FORESTVIEW NOMINEES PTY LTD and ANOTHER v PERPETUAL TRUSTEES WA LTD

FEDERAL COURT OF AUSTRALIA — GENERAL DIVISION

FRENCH, EINFELD and R D NICHOLSON JJ

18 March, 30 October 1996 — Perth

Real property — Restrictive covenants — Enforceability against successor in title — Whether covenant touches and concerns land — Whether burden runs or passes with land — Intention — (WA) Property Law Act 1969 ss 47, 48 — (WA) Transfer of Land Act 1893 s 129B.

Equity — Equitable interests — Restrictive covenants.

At the time of sale of a shopping centre from a vendor to the respondent, the vendor and respondent entered into a restrictive covenant over adjacent land owned by the vendor whereby the vendor was prevented from using the land for retail purposes. The covenant was worded so as to exclude tenants of the shopping centre from its benefit. The covenant was also worded so that the vendor covenanted with the words "the transferor as registered proprietor".

The vendor subsequently sold the land adjacent to the shopping centre to the appellants. At the time of purchase the appellants were aware of the restrictive covenant which appeared in the certificate of title of the land.

The appellants, who wished to develop the land, argued that the restrictive covenant was not enforceable against a new owner. The appellants argued that because the covenant excluded tenants of the shopping centre from its benefit it did not "touch and concern" the land. Hence the covenant did not meet a necessary condition for the burden of the covenant to run with the land. Nor did the covenant "relate to" the land for the purpose of s 47 of the Property Law Act 1969 (WA). The appellants also argued that confinement of the burden of the covenant to "registered proprietors" of the land indicated that the burden of the covenant was not intended to run with the land and that s 48 of the Property Law Act was ineffective to remedy this problem. The appellants further argued that the operation of s 129B of the Transfer of Land Act 1893 (WA) had the effect that the covenant was not enforceable.

The trial judge held that the covenant was enforceable.

Held, dismissing the appeal:

(i) The restrictive covenant touched and concerned the land.

Tulk v Moxhay (1848) 2 Ph 774; 41 ER 1143, applied.

(ii) The restrictive covenant fell within the description of a covenant "relating to" land within the meaning of s 47 of the Property Law Act.

(iii) There was nothing in the words of the covenant to express an intention contrary to that of s 48 of the Property Law Act that the covenant should bind the vendor and its successors in title and the persons deriving title under them.

(iv) The effect of s 129B of the Transfer of Land Act did not bring down the covenant or make it unenforceable as against the appellants.

Note

As to restrictive covenants see *Halsbury's Laws of Australia*, vol 12, EQUITY, [185 1200] [185 1255]

Appeal

This was an appeal from the decision of a trial judge concerning the enforceability of a restrictive covenant.

D J M Bennett QC and *D Stone* for the appellants.

W Martin QC and *B Dharmananda* for the respondent.

French J.

Introduction

This appeal concerns the enforceability of a restrictive covenant preventing the construction of retail premises on land adjacent to the Warwick Grove Shopping Centre. The covenant is made between Perpetual Trustees WA Ltd (Perpetual) who acquired the shopping centre land and National Mutual Life Association of Australia Ltd (NML) who sold it and also owned the adjoining land. The covenant was worded so as to exclude tenants of the centre from its benefit. The object of the exclusion was to allow any variation or discharge to be negotiated directly by the registered proprietors. That exclusion has raised a question of the enforceability of the covenant against a company which has subsequently purchased the land which adjoined the shopping centre. It is contended that the covenant is unenforceable against the new owner of the adjoining land. It is said that because the covenant seeks to exclude tenants of the shopping centre land from its benefits it does not touch and concern that land and therefore fails to satisfy a condition of enforceability in equity. The operation of ss 47 and 48 of the Property Law Act 1969 (WA) relating to the passing of the benefit and the burden of covenants and s 129B of the Transfer of Land Act 1893 (WA) relating to the discharge or modification of covenants on the register are also at issue in this case.

Factual background

On 16 September 1993 a contract was executed for the sale of land comprising the Warwick Grove Shopping Centre (the shopping centre land) and one hectare (the subdivided land) to be excised from a 4.9 hectare lot (the adjoining land) adjoining the shopping centre land. The combination of the shopping centre land and the subdivided land is referred to in these reasons as "the amalgamated shopping centre land". The vendor was the National Mutual Life Association of Australia Ltd. The purchaser was Perpetual Trustees WA Ltd. The purchase price was $56.7 million, of which $1 million was allocated to the subdivided land.

The contract provided for a restrictive covenant to be applicable to the area of 3.9 hectares which remained in the ownership of NML after the excision of the subdivided land (the remaining land). The object of the covenant, as indicated in a letter of offer from Perpetual to NML of 15 July 1993, was to prevent the use of the remaining land for any retail sales, bulk goods sales, showroom uses or market stall operations. NML's promise to make the covenant was set out in cl 3.5 of the contract. Appendix 1 to the contract set out the terms of the covenant.

On 29 September 1993, NML and Perpetual executed a deed of restrictive covenant embodying the provisions of appendix 1. A settlement of all but $500,000 of the purchase price took place on 30 September and Perpetual became the registered proprietor of the shopping centre land. It lodged caveats on both the subdivided land and the remaining land The latter caveat gave notice

that Perpetual claimed an interest "as the holder of the benefit of an unregistered deed of restrictive covenant". The subdivision of the 4.9 hectare area adjoining the centre was not approved by the State Planning Commission until 31 January 1994 and the subdivided land became available for dealing on 14 April 1994.

On 15 June 1994, the settlement of the sale of the subdivided land took place and the transfer from NML to Perpetual was lodged at the Titles Office for registration. The transfer contained the restrictive covenant set out in appendix 1 to the contract of sale save for the excision of a reference to leasehold interests in the benefited land, ie the amalgamated shopping centre land. Subsequent correspondence in response to a requisition raised by the Land Titles Office led to new clauses being substituted for existing cll 2 and 4 of the covenant. The correspondence was attached to and registered with the transfer which was approved for registration on 24 November 1994. The date of registration of the transfer was shown on the certificate of title as 15 June 1994. The certificate of title disclosed an encumbrance in its second schedule in the following terms:

> Transfer F582167 contains a restrictive covenant.
> Registered 15.6.1994 at 11.13 hrs.

The terms of the covenant as amended appeared on the transfer as registered in the following terms:

> 1. Restrictive Covenant
> The transferor as the registered proprietor of:
> the balance of part of Lot 738 on plan 10130 remaining after excision of the land (the burdened land)
> COVENANTS with the transferee as the registered proprietor of:
> (aa) the land hereby transferred, and
> (bb) the land comprised in

Description of land	*Extent*	*Volume*	*Folio*
Lot 908 on diagram 47752	Whole	1399	004
Lot 906 on diagram 45282	Whole	1980	428
Part of Lot 907 on diagram 45282	Whole	1980	429
Lot 909 on diagram 47753	Whole	1980	430

> (together "the benefited land"):
> that it will not use the burdened land for any purpose involving:
> (a) the retail sale of goods, including without limitation on goods sold in bulk; or
> (b) market stalls; or
> (c) showrooms;
>
> EXCEPT for the retail sale of minor convenience items such as newspapers, milk, bread and basic toiletries from a facility that is required as a condition of an approval given by a relevant authority for a medium density residential development of the burdened land (such as a retirement village) (the development) and where:
> (i) the facility is built within and remains part of the development; and
> (ii) the facility is not open to the general public and its business is carried on for the sole purpose of providing minor convenience items to residents of the development; and
> (iii) the facility and any sign advertising it is not visible from:
> • any road outside the development or

- any road within the development that is or becomes regularly used by persons who are not residents of the development for access between points outside the development.

2. Covenant binds successors in title

See amended schedule for cl 2

[An earlier version of cl 2 appearing on the transfer was struck through]

3. No application for retail use

The transferor will not include in any development application with respect to the burdened land any request for a use prevented by the restrictive covenant or for the facility referred to in cl 1 but this does not require the transferor to object to the requirement for such a facility if it is imposed as a condition of the approval. SCHEDULE

2. Covenant binds successor in title

The covenants made in cl 1 by the transferor (the restrictive covenant) are made for itself and its successors in title as the registered proprietor or proprietors of the burdened land or any part or parts of it with the intent that the restrictive covenant will enure only for the benefit of the transferee and its successors in title as the registered proprietor or proprietors of the benefited land or any part or parts of it. Without limiting the generality of this cl 2, the restrictive covenant will not enure for the benefit of any tenant for the time being of the benefited land or any part or parts of it.

4. Restrictive covenant to be removed in respect of certain land.

4.1 If any part of the burdened land is a lot which:

(a) does not exceed 800 square metres in area; and

(b) is zoned residential and is not the subject of an application to be zoned for any use that the restrictive covenant prevents;

the registered proprietor of the burdened land for the time being and the registered proprietor of the benefited land for the time being will do all acts and things necessary to discharge the restrictive covenant under s 129B of the Transfer of Land Act 1893 in respect of that lot, at or before the time referred to in cl 4.2.

4.2 The registered proprietor of the burdened land for the time being and the registered proprietor of the benefited land for the time being will cause the restrictive covenant to be discharged in accordance with cl 4.1 before the time of the registration of the transfer of the lot referred to in cl 4.1 into the name of a purchaser who does not intend and is not able by law to use the lot for a purpose which would be prohibited by the restrictive covenant if it were not removed.

4.3 If the then registered proprietor of the burdened land provides evidence to the then registered proprietor of the benefited land which reasonably demonstrates that the then registered proprietor of the burdened land intends to transfer a lot in accordance with cll 4.1 and 4.2, the then registered proprietor of the benefited land will execute and deliver to the registered proprietor of the burdened land any document prepared by that registered proprietor which is reasonably required by that registered proprietor to cause the restrictive covenant to be removed from the title to the lot immediately prior to the registration of the transfer of the lot into the name of the purchaser referred to in cl 4.2.

4.4 For the purpose of s 129B of the Transfer of Land Act 1893, the registered proprietor of the benefited land for the time being and the registered proprietor of the burdened land for the time being covenant with each other that the restrictive covenant is entered into for the benefit of the registered proprietor of the benefited land and its successors in title and is not entered into for the benefit of any other person. Without limiting the generality of the foregoing, the restrictive covenant is not entered into for the benefit of any tenant for the time being of the benefited land.

4. Restrictive covenant not to apply to certain land.

See amended schedule for cl 4.

[The version of cl 4 originally endorsed on the transfer at this point was struck through.]

Pending the registration of the transfer of the subdivided land, negotiations had been under way between NML and Forestview in relation to the remaining land

and on 9 May 1994 NML granted Forestview an option to purchase that land free from all encumbrances other than those specified in the option, one of which was:

> The restrictive covenant substantially in the terms attached to this deed.

The attachment was a copy of appendix 1 to the contract of sale between NML and Perpetual. The option and any sale pursuant to the exercise of the option was made conditional on the withdrawal of the caveats on the land at or before settlement.

Mr Norman Carey, who was a director of both Forestview and an associated company, Silkchime Pty Ltd, negotiated with Perpetual about the development of the remaining land. These negotiations were not fruitful and on 13 October 1994, Forestview filed an application in this court seeking a declaration that the restrictive covenant was unenforceable by reason of s 45B(1) of the Trade Practices Act 1974 (Cth) and alternatively, on its true construction, ineffective to create an interest binding on the remaining land. It sought an injunction to restrain Perpetual from enforcing the covenant. Forestview wished to develop and sell or lease the remaining land as a retail shopping centre but was prevented from doing so by the covenant.

On 26 December 1994, Forestview executed a deed declaring that it held the option on behalf of Silkchime. On 30 December it executed the option to purchase the remaining land. Transfers were registered from NML to Forestview and Forestview to Silkchime on 27 January 1995. The land was transferred subject to an encumbrance, being transfer F582167, namely the transfer of the subdivided land from NML to Perpetual.

Issues for decision by the trial judge

The pleadings are conveniently summarised in the judgment of the learned trial judge. Forestview and Silkchime seek a declaration that on its true construction the covenant is not a restrictive covenant and does not bind the successors in title of NML who are not registered proprietors of the remaining land. A declaration is sought in the alternative that the covenant does not preclude Silkchime from leasing parts of the remaining land to third parties who might wish to develop those parts and use them for the retail sale of goods. A further alternative declaration was sought that the covenant, on its true construction, is ineffective to create an interest binding the remaining land. Injunctive relief was sought to prevent Perpetual from enforcing the covenant.

Allegations in the statement of claim that the covenant is void and is contrary to public policy reflected in the Town Planning and Development Act 1928 (WA) and the Town Planning Scheme of the City of Wanneroo, along with a claim that it is rendered unenforceable by virtue of s 45B of the Trade Practices Act were to be heard and determined at a later date.

Perpetual denied that Forestview and Silkchime were entitled to the relief claimed and cross-claimed against them and NML for rectification if the covenant, in its present form, were found to be ineffective as contended. It pleaded, inter alia, an oral agreement made with NML or a common intention, that the covenant would bind all registered proprietors, occupiers and other successors in title to the remaining land to prevent its use by any and all persons for any retail sales, bulk goods sales, showroom uses or market stall operations. Moreover it was agreed or intended that the covenant would enure for the benefit of the shopping centre land

The judgment of the trial judge

What follows is a summary of the issues identified by the learned trial judge and his disposition of those issues. It does not attempt to do justice to his Honour's comprehensive and detailed reasons.

His Honour first posed for himself the question whether Perpetual could enforce the covenant against Silkchime regardless of whether it were annexed to the Amalgamated Shopping Centre Land. He answered that question in the affirmative, relying upon the decision of the Court of Appeal in *Rogers v Hosegood* [1900] 2 Ch 388. He reasoned that Perpetual was the original covenantee. Forestview and Silkchime took their respective interests in the remaining land with express notice of the covenant and in each of the transfers described the interest transferred as being subject to the encumbrance of the covenant. The covenant touched and concerned the amalgamated shopping centre land.

After referring to a number of authorities, his Honour said:

> To hold Silkchime as being bound by the covenant, being a negative covenant, (of which Silkchime had the clearest express notice when it acquired the remaining land) in favour of Perpetual as original covenantee which still owns the adjoining amalgamated shopping centre land, being land which the covenant "touches and concerns", in my opinion accords with the basic equitable principles reflected in the above cases. In my view, it would be unconscionable in those circumstances for the covenant to be unenforceable against Silkchime.

Having come to that conclusion it was strictly speaking unnecessary for his Honour to consider whether the covenant was annexed to and ran with the amalgamated shopping centre land. The covenant being enforceable against Silkchime, only the constructional points remained. Nevertheless, in case his conclusion were wrong, his Honour turned to that question which he posed thus:

> Does the express exclusion of lessees from taking the benefit of the covenant preclude annexation of the covenant to the amalgamated shopping centre land?

His Honour began by rejecting the notion that a necessary attribute of a restrictive covenant is its characterisation as an equitable easement or any particular category of property interest. The proper approach was to ascertain whether in this area of equity any principle had been laid down which required the benefit of a restrictive covenant to enure for the benefit of every person having an interest in the land. He noted that there would have been nothing to prevent Perpetual from leasing premises in the shopping centre land on terms excluding from the leased property any interest comprised in the restrictive covenant. With respect to future tenants there was no equitable principle to preclude the registered proprietors of the dominant and servient tenements respectively from agreeing to achieve this in advance. Even if a restrictive covenant is a quasi easement there was no reason in law or equity why tenants of the dominant land could not be excluded from enjoying its benefit.

His Honour then turned to the question whether the benefit of the covenant was annexed to the amalgamated shopping centre land. Forestview and Silkchime argued that as a matter of construction it was not so annexed. He concluded that the covenant contained language sufficient to disclose the intention that the benefit of the covenant should pass to Perpetual and its successors in title as owners of the amalgamated shopping centre land and thus be annexed to the land. His opinion in that respect was reinforced by s 47 of the Property Law Act His

Honour also expressed the tentative view that s 47 operated to render ineffective the purported exclusion of the tenants from the benefit of the covenant.

The next question was whether the covenant merely imposed a burden or conferred a benefit on certain persons or classes of persons and was therefore a personal covenant binding only upon those parties to it. His Honour held that the burden of the covenant was annexed to and thus ran with the remaining land. He also rejected a submission that the covenant did not run with either the remaining land or the amalgamated shopping centre land because it did not "touch and concern" the latter. The covenant, he found, was intended to preserve the income generating capacity of the shopping centre erected in and forming part of that land and to maintain its capital value.

Finally his Honour rejected a submission that on its proper construction the covenant bound only those who were registered proprietors of the remaining land.

In the light of the above conclusions it was not necessary for his Honour to decide the cross-claim for rectification. Forestview and Silkchime appeal against his decision.

The grounds of appeal

By their grounds of appeal, Forestview and Silkchime assert that:

> 2. The learned judge erred in law in:
>
> 2.1 holding that on its true construction the restrictive covenant (restrictive covenant) contained in transfer F582167 and notified in relation to the estate and land comprised in certificate of title volume 2003 folio 201 (burdened land) is effective and enforceable as a restrictive covenant relating to the estate and land comprised in certificate of title volume 2001 folio 1000, certificate of title volume 1980 folio 482, certificate of title volume 1399 folio 004 and certificate of title volume 1890 folio 430 (together the benefited land);
>
> 2.2 that on its true construction, the restrictive covenant binds the owner of the burdened land and its successors in title and any person deriving title under the owner or its successors in title including any owner, lessee, sub lessee or occupier of the burdened land;
>
> 2.3 the restrictive covenant "touches and concerns" the benefited land.

Perpetual by a notice of contention sought rectification if any of the grounds of the appeal were to be made out. At the hearing of the appeal, the court ruled that if the appeal were allowed the question of rectification would be remitted to the trial judge.

Before turning to the contentions advanced on appeal it is convenient to refer to the statutory provisions which affect the operation of the law in areas relevant to this appeal.

Statutory provisions

The general law relating to restrictive covenants in Western Australia is affected by ss 47 and 48 of the Property Law Act which provide for the transmission of the benefit and burden of covenants relating to land. The sections derive from ss 78 and 79 of the Law of Property Act 1925 (UK). Each provision has its equivalent in other States of Australia. The sections provide as follows:

> *Benefits of covenants relating to land*
>
> 47(1) A covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in title and the persons deriving title under him or them, and has effect as if those successors and other persons were expressed

(2) For the purposes of subsection (1) in connection with covenants restrictive of the user of land, "successors in title" shall be deemed to include the owners and occupiers for the time being of the land of the covenantee intended to be benefited.

(3) This section applies only to covenants made after the coming into operation of this Act.

Burden of covenants relating to land

48(1) Unless a contrary intention is expressed, a covenant relating to any land of a covenantor or capable of being bound by him, shall be deemed to be made by the covenantor on behalf of himself, his successors in title and the persons deriving title under him or them, and, has effect as if those successors and other persons were expressed.

(2) Subsection (1) extends to a covenant to do some act relating to the land, notwithstanding that the subject-matter may not be in existence when the covenant is made.

(3) For the purposes of this section in connection with covenants restrictive of the user of land "successors in title" shall be deemed to include the owners and occupiers for the time being of the land.

(4) This section applies only to covenants made after the coming into operation of this Act.

The Torrens title system in Western Australia has a number of provisions relating to the operation of restrictive covenants on land subject to the Act. Section 129A of the Transfer of Land Act provides for the creation of restrictive covenants and their endorsement on the certificate of title of the benefited land. Section 129B deals with the discharge of such covenants:

129B(1) Notwithstanding anything contained in this Act to the contrary any covenant or agreement affecting or restricting the use of land may be discharged or modified by agreement by all persons interested in the land affected by such covenant or agreement consenting to such discharge or modification.

(2) The Commissioner shall, when satisfied that all parties interested as aforesaid have agreed to the discharge or modification of any covenant entered in the register book direct the Registrar to enter a memorandum of such discharge or modification in the register book.

The contentions of the parties

The appellants contend that the burden of the covenant did not pass as against them. It was a covenant which, according to its terms, did not enure for the benefit of any tenant for the time being of the benefited land or any part or parts of it. Thus expressed, the covenant did not touch and concern the land, was not a valid *Tulk v Moxhay* covenant and did not bind the successors in title of NML to the remaining land. The position could not be rescued by s 47 of the Property Law Act. For that section would not operate in the face of the express words of the covenant to pass its benefit to tenants of the covenantee. The section merely applies words into a covenant. It does not validate an otherwise invalid covenant. Moreover, as a matter of construction, a covenant expressed not to operate for the benefit of all persons having an interest in the land said to be benefited thereby manifests an intention that it not be annexed to the land. Although the burden may run where the benefit is not annexed it cannot run where the benefit is incapable of being annexed.

Section 48 of the Property Law Act does not cause the burden to pass as this was a case in which a contrary intention was expressed, namely the confining of the burden to registered proprietors. This construction is supported by the exclusion of tenants from the benefit provision

The appellants made a formal submission that the decision of the High Court in *Quadramain Pty Ltd v Sevastapol Investments Pty Ltd* (1976) 133 CLR 390; 8 ALR 555 was wrongly decided. That case concerned a purchaser's covenant that land purchased, which adjoined an hotel, would not be the subject of an application for a liquor licence. The covenant was expressed to be made by the purchaser for himself and the owners and occupiers of the purchased land. It was expressed to be in favour of the vendor and the owners or occupiers of the hotel land. The court, by majority, (Barwick CJ, McTiernan, Gibbs, Stephen and Mason JJ; Jacobs and Murphy JJ dissenting) held that the covenant did not attract the application of the restraint of trade doctrine or s 45(1) of the Trade Practices Act. In so doing reliance was placed upon the judgments in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269. Those judgments reached their conclusion through two approaches. The first was that a purchaser taking land under a restrictive covenant takes a qualified interest in the land and yields no existing freedom. The restraint of trade doctrine which applies to restraints on existing freedoms therefore has no application. The second was that restrictive covenants affecting trade on the burdened land are accepted as part of the structure of a trading society and are therefore exempt from the doctrine. Gibbs J who wrote the principal judgment in *Quadramain*, seemed to prefer the latter approach (at CLR 401) but it was unnecessary to choose between them as the outcome was the same (ibid, at CLR 402). Barwick CJ preferred the former approach (at CLR 394), McTiernan J relied upon both approaches: at CLR 398. Stephen and Mason JJ generally agreed with Gibbs J.

The appellants in the present case reserved the right to argue, if the matter goes further, that the covenant in this case was unenforceable as a restraint of trade.

Finally, the appellants contended that by virtue of s 129B of the Transfer of Land Act the covenant could only be discharged by all persons entitled to its benefit. Therefore unless cll 4.1 and 4.2 were severed, the covenant would fail.

The respondent put against the appellants' primary argument the proposition that the benefit of a restrictive covenant could be allocated to different interest holders just as rights could be carved out of a freehold estate in favour of particular interest holders. An interest in land is not required to benefit every estate holder provided it benefits some of them.

The question whether the covenant ran with the land was a matter of intention which could be construed by reference to the terms of the transfer and the covenant itself. The designation of the covenantor as "NML as registered proprietor" indicated an intention that the covenant should relate to the land. The definition of "proprietor" in s 4(1) of the Transfer of Land Act does not support the proposition that the covenant was not intended to bind successors in title to NML.

There is, it was said, no authority for the proposition that a restrictive covenant must be expressly stated to bind all successors in title. A construction of the covenant restricting its burden to NML or to registered proprietors only would be "commercially absurd".

As to s 48 of the Property Law Act, it was submitted that even if it does not have a substantive operation of making the burden of a restrictive covenant run with the burdened land, it provides the element of a presumed intention to that effect. The section operates if no "contrary intention" is expressed. There was no expressed contrary intention in this case.

It was also said for the respondent that there is no authority that for the burden of a restrictive covenant to be enforced by the original covenantee against a

successor in title to the covenantor, the benefit must have been annexed to the benefited land. In any event the covenant was so annexed as evidenced by the reference in it to Perpetual "as the registered proprietor". This annexation is also supported by the operation of s 47(1) of the Property Law Act. It was accepted that it may be that that section rendered the exclusion of the tenants ineffective.

On the question whether the covenant touched and concerned the land, it was put that the appropriate test is whether the land is capable of being benefited by the covenant. As a matter of fact it was said that it appeared from the evidence that the parties to the covenant reasonably held the view that the value of the benefited land would be enhanced by the covenant. The covenant did benefit the land in the required sense which was in relation to its mode of occupation or "per se" and not merely from collateral circumstances.

The covenant conferred upon Perpetual an equitable proprietary interest in the burdened land in the sense that it deprived the registered proprietor of that land of a proprietary right. It carved out of the freehold estate a part which did not pass to the subsequent purchaser.

Restrictive covenants under *Tulk v Moxhay*

The nature of the equity

It was *Spencer's Case* (1583) 5 Co Rep 16a that first relaxed the rigours of the common law which did not allow covenants to be enforced by and against successors in title: see *Rhone v Stephens* [1994] 2 AC 310 at 317. The Court of Kings Bench in that case held that leasehold covenants could run with the land affecting all assignees who were privy to the relevant estate. The rule applied only to covenants which touched and concerned the leasehold land. The decision is said still to be "the linchpin of covenant enforcement" (Gray, *Elements of Land Law*, 2nd ed, Butterworths, 1993, p 866) and the entire volume of subsequent case law "but an extended exegesis": Meagher, Gummow and Lehane, *Equity Doctrines and Remedies*, 2nd ed, Butterworths, 1984, para 4301.

The enforceability in equity of covenants affecting freehold land was established in *Tulk v Moxhay* (1848) 2 Ph 774. It was beyond doubt that a covenant between vendor and purchaser of land limiting the use of the purchased land or land retained by the vendor would be enforceable between those parties under the law of contract. Moreover, such a covenant could be enforced at law against the covenantor by an assignee of the covenantee where the covenantee had a legal estate in the land benefited by the covenant, the covenant touched and concerned the land and it was the demonstrated intention of the parties that the covenant run with the land: *Rogers v Hosegood* [1900] 2 Ch 388 at 395 per Farwell J.

Prior to 1848 neither a covenantee nor a successor in title could enforce the covenant against the successor in title of the covenantor even if the latter took with notice of the covenant: Meagher, Gummow and Lehane, supra, para 4306. However, in *Tulk v Moxhay*, Lord Cottenham (at 776) held that the assignee of a purchaser who took with notice of the covenant would be bound by it. There it was said:

> That the question does not depend upon whether the covenant runs with the land is evident from this, that if there was a mere agreement and no covenant, this court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased

As enunciated in *Tulk v Moxhay* the enforceability of the class of covenants contemplated in that case turned upon the assignee of the covenantor being fixed with notice of the covenant. In the years immediately following the decision it was applied to positive and negative covenants, on behalf of litigants who held no estate in the land benefited and outside the area of real property: Gray, supra, p 1138. In the last quarter of the nineteenth century, however, the basis of enforceability and its limits were recast: Meagher, Gummow and Lehane, supra, para 4307; Gray, p 1139.

What emerged from *Tulk v Moxhay* was interpreted in the words of Jessel MR in *London & South Western Railway Co v Gomm* [1882] 20 Ch D 562 (at 583) as "an equitable doctrine establishing an exception to the rules of common law which did not treat such a covenant as running with the land". It was either an extension in equity of *Spencer's Case* or of the doctrine of negative easements: at 583. If the covenant bound the land it created an equitable interest in the land: at 580. Notice of the covenant by the covenantor's successor in title was not the source of the right, it was required to avoid the effect of the legal estate. The purchaser of an equitable estate from the covenantor would be bound without notice. (Sir James Hannen agreed at 586, as did Lindley LJ at 588.) These remarks were adopted by the Court of Appeal in *Rogers v Hosegood* at 4045–. It was plain that the person entitled to the benefit of the restrictive covenant had an equitable interest in the burdened land: *Re Nisbet and Potts' Contract* [1905] 1 Ch 391 at 398 per Farwell J. The equity thus generated, however, derived only from restrictive or negative covenants: *Haywood v Brunswick Permanent Benefit Building Society* (1881) 8 QBD 403 at 408 per Brett LJ, 409 per Cotton LJ and 410 per Lindley LJ.

Dixon AJ in *Attorney-General (Ex rel Lumley) v TS Gill & Son Pty Ltd* [1927] VLR 22 at 35, identified the basis for distinguishing between personal contractual covenants and those restrictive covenants creating an equity in the land thus:

> This discrimination was made in equity by the adoption of the analogy of legal easements and covenants running with the land at law, and it was settled that no stipulation restricting the use of land created an equitable interest or equity unless it established something in the nature of a servitude appurtenant to another tenement. If the restriction upon the quasi-servient tenement were directed to strengthen title or to increase enjoyment in possession of the quasi-dominant tenement, the test is satisfied. The enjoyment of an owner, considered as owner, may be enhanced by encumbering other land with any rights which will enlarge, amplify, secure or improve the use to which the owner in possession may put his own.

Analogy features prominently in the characterisation of restrictive covenants whose burden runs with the land. The extended doctrine of "negative easement" identified by Jessel MR stands with other designations such as "equitable charge" (*Re Nisbet and Potts' Contract*, supra, at 397 per Farwell J), "quasi-negative easement" (*Kelly v Barrett* [1924] 2 Ch 379 at 405 per Warrington LJ), a "kind of negative easement" (*Bell v Norman C Ashton Ltd* (1956) 7 P & Cr 359 at 364 per Harman J), and "something analogous to an equitable easement": *Newton Abbot Co-operative Society Ltd v Williamson & Treadgold Ltd* [1952] 1 Ch 286 at 293 per Upjohn J.

The analogies have their uses but the doctrine is sui generis: Meagher, Gummow and Lehane, supra, at para 4308. Whatever the historical inspiration of the principles governing restrictive covenants they are equitable in character and not to be confined by technicalities derived from their analogical ancestors: Preston and Newsom, *Restrictive Covenants Affecting Freehold Land*, 8th ed,

paras 1–12. Equity in developing its doctrines will not be fettered by the concepts on which the doctrine is based if to do so would make the doctrine unfair or unworkable (*Brunner v Greenslade* [1971] 1 Ch 993 at 1006 per Megarry J):

> ... it is of the essence of a doctrine of equity that it should be equitable ... that it should work: equity like nature does nothing in vain.

Carr J at first instance rejected submissions which sought to characterise restrictive covenants as equitable easements and that, as in the case of easements, all persons with an interest in the servient tenement must be bound and all persons with an interest in the dominant tenement must be entitled to enforce the restriction: Appeal Book p 1245. I respectfully agree with his Honour's observation that it is illogical to start by attempting to characterise restrictive covenants as a particular species of property interest and require that they bear all the necessary attributes of that species of property if the burden is to run with the land. The proper course is to consider the content of the doctrine as disclosed in the case law and relevant statutory provisions and any implications arising therefrom.

The passing of the burden

Must the equity be enforceable by all interest holders?

The respondent being the original covenantee, the appellants were not concerned about the actual passing of the benefit. That was not the issue: appeal hearing transcript p 5. The appellants' primary contention was that because the covenant in terms excluded future tenants of the amalgamated shopping centre land from the benefit of the covenant, it did not "touch and concern" that land. A necessary condition for the running of the burden with the remaining land was therefore not satisfied. This contention requires consideration of the conditions upon which the burden of a restrictive covenant runs.

However, the development of the law after *Tulk v Moxhay* confirmed its application so that the burden of a covenant would pass only if it met certain conditions. The first of these was that the covenant must be negative in nature: *Haywood v Brunswick Permanent Benefit Building Society*, supra, at 408 per Brett LJ; 409 per Cotton LJ and 410 per Lindley CJ; *London & South Western Railway Co v Gomm* [1882] 20 Ch D 562 at 583 per Jessel MR; 587 per Sir James Hannen; 588 per Lindley LJ; *Austerberry v Oldham Corp* [1885] 29 Ch D 750 at 773 per Cotton LJ; *Re Nisbet and Potts' Contract*, supra, at 396 per Farwell J; *Marquess of Zetland v Driver* [1939] 1 Ch D 1 at 8. That the covenant in this case is a negative covenant is not in issue.

The second condition was that all or some of the land said to be benefited remain in the possession of the covenantee or his assign suing to enforce the contract: *London County Council v Allen* [1914] 3 KB 642 at 655 per Buckley LJ; 662 per Kennedy LJ; 672 per Scrutton J relying upon *Formby v Barker* [1903] 2 Ch D 539; *Re Nisbet and Potts' Contract*, supra; and *Millbourn v Lyons* [1914] 1 Ch D 34. See also *Kerridge v Foley* (1964) 82 WN (Pt 1) (NSW) 293; *Re Mack and the Conveyancing Act* [1975] 2 NSWLR 623 cited on this point in Bradbrook and Neave, *Easements and Restrictive Covenants in Australia*, Butterworths, 1981, at para 1417. Again there is no issue in the present case on this point. The land said to be benefited by the covenant is the amalgamated shopping centre land part of which, the shopping centre land, had been transferred to the respondent at the time the amended covenant was negotiated and all of which remained in its ownership subsequently

In this connection it can be observed that the covenantee's interest in the land is not required to be a fee simple interest in order that the burden of the covenant pass although the covenant may only continue to pass for so long as the interest of the covenantee or its assigns continues: Bradbrook and Neave, ibid, at para 1420, and see *Golden Lion Hotel (Hunstanton) Ltd v Carter* [1965] 1 WLR 1189. This proposition is not consistent with the view that a covenant will only attract the equitable protection deriving from *Tulk v Moxhay* if all interests in the benefited land are entitled to enforce it.

The third condition was that the covenant must touch or concern the land. When expressed as a limitation on the doctrine of *Tulk v Moxhay* this condition was equated with a requirement that the covenant must either affect the land in relation to its mode of occupation or enhance its value per se and not merely from collateral circumstances: *Rogers v Hosegood*, supra, at 395 per Farwell J and explicitly as to burden in the judgment of the Court of Appeal at 407. The test has been variously formulated. One approach asks whether the land is "affected by the performance or breach of the obligation in question": *Kelly v Barrett*, supra, at 411 per Warrington LJ. Another formulation asks whether the restriction on the burdened land is directed to strengthen title or increase enjoyment in the possession of the land said to be benefited. Enjoyment in that context refers to the enlargement, amplification, securing or improvement of the use to which the owner in possession of the benefited land may put his land by encumbering the burdened land: *Attorney-General (Ex rel Lumley) v TS Gill & Son Pty Ltd* [1927] VLR 22 at 35 per Dixon AJ. The House of Lords has approved the proposition that whether or not a benefit derives from collateral circumstances depends on whether the covenant is beneficial to the owner for the time being of the covenantee's land and to no one else: *P & A Swift Investments v Combined English Stores Group Plc* [1989] 1 AC 632 at 640–1 per Lord Oliver of Aylmerton with whom the rest of their Lordships agreed, applying the conclusion of Wilkinson VC in *Kumar v Dunning* [1989] QB 193.

The ways in which land may be affected or benefited by a restrictive covenant are many. Their categories cannot be closed. In particular, they cannot be limited to demonstrable economic benefits accruing to the owner or others holding interests in the land said to be benefited by it. There may be benefits which are not readily translatable into economic values such as preservation of amenity or environment in the vicinity of the benefited land.

An equity which attaches to burdened land and restricts its use is plainly capable of affecting its value and correspondingly enhancing the value of land adjacent to it although that enhancement may be as the result of a variety of extraneous factors.

Reasonable men and women may differ on whether it can be said that a benefit flows from a particular restrictive covenant. The courts have tended to respect the judgment of the contracting parties in that regard and not seek to substitute their own standards: *Marten v Flight Refuelling Ltd* [1962] 1 Ch 115 at 137 per Wilberforce J. In *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798, Brightman J, at 808, said:

> In my judgment, in such cases, it is not for the court to pronounce which is the correct view. I think that the court can only decide whether a particular view is one which can be reasonably held. If a restriction is bargained for at the time of sale with the intention of giving the vendor a protection which he desires for the land he retains, and the restriction is expressed to be imposed for the benefit of the estate so that both sides are apparently accepting that the restriction is of value to the retained land, I think that the

validity of the restriction should be upheld so long as an estate owner may reasonably take the view that the restriction remains of value to his estate, and that the restriction should not be discarded merely because others may reasonably argue that the restriction is spent.

Covenants restricting the range or nature of trades which may be carried on on the burdened land have been held capable of benefiting the covenantee's land for the purpose of answering this requirement: *Newton Abbot Co-operative Society Ltd v Williamson & Treadgold Ltd*, supra.

In submitting that the covenant in this case did not touch and concern the land, the appellants focused not upon the content of the benefit deriving from the covenant but the fact that it benefited only one class of owner. Senior counsel for the appellants put it thus, "an interest in land is an interest in land and one simply cannot say: I only want this to be for owners not for tenants . . . ". Counsel accepted that it was a consequence of his submission that (subject to a possibility of severance which he tended to discount) no matter how small the interest carved out in the restrictive covenant it would fail to touch and concern the land if not applicable to all interest holders: appeal hearing transcript p 9.

The covenant is expressed not to enure for the benefit of any tenant for the time being of the benefited land or any part of it. The question whether that limitation is effective against s 47 of the Property Law Act can be put aside for the moment.

In deciding whether a covenant so limited can touch and concern the land there is a number of factors to consider. First is that the equity recognised by *Tulk v Moxhay* and developed in later cases is sui generis. It is not to be confined by doctrines relating to analogous property rights such as easements. The second factor is that equity should work and not readily be defeated by technicality: refer Preston and Newsom, *Restrictive Covenants Affecting Freehold Land*, 8th ed, paras 1-12. Acceptance of the appellants' submissions would render the equity a fragile creation defeated by exclusion of the least interest from its benefit. The third factor is that there is no intrinsic difficulty with the concept that an equity may attach to some but not all of the interests in a piece of land. That is illustrated by the proposition referred to earlier that a covenantee's interest in benefited land is not required to be a fee simple in order that the burden of the covenant may pass: Bradbrook and Neave, ibid, at para 1420; and see *Golden Lion Hotel (Hunstanton) Ltd v Carter* [1965] 1 WLR 1189.

A covenant by a lessor to lessees of land by which he agreed to restrict the use of unlet land which he owned in the vicinity was held to touch and concern the leased land. The freehold reversion to the leased land having been subsequently acquired by an assignee of the tenants and merged with the leasehold interests, the covenant was extinguished. The judgment of Cross J (later Lord Cross) in *Golden Lion (Hunstanton) Ltd v Carter* [1965] 1 WLR 1189 was brief but indicative of the uncontroversial nature of the proposition that the benefit of a covenant may touch and concern land even though it enures for the benefit of limited interests in that land. The same proposition is applicable in this case.

I am satisfied that assuming the limitation in the covenant to be effective against s 47 of the Property Law Act it nevertheless touches and concerns the land and falls within the equitable doctrine of *Tulk v Moxhay*.

The operation of s 47 of the Property Law Act 1969 (WA)

Having reached the above conclusion, it is strictly unnecessary to consider the operation of s 47. Nevertheless, it is desirable to do so, if only for completeness. Whatever the true scope of operation of this section a restrictive covenant which

"touches and concerns" the land falls within the description of a covenant "relating to" that land within the meaning of the section. That condition being satisfied, the effect of the section is to deem the covenant to be made "with the covenantee and his successors in title and the persons deriving title under him or them". This includes, by virtue of s 47(2) "owners and occupiers for the time being". It may be accepted, therefore, that the section has the effect of deeming the covenant to be made with the lessees of the covenantee as well as with any successors in title. But to accept that the section has that effect which is plainly intended to be facultative does not mean that it operates to contradict the content of the covenant to which it applies. While the covenant in this case may be deemed to have been "made" with lessees it is so made on the basis that it does not enure for their benefit. In other words, notwithstanding s 47 the covenant is open to the construction that no tenant can seek to enforce it for his own benefit. Whether a tenant would have any cause of action for breach of the covenant deriving from his status under s 47 as a party to it need not be determined here.

Intention and s 48 of the Property Law Act 1969

The fourth condition to be satisfied in order that the burden of the covenant run with the land is that it must be intended to so run. The running of the burden is affected by s 48 of the Property Law Act so that "unless a contrary intention is expressed" a covenant "relating to any land" is deemed to be made on behalf of the covenantor, his successors in title and persons deriving title under him or them. In the present case, and for the purposes of s 48, the covenant related to the land of the covenantor, that being the remaining land. The appellants, however, submitted that for the purposes of the section there was a contrary intention expressed which appeared from the confining of the burden to "registered proprietors".

NML covenanted with the words "the transferor as registered proprietor". In cl 2 of the covenant it was said that the covenants made by the transferor were made "for itself and its successors in title as the registered proprietors of the burdened land". With all due respect to the submission from the appellants there is, in my opinion, nothing in the words of the covenant to express an intention contrary to that of s 48(1) that it should bind NML and its successors in title and the persons deriving title under them.

Discharge of the covenant — s 129B of the Transfer of Land Act

The final point taken by the appellants related to the operation of s 129 of the Transfer of Land Act. Clause 4.4 of the covenant provided that for the purposes of that section the covenant was entered into "for the benefit of the registered proprietor of the benefited land" and not for "the benefit of any other person". The clause expressly excluded tenants of the benefited land from the benefits of the covenant.

Section 129B(1) is expressed in facultative terms. However, satisfaction of its requirements of "agreement by all persons interested in the land" affected by the covenant is a condition of the duty of the Commissioner, imposed by s 129B(2), to enter a discharge or modification of the covenant in the register book. The agreement or consent required by s 129B(1) must involve all persons "interested" in the land. The section is directed to the discharge of the relevant entry in the register book. That entry will relate to the burdened land there being, by virtue of s 129A(2), no obligation on the registrar to make an entry on the certificate of title to the benefited land

Discharge of a covenant affecting or restricting the use of land requires the agreement or consent of all persons interested in the land affected. For the reasons already expressed, this appears to be a reference to the burdened land. The persons interested in the burdened land would include, for present purposes, all persons who hold interests in that land and persons who are entitled to enforce the covenant. As already indicated in the consideration of s 47 of the Property Law Act there may be a real question whether tenants of the benefited land in this case have any standing to enforce the covenant. It may be that they are not "interested" in the burdened land for the purposes of s 129B. Whatever the true position, in my opinion cl 4.4 is ineffective to modify it one way or the other. Tenants are excluded from the benefit of the covenant by cl 2. If, contrary to my opinion, s 47 confers the benefit of the covenant upon them, cl 4.4 will not affect that result.

At worst cl 4.4 may not avoid the requirement to obtain the agreement or consent of tenants for the time being of the amalgamated shopping centre land to the discharge of the covenant. That result, while it may not have been intended by the parties, does not bring down the covenant or make it unenforceable as against the appellants.

Conclusion

For the preceding reasons, in my opinion, the covenant is enforceable as against the appellants. Their appeal should be dismissed with costs.

Einfeld J. I agree with the orders proposed by French and R D Nicholson JJ for the reasons given by their Honours.

R D Nicholson J. This appeal is against a judgment and order of Carr J made on 6 December 1995 holding that (1) a restrictive covenant (the restrictive covenant) is effective and enforceable as a restrictive covenant over the "burdened land" for the benefit of the "benefited land"; (2) on its true construction, the restrictive covenant binds the owner of the burdened land and its successor in title and any person deriving title under the owner or its successors in title, including any owner, lessee, sub-lessee or occupier of the burdened land; and (3) the restrictive covenant "touches and concerns" the benefited land.

The restrictive covenant was found by the trial judge to be made between a vendor as covenantor and the respondent as purchaser of the dominant land whereby the former covenanted with the latter in respect of the land retained by it that:

> . . . it will not use the burdened land for any purpose involving:
>
> (a) the retail sale of goods, including without limitation goods sold in bulk; or
> (b) market stalls; or
> (c) showrooms;
>
> EXCEPT for the retail sale of minor convenience items such as newspapers, milk, bread and basic toiletries from a facility that is required as a condition of an approval given by a relevant authority for a medium density residential development on the burdened land (such as a retirement village).

In cl 2 of the transfer containing the restrictive covenant it is also provided that it is:

> made for itself and its successors in title as the registered proprietor or proprietors of the burdened land or any part or parts of it with the intent that the restrictive covenant

will enure only for the benefit of the proprietor or proprietors of the benefited land or any part or parts of it. Without limiting the generality of this cl 2, the restrictive covenant will not enure for the benefit of any tenant for the time being of the benefited land or any part or parts of it.

There are also provisions in cl 4 for the removal of the restrictive covenant in respect of a lot not exceeding 800 sq m zoned residential and, for the purpose of s 129B of the Transfer of Land Act 1893 (WA), there is agreement in the same terms as above that it is for the benefit of successors of the covenantee excluding lessees. These provisions read:

> 4. Restrictive covenant to be removed in respect of certain land.
>
> 4.1 If any part of the burdened land is a lot which:
>
> (a) does not exceed 800 square metres in area; and
>
> (b) is zoned residential and is not the subject of an application to be zoned for any use that the restrictive covenant prevents;
>
> the registered proprietor of the burdened land for the time being and the registered proprietor of the benefited land for the time being will do all acts and things necessary to discharge the restrictive covenant under s 129B of the Transfer of Land Act 1893 in respect of that lot, at or before the time referred to in cl 4.2.
>
> 4.2 The registered proprietor of the burdened land for the time being and the registered proprietor of the benefited land for the time being will cause the restrictive covenant to be discharged in accordance with cl 4.1 before the time of the registration of the transfer of the lot referred to in cl 4.1 into the name of a purchaser who does not intend and is not able by law to use the lot for a purpose which would be prohibited by the restrictive covenant if it were not removed.
>
> 4.3 If the then registered proprietor of the burdened land provides evidence to the then registered proprietor of the benefited land which reasonably demonstrates that the then registered proprietor of the burdened land intends to transfer a lot in accordance with cl 4.1 and cl 4.2, the then registered proprietor of the benefited land will execute and deliver to the registered proprietor of the burdened land any document prepared by that registered proprietor which is reasonably required by that registered proprietor to cause the restrictive covenant to be removed from the title to the lot immediately prior to the registration of the transfer of the lot into the name of the purchaser referred to in cl 4.2.
>
> 4.4 For the purpose of s 129B of the Transfer of Land Act 1893, the registered proprietor of the benefited land for the time being and the registered proprietor of the burdened land for the time being covenant with each other that the restrictive covenant is entered into for the benefit of the registered proprietor of the benefited land and its successors in title and is not entered into for the benefit of any other person. Without limiting the generality of the foregoing, the restrictive covenant is not entered into for the benefit of any tenant for the time being of the benefited land.

Passing of qualified benefit

The first contention for the appellants is where the benefit is annexed for some but not all future interest holders (the tenants being expressly excluded from the benefit) there cannot be a valid covenant in accordance with *Tulk v Moxhay* (1848) 2 Ph 774; 41 ER 1143 so the learned trial judge was in error in holding the restrictive covenant annexed to the benefited land and "touched and concerned" it. The contention is that, as the benefit is not expressed to pass universally, the covenant cannot have the consequences found for it. The actual passing of the benefit is not in issue as the respondent is the original covenantor.

It is provided in s 47 of the Property Law Act 1969 (WA):

> (1) A covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in title and the persons deriving title under him or them, and has effect as if those successors and other persons were expressed

(2) For the purpose of subs (1) in connection with covenants restrictive of the user of land, "successor in title" shall be deemed to include the owners and occupiers for the time being of the land of the covenantee intended to be benefited.

(3) This section applies only to covenants made after the coming into operation of this Act.

The effect of s 47 makes it unnecessary to refer to "and for my successors" in a covenant. The precondition for the operation of the section, however, is that the covenant "relates to land". It is this precondition the case for the appellants contends is not possible where the covenant is not universal in the interests which it purports to touch in the benefited land. However, it should be noted s 7 of the Property Law Act defines "land" to include "land of any tenure" and "land under the Transfer of Land Act 1893" to mean any estate or interest registered under that Act.

The appellants case points to *Roake v Chadha* [1984] 1 WLR 40 where the covenant contained the words "and the purchaser to the intent and so as to bind (so far as practicable) the land hereby transferred . . . hereby covenants with the vendor but so that this covenant shall not enure for the benefit of any owner or subsequent purchaser of any part of the . . . estate unless the benefit of this covenant shall be expressly assigned . . . ". It was held that the provisions of s 78 of the Law of Property Act 1925 (UK), the equivalent of s 47 of the Property Law Act, like the latter section not expressed to be subject to contrary intention, did not have the effect of annexing the benefit of the covenant in each and every case irrespective of the other express terms of the covenant. It is accepted for the appellants that *Roake* is a stronger case than the present one because of the terms of the covenant there in issue compared to the restrictive covenant.

Put another way, this argument for the appellants is that a covenant expressed not to operate to benefit all interests in the land manifests an intention that it not be annexed to the benefited land because it is for the benefit of specified interests only; cf *Attorney-General v TS Gill & Son Pty Ltd* [1927] VLR 22 at 34–5. While it is accepted for the appellants the burden may run where the benefit is not annexed (*Rogers v Hosegood* [1900] 2 Ch 388) it is contended it cannot run where the benefit is incapable of being annexed.

The case for the appellants also relies upon the absence of any authority holding a *Tulk v Moxhay* covenant can be annexed so as to benefit some but not all interests in land.

In *Tulk v Moxhay* the issue was whether a covenant between vendor and purchaser that the purchaser and his assigns should use or abstain from using the land in a particular way was enforceable. It was held the covenant would be enforced in equity against all subsequent purchasers with notice. Cottenham LC said:

> It is said that, the covenant being one which does not run with the land, this court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased . . . That the question does not depend upon whether the covenant runs with the land is evident from this, that if there was a mere agreement and no covenant, this court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased.

That was the view of this issue taken by the trial judge in this proceeding. He regarded *Rogers v Hosegood* as having accepted a similar proposition as

obviously correct. In that case Farwell J at 394 had observed "it is not contended that the burden of those covenants has not passed to the defendant; he is obviously bound, by reason of notice, whether the covenant as regards him runs with the land or not: *Tulk v Moxhay*". In the Court of Appeal at 403 it was said:

> No difficulty arises in this case as to the burden of the covenants. The defendant is the assignee of the covenantor in respect of the two plots of land comprised in the conveyance of 31 May and 31 July 1869, and he took with notice of the covenants now sought to be enforced.

The learned trial judge considered therefore the respondent may enforce the covenant against the second appellant regardless of whether the covenant is annexed to the benefited land. He continued:

> [The respondent] is the original covenantee. The [appellants] took their respective interests, one after the other on the same day, in the remaining land with express notice of the covenant. [The respondent] owns the [benefited land] which adjoins the [burdened land] and is quite clearly capable of being benefited by the covenant. There may be a distinction between "land which is capable of being benefited" by a covenant and a covenant which "touches and concerns" the relevant land. It is not necessary for me to decide this because, as will be seen, I have come to the conclusion that the covenant does "touch and concern" the [benefited land]. In those circumstances it seems quite clear to me from the relevant case law that the covenant is enforceable against [the second appellant] whether or not it is annexed to and thus runs with the benefited land.

The trial judge supported this conclusion by reference to other authorities upon which the case for the respondents relies on this appeal. The first is *Re Union of London and Smith's Bank Ltd's Conveyance; Miles v Easter* [1933] 1 Ch 611 at 631 where Romer LJ in delivering the judgment of the Court of Appeal said:

> It is plain, however, from these and other cases, and notably that of *Renals v Cowlishaw* (1878) 9 Ch D 125, that if the restrictive covenant be taken not merely for some personal purpose or object of the vendor, but for the benefit of some other land of his in the sense that it would enable him to dispose of that land to greater advantage, the covenant, though not annexed to such land so as to run with any part of it, may be enforced against an assignee of the covenantor taking with notice, both by the covenantee and by persons to whom the benefit of such covenant has been assigned, subject however to certain conditions. In the first place, the "other land" must be land that is capable of being benefited by the covenant — otherwise it would be impossible to infer that the object of the covenant was to enable the vendor to dispose of his land to greater advantage.

The trial judge said this passage was cited with approval by McLelland J in *Lane Cove Municipal Council v H & W Hurdis Pty Ltd* (1955) 72 WN(NSW) 284 at 289. He added there had been a similar result in similar circumstances in *London County Council v Allen* [1914] 3 KB 642 (CA). He also relied upon *Osborne v Bradley* [1903] 2 Ch 446; *Marten v Flight Refuelling Ltd* [1962] Ch 115 and Preston and Newsom, *Restrictive Covenants Affecting Freehold Land*, 8th ed, 1991, p 12, para 1-17.

The case law relating to restrictive covenants, particularly as it has developed in England, is sometimes difficult to reconcile at least so far as concerns various dicta in it. The effect of that case law is conveniently set out in A J Bradbrook and M Neave, *Easements and Restrictive Covenants in Australia*, 1st ed, 1981, at 207-66.

The first thing which needs to be said about the course of authority is that it has defined the scope of application of the rationale enunciated by Cottenham LC

in *Tulk v Moxhay*. It has long been settled that the doctrine is applicable only to a "covenant restricting the mode of using the land only . . . ": *Haywood v Brunswick Permanent Benefit Building Society* [1881] 8 QBD 403. That decision was followed by the decision of the Court of Appeal in *London & South Western Railway Co v Gomm* (1881) 20 Ch D 562. There an option to purchase land on the happening of an uncertain event was held void for remoteness. This led to the contention it was enforceable in equity. Jessel MR, after agreeing with the decision in *Haywood*, said of the doctrine of *Tulk v Moxhay* (at 582–3):

> I think that we ought not to extend the doctrine of *Tulk v Moxhay* in the way suggested here. The doctrine of that case . . . appears to me to be either an extension in equity of the doctrine of *Spencer's Case* 5 Co Rep 16a to another line of cases, or else an extension in equity of the doctrine of negative easements; . . . The covenant in *Tulk v Moxhay* was affirmative in its terms, but was held by the court to imply a negative. Where there is a negative covenant expressed or implied . . . the court interferes on one or other of the above grounds. This is an equitable doctrine, establishing an exception to the rules of common law which did not treat such a covenant as running with the land, and it does not matter whether it proceeds on analogy to a covenant running with the land or on analogy to an easement. The purchaser took the estate subject to the equitable burden, with the qualification that if he acquired the legal estate for value without notice he was freed from the burden.

Lindley LJ at 587–8, citing *Haywood*, also said the doctrine extends only to restrictive covenants. This view was reinforced in *Austerberry v Oldham Corp* (1885) 29 Ch D 750. There is also authority in *Re Nisbet & Potts' Contract* [1905] 1 Ch 391 at 397 per Farwell J that restrictive covenants are analogous to equitable charges upon land. This understanding of the doctrine of *Tulk v Moxhay* was accepted by the House of Lords in *Rhone v Stephens* [1994] 2 AC 310.

It is not disputed here that the restrictive covenant is a negative covenant restricting the mode of using the burdened land.

The authorities also establish the covenant must fall within the defined class of relationship with the benefited land, that is the covenantee's land. In *Osborne v Bradley* at 450, Farwell J classified such covenants as falling under three classes: (1) where the covenant is entered into simply for the vendor's own benefit; (2) where the covenant is for the benefit of the vendor in his capacity as owner of a particular property; and (3) where the covenant is for the benefit of the vendor in so far as he reserves unsold property, and also for the benefit of other purchasers as part of a building scheme.

As Clauson J stated in *Re Ballard's Conveyance* [1937] 1 Ch 473 at 479:

> The first question which arises for consideration is: What is the land for the benefit of which the covenant was taken? The next question will be: Is the person who claims to enforce the covenant seised of that land by title derived through or under the original covenantee? The remaining question will be: Is the covenant one which, in the circumstances of the case, comes within the category of a covenant the benefit of which is capable of running with the land for the benefit of which it was taken?

The nature of the relationship has been variously described in the authorities. The covenant must have been intended to benefit the property as property and not be merely personal. This question of intention is intermixed with the question whether the covenant is:

(a) annexed to or runs with the land; or
(b) touches and concerns it (described by Brightman J in *Federated Homes Ltd v Mill Lodge Properties Ltd* [1980] 1 WLR 594 at 604 as "the old fashioned expression"), or

(c) benefits it.

Compare Meagher, Gummow and Lehane, *Equity Doctrines and Remedies*, 3rd ed, 1992, p 913, para 4312; D J Hayton, "Restrictive Covenants as Property Interests" (1971) 87 *Law Quarterly Review* 538 at 551–3. In later authorities the courts have moved away from the concept of "touch and concerned" to the concept of land being "benefited" by the restrictive covenant: *Newton Abbot Co-operative Society Ltd v Williamson & Treadgold* [1952] 1 Ch 286; *Marten v Flight Refuelling Ltd; Re Gadd's Land Transfer* [1966] Ch 56 at 66, Buckley J said the benefited land:

> ... must be capable of deriving, and must derive, benefit from the covenant. A benefit for this purpose must be something affecting either the value of the land or the method of its occupation or enjoyment.

The authorities also establish that while a covenant will not be enforced even against a successor to a covenantor taking with notice if the covenantee is not in possession of or interested in benefited land (*London County Council v Allen*), a restrictive covenant will be enforceable where it is not annexed to the benefited land or where the land to be benefited is not referred to in the covenant provided there is land of the covenantee capable of benefiting from it: *Miles v Easter* and *Marten*.

Myers J in the Supreme Court of New South Wales in *Re Barry and the Conveyancing Act* [1962] NSWR 977 at 978 accepted that *Miles v Easter* and the earlier authorities of *Renals v Cowlishaw* (1878) 9 Ch D 125 and *Formby v Barker* [1903] 2 Ch 539 established the proposition that if a restrictive covenant is entered into for the benefit of other land retained by the covenantee, it is said to be annexed to that land, or to enure for the benefit of it, and the benefit passes, without express assignment of the covenant, to the successive owners of the land.

To be added to the authorities relied upon by the trial judge is the decision in *Marquess of Zetland v Driver* [1939] 1 Ch 1 where Farwell J on behalf of the Court of Appeal at 8 said that:

> The covenant must be one that touches or concerns the land, by which is meant that it must be imposed for the benefit or to enhance the value of the land retained by the vendor or some part of it, and no such covenant can ever be imposed if the sale comprises the whole of the vendor's land.

In addition he said:

> The land retained by the vendor must be such as to be capable of being benefited by the covenant at the time when it is imposed.

On the question whether the benefit must be to the whole of the land the Court of Appeal in *Zetland* said:

> ... the land which is intended to be benefited must be so defined as to be easily ascertainable, and the fact that the covenant is imposed for the benefit of that particular land should be stated in the conveyance and the persons or the class of persons entitled to enforce it. The fact that the benefit of the covenant is not intended to pass to all persons into whose hands the unsold land may come is not objectionable so long as the class of persons intended to have the benefit of the covenant is clearly defined.

This last sentence is a reference to a covenant not extending to all persons into whose hands the unsold land may come. The question whether a restrictive covenant benefits the whole or each and every part of the benefited land has been the subject of many decisions and much dicta see Preston & Newsom, op cit,

pp 24–9, para–2.20–2.26. In *Federated Homes Ltd* at 606, Brightman LJ stated a covenant annexed to the land of the covenantee by virtue of the Law of Property Act 1925 s 78 (the equivalent of s 47 of the Property Law Act) is annexed prima facie to that land and every part thereof "unless the contrary clearly appears". There was novelty in that proposition which it is unnecessary to examine. The relevance of the decision is that it shows the finding under appeal to be well within the set bounds of authority and to be akin to a restrictive covenant annexed to part of the land only.

Relevantly to this appeal, in *Rogers v Hosegood*, Collins LJ stated the covenants there in question had been made with the mortgagors and strangers to the land so that the benefit did not become annexed. Nevertheless, the covenant, being made with a person who in contemplation of the court was the true owner of the land, could be regarded as annexed to and running with the land.

Turning to, the restrictive covenant, it is to be observed it is made for the benefit of "the registered proprietor or proprietors of the benefited land or any part or parts of it".

In *Miles v Easter* the covenant for the benefit of "the owners or owner for the time being of the land . . . or any part or parts thereof" was held by Wilberforce J in obiter to annex the benefit of the covenant to each and every part of the land. I consider the trial judge was correct when he held the restrictive covenant to be indistinguishable from the covenant in *Miles v Easter* save as to the exclusion of lessees.

In considering the question of characterisation of the benefit the express exclusion of lessees from taking the benefit of the restrictive covenant must be taken into account. The learned trial judge, in addressing that exclusion, relied first upon the manner in which the Court of Appeal in *Rogers v Hosegood* at 404 dealt with the argument that the covenants in that case were made with the mortgagors as well as observations of Megarry J in *Brunner v Greenslade* [1971] 1 Ch 993 at 1005–6. He stated the question whether the holders of lesser estates in the land might be excluded from the benefit of such a covenant did not arise in the case and concluded:

> . . . nothing said in *Rogers v Hosegood* is inconsistent with the proposition that the benefit of a restrictive covenant, the terms of which make the intention of the parties clear, may become inhered in and annexed to a piece of land even though its very terms of creation and annexation exclude lessees from any rights of enforcement.

Consequently, he concluded that lessees would enjoy the benefit only to the extent that the owner/lessor saw fit. He also reached the view that there was nothing in *Pirie v Registrar General* (1962) 109 CLR 619 to conflict with his view:

> . . . that, providing the rules in and developed from *Tulk v Moxhay* are complied with, a covenant will run with the burdened land and the fact that holders of leasehold estates in the land are excluded from the benefit of the covenant does not prevent it from being a restrictive covenant which will run with the benefited land.

No argument was addressed against these foundations of the learned trial judge's reasoning in particular save for the general assertion that the effect of the authorities (in the absence of a direct authority) is to require the benefit to attach to all the interests in the land to which the benefit relates. In my opinion, the authorities do not provide support for these contentions made for the appellants

Furthermore, the authorities show, leaving aside for the moment the exclusion of lessee interests, the restrictive covenant is in all respects one which must be found to benefit the land.

There was no argument to the contention that if a covenant benefited some but not all of the interests in land there would be some difficulty in applying the law to it. A registered proprietor of the fee simple having the benefit of a covenant excluding lessees may impose the exclusion as a condition of the lease. Where the lessee is not entitled to the benefit under a lease of the fee simple with the registered proprietor, the lessee is in a like position to an assignee of part of land to which the benefit of a restrictive covenant did not extend. The restrictive covenant would not thereby be inhibited in applying for the benefit of non-lessee interests or the balance of the land not excluded respectively.

Additionally, no argument was presented that the foundations upon which the doctrine in *Tulk v Moxhay* may rest require the benefit of the covenant to relate to all the interests in the benefited land. By this I mean that it was not contended that if the true foundation of that doctrine is (1) an extension in equity of the doctrine in *Spencer's Case* (1583) 5 Co Rep 17b; or (2) the doctrine of negative easements; or (3) the existence of an equitable charge, it must follow the benefit cannot attach to some but not all of the interests in the benefited land in order for consistency to be maintained with those doctrinal foundations.

Furthermore, the position recognised by the trial judge is consistent with the proposition that a registered proprietor of the fee simple can create an equitable charge which does not apply to a leasehold interest: *United Starr-Bowkett Co-operative Building Society v Clyne* [1968] 1 NSWR 134.

In *Brunner* at 1006, Megarry J said:

> ... equity, in developing one of its doctrines, refuses to allow itself to be fettered by the concept upon which the doctrine is based if to do so would make the doctrine unfair or unworkable. After all, it is of the essence of a doctrine of equity that it should be equitable, and, I may add, that it should work: equity, like nature, does nothing in vain.

That appears to me to be an appropriate observation for the trial judge to have relied upon in an area not covered by precise authority.

In my opinion there is no error in the conclusions of the trial judge that the exclusion of lessees from the benefit was not such as to prevent the restrictive covenant being either annexed to the benefited land or to touch and concern that land or to enure for its benefit.

Passing of the burden

Section 48 of the Property Law Act reads:

> (1) Unless a contrary intention is expressed, a covenant relating to any land of a covenantor or capable of being bound by him, shall be deemed to be made by the covenantor on behalf of himself, his successors in title and the persons deriving title under him or them, and, has effect as if those successors and other persons were expressed.
>
> (2) Subsection (1) extends to a covenant to do some act relating to the land, notwithstanding that the subject-matter may not be in existence when the covenant is made.
>
> (3) For the purpose of this section in connection with covenants restrictive of the user of land "successors in title" shall be deemed to include the owners and occupiers for the time being of the land.
>
> (4) This section applies only to covenants made after the coming into operation of this Act

For the appellants it is contended the relevant contrary intention here appears from the express confining of the burden in cl 2 of the transfer to "registered proprietors" of the burdened land. It is said the use of these words carries with it the exclusion of unregistered proprietors or even persons with subsidiary registered interests like lessees, so that the contrary intention is manifest. This construction, it is contended, is supported by the exclusion of tenants from the benefit provision (whether or not the words "registered proprietor" in the Transfer of Land Act include the registered proprietor of an interest in land). It is argued for the appellants that, properly understood, what the original contracting parties intended was giving the owners for the time being certain benefits and burdens (which they could release) but not benefiting or burdening subsidiary interest holders.

This is said to be supported by analogy to *Tophams Ltd v Earl of Sefton* [1967] 1 AC 50 where purchasers covenanted with a vendor "not to cause or permit land to be used otherwise than for the purpose of horse racing and agricultural purposes". It was held not to be a breach of that covenant for a subsequent purchaser to use the land for other purposes when the covenant did not run with the land. By analogy, it is argued the restrictive covenant does not use the word "permit" and if the appellants lease the land to a party who uses it for purposes prohibited by the restrictive covenant, the appellants are not "using" the land for that purpose. It is said that supports the understanding of the way in which the words "registered proprietor" are to be understood in relation to the burdened land.

The trial judge concluded for the purpose of s 48(1) of the Property Law Act there was no contrary intention expressed or implied on the burden or covenantor's side. He began by finding no difficulty with giving an expansive definition to the expression "registered proprietor" in respect of the reference to the burdened land in cl 2 so as to include a registered proprietor of a leasehold in that land. He saw reason to infer that the parties, in drafting an instrument to be registered under the Transfer of Land Act were using those words in the sense defined in s 4 of the Act, namely:

> "Proprietor" means the owner whether in possession remainder reversion or otherwise of land or of a lease, mortgage or charge whose name appears or is entered as the proprietor thereof in the register book; and such word also includes the donee of a power to appoint or dispose of the same.

Although there is no form of instrument prescribed for the purposes of s 129A, a transfer in the prescribed form under that Act was used.

So far as cl 4.1 is concerned the trial judge regarded it as quite probable that the intention of the parties was that the words "registered proprietor" were intended to refer to the registered proprietor of the fee simple of each parcel of land on the basis that only the registered proprietor of the fee simple in the benefited land was thought to have the benefit of the restrictive covenant. Accordingly, it was consistent with that view for the parties to have considered the subject matter of cl 4 was not something which concerned anyone other than the registered proprietor of the fee simple.

Then his Honour reasoned that even if the "registered proprietor" in cl 2 was confined to meaning the registered proprietor of the fee simple, that, on the authorities, would not prevent the burden of the restrictive covenant running with the burdened land. This conclusion was founded first on the expression in cl 2 "the transferor for itself and its successors in title as the registered proprietor

or proprietors of [the burdened land]" which was well-recognised as a conveyancing technique for distinguishing a covenant from being a purely personal one and for annexing the burden of a covenant to the land. It was supported secondly by reference to dicta in *Miles v Easter* where it was said that the words " . . . the purchasers their heirs and assigns or other the owner or owners for the time being of the land . . . " were "apt words" to ensure the benefit of the covenant in that case ran with the land, the reference to the owner of unregistered land being relevantly equivalent to a reference to the registered proprietor under the Torrens system established by the Transfer of Land Act. After reference to *Drake v Gray* [1936] Ch 451 at 466, the trial judge said there was no reason annexure of the benefit results from such a formulation of words but not annexure of the burden, the object in each case being to distinguish clearly between personal covenants and covenants which are intended to run with the land. His view was that the proper construction of cl 2 is that the burden of the restrictive covenant is to run with the burdened land. There was no room for implying an exclusion of any tenant or any other holder of an interest in the burdened land from the burden of the restrictive covenant. He concluded no contrary conclusion was merited by consideration of the decision in *Re Royal Victoria Pavilion, Ramsgate* [1961] 1 Ch 581 which was clearly distinguishable. Section 48 applied to the restrictive covenant so that it had effect as if the successors and other persons of the registered proprietors on the burden side were expressed as being persons on whose behalf the contract was made.

The case for the appellants on this issue does not address any error in the elements of this reasoning. In my opinion no error is apparent.

Method of discharge

Section 129B(1) of the Transfer of Land Act provides:

> Notwithstanding anything contained in this Act to the contrary any covenant or agreement affecting or restricting the use of land may be discharged or modified by agreement by all persons interested in the land affected by such covenant or agreement consenting to such discharge or modification.

For the appellants it is submitted the only persons entitled to discharge the benefit of a covenant are all persons interested in the land. Here it is said the effect of cl 4 in the restrictive covenant is that the registered proprietors can effect a discharge so the interest of others interested in the land, particularly tenants, can be ignored. Consequently, it is contended, unless there is severance of the clauses providing for discharge, the parties' instrument fails because to hold them to the balance of their bargain would be to produce a completely different agreement. These submissions are supported by reference to the opinion of J Baalman, (given in the context of the provision in s 89 of the Conveyancing Act 1919 (NSW) requiring parties to a covenant to designate "the persons (if any) by whom or with whose consent the covenant may be released varied or modified"), that a covenant purporting to confer extraordinary powers of variation automatically excludes itself from the category of interest which may be noted on the title to land: (1948) 21 *ALJ* 459 at 461.

The trial judge's view was that the authorities show that a covenant which binds the burdened land in equity binds any lessee or occupant and even a person holding title by adverse possession. Further, as a matter of construction there is nothing in the language expressing the extent of the burden of the restrictive covenant which in his view required a construction restricting those bound to only those who are registered proprietors The authorities are *Mander v Falcke*

[1891] 2 Ch 554 referred to in *Re Nisbet & Potts' Contract* at 398 where Farwell J implicitly had no doubt that a person deriving title from the covenantor would have been bound unless that person could prove that they were a purchaser of the legal title without notice.

Further the trial judge considered as a matter of construction and in equity the restrictive covenant would bind any lessee or occupier of the burdened land whether taking a registered or an unregistered interest in that property. For this he relied upon the statement by Lord Cottenham in *Tulk v Moxhay* at Ph 777. In his view that principle applies to a lessee.

Again this reasoning is unchallenged in its particulars. In my opinion it is not in error.

Rectification

In view of the conclusion which I have reached on the appeal it is unnecessary to consider the respondent's cross-claim for rectification.

For these reasons I consider the appeal should be dismissed.

Order

(1) The appeal is dismissed.

(2) The appellants pay the respondent's costs of the appeal.

Solicitors for the applicant: *Williams & Hughes.*

Solicitors for the respondent *Mallesons Stephen Jaques*

BEN ZIPSER
SOLICITOR