the covenant. As Mr Gosling had notice of the covenant, it was argued that he could be sued in accordance with the principle in *Tulk v Moxhay* (1848) 2 Ph 774. However, he argued that Mr Taite could not enforce the covenant because, as the holder of only a leasehold interest, he was not the "assign" of the original purchaser.

42 Justice Fry held that Mr Taite was entitled to sue on the covenant. His Honour rejected an argument that an "assign" in such a covenant had to be a person who had taken the owner's whole estate or at least some freehold estate in the land, instead holding that the word "assign" used in that circumstance included a lessee in ordinary legal language. His Honour said:

> "It is true that underletting is not considered an assignment of a lease, so as to be a breach of a covenant not to assign, but that is because the verb 'assign' as applied to leasehold property has the technical meaning of assigning the whole interest, while the word 'assign' as used in the expression 'heirs and assigns', has not been confined to a person taking by an assignment exhausting the whole interest."

43 In the present appeal, the owners corporation argued, by analogy, that the long-term lease of property by the holder of the fee simple having the benefit of statutory warranties in its favour should be recognised as a form of assignment carrying the benefit of those warranties. It was submitted by that reasoning that the fact that the owners corporation did not take the whole of the trustees' title to the land on which the strata scheme was developed did not preclude it from being a successor in title within the meaning of the provisions of the *Home Building Act*.

44 I do not accept that submission. The proper construction of a different word in a different context (the operation of a negative covenant) is, with respect, unhelpful in construing the words of this statute.

The respondents' construction point

45 Mr Ashhurst noted that the phrase "successor in title" is also used in s 99(1)(b) of the Act which concerns the obligation to obtain insurance. Section 99(1) provides:

> (1) A contract of insurance in relation to residential building work required by section 92 must insure:
>
> > (a) a person on whose behalf the work is being done against the risk of loss resulting from non-completion of the work because of the insolvency, death or disappearance of the contractor, and
> >
> > (b) a person on whose behalf the work is being done and the person's successors in title against the risk of being unable, because of the insolvency, death or disappearance of the contractor:
> >
> > > (i) to have the contractor rectify a breach of a statutory warranty in respect of the work, or
> > >
> > > (ii) to recover compensation from the contractor for any such breach.

46 The operation of that section has been held not to extend beyond a successor in title in the traditional understanding of the phrase: *Ace Woollahra Pty Ltd v The Owners – Strata Plan 61424 & Anor* (2010) 77 NSWLR 613; [2010] NSWCA 101 at [55]-[57] per Sackville AJA; Tobias and McColl JJA agreeing at [1] and [2]. Mr Ashhurst submitted that the phrase "successor in title" must have the same meaning in both sections.

47 That is certainly the basis on which Hammerschlag J proceeded in *Gardez*. His Honour explained at [50]-[52]:

> "[50] In its general meaning, 'successor in title' connotes no more than a person who holds title after another. The Oxford Australian Law Dictionary definition is, unexceptionally:
>
> > 'The party that comes later in time than another, as the holder of an estate or interest in property.'
>
> [51] The concept is used in both s 18D(1) and s 99(1)(b) to achieve transmission from the original object of the statutory warranties and corresponding insurance cover (the predecessor) to a person who subsequently comes to hold the title (the successor), which was held by the predecessor when the warranties were impliedly given, namely, the entering into of the contract.
>
> [52] The Act does not expressly state what title it has in mind. However, the mechanism for transmission of the benefit of the warranties and insurance, both where the owner contracts with the contractor and where the owner does not contract, is transmission of the owner's title to the successor."

48 Mr Coles submitted in response to that argument that, having regard to the fact that failure to comply with the obligation under s 99 to obtain insurance carries criminal sanctions (whereas s 18C does not), there is some warrant for construing the phrase "successor in title" differently in each section.

49 While there may be some logic in drawing such a distinction in some circumstances, in my view the meaning of the phrase “successor in title” in ss 18C and 18D is clear. As submitted by Mr Ashhurst, on the owners corporation’s argument, there could be two or three or more successors entitled to enforce the statutory warranties. That would have the effect that, for example, one could terminate those rights as against the builder, which is an unlikely construction of the section.

Conclusion

50 In my view the primary judge’s construction of the section was correct.

51 For those reasons, I am of the view that the appeal must be dismissed. I propose the following orders:

(1) That leave to appeal, if required, be granted;

(2) That the appeal be dismissed;

(3) That the appellant pay the respondents’ costs.

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