

**RESTRICTIVE COVENANTS ON**  
**FREEHOLD LAND: A RECAP**  
**AND PARTICULAR PROBLEMS**  
**OF CONSENT**

*by*

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## COVENANT IS A CONTRACT



- ORIGINAL COVENANTEE CAN ALWAYS ENFORCE AGAINST ORIGINAL COVENANTOR
- ONLY NOMINAL DAMAGES IF NO LONGER OWNS LAND

## THREE CRUCIAL DISTINCTIONS



### DISTINCTIONS BETWEEN:

- BENEFIT AND BURDEN
- LAW AND EQUITY
- POSITIVE AND  
NEGATIVE/RESTRICTIVE  
COVENANTS

## WHERE EQUITY INTERVENES



- ONLY EQUITABLE REMEDIES  
(DECLARATION INJUNCTION  
DAMAGES IN LIEU) AVAILABLE
- NO COMMON LAW REMEDIES  
(DAMAGES FOR BREACH)

## POSITIVE AND NEGATIVE COVENANTS

- POSITIVE-REQUIRES COVENANTOR TO DO SOMETHING
  - EG: COV TO REPAIR A DRIVEWAY OR PAY MONEY
- NEGATIVE-IMPOSES A RESTRICTION
  - EG: COV TO BUILD ONLY ONE DWELLING HOUSE
- DIFFERENCE IS QUESTION OF SUBSTANCE RATHER THAN FORM
  - COV NOT TO ALLOW A HEDGE TO GROW ABOVE A CERTAIN HEIGHT

## RUNNING OF BENEFIT AT LAW

BENEFIT OF COVENANT WILL RUN AT LAW IF:

- TOUCHES AND CONCERNS LAND AND
- COVENANTEE AND SUCCESSOR BOTH HAVE LEGAL ESTATE

SECTION 78 LPA EFFECTS AUTOMATIC ANNEXATION OF BENEFIT IF:

- LAND IS IDENTIFIABLE
- COV TOUCHES AND CONCERNS

## SECTION 78 LPA 25



*“(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 shall have effect as if such successors and other persons were expressed. For the purposes of this subsection in connexion 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.”*

## SECTION 78 LPA 25



**WILL NOT APPLY IF:**

- **CONTRARY INTENTION APPEARS FROM DEED (IE COV IS PURELY PERSONAL) OR**
- **LAND TO BE BENEFITTED CANNOT CLEARLY BE ASCERTAINED FROM DEED OR ADMISSIBLE EXTRINSIC EVIDENCE**



BURDEN OF COVENANT AT LAW



BURDEN OF A COVENANT  
CAN NEVER RUN AT LAW

# RUNNING OF BURDEN IN EQUITY:TULK V MOXHAY

## FOUR CONDITIONS

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- (1) the covenant must be restrictive in nature;
- (2) there must be land benefited ('touched and concerned') by the covenant;
- (3) the burden of the covenant must have been intended to run;  
(but see now statutory presumption in section 79 LPA 25); and
- (4) the successor in title to the covenantor must have notice of the covenant.  
(but now: Unregistered land-registered as land charge;  
Registered land-notice on register)

# RUNNING OF BENEFIT IN EQUITY



## THREE METHODS

- ANNEXATION

- SEE SECTION 78-REF TO EQUITY NOW RARELY REQUIRED

- CHAIN OF ASSIGNMENTS

- PERSONAL BENEFIT BY EXPRESS ASSIGNMENT

- SCHEME OF DEVELOPMENT

- SEE ELLISTON V REACHER AND BIRDLIP HUNTER

## SCHEME OF DEVELOPMENT

- ALLOWS MUTUAL ENFORCEMENT BY SUCCESSORS
- FOUR CONDITIONS:
  - (1) that there is a common vendor
  - (2) who lays out a defined plot of land in lots subject to mutually binding restrictions
  - (3) intended to benefit the other lots in the scheme and
  - (4) who sells the lots to purchasers who take on the footing that the restrictions are to bind them for the benefit of the other lots

## INTERPRETATION OF RESTRICTIVE COVENANTS



- INTERPRETED IN SAME WAY AS OTHER CONTRACTUAL DOCUMENTS
- SEE EG BRYANT HOMES V STEIN-CHERRYTREE V LANDMAIN APPLIES

## BRYANT HOMES V STEIN [2016] EWHC 2435

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*...the meaning of the contract or conveyance is that which would be conveyed to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of entering the document...In the light of those considerations the reasonable reader would understand that the true nature of the covenant was more likely to be set out in the registered document of title and would not treat the [UNREGISTERED] Agreement as containing material of sufficient weight entirely to recast the nature of the obligation as so disclosed.”*

## Consent: typical covenants

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*“The Purchaser for itself and its successors in title with the object and intent of binding the land hereby conveyed and benefitting the neighbouring and adjoining land of the Vendor known as “the X Estate” hereby covenants with the Vendor and his successors in title as follows:*

*That it will not without previous consent in writing of the Vendor or his Agent (such consent not to be unreasonably withheld) make any alteration to the external appearance of buildings hereby conveyed nor without the like consent erect or build any new buildings on the land hereby conveyed.”*

## Consent: typical covenants (2)

*“The Purchasers for themselves and their successors in title to [the property sub-sold] jointly and severally covenant with the Vendor for the benefit of the land edged blue on the said plan (herein-after called “the Vendors land”) and each and every part thereof to observe and perform the covenants contained in the Second Schedule hereto...*

*“Not to erect more than one dwellinghouse on in accordance with plans and specifications approved in writing by the surveyor or agent appointed by the Vendor and subsequently not to carry out any alterations thereto without obtaining prior consent as aforesaid.”*



## Consent: Typical problems



- On the correct construction of the conveyance imposing the covenant, is the consent of the present owner of the benefitted land required, or was the consent of the original covenantee only required?
- If it is the consent of the original covenantee that is required, what happens if that person is dead or, if a company, it has been dissolved?
- If consent is required, on what grounds can it be withheld? Can it be withheld for any reason or can consent only be withheld on grounds that are reasonable?
- If the land originally benefitted by the covenant has been sub-divided, is consent required from the present owners of every part of that land?

## Original covenantee or successor?

- SIMS V MAHON [2005] 3 EGLR 67
- CITY INN (JERSEY) LIMITED V TEN TRINITY SQUARE LIMITED [2008] EWCA Civ 156
- MARGERISON V BATES [2008] EWHC 1211
- CHURCHILL V TEMPLE [2010] EWHC 3369
- RE COOK [2014] UKUT 528
- TUPHOLME V FIRTH [2015] (Leeds County Court 17 September 2015)

## Original covenantee or successor?

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1. Does the definition of the party whose consent is required (perhaps “the Vendor”) expressly include his “successors in title”? If it does not, is there reference to “successors in title” anywhere else in the conveyance? If the answer to the first question is “no” and the answer to the second is “yes” then courts will tend to give a restrictive interpretation to the identity of the party whose consent is required.
2. Is there reference to “the surveyor or agent appointed by” the consenting party? If there is, then it can be argued that this is not apt to refer to a successor in title to the original covenantee who might be a householder. It is much more apt to refer to a professional appointed by the original covenantee who presumably had such an agent.

## Original covenantee or successor?



3. If the covenant applies in favour of successors in title then, if the benefitting land was subdivided, could there be a multiplicity of persons from whom consent or approval was required? It may be said that this is unlikely to have been intended.
4. Is the original covenantee a company? If it is then it may have been expected to have survived longer than a natural person. There is also much less risk of the company becoming untraceable.

## Original covenantee dead or dissolved?

- BELL V NORMAN C ASHTON LTD (1957) 7 P&CR 359
- BEECHWOOD HOMES LIMITED [1994] 2 EGLR 178
- BRIGGS V MCCUSKER [1996] 2 EGLR 197
- RE WOODHOUSE [2010] UKUT 235
- CREST NICHOLSON RESIDENTIAL (SOUTH) LTD V MCALLISTER  
[2002] EWHC 2443
- MARGERISON V BATES [2008] EWHC 1211
- SEYMOUR ROAD (SOUTHAMPTON) V WILLIAMS [2010] EWHC  
111
- UNIVERSITY OF EAST LONDON HIGHER EDUCATION CORP V  
BARKING AND DAGENHAM LBC [2004] EWHC 2908

## Seymour Road v Williams



*“Once the vendor disappears some of the cases suggest that the dispensing power falls off and the covenant becomes an absolute covenant. I cannot see that is the correct position here as a matter of construction. The reality is that once the Society was dissolved any interest in enforcement of these covenants disappeared likewise. On the construction of the Indenture as I set out above when the Society had sold all of its land it ceased to have any interest in enforcing the covenants. Once it is clear that the interest in enforcing the covenants disappears there is no sense when that event occurs in ripening the covenant to an absolute covenant where no one is in a position to give the consents or the variations contemplated by the various covenants. That cannot be in my view what the draftsman intended in this case.”*

## Reasonable grounds required?

- PRICE V BOUCH (1987) 53 P&CR 257
- CRYER V SCOTT BROTHER (SUNBURY) (1988) 55 P&CR 183
- JILLAS APPLICATION [2000] 2 EGLR 99
- SIMS V MAHON [2005] 3 EGLR 67
- RICKMAN V BRUDENELL-BRUCE [2005] EWHC 3400
- EASTLEIGH BC V TOWN QUAY DEVELOPMENTS LTD [2009] EWCA CIV 1391
- 89 HOLLAND PARK MANAGEMENT V HICKS [2013] EWHC 391

## Reasonable grounds required?

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1. It can generally be said that, in most covenants by which consent is required to build or approval is required for plans, some construction is contemplated. Thus it can be argued that it would make no commercial sense if the covenantee could effectively prevent any construction and sterilise the land by an arbitrary or capricious withholding of consent.
2. If consent is also required for alterations to buildings once constructed, then again it would seem very odd if any minor alterations could be prevented on an arbitrary or capricious basis.



## Reasonable grounds required?



3. These are or tend to be “regulatory” covenants requiring approval of a specific matter of a type into which the courts will more readily imply a term.
4. If it is the case that approval has to come from the “surveyor or agent” of the covenantee, then this would again seem to indicate to me that a standard of reasonableness should be applied to the decision

## Every owner of the benefitted land?

- The general rule Brightman J in FEDERATED HOMES LTD. V. MILL LODGE LTD. [1980] 1 W.L.R. 594:
- on a true construction of section 78 of the Law of Property Act 1925, the benefit of covenants is generally annexed to each and every part of the land of the covenantee.
- Thus, prima facie, if consent of the present owners of benefitted land is required, then it is required from all the owners.
- This applies “*unless the contrary clearly appears*”.

## What are the grounds of reasonable objection?



*“...the paramount purpose of [the relevant] covenant...as appears from the 1955 transfer, was to benefit and protect the unsold land of the transferors. The transferors, or their successors in title, are not entitled to withhold their approval from building plans placed before them unless, on reasonable grounds, they consider that the building proposed would be detrimental or injurious to unsold land still remaining in their hands. In other words, the criteria which they apply in deciding whether or not to give such approval must, in my judgment, relate solely to such land, that is to say the two yellow plots, which alone enjoy the benefit of [the] covenant...and alone are said to be capable of being benefited by it.”*