IN THE COURT OF APPEAL OF NEW ZEALAND

CA102/04

	BETWEEN	GIBBONS HOLDINGS LIMITED Appellant
	AND	WHOLESALE DISTRIBUTORS LIMITED Respondent

Hearing: 7 February 2005

Court: McGrath, Glazebrook and Chambers JJ

Counsel: W M Wilson QC and M J Radich for Appellant
A R Galbraith QC and M V Robinson for Respondent

Judgment: 28 July 2005

JUDGMENT OF THE COURT

A The appeal is allowed and the judgment of the High Court set aside.

B There will be a declaration that the respondent is bound to meet the obligations of the sublessee under the 1991 deed through to 31 October 2010.

C There will be no order for costs on the appeal.

D Leave is reserved to the appellant to apply for any further relief sought in the fourth statement of claim.

REASONS

MCGRATH AND GLAZEBROOK JJ

(Given by McGrath J)

[1] This is an appeal against a judgment of the High Court which held that the terms of a covenant given to the lessor by the assignee, on the assignment of a lease, to perform all of the lessee's covenants, did not extend to bind the assignee during the term of a new lease provided for in the lease document.

[2] On 10 July 1991 the appellant, Gibbons Holdings Limited, as sub-lessor, entered into a deed (the 1991 deed) recording an agreement to sublease warehouse premises to G.U.S Properties Limited. Gibbons held a head-lease of the land comprised in the sub-lease from Port Nelson Limited for a term due to expire on 31 October 2002 but with perpetual rights of renewal. The 1991 deed provided for an initial term of 12 years less one day commencing on 1 November 1990. On expiry of that initial term, Gibbons was required to hold the premises on trust for G.U.S Properties in return for compensation equal to one day's rental. Gibbons was then bound to enter into, and G.U.S Properties to take, a new lease of the premises for a term commencing on 2 November 2002 and expiring on 31 October 2010. The total period of occupancy for which the parties contracted under the 1991 deed was accordingly 20 years.

[3] It is common ground that the parties structured their agreement in the form outlined in order to avoid the potential impact on Gibbons of the common law rule that a sublease for a term of the same length or longer than the superior lease operates as an assignment of the entire rights of the sub-lessor.

[4] In 1997 G.U.S Properties agreed to assign its interest under the 1991 deed to the respondent**,** Wholesale Distributors Ltd**,** as part of an agreement to acquire certain warehouse facilities. They entered into a deed on 3 April 1997 (the 1997

deed) to give effect to that assignment. G.U.S Properties subsequently ceased trading and is no longer on the register of companies.

[5] In 1999 Wholesale Distributors entered into a further sublease of part of the premises demised under the 1991 deed with TNT Group Limited. In November 2000 Wholesale Distributors assigned its interest under the 1991 deed to another company which subsequently defaulted in its obligations to Gibbons. Gibbons then brought proceedings against Wholesale Distributors, relying on its covenant in the 1997 deed to pay the rent. Wholesale Distributors' response was that its obligation to pay rent ceased on 30 October 2002, with the expiry of the initial lease term provided for in the 1991 deed.

[6] The 1997 deed is headed and operated as a deed of assignment to Wholesale Distributors of the interest of G.U.S Properties as "Lessee" under the 1991 deed. The 1997 deed also incorporated a covenant between Wholesale Distributors as assignee and Gibbons as "Landlord". Clause 14(a) of the 1991 deed had stipulated that the obtaining of a deed of covenant, binding the assignee, was a requirement of any consent that Gibbons might give to an assignment of the lessee's interest. Gibbons became a party to the 1997 deed accordingly, and that deed also incorporates its consent to the assignment to Wholesale Distributors.

[7] The terms of Wholesale Distributors' covenant with Gibbons, under the 1997 deed, are set out in clause 4 of the Second Schedule:

> The Assignee covenants with the Landlord that from the Date of Assignment and during the remainder of the term of the lease the Assignee will pay the rent provided for in the lease and keep and perform all the covenants in the lease.

[8] The circumstances in which this appeal comes before the Court and the basis on which it was argued are fully set out by Chambers J in his dissenting reasons. Chambers J concludes that the phrase in clause 4 "during the remainder of the term of the lease" confined the duration of the obligations that Wholesale Distributors owed to Gibbons under clause 4 to the period covered by the initial term provided for in the 1991 deed which expired in October 2002. We disagree with that analysis of the meaning of clause 4 which in our view focuses on the words "new lease" in

the 1991 deed to the exclusion of the commercial purpose of the document as a whole. That purpose was to create obligations for the occupancy of the premises for a 20 year period in a manner that avoided an assignment of Gibbons' head-lease. Instead we hold that clause 4 binds Wholesale Distributors to the obligations of G.U.S Properties under the 1991 deed to enter into a new lease for a term commencing on 2 November 2002 and expiring on 31 October 2010. We now outline our reasons for this conclusion.

[9] The crucial question in the appeal then is the meaning of the words "the remainder of the term of the lease" in clause 4 of the Second Schedule to the 1997 deed. In ascertaining the intention of the parties expressed by that clause the meaning of the words used, in their context, must be ascertained. An important part of that context is the commercial purpose of the clause concerned.

[10] The general purpose of a clause in a lease**,** whereby it is made a requirement of the giving of consent to an assignment of the lessee's interest that the assignee covenant directly with the lessor to perform all covenants of the lessee, is to secure privity of contract between the lessor and the assignee in relation to all of the lessee's obligations. Without that direct covenant the lessor's rights will be confined to those covenants of the lessee that touch or concern the land. The purpose of the term is accordingly to provide the lessor with the means of enforcing the lease against the assignee on the same basis as the original lessee. This suggests that the objective intention of the parties in relation to the covenant of an assignee in these circumstances will generally be that the scope of the assignee's direct covenant should cover all the obligations of the original lessee.

[11] The meaning of the words "during the remainder of the term of the lease" in clause 4 of the Second Schedule is clarified by the definition of lease in the 1997 deed. That deed stipulates that:

> WHENEVER words or phrases appear in this Deed and in the Second, Third, Fourth and Fifth Schedules that also appear in the First Schedule then those words or phrases shall also mean and include the details supplied after them in the First Schedule.

In this respect the First Schedule relevantly provides:

> LEASE: Deed of Lease dated 10 July 1991

This definition indicates that the term, during the remainder of which the assignee is bound by clause 4 to perform the lessee's covenants, is the term stipulated in the 1991 deed. In the context of a document providing for obligations in relation to occupancy of premises for a 20 year period, we conclude that the term concerned is the whole of that period. It is not merely the first of its three components, being the term of the lease which expired on 30 October 2002.

[12] This reading of clause 4 in our view follows from the acknowledgement in the 1997 deed concerning the expiry date of the "current term". Clause 6 reads:

> 6. The Assignor, the Assignee, the Landlord all acknowledge that the current term under the Lease expires on the date set out in the First Schedule…

The First Schedule relevantly provides:

> EXPIRY DATE OF LEASE: 31 October 2002 with a New Lease being granted for a term expiring 31 October 2010.

[13] The terms of this acknowledgement by Gibbons as Landlord and Wholesale Distributors as assignee convey, as a qualification to the statement that 31 October 2002 is the expiry date of the lease term, that there is an obligation to take a new lease until 31 October 2010. Clause 6 therefore can be taken as a specific acknowledgement by Wholesale Distributors and Gibbons that the assignment is for a period covering the term of that new lease. In this context the reference in clause 4 of the Second Schedule to the "remainder of the term of the lease" is again logically to be taken as being to the overall term of occupancy under the deed. As well, we note that clause 4 does not refer to the "current term," but simply to the "term of the lease."

[14] Significantly also clause 1 of the Second Schedule to the 1997 deed provides:

> 1. The Assignee covenants with the Assignor from the Date of Assignment to pay the rent in accordance with the provisions in the lease and to observe and perform all and singular the covenants, conditions and provisions in the Lease contained or implied and on the part of the tenant thereunder to be observed or performed.

[15] By this provision Wholesale Distributors covenanted with G.U.S Properties to perform all of the lessee's covenants under the 1991 deed. This includes the covenant to enter into the new lease expiring on 31 October 2010 in terms of clause (u) of the mutual covenants under the 1991 deed. Clause (u) relevantly provides as follows:

> (u) NEW LEASE: The parties hereto acknowledge that the term of the head lease expires on the 31st day of October 2002 and contains a right of renewal for a further period of twenty-one (21) years. It is the intention of the parties that two (2) days following the expiry of the lease hereby granted the parties shall enter into a new lease of the premises for a period expiring on the 31st day of October 2010 but it is not the intention of the parties that the granting of such new lease shall operate as an assignment of the head lease. In pursuance of the foregoing arrangements the Lessor shall grant to the Lessee and the Lessee agrees to take on lease a new lease of the premises for a term commencing on the 2nd day of November 2002 and expiring on the 31st day of October 2010 (hereinafter called "the New Lease").

[16] There is no question but that G.U.S Properties assumed an obligation under clause (u) to enter into a new lease from 2 November 2002. This feature distinguishes the present case from those such as *Sina Holdings Ltd v Westpac Banking Corporation* [1996] 1 NZLR 1 where there was merely a right of renewal at the date of the assignment. Under the terms of Gibbons' consent to the assignment effected by the 1997 deed G.U.S Properties retained its liability to Gibbons under the 1991 deed, as clause 7 of the 1997 deed provided:

> 7. THE LANDLORD consents to the assignment but without prejudice to the Landlord's rights, powers and remedies under the lease.

[17] The effect of clause 1 of the Second Schedule is accordingly that if Gibbons were to require G.U.S Properties, as the original lessee, to take the new lease from 2 November 2002, because Wholesale Distributors as its assignee had not, then G.U.S Properties could require Wholesale Distributors to take the lease. We accept the submission of Mr Wilson QC for Gibbons that this is a strong indication that, when, in clause 4 of the same schedule, Wholesale Distributors covenanted directly with Gibbons to perform the lessee's covenants, their mutual intention was that all the obligations covered by clause 1 as between G.U.S Properties and Wholesale Distributors would also be the subject of direct covenant under clause 4 as between Wholesale Distributors and Gibbons.

[18] It is true, as Chambers J points out, that clause 14(a) of the 1991 deed contemplates that an assignment of the lessee's interest may be for a shorter term of occupancy than the full term provided for in the 1991 deed, but in the end we are not persuaded that this is a significant factor in the interpretation of the 1997 deed as the intention of the parties to that document was that the assignment was of interests which endured until the end of the term of the new lease. Nor do the terms of the subsequent dealings by Wholesale Distributors in its interest under the 1991 deed, or any of the pre contractual correspondence, offer any legitimate assistance in the interpretation of clause 4.

[19] This analysis of clause 4 reflects the reality of what apparently happened in the drafting of the 1997 deed. A standard form of deed of assignment was used which incorporated both the lessor's consent and the covenants with the lessor required as standard practice from the assignee. Amendments were made to the standard form to reflect the way in which the 1991 deed's transaction was structured. In substance it was a transaction in the nature of a lease for a 20 year term which took the form of two leases for fixed periods**,** with a holding on trust for one day interposed. This was and is a standard drafting practice to avoid the impact on the head lease of the common law rule mentioned. Mr Galbraith QC for Wholesale Distributors observed in the course of oral argument that the 1997 deed, which was based on a standard form, was a poor fit in relation to the 1991 deed which was not a standard document at all. That is true but seen in this context, the changes made to the standard form are entirely consistent with an intention that the obligations assumed by the assignee to the landlord included occupation of the premises for the remainder of the full term of 20 years stipulated in the 1991 deed. The meaning of clause 4 which we favour reflects this reality as well as the commercial purpose of the provision in the 1991 deed that gave rise to the direct covenant in clause 4. That meaning is in our view clear on the wording of the 1997 deed and it is supported by the context. We adopt it.

[20] We conclude by observing that the common law principle referred to in para [3] above, and recent New Zealand authorities concerning it, were traversed by the Law Commission in its discussion paper**:** *The Property Law Act* 1953 NZLC (1991) p116 paras 486 to 493. A provisional proposal for reform in that report was the

subject of a specific proposal for legislation in the Law Commission's final report stipulating that the subleases not operate as assignments in such circumstances unless there were a contrary intention expressed: *A New Property Law Act* NZLC R29 (1994) paras 553 and 554. Unfortunately the difficulties presented by the common law rule remain, with no end in sight, as the Law Commission's proposal**,** and the 1994 report as a whole**,** have not yet been the subject of departmental proposals to government for legislation.

[21] For these reasons, which in essence were the appellant's case as put to us by Mr Wilson, we allow the appeal and make a declaration that the respondent is bound to meet the obligations of the sublessee under the 1991 deed through to 31 October 2010. We reserve leave to the appellant to seek any further relief sought in the fourth statement of claim. In accordance with the parties' agreement**,** however**,** there should be no order for costs on the appeal.

CHAMBERS J

Assignment of a sublease

[22] This appeal gives rise to a tricky point in the law of landlord and tenant following the assignment of a sublease.

[23] The essential facts relevant to the primary cause of action are not in dispute. Nelson Harbour Board leased premises it owned to Gibbons. The lease commenced on 1 November 1981 and had a term of 21 years. That is to say, it was due to expire on 31 October 2002. Under this lease (which I shall term "the head lease"), Gibbons had one right of renewal, for a further term of 21 years.

[24] Subsequently Gibbons subleased the premises to G.U.S Properties pursuant to a "Deed of Lease" bearing the date 10 July 1991. The commencement date of the sublease was 1 November 1990. The sublease was for a term of "12 years less one day". It was accordingly due to expire on 30 October 2002, one day before the expiry of the head lease. There is no dispute that the purpose of this arrangement was to avoid any question of the sublease operating as an assignment of the head

lease. The 1991 deed contained other provisions which are of crucial significance in this case and to which I shall revert shortly.

[25] In 1997, G.U.S Properties assigned its interest in the sublease to Wholesale Distributors. Gibbons consented to that assignment, such consent being recorded in a deed of assignment dated 3 April 1997.

[26] Later still Wholesale Distributors entered into a deed of sub-sublease with respect to part of the premises. The sub-sublessee was TNL Group Limited.

[27] The final step in the chain occurred in 2000. At that time Wholesale Distributors further assigned its interest in the sublease to Rattrays Wholesale Limited ("RWL").

[28] G.U.S Properties was subsequently removed from the New Zealand register of companies. In October 2002, RWL went into receivership and, in early 2003, into liquidation.

[29] So far this is all straightforward. But now I come to the tricky part. There was a provision in the 1991 deed – clause (t) - that, "for the day after the expiration of the term" (ie for 31 October 2002), Gibbons was to hold the premises in trust for G.U.S Properties, subject to G.U.S Properties paying to Gibbons by way of "compensation" an amount equivalent to a day's rental and lessee outgoings.

[30] Another provision in the 1991 deed – clause (u) - then provided that Gibbons would grant to G.U.S Properties and G.U.S Properties would take on lease "a new lease of the premises for a term commencing on the 2nd day of November 2002 and expiring on the 31st day of October 2010". In the 1991 deed, this proposed new lease was referred to as "the new lease" and I shall also use that terminology.

[31] The purpose of clauses (t) and (u) is reasonably clear. G.U.S Properties wanted to take the premises for 20 years – from 1 November 1990 to 31 October 2010 – and no more than 20 years. G.U.S Properties did not want to take an assignment of the head lease, as that would have meant it had to make a decision in

2002 as to whether or not it exercised a right of renewal. G.U.S Properties would have ended up with a lease either for 12 years (if it decided not to renew) or 33 years (if it did exercise the right of renewal). Neither period is what it wanted. The fear obviously was that, if G.U.S Properties took a sublease for 20 years, that might result in an unintended assignment of the head lease, on the basis that "if what purports to be a sublease is for a term equal to or greater than the term of the head lease, the document operates as an assignment of the head lease": see Hinde McMorland and Sim *Land Law in New Zealand* (2004) at [11.146]. The refinements on that general principle to be found in cases like *Neva Holdings Ltd v Wilson* [1991] 3 NZLR 422 (CA) appear not to have been known by the parties or their legal advisors. To eliminate any risk that the parties' documentation would give rise to an unwanted assignment of the head lease, a stratagem was used to break the period into two lease periods, with a day in between them where G.U.S Properties' occupation of the premises was not as lessee but rather as beneficiary of an express trust.

[32] The current dispute between Gibbons and Wholesale Distributors arose in October-November 2002. RWL at that time went into receivership and the receiver stopped paying the rent. This was just at the time that the new lease was expected to commence. Obviously Gibbons wanted the rent paid by someone. RWL could not pay. G.U.S Properties was no good either, as it had been removed from the register by this stage. So Gibbons looked to Wholesale Distributors. Gibbons demanded rent from Wholesale Distributors on the basis that the obligation to take a new lease was a covenant of the sublease which had been assigned to it. Wholesale Distributors refused to sign a new lease or to pay rent. Its attitude was that its liability under the sublease terminated on 30 October 2002 when it came to an end.

[33] Gibbons's claim against Wholesale Distributors was heard in the High Court in February last year. Ellen France J delivered her decision on 5 May 2004: *C Gibbons Holdings Limited v Wholesale Distributors Limited* HC NEL CIV-2003-442-19. Her Honour found in favour of Wholesale Distributors. Gibbons subsequently appealed to this court.

Issues on the appeal

[34] Gibbons, having brought the appeal, then failed to file the case on appeal within six months, in breach of r 10(1) of the Court of Appeal (Civil) Rules 1997. The effect of that failure was that the appeal was to be treated as having been abandoned. Gibbons applied for an extension of time. Wholesale Distributors initially opposed the application, but in the end Gibbons and Wholesale Distributors reached a compromise. Wholesale Distributors would consent to the extension of time on the basis that Gibbons would not seek costs in this court if successful. I record that an order was made extending time on that basis.

[35] Mr Wilson presented before us a different argument from that which he presented in the High Court. Indeed, his oral argument differed in significant respects from the argument presented in the pre-hearing submissions. This was why Mr Wilson, at least on the main argument, saw fit at the hearing to submit a written "note of oral argument". Mr Galbraith QC, for Wholesale Distributors, did not object to this change of direction on Gibbons's part, as he submitted that the new argument was as flawed as the old. In these circumstances, the court permitted Mr Wilson to develop his new argument. It is to that new argument that I address myself in these reasons. Because the argument was so different from that which had been presented in the High Court, I shall need to refer only briefly to the High Court decision.

[36] Gibbons's principal argument is that, by virtue of the 1997 deed, Gibbons and Wholesale Distributors became contractually committed to one another, with the consequence that Wholesale Distributors became contractually bound to Gibbons to enter into the new lease and contractually committed to paying the rent under it. Wholesale Distributors disputes that. It says that its contractual obligations ceased when the sublease expired on 30 October 2002. Mr Wilson's contractual argument is therefore the first issue that must be determined on this appeal.

[37] The second issue relates to Gibbons's alternative cause of action. Gibbons, in its written submissions, contended that, by reason of representations made by Wholesale Distributors, it was now estopped from denying that it is liable to

Gibbons under the new lease. Ellen France J found against Gibbons on its estoppel argument. She held that, even if representations had been made to Gibbons, Gibbons could not show any detrimental reliance. Gibbons submitted that she was wrong so to find.

[38] I shall deal with the issues in turn.

The contractual argument

[39] Mr Wilson submitted that there were two crucial documents in this case, the 1991 deed and the 1997 deed. His argument ran like this.

[40] Under clause 1 of the 1997 deed, G.U.S Properties assigned to Wholesale Distributors all its "estate right title and interest in the Premises and the Lease all as set out in the First Schedule". "The Lease" was defined in the First Schedule as the "Deed of Lease dated 10 July 1991". Among the terms of that document were clauses (s)-(u), which I now set out:

> (s) RENEWAL OF HEAD LEASE: The parties hereto acknowledge that this lease has been entered into on the basis that the Lessor will exercise the rights of renewal contained in Memorandum of Lease Number 222897.1.
>
> (t) PREMISES TO BE HELD IN TRUST: The Lessor shall for the day after the expiration of the term hereof hold the premises in trust for the Lessee subject to the Lessee paying to the Lessor by way of compensation an amount equivalent to one (1) day's rental at the rate being paid by the Lessee at the expiration of the term hereof together with an amount equivalent to one (1) day's share of the outgoings payable by the Lessee pursuant to Clause 2 hereof.
>
> (u) NEW LEASE: The parties hereto acknowledge that the term of the head lease expires on the 31st day of October 2002 and contains a right of renewal for a further period of twenty-one (21) years. It is the intention of the parties that two (2) days following the expiry of the lease hereby granted the parties shall enter into a new lease of the premises for a period expiring on the 31st day of October 2010 but it is not the intention of the parties that the granting of such new lease shall operate as an assignment of the head lease. In pursuance of the foregoing arrangements the Lessor shall grant to the Lessee and the Lessee agrees to take on lease a new lease of the premises for a term commencing on the 2nd day of November 2002 and expiring on the 31st day of October 2010 (hereinafter called "the New Lease"). The rental payable under the New Lease for the period expiring on the 31st day of October 2004 shall be fixed in accordance with clause (n) of this lease as if it was a review of rental with such modifications as may be necessary to give effect thereto.

> The rental payable for the period of two (2) years commencing 1 November 2004 and the rental payable for the period of two (2) years commencing 1 November 2006 shall be similarly determined in accordance with clause (n) of this lease. The New Lease to be entered into by the parties hereto pursuant to this subclause shall be otherwise on the same terms and conditions contained in this present lease except that clauses (s), (t) and (u) hereof shall be deleted.

[41] Mr Wilson goes on that those clauses "created reciprocal obligations on the contracting parties to lease the Premises until 2010". He added that Wholesale Distributors "now accepts" that proposition. It is certainly true that Wholesale Distributors accepts that clauses (s)-(u) did create reciprocal obligations between Gibbons and G.U.S Properties through to 2010, obligations which Wholesale Distributors accepts Gibbons could have enforced against G.U.S Properties had it not been removed from the register of companies.

[42] The next step in Mr Wilson's argument is that the expiry date of the agreement to lease was 2010. For that proposition he relies on clause 6 and the First Schedule of the 1997 deed. Clause 6 reads as follows:

> [G.U.S Properties, Wholesale Distributors, and Gibbons] all acknowledge that the current term under the Lease expires on the date set out in the First Schedule and the current rent is as set out in the First Schedule.

[43] In the First Schedule, the "expiry date of lease" is said to be:

> 31 October 2002 with a New Lease being granted for a term expiring 31 October 2010.

[44] Mr Wilson submits that Gibbons consented to the assignment "but without prejudice to [its] rights powers and remedies under the Lease" (clause 7). One of those rights, he submits, is the right to have the premises leased to 2010.

[45] Mr Wilson then points to the following covenants which Wholesale Distributors made to G.U.S Properties in the 1997 deed:

(a) To observe and perform all the covenants, conditions and provisions in the lease: clause 1 of the Second Schedule;

(b) To indemnify G.U.S Properties against any liability arising out of any default by it in performance of the covenants in the lease: clause 2 of the Second Schedule.

[46] Those covenants included, Mr Wilson submits, the obligation to lease to 2010.

[47] Finally, Mr Wilson submits that Wholesale Distributors covenanted with Gibbons that it would "during the remainder of the term of the lease…pay the rent provided for in the Lease and keep and perform all the covenants in the Lease": clause 4 of the Second Schedule. Again, Mr Wilson submits that one of those covenants was the obligation to lease to 2010.

[48] The final step in Mr Wilson's chain of reasoning is that, by virtue of the 1997 deed, Gibbons and Wholesale Distributors entered into a contractual relationship. As from the date of the 1997 deed, there was not only privity of estate between Gibbons and Wholesale Distributors but also privity of contract. By this means, privity of contract was created between Gibbons and Wholesale Distributors, which privity was not lost by the subsequent assignment of the premises to RWL.

[49] The crux of Mr Wilson's argument is contained in the last two paragraphs. I accept, as did Mr Galbraith, that the 1997 deed created privity of contract as well as privity of estate between Gibbons and Wholesale Distributors. But Gibbons's difficulty is that Wholesale Distributors' sole covenant with Gibbons was that contained in clause 4 of the Second Schedule. The difficulty stems from the fact that Wholesale Distributors' promise to Gibbons endured only until the end of the term of the sublease. There is no doubt at all that the sublease expired on 30 October 2002. Wholesale Distributors made no promise beyond that date.

[50] The error in Mr Wilson's submission was where he stated that one of the covenants Wholesale Distributors promised to keep was "the obligation to lease to 2010". It is quite true that G.U.S Properties had made that promise. It did agree to enter into a new lease commencing on 2 November 2002. But, as Mr Galbraith submitted, Wholesale Distributors did not make the same promise. All its

obligations terminated on 30 October 2002. If Gibbons wanted to commit Wholesale Distributors beyond 30 October 2002, it should have entered into a novation with G.U.S Properties and Wholesale Distributors, under which Gibbons agreed to lease the premises to Wholesale Distributors from 2 November 2002 (or more accurately 1 November 2002) and G.U.S Properties was released from its earlier agreement.

[51] That for me is the simple answer to Gibbons's contractual claim. But the majority accepts that claim. So I need to go further and explain in more detail why I consider Mr Wilson's argument (and the majority's reasoning) to be wrong.

[52] Under the 1991 deed, G.U.S Properties was obliged to pay the rent and perform all the lessee's covenants under the sublease for the balance of the term (i.e., until 30 October 2002).

[53] The parties also agreed what their relationship was to be after the sublease came to an end. First, the parties agreed what their relationship was to be on 31 October 2002. This agreement was contained in clause (t) of the 1991 deed, but this was not a term of the sublease relationship. It could not be: the sublease would be at an end before this new relationship arose. The entry into the clause (t) agreement may have been, from the parties' viewpoints, a condition of their entering into the sublease, but it was not in truth part of the sublease. The mutual obligations were at best collateral. It was only for the sake of convenience that the 31 October 2002 arrangement was contained in the same document as the sublease. On 31 October 2002, Gibbons was to hold the premises on trust for G.U.S Properties, subject to G.U.S Properties paying to Gibbons by way of compensation an amount equivalent to one day's rent, together with an amount equivalent to one day's share of the outgoings. It is quite clear that, for that day, the relationship between Gibbons and G.U.S Properties would have been trustee and beneficiary, not landlord and tenant.

[54] Because of some muddlement as to dates in the 1991 deed, no provision was made for what was to happen on 1 November 2002. The new lease was due to start on 2 November 2002. Had either party not entered into that new lease, the other

could have obtained an order for specific performance of the agreement contained within clause (u). Once again, the agreement to enter into a new lease was not part of the sublease itself. It was a collateral undertaking, which for convenience was included within the same document as the sublease. The parties' position would have been identical had they, instead of including clauses (t) and (u) in the 1991 deed, inserted those provisions in separate documents, namely a declaration of trust and an agreement to lease respectively.

[55] The assignment to Wholesale Distributors did not alter G.U.S Properties' contractual obligations to Gibbons. The assignment was entered into under clause 14(a) of the sublease. The first part of clause 14(a) provided for Gibbons's written consent. In the second part, G.U.S Properties promised Gibbons that it would:

> procure the proposed transferee or assignee at the cost and expense of [G.U.S Properties] to enter into a Deed of Covenant with [Gibbons] such Deed of Covenant to be prepared by [Gibbons's] solicitor at the cost in all things of [G.U.S Properties] that such transferee or assignee will duly and punctually pay the rent and perform and observe all the covenants and agreements on the part of [G.U.S Properties] herein contained or implied during the residue of the term of years hereby created or during such lesser term which such transferee shall so acquire or should be about to acquire.

[56] It was pursuant to clause 14(a) that the 1997 deed was entered into. Clause 7 of the 1997 deed provided for Gibbons's written consent to the assignment, as required by the first part of clause 14(a) of the sublease. Clause 4 of the Second Schedule of the 1997 deed was the "Deed of Covenant" which G.U.S Properties had been obliged to procure pursuant to the second part of clause 14(a) of the sublease. Clause 4 of the Second Schedule was the covenant between assignee (Wholesale Distributors) and landlord (Gibbons). By virtue of that clause and Wholesale Distributors and Gibbons being parties to the 1997 deed, privity of contract was created between Wholesale Distributors and Gibbons. Privity of estate between them arose *independently* - from the assignment effected by clause 1 of the 1997 deed: *Hill and Redman's Law of Landlord and Tenant* (looseleaf ed) at A[2225].

[57] The important thing to note about clause 4 of the Second Schedule is that it is time limited: Wholesale Distributors' promise to pay the rent and to keep and perform covenants in the lease is limited to the period from the date of assignment to

the expiry of the term of the lease. In that regard, Wholesale Distributors' promise is entirely in accord with the sort of covenant referred to in the second part of clause 14(a) of the sublease. That clause envisaged the assignee promising to pay rent and perform covenants only "during the residue of the term of years hereby created or during such lesser term which such transferee shall so acquire". Neither the sublease nor the 1997 deed made any provision for renewal of the sublease or an extension of its term because such was not possible under the sublease. By virtue of the 1997 deed, Wholesale Distributors became liable to pay rent and observe covenants – but only until 30 October 2002.

[58] The parties' relationship on 31 October 2002 is interesting. The relationship between Gibbons and G.U.S Properties was intended to be that of trustee and beneficiary, provided that G.U.S Properties paid compensation to Gibbons. As we know, it did not. What was the relationship, if any, between Gibbons and Wholesale Distributors? Neither Mr Wilson nor the majority deal with this point. It is possible to assign a beneficial interest in a trust. But there is no mention of such an assignment in the 1997 deed. In any event, there was clearly an election on the beneficiary's part as to whether it wished to take up its beneficial interest. Clearly Wholesale Distributors did not want to take up that interest (even if it was eligible so to do, which I doubt).

[59] What then of the position on 2 November 2002? Gibbons could still have required G.U.S Properties to enter into a new lease on the agreed terms (which were, for convenience, set out in clause (u) of the 1991 deed). That agreement was not part of G.U.S Properties' estate or interest in the premises and the lease. Rather, it was, as Mr Galbraith submitted, an agreement which "could (and probably should) have been recorded in a separate document". Mr Galbraith submitted that the fact that it was incorporated into the deed of sublease did not mean that it passed with the estate. I agree. It was not assigned; there was no novation.

[60] This is the answer to the submission Mr Wilson made in reply to Mr Galbraith's. In reply, Mr Wilson referred to clause 1 of the Second Schedule of the 1997 deed, which read as follows:

> [Wholesale Distributors] covenants with [G.U.S] from the Date of Assignment to pay the rent in accordance with the provisions in the Lease and to observe and perform all and the covenants, conditions and provisions in the Lease contained or implied and on the part of the tenant thereunder to be observed or performed.

[61] Mr Wilson argued that that provision did not have the cut-off date on which Wholesale Distributors placed such store in relation to clause 4. Mr Wilson submitted that Gibbons could sue G.U.S Properties to perform the agreement to lease and that G.U.S Properties could sue Wholesale Distributors under clause 1 to compel it to perform this covenant falling on the tenant under the sublease. Mr Wilson submitted that clause 1 and clause 4 should be read together. It would make no sense, he submitted, if Gibbons could indirectly enforce against Wholesale Distributors the agreement to lease via clause 1, but could not do so directly via clause 4. The error in that argument is that clause 1 did not effect an assignment of the agreement to lease. There is no conflict between clauses 1 and 4 on a proper interpretation of them.

[62] Even if I were wrong in my view that the 1997 deed was not effective to assign the agreement to lease, it would at best have been effective only to assign the benefit of that agreement. The burden of the contract would not have been assigned: *Hill and Redman* at A[2063]; Hinde McMorland and Sim at [11.132]. To achieve that result, a novation would have been required. The 1997 deed could have achieved that result, but it did not.

[63] In my respectful view, the majority's reasoning fails to deal with the arrangement Gibbons and G.U.S Properties actually agreed. The reasoning proceeds on an assumption that, because those parties effectively negotiated a 20 year lease, a simple assignment achieved the purpose of assigning the balance of the 20 year term. That ignores the fact that the parties' relationship was intended to change at least twice during the 20 year period. When the first lease came to an end, so did the relationship of landlord and tenant. That relationship potentially changed (at G.U.S Properties' election) to trustee and beneficiary. It then changed again under an agreement to lease, the proposed terms of the new lease being different from the terms of the first lease. As if these complexities were not enough, we then have the additional difficulty of 1 November 2002 – a day apparently on which the parties

were to have no relationship at all. As Anderson J observed in the not dissimilar case of *Robert Jones Investment Ltd v W F and E L King Ltd* HC HAM CP77/87 28 August 1989, the "metamorphosis" effected by an arrangement of the sort negotiated in that case, as here, is "substantial not semantic": at 20. His Honour observed:

> [T]he relationship of landlord and tenant is extinguished and a relationship of trustee and cestui qui trust arises. ... The plaintiff assumed all the obligations of a trustee. The first defendant was relieved of all the obligations under the lease referable to a lessee's covenants and became liable for only a specified payment of money.

[64] See in respect of that case the useful case note by Associate Professor David Grinlinton in (1991) 6 BCB 34, especially at 35.

[65] The majority's reasoning, as well as glossing over the complex arrangement that Gibbons and G.U.S Properties put in place, also necessitates a reading of clause 14(a) of the 1991 deed which is contrary to its plain, unambiguous words. It also involves a rewriting of clause 4 of the Second Schedule of the 1997 deed by removing the time restriction on Wholesale Distributors' covenant. All of this is apparently justified by the majority's assumption as to the parties' "purpose". In my view, we cannot be certain as to what the parties' "purpose" was in 1997. It may be that Gibbons did intend that Wholesale Distributors would be liable through to 2010. Even if that was their purpose, however, Gibbons failed to achieve it.

[66] The majority's reasoning is also, with respect, directly contrary to this court's decision in *Sina Holdings Ltd v Westpac Banking Corporation* [1996] 1 NZLR 1. In that case, the tenant (Westpac) assigned its interest in a lease to Haig Robertson Real Estate Limited. The lease contained a right of renewal, which Haig Robertson exercised. During the period of that renewed lease, Haig Robertson defaulted. The landlord looked to Westpac, as the original lessee. This court held that the renewed lease was "the grant of a new lease which followed expiry of the original lease": at 5. It could not properly be described "as simply an extension of the original term". This court held that Westpac's contractual obligations did not extend beyond the date of its lease. Westpac was accordingly not liable following Haig Robertson's default. Similar reasoning applies here. If wording such as is found in the 1997 deed is

effective to create an obligation on the assignee to take a new lease (which I doubt), then clearly that obligation passed to RWL on the further assignment to it in 2000. It would be to RWL that Gibbons should look.

[67] Before leaving this ground of appeal, there are two further matters to which I should refer. First, there was much evidence as to the parties' negotiations in 1997. Mr Wilson submitted that we should look at that evidence if we considered there was ambiguity in the 1997 deed. Mr Galbraith submitted that this evidence was "all irrelevant and inadmissible". I do not need to resolve that question as I do not consider there was any ambiguity.

[68] Secondly, Mr Wilson also referred us to subsequent dealings by Wholesale Distributors. In particular, in 1999 Wholesale Distributors entered into the sub-sublease to TNL. That sub-sublease was due to run until 29 October 2002. TNL had the right, however, to take a new lease from 2 November 2002. The new term could run, at TNL's election, until 2 November 2008. Mr Wilson's argument was that Wholesale Distributors would not have committed itself to such terms "beyond 2002, unless following the assignment to it it had the right to lease the premises from [Gibbons] until 2008." Further, Mr Wilson submitted that "the internal documentation" of Wholesale Distributors at the time of the assignment to RWL demonstrated an understanding that Wholesale Distributors considered itself "committed to 2010". The deed of assignment to RWL "confirmed and continued" Wholesale Distributors' obligations to Gibbons. I cannot accept those submissions. Later contractual arrangements between Wholesale Distributors and third parties cannot assist in the interpretation of the 1997 deed. In this regard, I agree with the majority.

[69] I would accordingly have held that Gibbons fails on its first ground of appeal. My reasoning is somewhat different from that of Ellen France J, but that reflects the fact that the argument presented to us was significantly different from that presented to her.

Estoppel

[70] I now turn to Gibbons's alternative cause of action based on estoppel. The majority did not need to deal with the alternative argument, as they have found for Gibbons on its first cause of action. Mr Wilson did not deal with the alternative cause of action orally, despite argument having been made on the topic in Gibbons's pre-hearing submissions. Indeed, Mr Wilson submitted that Gibbons's case stood or fell on contract. At the same time, he did not formally abandon the alternative cause of action.

[71] I can deal with it quite shortly.

[72] Ellen France J recorded that there was no dispute between the parties as to the requirements for an estoppel. Both parties considered that the following passage from *Burbery Mortgage Finance and Savings Limited v Hindsbank Holdings Limited* [1989] 1 NZLR 356 (CA) at 361 correctly recorded the law:

> It is well settled that where one party has by words or conduct made to the other a clear and unequivocal promise or assurance intended to affect the relations between them and to be acted on accordingly, then once the other party has taken him at his word and acted on it, the one who gave the promise or assurance is bound by that assurance unless and until he has given the promisee a reasonable opportunity of resuming his position.

[73] Before Ellen France J, Gibbons relied on the negotiations that took place between Wholesale Distributors and TNL when the sub-sublease was being negotiated. Gibbons said that Wholesale Distributors represented that it had rights in relation to the premises until 2008. Gibbons argued that it acted upon those representations by consenting to a sub-sublease to TNL and by managing the premises on the basis that Wholesale Distributors had obligations beyond 2002.

[74] Ellen France J rejected this argument. She considered that "arguably" Wholesale Distributors' actions in giving TNL rights in relation to the premises until 2008 did comprise representations: judgment at [86]. Even assuming that to be so, however, she said that Gibbons must fail because there had been no detrimental reliance on the representations.

[75] Gibbons, in its written submissions prepared by Ms Radich, its junior counsel, submitted that Ellen France J was wrong to find that Gibbons had suffered no detriment as a result of its reliance on Wholesale Distributors' representations.

[76] I am not persuaded by Gibbons's argument. I do not consider Wholesale Distributors did represent to Gibbons that it was bound to take a new lease from 2 November 2002. All it asked Gibbons to do was consent to the sub-sublease. By asking for that consent, it did not make any representations or promises to Gibbons as to its future intentions.

[77] It is true that Wholesale Distributors did agree with TNL that TNL could, at its election, take a new lease for a term commencing on 2 November 2002. The sub-sublease was to expire on 29 October 2002. The parties agreed that, for the three days between the expiry of the sub-sublease and the start of the potential new sub-sublease, namely 30 October, 31 October, and 1 November 2002 (erroneously recorded as 30 October, 1 November and 2 November 2002 in clause 9.2 of the sub-sublease), Wholesale Distributors would hold the premises on trust for TNL. This three-day trust arrangement and the agreement to lease thereafter did not amount to a representation by Wholesale Distributors to Gibbons that Wholesale Distributors would be bound by the agreement to lease in the 1991 deed.

[78] Further, as Ellen France J held, there was in any event no detrimental reliance on what Gibbons did and said when entering into the sub-sublease. While under clause 14(a) of the sublease, Wholesale Distributors was bound to obtain Gibbons's consent to the sub-sublease, Gibbons for its part could not arbitrarily or unreasonably withhold its consent. It is clear on the evidence that Gibbons regarded TNL as a satisfactory sub-subtenant. There is no evidence to suggest that Gibbons's decision would have been any different had the sub-sublease not contained the three-day trust arrangement and the agreement to lease. They would have been irrelevant to Gibbons's decision. Gibbons cannot say that it gave its consent to the sub-sublease because the contractual arrangement also included the three-day trust arrangement and the agreement to lease. Even if, contrary to my view, therefore, Wholesale Distributors' act of presenting the sub-sublease to Gibbons for consent amounted to a representation by Wholesale Distributors that it was bound to Gibbons beyond

2002, that was irrelevant to Gibbons's decision; its consent to the sub-sublease was not made in reliance on that.

[79] Nor do I accept Ms Radich's submission that "TNL now has the right to occupy part of the building through to 2008". TNL may sue Wholesale Distributors for failing to give it a sub-sublease from 2 November 2002. While such a dispute is not currently before us, it would clearly not be possible for TNL to obtain an order for specific performance, as it is not now in Wholesale Distributors' power to grant such a sub-sublease. TNL's remedy would have to be damages.

[80] I express no view as to whether TNL would have rights against Gibbons under s 119 of the Property Law Act 1952. There may be some doubt as to whether TNL is an "underlessee" as that term is defined for the purposes of s 119: see s 117. There may well be an argument that, while there is an agreement for an underlease, it is not an "underlease" as defined because TNL is not entitled to have the underlease granted. I prefer not to decide that point as TNL is not a party to the present appeal and its ability to argue for protection under s 119 should not be curtailed without its being heard. In any event, this is a minority judgment.

[81] The crucial point is, however, for current purposes that, even if Gibbons is now subject to a potential claim by TNL under s 119, that detriment to Gibbons has not come about because of a representation by Wholesale Distributors to Gibbons that it was bound beyond 2002. Rather, the potential detriment (if it exists) has come about because Wholesale Distributors entered into an agreement to sub-sublease which perhaps it should not have. If, ultimately, Gibbons were held liable to TNL under s 119, Gibbons may well have some claim against Wholesale Distributors. But that would be a claim for damages; it would not be a claim, as the current claim is, for rent pursuant to a clause (u) sublease.

[82] I express no view as to what the relationship may today be between Gibbons and TNL, as I do not have the details. If there is a current, legally recognised relationship between them, it does not stem from the sublease or Gibbons's approval of it or any representations made by Wholesale Distributors in 1999. If it exists, it

would stem from conduct between Gibbons and TNL since November 2002. That is not the subject of the present appeal.

[83] On the second ground of appeal, therefore, I would also find for Wholesale Distributors.

[84] I would have dismissed the appeal.

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