Chapter 23

Question 1: Given the scope of public planning legislation, is there a continuing place for restrictive covenants in controlling land use?

We consider the role of land covenants in section 23.1.1 and conclude that there is certainly a continuing role for land covenants despite the extensive scope of public planning and building regulation. Land covenants act at the micro level between neighbouring land owners. As such, they can deal with a greater level of detail and encompass a wider variety of concerns that neighbouring owners may wish to address than public planning policy which operates at a macro level. The large number of land covenants that are registered each year at the Land Registry provide evidence of the important role land covenants continue to play. Indeed it would be unusual to find any residential estate that is not subject to land covenants.

Question 2: How have the characteristics of restrictive covenants developed since *Tulk v Moxhay*?

The seminal case of *Tulk v Moxhay* on the running of the burden of covenants is considered in section 23.2. There we explain that liability primarily arose because of Moxhay's conduct: he knew about the covenant. Thus Tulk was asserting a new direct right, rather than a pre-existing proprietary interest. Lord Cottenham did also hint that the promise to keep Leicester Square in an open state i.e. not to build might have proprietary characteristics and it was this analysis that was later developed to give rise to the content of restrictive covenants as property rights that we recognise today. In particular, first, the covenant must not be purely personal, it must relate to servient land, secondly the covenant must benefit the dominant land which must thus be identifiable – see *London CC v Allen* – and thirdly the covenant must be negative in nature – see *Hayward v Brunswick Permanent Benefit Building Society* and *London and South West Railway v Gomm*. We explore each of these elements further in sections 23.2.1, 23.2.2 and 23.2.3.

Question 3: Should the burden of a positive covenant run with the land as a general principle?

This is a question which has troubled lawyers for a considerable time. We explore the question in sections 23.2.3 and 23.2.4 and the mechanisms conveyancers have adopted to try and overcome the difficulties presented by the fact that the burden of positive covenants do not presently run either at law or in equity. These mechanisms may become redundant in the event of the adoption of the Law Commission's recommendation that the burden of all land covenants, both positive and negative, should run with ownership of the servient land through the recognition of a new legal interest in land, to be called a land obligation. We consider this recommendation in section 23.5.

The current structures for the ownership of flats that we explore in Chapter 24, namely the long lease system and commonhold, also have been largely driven by the difficulties caused by the fact that the burden of positive covenants does not presently run.

Question 4: Restrictive covenants have been described as an equitable extension of either privity of estate or negative easements. How helpful are these analogies?

It was the notable Chancery judge Sir George Jessel in *London and South Western Ry. Co. v Gomm* who drew these analogies. He was no doubt seeking to fix the development of the restrictive covenants within well established concepts rather than overtly acknowledge the recognition of a new property interest. Restrictive covenants bear some similarities to both privity of estate and negative easements but there are crucial distinctions and thus the analogies are of limited assistance.

We consider the running of leasehold covenants through the concept of privity of estate in Chapter 24 and note that burden of leasehold covenants may run whether they are positive or negative. This is a fundamental distinction between restrictive and leasehold covenants. We have also noted that for a restrictive covenant to be enforceable against a subsequent owner of the servient land it is necessary for there to be neighbouring land

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that is capable of benefiting from the covenant. It might not seem immediately obvious in the leasehold context that there is neighbouring land that is capable of benefiting from performance of the covenants in the lease. After all, the lease relates to one physical piece of land and the covenants it contains are not given by neighbouring owners but between the landlord and tenant. However, we can identify two distinct estates in the same physical piece of land, namely the tenant's lease and the landlord's reversion, which can respectively benefit from the performance of the landlord's and tenant's covenants – see *Hall v Erwin*.

The nature of negative easements is explored in Chapter 22, sections 22.1 and 22.2. Negative easements operate to restrict what the servient owner can do on his or her land rather than give the dominant owner a right to do something on the servient land. Examples include the rights to light, air and support. As such they perform much the same function as a restrictive covenant. Indeed the reluctance of the courts to recognize new forms of negative easements is influenced by the fact that neighbouring owners can address their concerns by creating a suitably framed restrictive covenant – see *Phipps v Pears*. Both negative easements and restrictive covenants operate between neighbouring landowners and call for at least two pieces of land, commonly referred to as the dominant and servient land. The principle of benefit to adjoining land is also similar to the requirement for accommodation that we explored when considering easements. The analogies between the two interests are thus easy to spot but distinctions do exist particularly in the manner in which the two interests may be created and may bind owners of the servient and dominant land. Easements may be created by express, implied and presumed grant – see section 22.3. Covenants are based upon the parties' agreement which is invariably found in the express terms of a deed. Easements may exist at law, and are recognised as overriding interests where the land is registered. They will thus automatically bind a future owner of the servient land. By the terms of section 62 of the LPA 1925 the benefit of an easement will also pass automatically to the purchaser of the dominant land. A restrictive covenant as an equitable interest must always be registered to bind a future owner of the servient land, whether as a land charge if the land is unregistered, or as a notice, where the land is registered – see section 23.2.5. The running of the benefit of restrictive covenants to a purchaser of the dominant land is dependent on the complications of annexation, assignment or building scheme which we consider in section 32.3.

Question 5: How does the court's interpretation of sections 78 and 79 of the Law of Property Act 1925 differ? Is the difference justified?

Section 79 LPA 1925 concerns the burden of land covenants whilst section 78 relates to the burden.

Section 79 is limited in its impact. It does not, as some have sought to argue, automatically allow for the running of the burden of covenants. It merely acts as a word saving device to demonstrate that the covenant is intended to bind successors in title of the original covenantor, where the other requirements to pass the burden are satisfied. We consider section 79 in section 23.2.1.

Section 78 has been held to automatically annex the benefit of a covenant to the land of the covenantee so that a successor in title of the covenantee may enforce the covenant without the need for express words of annexation or assignment – see *Federated Homes Ltd v Mill Lodge Properties Ltd*. Annexation, including statutory annexation by section 78, is considered in section 23.3.2.

The concept of statutory annexation has been criticized by some conveyancers who take a more traditional view. They argue that section 78, like section 79, should be regarded as merely a word saving provision. They do not believe that the sections should be construed differently. However, the courts have done just that. The supporters of statutory annexation point out that the two sections are worded differently in articulating with whom the covenant is made. In addition section 78 is not expressly subject to a contrary intention, whilst section 79 is. However the courts have made clear that the benefit of a covenant will not pass to who's who are not intended to benefit – see *Roake v Chadha* and *Crest Nicholson Residential South Ltd v McAllister*.

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Question 6: Why is it important to identify the land to be benefited from a restrictive covenant?

Annexation attaches the benefit of a land covenant to the land which is intended to benefit from the covenant. Its acts like affixing glue. It is thus necessary to know what land is intended to benefit. This point was emphasized in *Crest Nicholson Residential South Ltd v McAllister*. Ideally the land will be identified by reference to a clear and accurate plan although a written description from which the land can be identified in the deed creating the covenant will be sufficient, even if oral evidence is required to clarify that description. Nevertheless, it can be difficult to be sure of the land to be benefited where the covenant was created many years ago and the land that was intended to benefit has been subdivided and redeveloped over the intervening years.

Annexation is considered in section 23.3.2.

The need to identify the land to be benefited is also evident from the requirements of a building scheme which we consider in section 23.3.3.

Question 7: Have the courts relaxed their approach to the proof of a building scheme?

The rigour with which the requirements of a building scheme have been expressed and implemented has varied over the years. Early cases looked to an intention of mutual enforceability of covenants imposed upon plots within a defined area or estate, a kind of local law - see *Renals v Colishaw, Spicer v Martin* and *Reid v Bickerstaff*. *Elliston v Reacher* however articulated this search for intended mutual enforceability as demanding a rather more restrictive approach to the evidence. The *Elliston v Reacher* requirements are clearly articulated and have been influential. Nevertheless the courts in more recent times have reverted to a more relaxed approach to the required evidence – see for example *Re Dolphin's Conveyance*.

Building Schemes and their proof is considered in section 23.3.3.

Question 8: Can the court's approach to the enforcement of restrictive covenants be described as the compulsory purchase of the benefit of the covenant?

The usual remedies granted for the breach of a restrictive covenant are either for the court to exercise its discretion to grant an injunction to restrain the alleged breach, or by the award of damages for the loss the covenantee has suffered. An injunction, whether prohibitive to restrain a threatened breach, or mandatory to remedy a past breach, is often the remedy of first choice since the covenantor can no longer act, or threaten to act, in breach. Nevertheless the award of an injunction is a discretionary remedy where damages would be an inadequate remedy or where an injunction would cause unnecessary oppression on the covenantor.

The issues surrounding the enforceability of restrictive covenants and the principles upon which the courts will exercise their discretion are considered in section 23.4.1.

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