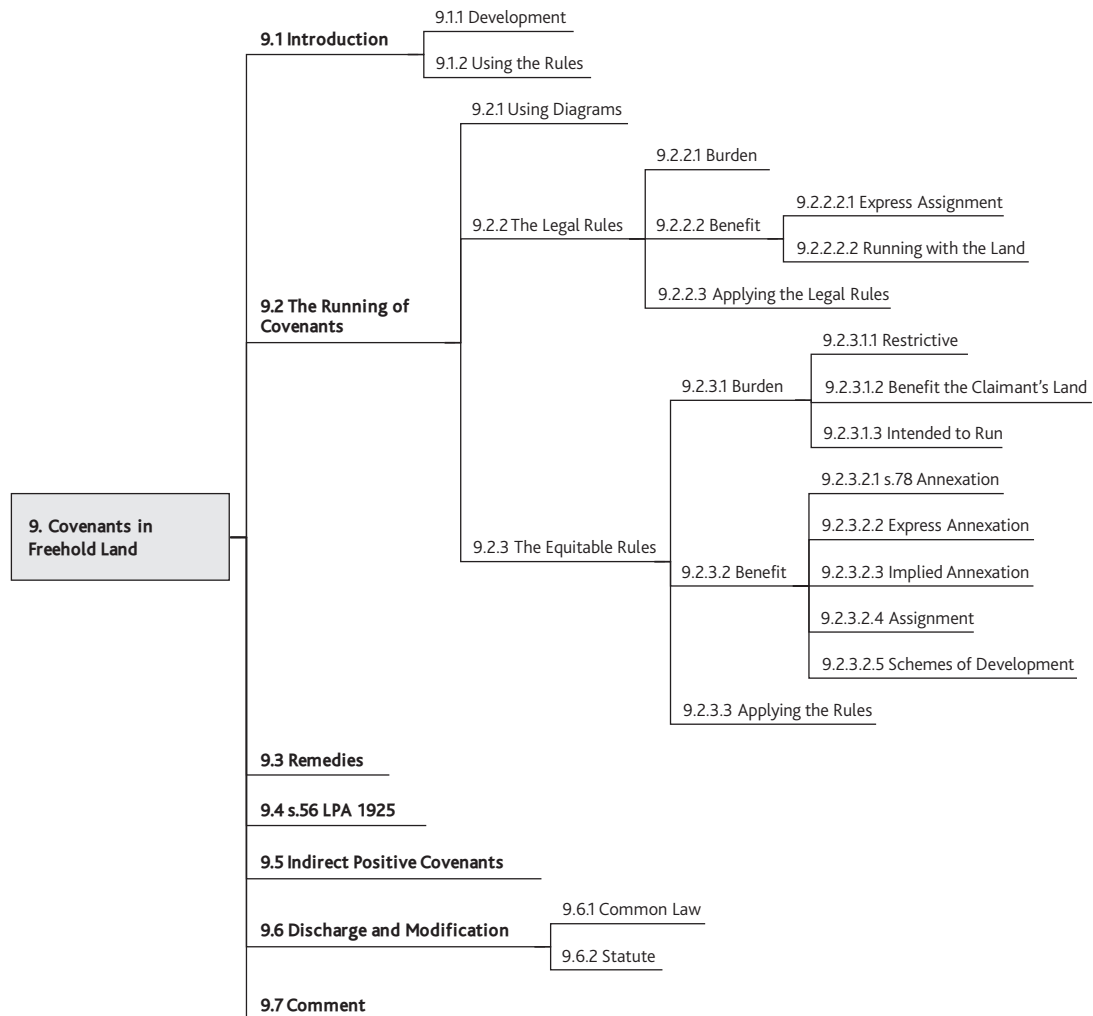


# Chapter 9

## Covenants in Freehold Land



## 9.1 Introduction

This chapter is about formal promises made between freeholders in relation to the use of their land and the rules that determine whether such a promise can be enforced by and against their successors in title. These rules are different from those for leasehold covenants (see Chapter 6) and those for easements (see Chapter 8). It is important, therefore, to be able to distinguish freehold covenants from these other types of right over land.

- ▶ Freehold covenants enable landowner A to directly control what landowner B does on B's land. Easements, in contrast, allow landowner A to use the land belonging to B.
- ▶ Like leasehold covenants, freehold covenants arise out of a contract. However, whilst the effect of freehold covenants can also extend well beyond the original parties, this is not dependent upon there being privity of estate between the parties.

Freehold covenants are not the only controls over a landowner's use of his land. He must also, for example, also comply with planning requirements and ensure that his use of the land does not constitute the tort of nuisance.

### 9.1.1 The Development of the Rules

It has long been possible for the *benefit* of a freehold covenant to be transferred with the land. For example, if Tony sold part of his land to Ray and Ray covenanted to construct and maintain a road on the land, Tony could pass the benefit of the covenant on to his successors in title. So, if Tony subsequently sold the remainder of his land to Giselle, she would be able to enforce the promise made by Ray. However, the *burden* of a covenant cannot run at law. If Ray sold his land to Liz, neither Tony nor Giselle could enforce the covenant against her. This is known as the rule in *Austerberry v. Oldham Corporation* (see Section 9.2.2.1).

Although well established at common law, this rule has a number of disadvantages which the courts of equity began to address in the mid-nineteenth century. By the end of that century it was accepted that the *burden* of a freehold covenant could be attached to land (affecting anyone who owned the land) provided that the terms of the covenant were 'restrictive': that is, they prevented the owner from doing something. Even today, restrictive covenants can only be equitable interests. They must be protected by registration and any remedies for breach are discretionary. The courts were concerned with finding a balance between protecting third-party interests in land and encouraging land development, themes which also run through the law of leases and easements. Perhaps inevitably, therefore, the courts adopted the established policy test of whether the covenant 'touches and concerns' or 'accommodates' the land concerned.

*Tulk v. Moxhay* (1848) 2 Ph. 774 is the first major case in which a court enforced a covenant on freehold land against a successor to the original covenantor. Tulk sold freehold land in Leicester Square in London and the buyer promised, on behalf of himself and his successors in title, to:

keep and maintain the said parcel of ground and square garden, and the iron railing around the same in its [present] form and in sufficient and proper repair, as a square garden and pleasure ground, in an open state, uncovered with any buildings, in a neat and ornamental order.

The land changed hands several times and a later owner decided to build on the garden, although he had known about the covenant before he had bought the land and had paid less because of it. In a dramatic decision by the Court of Chancery, Tulk, the original covenantee (the person to whom the promise had been made) successfully enforced the covenant against

the later owner. The decision was based on the doctrine of notice and the inequitable consequences that would follow if:

the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken (Lord Cottenham at p. 778).

In succeeding decisions, equity came to provide a cheap and effective planning law nearly a hundred years before the State seriously took on the control of land use. Many urban areas have their present shape and character because of covenants imposed by careful developers. Nowadays the public restrictions on the use of land (for example, planning law and building regulations) are normally of greater significance, but covenants are still imposed and enforced because they allow for a more detailed and individual control than public planning law is able to provide.

Under certain circumstances, statute permits covenants to be discharged or modified. For example, public policy requires that a covenant rendered obsolete because of a change in the character of a neighbourhood should no longer be enforceable. This jurisdiction is briefly reviewed at the end of this chapter. However, first it is necessary to explain the rules about covenants 'running with the land'.

### 9.1.2 Using the Rules

There are several tasks that need to be addressed when approaching a problem in this area of land law. Examination questions may focus on the first of these tasks, but the others are no less important in practice.

- ▶ Identifying who might have the benefit of a covenant and who might have the burden – that is, who might be able to enforce it and who might be bound by it. The easiest way to do this is by using diagrams and the technique explained in Section 9.2.1.
- ▶ Determining whether the covenant is enforceable: if relying on the equitable rules, has the covenant been protected by registration?
- ▶ Deciding what remedy, if any, is appropriate to deal with the injury to the claimant. In many cases this will be an injunction, prohibiting any breach of the covenant, but the courts may award damages in lieu if satisfied that this will be sufficient.

## 9.2 The Running of Covenants

### 9.2.1 The Use of Diagrams

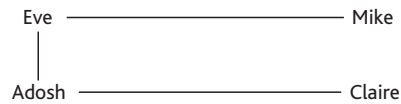
The basic pattern for determining whether a covenant can be enforced is simple.

- ▶ There are two sets of rules: *legal* and *equitable*.
- ▶ Each set of rules is divided into subsets of rules for the passing of the benefit and the burden respectively.
- ▶ The legal and equitable rules in regard to the benefit are similar, but not identical.
- ▶ The sets of rules for the burden are quite different.

The sets of rules are the result of case law and are therefore open to argument – and they tend to be expressed differently in each textbook. The present statement seeks to be as simple and accurate as possible. The rules are summarised in Table 9.1 at the end of this chapter.

To take a typical story in this area of land law. Eve was the fee simple owner of Paradise House and in 2000 she sold a part of her garden to Adosh who promised her that he would not build on the land. Eve moved to the seaside for her health and sold her remaining land to Mike. Adosh took early retirement and sold his land to Claire who has obtained planning permission for a block of flats on the land. Mike wishes to know whether he can prevent Claire building the flats.

In order to find an answer, it is necessary to establish the relationships of the plaintiff and the defendant to the promise which has been, or may be, broken. The promise is usually represented by a vertical line, with the benefiting person (the covenantee, Eve in this case) at the top and the burdened person (covenantor, Adosh) at the bottom. As with leases, sales of the land are usually shown by horizontal lines as in Figure 9.1.



**Figure 9.1**

In most cases it will be easy to identify the original parties to the covenant, as they will be named in the documentation. In this case Adosh is the covenantor (he made the promise) and Eve the covenantee. However, s. 56 LPA 1925 makes it possible for a person to have the benefit of a covenant (that is, to be a covenantee) without being expressly named in the original document. This is considered in more detail in Section 9.4.

Claire is clearly planning to breach the promise made by Adosh, her predecessor. Whether Mike can use the promise made by Adosh to prevent Claire building the flats depends upon the answers to two questions.

- ▶ Has the burden of the covenant passed to Claire?
- ▶ Has the benefit of the covenant passed to Mike?

In order to find the answers, the rules of law and equity must be applied in turn.

## 9.2.2 The Legal Rules

### 9.2.2.1 *The Running of the Burden at Law*

As indicated earlier, the common law did not (and still does not) allow the burden of a freehold covenant to be attached to land so as to bind buyers. In *Austerberry v. Oldham Corporation* (1885) LR 29 Ch D 750, the Court of Appeal applied the contractual doctrine that only a party to an agreement can be burdened by it. The decision in *Austerberry* was confirmed by the House of Lords in *Rhone v. Stephens* [1994] 2 AC 310 (discussed in more detail in Section 9.2.3.1.1). There are, however, several ways in which the strictness of the rule can be avoided at law – see Section 9.5.

### 9.2.2.2 *The Running of the Benefit at Law*

In answering the question, ‘Can the plaintiff sue at law?’ (‘Has the benefit passed to the plaintiff at law?’), two separate rules must be examined: the first provides for the express transfer

of the benefit of a contract, and the second for the automatic running (implied transfer) of a benefit when the land is sold.

9.2.2.2.1 Express Assignment Anyone can expressly transfer the benefit of any contract to which he is a party provided that the covenant is not a purely personal one. Under s.136 LPA 1925, the benefit of a promise relating to the use of land can be sold and will be enforceable at law by the buyer, provided that the assignment is in writing and express notice in writing has been given to the covenantor.

9.2.2.2.2 Running with the Land If there has been no express assignment of the benefit of a covenant, the law allows the benefit to pass automatically with the benefited land if:

- (a) the covenant benefits the land; and
- (b) the covenantee had a legal estate in the land when the promise was made; and
- (c) the plaintiff now has a legal estate in that land; and
- (d) the benefit was intended to pass.

For the covenant to benefit the land, it must be shown that the promise affects the land itself rather than its owner: that is to say it must 'touch and concern' the land (see *P & A Swift Investments v. Combined English Stores Group Plc* [1989] AC 632 (Section 6.4.1.2)). There is some question about whether it is essential for the original parties to the covenant to have intended that its benefit should pass as it is not included in the requirements set out by the House of Lords in *P & A Swift Investments*. Practically, however, the question is unlikely to be significant because of s.78 LPA 1925. This section provides that the benefit of a promise which 'relates to' (that is, touches and concerns) land is deemed to be made not only with the covenantee but also with all his successors in title. Section 78 means that anyone who owns a legal estate in land automatically has the benefit of any covenant made after 1925 which touches and concerns that land. The section is discussed in more detail in Section 9.2.3.2.1.

The importance of s.78 can be seen in the case of *Smith and Snipes Hall Farm v. River Douglas Catchment Board* [1949] 2 KB 500. In 1938 the Board promised Ellen Smith that it would maintain the banks of the Eller Brook adjoining her land in Lancashire. She sold the land to John Smith (the first plaintiff) and he leased it to Snipes Hall Farm. When the river flooded the land because of the Board's failure to carry out proper maintenance, John Smith and the Farm tried to recover their losses from the Board on the ground that the benefit of the covenant had automatically passed to them when they bought the land. It was held that (1) the covenant did benefit their land; (2) it had been made with a legal owner of the land; (3) the present plaintiffs were both legal owners; and (4) the benefit of the covenant had been intended to run by virtue of s.78 LPA 1925. Both plaintiffs could therefore claim damages for the Board's breach of covenant. The Farm, as tenant, succeeded because s.78 enables any legal owner – freeholder or leaseholder – to enjoy the benefit of a covenant relating to the land.

### 9.2.2.3 Applying the Legal Rules

To enforce the covenant at law, Mike must demonstrate that he has the benefit of the covenant and that Claire is subject to the burden. There is little doubt that Mike has the benefit of covenant, as the promise made by Adosh satisfies the requirements set out in *Smith and Snipes Hall Farm v. River Douglas Catchment Board* [1949] 2 KB 500. However, Claire cannot be subject to the burden of the covenant at law because of the rule in *Austerberry v. Oldham Corporation*

preventing the burden being transferred at law. It will be necessary, therefore, to consider whether Mike can enforce the covenant in equity.

### 9.2.3 The Equitable Rules

#### 9.2.3.1 *The Running of the Burden in Equity*

In *Tulk v. Moxhay* (1848) 2 Ph. 774 (see Section 9.1.1), Cottenham LC granted the claimant an injunction allowing him to enforce a covenant against the successor in title of the original covenantor. This appeared to be a straightforward decision. Lord Cottenham believed that if the court had failed to enforce the promise, 'it would [have been] impossible for an owner of land to sell part of it without incurring the risk of rendering what he retains worthless'. This is true, although it was, and still is, possible for a landowner to maintain control over the land being sold by granting a long lease (with the appropriate covenants) instead of parting with the freehold. The leasehold covenants would be enforceable against subsequent assignees of the lease.

The decision in *Tulk v. Moxhay* turned on the question of notice (see Section 9.1.1). If the purchaser of the affected land was found to have had notice of the burden of the covenant then equity required that he be bound by it. This potentially opened the way to allow the burden of all sorts of covenants, as well as other kinds of non-property obligations, to bind successors in title. However, later in the nineteenth century, the judges seem to have thought that the now depressed land market required restrictions on land use to be kept to a minimum in order to encourage purchasers. They therefore introduced increasingly complex and technical requirements limiting the effect of *Tulk v. Moxhay*. Today the burden of a covenant runs in equity if:

- (a) it is restrictive, and
- (b) it benefits land once owned by the covenantee and now owned by the claimant (or is part of a building scheme – see below), and
- (c) it was intended to run with the land

Further, because this is merely an equitable interest:

- (d) the notice or registration rules must be complied with (these rules are set out in Chapters 10 and 11), and
- (e) the claimant must have 'clean hands'.

9.2.3.1.1 *The covenant must be restrictive* Whether a covenant is 'restrictive', or negative, is a question of its substance, not its form. What matters is the real meaning of the covenant rather than what it appears to mean. For example, a covenant to maintain the land uncovered with buildings, although positive in form, is negative in substance because the covenantor can comply by doing nothing (that is, without spending money). In reality, it simply requires the covenantor not to build on it.

The rule that equity will enforce the burden of only those covenants that are restrictive was restated by the House of Lords in *Rhone v. Stephens* [1994] 2 AC 310. The case concerned a promise to maintain a roof in good condition – the whole roof belonged to the main house, but part of it protected an adjoining cottage owned by the claimant. The original owners of the house had promised the original buyers of the cottage that they would maintain the roof,

but a subsequent owner of the cottage found that the covenant could not be enforced against a new owner of the house. As it was positive, the burden could not pass.

Lord Templeman reviewed all the authorities and concluded that the rule of restrictive covenants is a rule of property: an owner of land cannot exercise a right which has never been transferred to him. Equity follows the law, and:

Equity cannot compel an owner to comply with a positive covenant entered into by his predecessors in title without flatly contradicting the common law rule that a person cannot be made liable upon a contract unless he was a party to it. Enforcement of a positive covenant lies in contract; a positive covenant compels an owner to exercise his rights. Enforcement of a negative covenant lies in property; a negative covenant deprives the owner of a right over property (at p. 69).

Further, he stated that any judicial alteration of the rule now would cause chaos for landowners.

9.2.3.1.2 The covenant must benefit the claimant's land The claimant's land (the land once owned by the covenantee) must be identifiable and either benefitted ('accommodated') by the covenant or be part of a scheme of development (see Section 9.2.3.2.5). The point here is that equity will enforce a restrictive covenant if its purpose is to protect the value and amenity of the covenantee's neighbouring land. The person trying to enforce the covenant need not own a legal estate and need not have bought the whole of the covenantee's land, so long as the part he owns is capable of benefiting from the promise. In *London CC v. Allen* [1914] 3 KB 642, Mr Allen promised the council that he would not build on a strip of land needed for the continuation of a road. The burdened land was conveyed to Mrs Allen and she proceeded to build on it. It was held, with great regret, that the claimant authority could not enforce the covenant because it had sold the benefiting land. (Statutes now provide that local authorities and certain other bodies, such as the National Trust, are exempt from this rule.)

In *Dano Ltd v. Earl Cadogan* [2003] All ER (D) 240, the sixth Earl Cadogan had conveyed some land in 1929 to a local authority which covenanted with him on behalf of itself and its successors that the land would be used for no other purpose than the housing of the working classes 'so long as such adjoining or neighbouring property or any part thereof forms part of the Cadogan Settled Estate in Chelsea but not further or otherwise'. In the 1960s the Cadogan family rearranged its affairs and the Settled Estate was ended. Later, Dano Ltd acquired the land from the local authority, received planning permission to build private houses on some of the land and sought a declaration that the covenant was unenforceable. Although the neighbouring land was still in the Cadogan family, it no longer formed part of the 'Cadogan Settled Estate in Chelsea', and on that basis the Court of Appeal held that there was no longer any land capable of benefiting from the covenant, which was therefore unenforceable, despite its philanthropic objectives.

9.2.3.1.3 The parties must intend the covenant to run This intention will usually be expressed in the document containing the covenant, but if not (and if the covenant was made after 1925), it may be implied by s.79 LPA 1925. The operation of s.79 can be excluded by demonstrating contrary intention. Usually, such intention will be clearly stated in the wording of the covenant, but the courts can construe the document as a whole in order to determine the intention of the original parties (see, for example, *Morrells of Oxford Ltd v. Oxford United FC Ltd* [2001] Ch 459).

### 9.2.3.2 *The Running of the Benefit in Equity*

Equity also developed its own rules about the running of the benefit of a covenant, based on the legal rules.

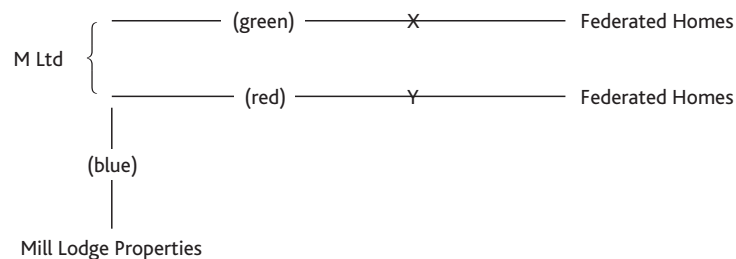
- (a) The covenant must touch and concern the land of the covenantee, and
- (b) the benefit of the covenant must have passed to the claimant.

There are three ways in which the benefit of the covenant may pass to the claimant:

- ▶ by annexation (statutory, express or implied); or
- ▶ by assignment; or
- ▶ under a scheme of development.

**9.2.3.2.1 Section 78 Annexation** For the benefit of a covenant to be annexed to the land it is necessary to establish that this was the intention of the original parties. Traditionally this was dependent upon how the court construed the document containing the covenant. However, the decision of the Court of Appeal in *Federated Homes Ltd v. Mill Lodge Properties Ltd* [1980] 1 WLR 594 means that almost all covenants made since 1925 are deemed to be annexed to the land by virtue of s.78 of the LPA 1925.

The facts of the *Federated Homes* case were relatively simple and are shown diagrammatically in Figure 9.2. M Ltd owned a large estate which was divided into three plots, blue, green and red. They sold the blue land to Mill Lodge Properties, who promised, for the benefit of the green and red land, that they would not build more than 300 houses on it. Both the green and the red land then came into the hands of Federated Homes. There was an unbroken chain of express assignments of the benefit of Mill Lodge's promise with the green land, but not with the red (the assignment of benefit is discussed in Section 9.2.3.2.4).



**Figure 9.2** *Federated Homes Ltd v. Mill Lodge Properties Ltd*

Federated Homes successfully claimed an injunction for breach of the covenant when Mill Lodge began building 32 houses more than was permitted under the covenant. The defendant's arguments centred on technical details of the planning permission, but this was decided in the claimant's favour. It then became clear that, as owners of the *green* land with an unbroken chain of express assignments, Federated Homes had the benefit of the covenant and could enforce it against Mill Lodge. However, the judge at first instance went further and said that, under s.62 LPA 1925 (by which a conveyance of land transfers all rights which benefit it, see Sections 2.6.1.4 and 8.5.1.2.3), Federated Homes could also enforce the covenant as owners of the *red* land.

The Court of Appeal agreed with the judge on the planning issue and the green land, but took a different view on the red land. Rather than s.62 they chose to use s.78 LPA 1925 to pass

the benefit of the covenant to the plaintiff. Until then, it had been thought that s.78 was merely a 'word-saving' provision, but Brightman LJ rejected this interpretation as it seemed to him to 'fly in the face of the wording'.

The widest interpretation of *Federated Homes* is that the benefit of any covenant made since 1925 automatically runs in equity if it touches and concerns the land. This represents the radical obliteration of a century of case law about the annexation or assignment of freehold covenants. Annexation and assignment cases (briefly outlined below) had been lovingly analysed by generations of academics and the Court of Appeal's decision surprised many commentators. Although the decision has not been challenged, the courts have had to address two questions not answered in *Federated Homes*. The first question relates to the need to identify the land benefiting from the covenant. The second to whether the parties can displace the effect of s.78 by expressing a contrary intention. Both of these questions were addressed by the Court of Appeal in *Crest Nicholson Residential (South) Ltd v. McAllister* [2004] 1 WLR 2409.

Chadwick LJ answered the first question by confirming that the requirement for express annexation (set out in *Marquess of Zetland v. Driver* [1939] Ch 1) also applied to s.78 cases: that is, the land which is intended to be benefited by the covenant must be sufficiently defined so as to be easily ascertainable. In the earlier case of *Stocks v. Whitgift Homes* [2001] EWCA Civ 1732 (not referred to by Chadwick LJ in *Crest*), the Court of Appeal stated that it is not necessary for the covenant to exactly identify the land to be benefited, providing that there is sufficient extrinsic identification evidence to determine the extent of the land concerned.

The second question had already been answered at first instance by Judge Paul Baker QC in *Roake v. Chadha* [1984] 1 WLR 40. In that case there was a 50-year-old covenant not to build more than one house per plot on land in a London suburb, and a further clause in the conveyance that the benefit of the covenant would not pass unless it was expressly assigned. All the land changed hands, without an express assignment of the benefit of the covenant, and a later owner of the burdened land wanted to build another house in his garden. Judge Paul Baker QC held that there was nothing in the *Federated Homes* decision that prevented the parties to the covenant preventing it being annexed to the land by s.78 if that was their intention:

The true position as I see it is that even where a covenant is deemed to be made with successors in title as s.78 requires, one still has to construe the covenant as a whole to see whether the benefit of the covenant is annexed (p. 46).

The effect of expressing contrary intention was contentious because, unlike s.62 and s.79 LPA 1925, there is no provision in s.78 allowing the parties to negate its effect by expressing their wish to do so. In *Crest Nicholson Residential (South) Ltd v. McAllister* [2004] 1 WLR 2409 Chadwick LJ confirmed the decision in *Roake v. Chadha*, explaining that the wording of s. 78 means there is no need for it to include the words 'unless a contrary intention is expressed':

The qualification 'subject to contrary intention' is implicit in the definition of 'successors in title' which appears in section 78(1); that is the effect of the words 'the land of the covenantee intended to be benefited'. If the terms in which the covenant is imposed show... [that the parties did not intend the benefit of the covenant to be annexed to the land] then the owners and occupiers of the land sold off in those circumstances are not 'owners and occupiers for the time being of the land of the covenantee intended to be benefited'; and so are not 'successors in title' of the original covenantee for the purposes of section 78(1) ... (para. 43).

The same argument does not apply to s.79, because of the specific meaning given to 'successors in title' in s.79(2).

Thus, the effect of *Federated Homes* is to annex the benefit of the covenant to the land (and each and every part of the land) unless the parties have expressed their intention that this should not be the case. There remain, however, a number of additional complications with *Federated Homes*' simplification of the law. For example, the operation of s.78 is almost certainly limited to covenants made since 1925. In addition, because of the wording of the section, it may only apply to the running of the benefit of restrictive covenants.

In cases where the statute may not apply it will be necessary to fall back on the old concepts of annexation and assignment created in nineteenth-century cases.

**9.2.3.2.2 Express Annexation** When considering whether the benefit of a covenant made before 1926 has been annexed to the land the situation is the reverse of that when s.78 LPA 1925 applies. For the benefit of a pre-1926 covenant to be annexed it must be possible to establish from the original document that this was the positive intention of the parties. The best evidence for this is the use of express words to this effect, similar to those used in *Rogers v. Hosegood* [1900] 2 Ch 388. In 1869, the Duke of Bedford bought a plot of land in Kensington and had promised not to build more than one house on it. The deed stated that this was:

with intent that the covenants might so far as possible bind the premises ... and might enure to the benefit of the [sellers] ... their heirs and assigns and others claiming under them to all or any of their land adjoining or near to the said premises.

The Duke's land passed to Hosegood who decided to build a large block of flats on it. Rogers, an owner of adjoining land, wanted to prevent the development. The burden of the covenant had clearly passed to Hosegood, so the question was whether the benefit had passed to Rogers. It was held that the benefit had been annexed to his land by the words of the deed, so anyone who subsequently owned that land could enforce the covenant.

**9.2.3.2.3 Implied Annexation** If the original document lacks the kind of wording used in the covenant in *Rogers v. Hosegood*, it may be possible for the successor to the covenantee to show that annexation can be implied by considering the wording of the original document in the context of all the surrounding circumstances – see *Marten v. Flight Refuelling Ltd (No 1)* [1962] Ch 115.

**9.2.3.2.4 Assignment** If there is no annexation, the benefit may still have been passed by a chain of assignments such as existed for the benefit of the green land in *Federated Homes*. If there is no complete express chain, it may be that there could yet be an implied assignment of the benefit. For this to happen, the covenant must have been intended to benefit the land of the original covenantee, and the successor who is attempting to enforce the covenant must have had the benefit expressly assigned to him. In *Newton Abbot Cooperative Society v. Williamson and Treadgold Ltd* [1952] Ch 286, a covenant preventing the use of a shop as an ironmongery was not expressed to be for the benefit of the land belonging to the covenantee. The judge, however, was able to look at the surrounding circumstances, and found that the covenantee (who herself ran an ironmongery and understandably did not want competition):

took the covenant restrictive of the user of the defendants' premises for the benefit of her own business of ironmonger and of her property ... where at all material times she was carrying on that business ... (p. 297).

When the covenantee died, her heir received the land and the benefit of the covenant, which he could then assign expressly to his successor who could enforce it.

9.2.3.2.5 Schemes of Development A final method by which successors in title of the original covenantee might enforce covenants is through what is known as a scheme of development. A scheme of development (or 'building scheme') is another creation of equity and provides a useful method for the modern developer to create and preserve new estates. If the conditions for a scheme are fulfilled, then the burdens (provided the covenants have been protected by registration) and the benefits of restrictive covenants which touch and concern the land run automatically to all owners covered by the scheme, thus greatly simplifying the question of whether one owner can stop another breaching a covenant.

The first known scheme was created in 1767 and upheld in 1866. A large number were created in the nineteenth century and upheld by the courts but, after 1889, the number of successful schemes began to fall. Strict rules were laid down in the judgment in *Elliston v. Reacher* [1908] 2 Ch 374, and later judges treated them as if they were part of a statute. According to *Elliston v. Reacher*:

- 1 there had to be one seller, and
- 2 the plots must have been laid out in advance, and
- 3 mutual restrictions must have been established for the mutual benefit of the plots, and
- 4 the purchasers of the plots must have known about the intended mutual enforceability.

Between 1908 and the 1960s only two schemes were successfully enforced in reported cases, but then the climate appears to have changed again and the rules in *Elliston v. Reacher* relaxed. In *Re Dolphin's Conveyance* [1970] Ch 654 there was neither a common vendor nor were the plots laid out in advance, but the local authority in Birmingham was nevertheless prevented from developing the site because it was held that a building scheme had been created and that the development would have been in breach of covenant. The judge said that the rules set out in *Elliston v. Reacher* were only part of a wider rule, and that a scheme arose because of the existence of 'the common interest and the common intention actually expressed in the conveyances themselves'. According to Stamp J in *Re Dolphin's Conveyance* the requirements for a building scheme are, therefore:

- (a) mutually binding covenants
- (b) applying within a clearly defined and commonly understood area.

The question of whether the covenants are sufficiently mutual is concerned with both the content of the covenant (are they all in broadly the same terms) and the awareness of the original covenantors that they were part of a building scheme. The recent case of *Small v. Oliver & Saunders (Developments) Ltd* [2006] 3 EGLR 141 provides a useful illustration of the application of these rules.

There are often problems in the older cases in finding sufficient numbers of the original documents, and often the original owners are beyond recall as well. In cases where common interest and intention cannot be shown from the covenants (as in *Emile Elias & Co Ltd v. Pine Groves Ltd* [1993] 1 WLR 305), the courts will apply the rules in *Elliston v. Reacher*. In *Emile Elias & Co Ltd* the Privy Council emphasised the necessity for a 'common code of covenants'.

In *Stocks v. Whitgift Homes* [2001] EWCA Civ 1732, a large residential estate of some 440 acres had been developed in the 1920s and 1930s. Some of the estate was clearly intended to be within a building scheme, but there was a good deal of uncertainty about the rest. In finding that no building scheme existed, even between owners of the properties situated within the area originally intended to be part of the scheme, the Court of Appeal stated that:

the authorities show that [a] number of characteristics must be established. Among them is certainty: otherwise, in relation to each plot of land said to fall within the scheme, the question will continually arise: does it or does it not so fall? More precisely, is it, or is it not subject to mutually enforceable benefits and obligations, and, if enforceable, by and against the owners of which plots? This essential requirement of certainty makes obvious practical sense (Judge LJ, at para. 110).

### 9.2.3.3 Applying the Rules

A return to the story of Claire and Mike told earlier in this chapter (Section 9.2.1) might help make the application of all these rules clearer. The question was whether Mike had the benefit and Claire the burden of the promise made by Adosh to Eve that there should be no building on the land. There is no building scheme here, of course.

A glance at the summary of the rules relating to the benefit and the burden (Table 9.1 in the Summary) shows that the strictest requirement relates to the running of the burden. This is therefore always the place to start in a problem of this kind, since otherwise you may go to all the trouble of tracing the benefit and then find that the burden does not run anyway.

To decide whether the burden has passed with the land from Adosh to Claire, it is necessary to apply the equitable rules in *Tulk v. Moxhay* since the burden cannot run at law. In this case: (a) the covenant is negative in substance, (b) it does benefit the land of the original covenantee (Eve) now owned by Mike, and (c) by s.79, it is deemed to have been intended to run (there is no evidence of a contrary intention). The final answer regarding the burden depends on whether the covenant was properly protected by registration (see Sections 10.3 and 11.6).

The next stage is to test whether the benefit has passed with the land from Eve to Mike. Here a fundamental principle emerges. It is not permitted to mix legal and equitable rules: *burden and benefit must run in the 'same medium'*. (In practice this means that if the burdened land has changed hands, and thus equitable principles must be applied, then the equitable rules must also be used for the benefit.) The covenant here does touch and concern the land, so by *Federated Homes* the benefit probably passes in equity. Therefore – subject to registration – Mike will probably be able to enforce the covenant against Claire.

## 9.3 Remedies for Breach of Covenant

It has already been noted that the equitable nature of restrictive covenants means that the burden of the covenant will need to be registered if it is to be enforced against a successor in title of the original covenantor. The detailed rules are examined in Sections 10.3 and 11.6. Another implication of the rule that the burden of a restrictive covenant runs only in equity is that only equitable remedies are available to the courts when remedying any breach. In principle, therefore, a remedy will only be available if the wrong committed can be solved by an injunction. Further, all equitable remedies are given at the discretion of the court and can be refused if, for example, the claimant has unnecessarily delayed bringing his action or has otherwise acted improperly.

Although the usual remedy for the breach of a restrictive covenant will be a permanent injunction, the court has the power to award damages instead (but not in circumstances where an injunction could not be granted). The circumstances in which damages may properly be awarded in lieu of an injunction were summarised by AL Smith LJ in *Shelfer v. City of London Electric Lighting Co. (No 1)* [1895] 1 Ch 287. Damages may be given in substitution for an injunction:

- (1) If the injury to the plaintiff's legal right is small,
  - (2) And is one which is capable of being estimated in money,
  - (3) And is one which can be adequately compensated by a small money payment,
  - (4) And the case is one in which it would be oppressive to the defendant to grant an injunction ...
- (*Shelfer v. City of London Electric Lighting Co. (No 1)* [1895] 1 Ch 287 at 322-323).

The original covenantor will always be liable in contract law (unless a contrary intention is expressed in the contract), but the remedy against him can only be damages once he has parted with ownership of the burdened land.

#### 9.4 The Use of s.56 LPA 1925

Section 56 LPA 1925 may be relevant whenever the person claiming the benefit (or his predecessor in title) owned land nearby at the time the covenant was made. In a sense, it is a legal extension of privity of contract and provides that:

A person may take ... the benefit of any ... covenant ... over or respecting land ... although he may not be named as a party to the conveyance or other instrument.

It is a way of giving the benefit of a covenant to someone other than those who are named in the deed, providing the covenant purports to be made with him. The section applies if the person alleged to have the benefit of the covenant was identifiable in the covenant agreement, and existed at the date of the covenant. The reason for these rules is that it would be unfair if the covenantor were effectively making his promise to everyone in the neighbourhood; he needs to be able to identify, on the day he made the promise, the landowners who might be able to take action against him.

The rules were established in *Re Ecclesiastical Commissioners for England's Conveyance* [1936] Ch 430. In that case, the court had to decide whether a large house near to Hampstead Heath in London was subject to a restrictive covenant. The issue was whether neighbouring landowners had the right to enforce it, and this depended on whether the original landowners who had owned the neighbouring land at the time of the covenant could enforce it through s.56. A clause in the conveyance stated that the original covenantor made the promise, 'also as a separate covenant with ... owners for the time being of land adjoining or adjacent to the said land hereby conveyed'. This was held to be enough to satisfy for s.56 to apply. The neighbours were identifiable from the agreement and were in existence at its date. Their successors in title were able to claim the benefit from them by the usual rules for the running of the benefit, and thus were able to enforce the covenant.

For covenants made after 11 May 2000, the Contracts (Rights of Third Parties) Act 1999 can also be used in this situation. Under s.1 of the Act, a person who is not a party to the contract may enforce it if it purports to confer or expressly confers a benefit on him, so long as the contract identifies him by name, as a member of a class or as answering a particular description, even though he was not in existence when the contract was entered into. From its wording, it seems that operation of the Act is wider than s.56, since it will allow a landowner to enforce the benefit of a covenant even though it is not purported to be made with him and even though he might not have been identifiable when the covenant was created. However, there are unlikely to be a significant number of cases involving covenants using the 1999 Act as the provisions of s. 56 LPA 1925 will usually be sufficient.

### 9.5 Indirect Methods of Enforcing Positive Covenants

There are many circumstances where a covenantee may wish the burden of a positive covenant to bind the successor in title of the original covenantor, and where the court's refusal to permit this (as in *Rhone v. Stephens* [1994] 2 AC 310) will cause significant inconvenience. It is not surprising, therefore, that lawyers have devised a number of methods of effectively enforcing positive covenants, although each has its own limitations.

- ▶ If the original covenantor, and each of his successors in title, obtains an indemnity covenant from the next purchaser, the continuing liability of the original covenantor can be offset by a claim against the landowner in breach of the covenant. It is essential, however, that the 'chain' of indemnity covenants is complete.
- ▶ The burden of a positive covenant may bind a successor who wishes to assert the benefit of a covenanted obligation provided that there is reciprocity between the benefit and burden. For example, in *Halsall v. Brizell* [1957] Ch 169 Upjohn J held that the purchaser of a house on a residential estate could not enjoy the benefit of use of a private road without performing a freehold covenant to maintain it.
- ▶ The performance of a positive covenant can be attached to a right of re-entry that becomes exercisable if the covenant is breached. The right of re-entry, but not the covenant itself, would, if annexed to a rent charge, run with the burdened land.
- ▶ Since there is no prohibition on the transfer of a positive leasehold covenant, the landowner may prefer to grant a lease of the relevant part of his land (with appropriate covenants) rather than sell the freehold.

### 9.6 Discharge and Modification

Covenants are automatically ended ('discharged') in two ways: by the common law, and under statute. Statute also allows covenants to be modified.

#### 9.6.1 Common Law

First, if the burdened and benefiting lands are owned by the same person, the covenant cannot be enforced: a person does not have rights against himself. However, if the covenant is part of a building scheme, life after death is possible: the covenants revive if the plots come into separate ownership again later.

Second, if the covenant has been abandoned the courts will not enforce it. This was argued in *Chatsworth Estates v. Fewell* [1931] 1 Ch 224. In this case, there was a covenant on a house in a seaside resort restricting its use to that of a private dwelling only. Thirty years later, the then owner started taking paying guests. The claimants warned him of the breach and asked whether he wished to apply to have the covenant modified or discharged under s.84 LPA 1925 (see Section 9.6.2), but he did nothing. When taken to court for the breach, he argued that the claimants had waived breaches by others in the neighbourhood and had therefore abandoned the benefit. The claimants won their injunction to end the breach. Abandonment is a question of fact in every case; here the essential residential character of the area still remained, and the claimants could not be expected to have to conduct inquisitorial examinations into their neighbours' lives in order to see how they were using the land.

In *Shaw v. Applegate* [1977] 1 WLR 970 a café owner in another resort was allowed to keep his amusement arcade, contrary to the covenant, because of the claimant's delay in enforcing it. On the facts, the delay had not meant that the claimants had acquiesced in the breach,

which would have made the covenant unenforceable, but an injunction – an equitable remedy – was refused on the grounds that the café owner had been lulled into a false sense of security because of the delay, and damages were awarded instead.

#### 9.6.2 Statute

Several statutes authorise the discharge of a covenant; a well-known example is s.237 Town and Country Planning Act 1971 which allows a local authority to carry out a development against a covenant, providing it pays compensation. The most important provision, however, is s.84 LPA 1925, as amended by s.28 LPA 1969. The power to discharge or modify covenants is important because the very existence of the power encourages people to agree to waive covenants. In many cases which do not go to litigation, it is merely a question of the developer ‘buying off’ the covenants.

A statutory power to end freehold covenants was deemed necessary in 1925 because restrictions on land use could ‘enclose individual premises and often whole streets and neighbourhoods in a legal straitjacket’ (Polden (1986) 49 MLR 195). There was no discussion of s.84 in Parliament, although it allows the state to destroy private property (the right to enforce the covenant), sometimes without compensation. The question is now whether s.84 is in breach of Article 1, Protocol 1 of the European Convention on Human Rights. This issue has been tested before the European Commission of Human Rights in *S v. UK* (1984) (Application No. 10741/84). The applicant lost her case there, on the particular facts, but it seems unlikely that any other application, even on different facts, would succeed because of the doctrine of proportionality and the public interest element: ‘ensuring the most efficient use of the land for the benefit of the community’ (see Dawson [1986] Conv 124 at p. 126).

Applications under the section are made to the Lands Tribunal, a body which spends much of its time determining land valuations for the purposes of rating and compulsory purchase. Appeal on a point of law can be made to the Court of Appeal. Under s.84 the Tribunal has power to modify or discharge any restrictive covenant and some covenants in long leases. There is provision for compensation to be paid in certain cases.

Under s.84, a covenant may be discharged or modified if:

- ▶ it should be deemed obsolete due to changes in the character of the property or neighbourhood; or
- ▶ it impedes some reasonable use of the land, provided money is sufficient compensation and either (a) ‘it provides no practical benefits of substantial value or advantage’ or (b) it is contrary to the public interest; or
- ▶ the parties agree, expressly or impliedly ‘by their acts or omissions’; or
- ▶ it will not injure anyone entitled to the benefit.

The Tribunal must have regard to any planning permissions or local plans but these are not decisive. There are innumerable cases on s.84 and each turns on its own facts; two examples are briefly considered here.

*Re Bass Ltd’s Application* (1973) 26 P & CR 156 concerned an application to use land, restricted to housing, as a lorry park; the owner of the burdened land already had planning permission, and the objectors to the covenant’s discharge (the owners of the benefit) already suffered from serious traffic noise. The adjudicator found, from a visit to the site, that, although living close to heavy lorries was far from pleasant, the restrictive covenant still conferred a substantial advantage on the objectors in preventing any increase in the number

of lorries, and the application therefore failed. (This case is useful in that it lists the questions which must be asked in an application under s.84.)

In *Re University of Westminster* [1998] 3 All ER 1014, the University applied to have discharged or modified covenants restricting the use of one of its properties to particular educational purposes. The Court of Appeal upheld the Lands Tribunal's determination that the covenants could be modified to permit the use of the property for the wider educational purposes the University proposed, but that the covenants could not be discharged entirely. The parties who had the benefit of the covenants had not objected to the proposal for discharge. However, the Lands Tribunal was not satisfied that they realised the possible effect of discharging them: the University, and any subsequent owner, would be able to use the property for any purpose. On this basis the Lands Tribunal found that they had not therefore agreed to the discharge of the covenants, as required by s.84(1)(b). Neither was the Lands Tribunal convinced that some reasonable use of the property would be impeded by a failure to allow discharge.

It can be seen, even from this brief review, that the Lands Tribunal has a challenging role. Many different interests are involved in these cases: developers, nearby landowners intent on preserving the status quo, 'expert' planners, the general policy that contracts be respected, the wider public interest in land use, and the views of particular political parties (such as the Conservative government's policy of reducing planning restrictions during the 1980s and 1990s). These difficult issues are part of the background of all planning law, private and public.

## 9.7 Comment

Restrictive covenants are part of the private law of planning, but are just one of several legal strategies to control use of land by others. Alternative ways are: long leases, which may be enlarged to a freehold with the covenants remaining enforceable; conditional fees simple subject to a right of re-entry (see 4.2); and the 'pure principle of benefit and burden' as in *Halsall v. Brizell* [1957] Ch 169: a person will not be allowed to escape from positive obligations under a covenant if he wishes to enjoy a related benefit. All these methods can also provide the means to avoid the rule that the burden of positive covenants cannot pass, as will a commonhold scheme (see Section 6.6). However, such arrangements require careful planning: *Rhone v. Stephens* [1994] 2 AC 310 illustrates the problems which may arise if the buyer of land fails to consider fully the implications of the non-enforceability of a positive covenant.

Reform of covenants in freehold land has been considered several times in the past. The Law Commission Report No 127 (1984) proposed a new and simple law to govern the running of benefit and burden at law of both restrictive and positive covenants through the creation of new legal interests in land, 'Neighbour Obligations', and a new kind of building scheme in 'Development Obligations'. This proposal was supplemented by a Report in 1991 (Law Com No 201) which recommended that a restrictive covenant should cease to be enforceable after 80 years unless the owner of the benefit could show it was not obsolete. In 2008 the Law Commission began a fresh consultation on the reform of the law relating to easements, covenants and *profits à prendre* (Law Com Consultation Paper 186), which included provisional proposals for a single scheme of 'Land Obligations' to replace covenants. It has yet to be seen whether these proposals will fare any better than their predecessors. However, even if the current rules, with all their complexities and uncertainties, are replaced by a more coherent scheme, the difficult decisions about land use will remain, decisions which reveal the usually concealed political and economic forces affecting land law.

## Summary

**9.1** There are separate sets of rules to pass the benefit of a covenant at law, and to pass both the benefit and the burden of a covenant in equity. Equity also provides for building schemes which create a mutually enforceable local law (see Table 9.1).

**Table 9.1** Summary of the rules relating to the running of freehold covenants.

	Benefit runs if...	Burden runs if...
At Law	(1) Expressly assigned (s.136 LPA 1925); or (2) (a) it benefits the land; and (b) the covenantee had a legal estate in the benefiting land; and (c) the claimant has a legal estate in the benefiting land; and (d) it was intended to run	Generally not possible
In Equity	(1) It benefits the land; and (2) (a) s. 78 LPA 1925 applies; or (b) it was expressly or impliedly annexed to the benefiting land; or (c) it was assigned to the claimant	Under the rule in <i>Tulk v. Moxhay</i> if: (1) it is restrictive; and (2) it benefited land owned by the covenantee and now owned by the claimant; and (3) it was intended to run (s. 79 LPA 1925); and (4) it is protected by registration; and (5) there is no reason to deny the claimant an equitable remedy.

**9.2** Only the equitable remedies are available for breach of a restrictive covenant. The usual remedy will be an injunction, but the court has the power to award damages in lieu of an injunction or to decline to give any remedy where it feels this would be justified on the facts of the case.

**9.3** Section 56 LPA 1925 allows a person not named in a deed to be a party to it if he was referred to in the deed and identifiable at that time. The Contracts (Rights of Third Parties) Act 1999 is wider and potentially more helpful.

**9.4** Covenants (except those in building schemes) may be ended at common law if the benefiting and burdened land come into the same hands or if the benefit is abandoned.

**9.5** Section 84 LPA 1925 provides machinery for the discharge or modification of restrictive covenants which have outlived their useful life; each case is decided on its own facts.

## Exercises

**9.1** To what extent does equity supplement the legal rules about covenants in freehold land?

**9.2** Did the decision *Federated Homes* improve the law?

**9.3** What are the advantages of proving a building scheme in an action for enforcing a restrictive covenant?

**9.4** What are the limitations of s.56 LPA? What is the effect of the Contracts (Rights of Third Parties) Act 1999?

**@ 9.5** In 1950 Karen sold part of her large garden in the Chequers Estate to Barry who built 'The Palace' on it. In 1965 she sold another part of her garden to Phil who promised her that he would not build more than one house on the land and that he would erect and maintain a fence around the land. The promise was stated to be made 'also with owners for the time being of adjoining land, formerly part of the Chequers Estate'.

In 1990 a council estate was built in the fields neighbouring the estate. Karen died and her executors sold her remaining land to Yehudi. Rita has bought Phil's land and plans to build a block of flats with an open, unfenced garden.

Who can enforce the covenants, and who is bound by them? What remedies are available to the parties?

**@ 9.6** An online quiz on the topics covered in this chapter is available on the companion website.

### Further Reading

- Dawson, 'Restrictive Covenants and Human Rights' [1986] Conv 124  
Gravells, 'Enforcement of Positive Covenants Affecting Freehold Land' (1994) 110 LQR 346  
Howell, 'The Annexation of the Benefit of Covenants to Land' [2004] Conv 507  
Martin, 'Remedies for Breach of Restrictive Covenants' [1996] Conv 329  
Polden, 'Private Estate Planning and the Public Interest' (1986) 49 MLR 195  
Todd, 'Annexation After *Federated Homes*' [1985] Conv 177

