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PASSING THE BENEFIT AND BURDEN OF RESTRICTIVE COVENANTS GOVERNING LAND IN SINGAPORE

The rules relating to the passing of the benefit and burden of restrictive covenants are extremely complicated. In recent years steps have been taken in England to simplify these rules. This article explores the differences between English and Singapore law on this subject and examines the extent to which the Singapore courts too can simplify this area of the law.

I. INTRODUCTION

THE law relating to restrictive covenants has acquired a reputation as one of the more technical areas of land law. Indeed the authors of an Australian work on the subject go so far as to say, "The law of restrictive covenants is a morass of technicalities, inconsistencies and uncertainties. In its complexity it resembles the medieval rules regulating the creation of future interests."[1] This may seem a somewhat extreme judgment, but it is unlikely that many students of land law in any common law country would dissent. What is particularly strange about the law of restrictive covenants is that, unlike some other areas of land law, it does not in fact date from the Middle Ages. It is generally traced back only as far as the landmark case of *Tulk* v *Moxhay,*[2] decided in 1848. A further peculiarity is that this case was decided by a court of equity, and most of the rules relating to restrictive covenants have indeed been worked out in equity rather than at common law. The unsuspecting might have assumed that this would mean that this area of the law would have avoided the technicalities which are sometimes supposed to be the hallmark of the common law. Unfortunately this is not the case. Much of the law relating to restrictive covenants gives the impression of having been designed to give the lie to the maxim that equity looks to the intent and not to the form.

[1] Bradbrook and Neave, *Easements and Restrictive Covenants in Australia* (1981), at 197. Beuscher, *Land Use, Controls, Cases and Materials* (3rd ed, 1964), quoted in Bradbrook and Neave, *loc cit*, describes it as "a blundering conceptualist jungle full of semantic swamps".

[2] (1848) 2 Ph 774.

Given the reputation that this area of the law has acquired, it is not surprising to find that in recent years steps have been taken in England to simplify the law. However, differences exist between the law in England and in Singapore, and the question therefore arises to what extent the Singapore courts too can simplify the law of restrictive covenants. There are two parts to the question – to what extent can the Singapore courts follow English cases which relax the law and, if this cannot be done, are there any other techniques that the Singapore courts can adopt to simplify the law?

Restrictive covenants originate in a contract between two parties, but may ultimately be enforced by someone who is not a party to the original contract against someone else who is not a party to the original contract either. However, different rules govern the passing of the benefit and the burden of the covenant to third parties, and it is important in any discussion of the law to distinguish clearly between these two sets of rules. Furthermore, different rules apply at common law and in equity to these two situations. Given the extent of the subject, it is not possible to discuss in a single article all the rules relating to restrictive covenants – or even all the rules relating to the passing of the benefit and burden of such covenants. It is generally assumed that the rules worked out by the English courts apply in Singapore.[3] This article will therefore confine its attention to those areas where Singapore law differs from English law or where particular difficulties arise under Singapore law.

II. Passing the Burden

The real innovation made by *Tulk* v *Moxhay*[4] was in allowing an action to be brought against a defendant who sought to build on Leicester Square in London in breach of a covenant against building made not by him, but by one of his predecessors in title. The importance of the case is that it marks the first time that a covenant made by one freeholder was enforced against one of his successors in title. By way of contrast, the notion of

[3] Somewhat surprisingly there appears to be a dearth of Singapore authority on this subject. The leading textbooks on Singapore land law (Tan, *Principles of Singapore Land Law* (1994) and Ricquier, *Land Law* (2nd ed, 1995)), do not refer to any Singapore cases on restrictive covenants. No Singapore cases on the subject are to be found in Mallal's *Digest of Malaysian and Singapore Case Law 1808 to 1988* (4th ed, 1992). A search in the CAESAR database of Singapore and Malaysian case law for the keywords "Tulk" and "Moxhay" revealed only one Singapore decision (*Tan Soo Leng David* v *Wee, Satku & Kumar Pte Ltd* [1993] 2 SLR 126), in which *Tulk* v *Moxhay* was referred to in argument.

[4] *Supra*, note 2.

allowing the benefit of a covenant to pass to a successor in title was not new. As will be seen shortly, the common law allowed this from an early date. Indeed, moving away from the confines of land law, assignments of the benefit of a contract are allowed today both at law[5] and in equity.[6] It is not, however, possible to assign the burden of a contractual obligation. This can only be done by a new contract or novation. There is an exception to this rule in land law, where the burden of the tenant's covenants passes on assignment of the lease.[7] However, until *Tulk* v *Moxhay* it was assumed that the burden of a covenant could not run with the land outside the field of landlord and tenant. In *Tulk* v *Moxhay* itself an injunction was granted against the defendant simply on the basis that he had purchased the land with notice of the restriction against building. Stated in such broad terms, *Tulk* v *Moxhay* could be seen as subverting such basic principles of the law as privity of contract. Later cases therefore laid down restrictions for the passing of the burden of the covenant.

Today it is clear that the burden of a covenant can pass only in equity and not at law and therefore a *bona fide* purchaser of the legal estate without notice will take free from the covenant. Furthermore, the burden can only pass if the following conditions are satisfied:

1. The covenant must be wholly negative or restrictive in nature.[8] This is a matter of substance rather than form. A covenant "to use the property for residential purposes only" is restrictive of the user of land although worded in a positive form.[9]

2. The covenant must be taken for the benefit of land retained by the covenantee. A restrictive covenant is treated as akin to a negative easement. It must touch and concern land[10] and, in particular, there must be a dominant as well as a servient tenement.[11]

3. The covenant must have been intended to run with the covenantor's land.

5 Civil Law Act, Cap 43, 1994 Rev Ed, s 4 (6).
6 See, *eg, William Brandt's Sons & Co* v *Dunlop Rubber Co* [1905] AC 454.
7 *Spencer's Case* (1583) 5 Co Rep 16a.
8 See *Haywood* v *Brunswick Permanent Benefit Building Society* (1881) 8 QBD 403 and *Austerberry* v *Oldham Corporation* (1885) 29 Ch D 750. The rule that the burden of positive covenants does not run with the land has recently been reaffirmed by the House of Lords in *Rhone* v *Stephens* [1994] 2 AC 310.
9 See *German* v *Chapman* (1877) 7 Ch D 271.
10 *Rogers* v *Hosegood* [1900] 2 Ch 388 at 395.
11 See *London County Council* v *Allen* [1914] 3 KB 642.

The first two conditions do not raise any particular problems in Singapore. The third requirement may give rise to difficulties because so far as unregistered land is concerned Singapore lacks any legislation equivalent to section 79 of the English Law of Property 1925, which provides as follows:

> *Burden of covenants relating to land*
>
> (1) A covenant relating to any land of a covenantor or capable of being bound by him, shall, unless a contrary intention is expressed, 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, subject as aforesaid, shall have effect as if such successors and other persons were expressed.
> This subsection 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.
> (2) 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 such land.
> (3) This section applies only to covenants made after the commencement of this Act.

In England therefore one starts from the assumption that the burden of a restrictive covenant is intended to run with the land. It is only where there is something in the language of the covenant which makes it clear that it is intended to bind only the covenantor, that one will reach the conclusion that the burden does not run with the land.[12] In Singapore, by way of contrast, one must start from the opposite assumption – at least in the case of unregistered land.[13] In accordance with the normal rules of construction, where a covenantor covenants on behalf of himself, one assumes that he means only himself and not his successors in title.[14] If the intention is that the covenant should be enforceable against successors in title, this must be clearly expressed. This difference may seem a matter of small moment. The rule that there must be an expressed intention that the covenant is to run with the land is clearly stated in the leading textbooks on Singapore

[12] See *Re Royal Victoria Pavilion, Ramsgate* [1961] Ch 581.

[13] In registered land in Singapore the position is the same as that which obtains generally in England. The position in registered land is discussed further in Part IV *infra*.

[14] See *Re Fawcett and Holmes' Contract* (1889) 42 Ch D 150.

land law.[15] It should be well known to all conveyancers. As against this, it may be said that in practice most restrictive covenants entered into on the sale of land are intended to run with the land, but they will only do so where the correct formulation is used. It brings little credit to the legal system for it to contain traps for the unwary. It would therefore be desirable to amend the Singapore Conveyancing and Law of Property Act[16] ("CLPA") to introduce a provision similar to section 79 of the English Act. Moreover, such legislation would have the merit of eliminating one of the technical rules in an excessively technical subject.

The difference between the two legal systems gives rise to one problem in the area of landlord and tenant. As has been previously stated, a restrictive covenant must be taken for the benefit of land retained by the covenantee, which is the dominant tenement. It has been held that the landlord's reversionary interest is a dominant tenement for the purpose of this rule.[17] Normally a landlord can only enforce covenants in a lease against the current tenant with whom he has privity of estate or, where he himself is the grantor of the lease, against the original tenant with whom he has privity of contract. However, where the covenant is a restrictive one, it is taken for the benefit of his reversion. It is therefore said that he can enforce it against anyone in possession of the land with notice of the covenant. The result is that if a subtenant has notice of the covenants in the head lease, the head landlord can sue him directly for breach of a restrictive covenant despite the fact that there is no privity of estate between the parties. This is clearly the law in England and, according to the leading textbook writers, it is the law in Singapore too.[18]

In England, the tenant's covenants in the head lease are deemed to be made on behalf of himself and those who derive title under him by virtue of section 79. In the absence of such a provision in Singapore it might be argued that a tenant's covenants in the head lease do not bind a subtenant, who therefore cannot be sued directly by the head landlord for breach of a restrictive covenant. In *Hall* v *Ewin*[19] and *Teape* v *Douse,*[20] the English cases decided before the 1925 Act which established the right of the head landlord to bring a direct action against the subtenant, the head tenant's covenants were expressed to be made on behalf of the tenant, "his executors, administrators and assigns". The question arises whether the subtenant would

15 See Tan, *op cit*, *supra,* note 3, at 439; Ricquier, *op cit*, *supra,* note 3, at 171.
16 Cap 61, 1994 Rev Ed.
17 *Hall* v *Ewin* (1887) 37 Ch D 74.
18 See Lye, *Landlord and Tenant* (1990), at 236; Tan, *op cit*, *supra,* note 3, at 300; Ricquier, *op cit*, *supra,* note 3, at 139.
19 *Supra*, note 17.
20 (1905) 92 LT 319.

have been so bound, had the head lease not contained such language. If not, then it is essential to use this formula in Singapore to preserve the head landlord's right of action against a subtenant.

It is submitted that a subtenant in Singapore is bound by restrictive covenants contained in a head lease whether or not these are expressly made on behalf of "executors, administrators and assigns". The reason is that these words are not strictly necessary where the covenant touches and concerns land. Since *Spencer's Case*[21] was decided in 1583 it has been clear that such covenants bind successors in title and there is no need to say so expressly. There is a clear contrast between the position relating to leasehold land and freehold land, where – in the absence of legislation like section 79 – there is no assumption that covenants are intended to run with the land. In other words, the issue here is whether the burden of the covenant is intended to run with the land and not whether a particular class of person has been identified as being potentially bound by the covenant.

This view is strengthened by the fact that restrictive covenants run against the land and not against a particular estate. If the three conditions mentioned above for the passing of the burden are satisfied, any occupier of the land other than a *bona fide* purchaser of the legal estate without notice is bound. Indeed in *Re Nisbet and Potts' Contract*,[22] which was decided in England before section 79 was enacted, it was held that a squatter was bound by restrictive covenants entered into by a previous owner of the fee simple. Further support for this view can be derived from the fact that although in *Hall* v *Ewin*[23] and *Teape* v *Douse*[24] the head tenant's covenants were expressed to be made on behalf of the tenant, "his executors, administrators and assigns", the head tenant's covenants were not expressed to be made on behalf of persons deriving title from him. Nevertheless it was held that such persons could be bound by the restrictive covenants.[25]

If this view is correct, it might sometimes create difficulties in Singapore for a subtenant, because under an open contract he may not always have

21 *Supra*, note 7.
22 [1905] 1 Ch 391.
23 *Supra,* note 17
24 *Supra*, note 20.
25 The point was expressly considered in the judgment of Swinfen Eady J in *Teape* v *Douse*, *ibid,* at 320. "It was contended that the covenant only extends to the lessee, his executors, administrators, or assigns, and that an underlessee could not be restrained even though the premises are used in contravention of the covenant ... It is clear if a person acquires an underlease, though not bound in law by the restrictive covenants of the lease, if he purchased with notice of the covenants he will not be allowed to use the land in contravention of the covenants."

the right to inspect the head lease. For example, according to section 3(2) of the CLPA, under a contract to assign a sublease, the purchaser does not have the right to call for the title to the head lease. Nevertheless, according to *Patman* v *Harland*[26] he has constructive notice of the restrictive covenants contained in the head lease because he might have contracted out of the statute, and by not doing so he is in the same position as if he has agreed to accept a short title. In the present context this seems somewhat unfair, and the rule in *Patman* v *Harland* has been reversed in England by section 44(5) of the Law of Property Act 1925. In Singapore he would not be deemed a *bona fide* purchaser and would be bound by the restrictive covenants contained in the head lease even though he might not have had actual notice of them.

III. Passing the Benefit

A. *Position at Common Law*

As stated above, the notion of passing the benefit of a contractual obligation is a more familiar one than that of passing the burden. Where the covenantee holds an estate in land to which the benefit may accrue, the common law has allowed the benefit of a positive or negative covenant to pass at least since the fourteenth century,[27] whereas to this day the burden of a covenant cannot pass at common law outside the field of landlord and tenant. It seems somewhat perverse therefore that when equity first recognised restrictive covenants it imposed rules for the passing of their benefit which are even more complicated than those which apply to the passing of the burden.

Before turning to equity, it may be helpful to look first at the rules which apply at common law.

1. The covenant must "touch and concern" the land.[28]

2. The covenantee must have a legal estate in the land benefited.

3. The assignee of the land must have the same legal estate in the land benefited as the original covenantee.

[26] (1881) 17 Ch D 353.

[27] *The Prior's Case* YB 42 Edw III, pl 14, fol 3A. There is no need at common law for the *covenantor* to own any estate in land.

[28] See, in particular, the House of Lords' case of *P & A Swift Investments* v *Combined English Stores Group Plc* [1989] AC 632.

The third rule is the only one where Singapore law may be different from English law. It follows from this rule that if the original covenantee was the owner in fee simple, the benefit of the covenant could not pass to a leaseholder, but only to someone who had acquired the fee simple itself.[29] The English Court of Appeal held in *Smith and Snipes Hall Farm Ltd* v *River Douglas Catchment Board*[30] that this requirement had been removed by section 78(1) of the Law of Property Act 1925. The position in England therefore is that the assignee of the land must have a legal estate in order to be able to sue at common law, but need not have the same legal estate as the original covenantee. Section 78 is studied in more detail below.[31] However, for present purposes it should be noted that the section provides that 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". The equivalent Singapore legislation – section 57 of the CLPA – contains no reference to "persons deriving title under him or them". It can therefore be assumed that in Singapore the third requirement stated above remains in force.[32]

Where it is sought to enforce a covenant against the original covenantor, the owner of the dominant tenement clearly needs only to satisfy the common law rules for the passing of the benefit in order to bring his action. Where the plaintiff only has an equitable interest in the land, he clearly must satisfy the more difficult equitable rules for the passing of the benefit. The question arises which set of rules must be satisfied where both the benefit and burden have passed, but the plaintiff has a legal estate in the land. Professor Gray has suggested that the plaintiff need only satisfy the common law rules for the passing of the benefit.[33] If this is correct, it would provide a simple way in most cases of avoiding the intricate rules laid down by equity for the passing of the benefit of a covenant. Indeed, one can only express surprise that the courts have not taken advantage of this simple technique, especially as they have shown considerable willingness to explore other ways of simplifying the equitable rules for the passing of benefit. The difficulty

29 See, *eg, Westhoughton UDC* v *Wigan Coal and Iron Co Ltd* [1919] 1 Ch 159.

30 [1949] 2 KB 500.

31 See text *infra,* at note 50.

32 In *Elements of Land Law* (2nd ed, 1993), at 1131, Gray states that the third requirement "was not imposed in *The Prior's Case* itself, and always constituted a somewhat doubtful feature of the common law rules on the passing of the benefit".

33 See Gray, *op cit*, at 1149-1150. The only authority cited is *obiter dicta* from the judgment of Farwell J in *Rogers* v *Hosegood* [1900] 2 Ch 388 at 395. The judgment of Farwell J was affirmed on appeal, but without reference to these remarks.

with Professor Gray's suggestion is that it seems to involve a fusion of the rules of law and equity.[34] The burden of the covenant passes in equity, whereas the benefit passes at law. The orthodox position, however, is that the Judicature Acts only fused the *administration* of law and equity, but the two systems remain separate.[35] Where the original covenantor has parted with the land, the plaintiff is forced to sue in equity to enforce the covenant because the burden of the covenant cannot pass at law. Before the Judicature Acts the plaintiff would have had to bring his action in a court of equity and obviously would have been subject to all the rules of equity relating to his claim. He would have had to prove that the burden of the covenant had passed to the defendant in accordance with the rules of equity and he would have had to prove that the benefit of the covenant had passed to him under those same rules. Essentially the position has not changed after the Judicature Acts. Suing in equity in the fused court, the plaintiff must still show his right to sue in equity. In other words he must still show that equity recognises that the benefit of the covenant has passed to him.

B. *Position in Equity*

It is appropriate now, therefore, to turn to the rules laid down by equity for the passing of the benefit of a covenant. Clearly the covenant must "touch and concern" or "benefit" the dominant tenement, but in addition one of the following modes of transmission must be adhered to:

1. The benefit of the covenant must be annexed to the covenantee's land.

2. The benefit of the covenant must be expressly assigned to the successor in title to the covenantee's land.

3. There must be a building scheme or scheme of development covering land including the dominant and servient tenement.

The second and third requirements do not raise any particular difficulties under Singapore law – at least in unregistered land.[36] So far as the second

[34] For a general discussion of what has been termed "fusion fallacy", see Meagher, Gummow and Lehane, *Equity Doctrines and Remedies* (3rd ed, 1992), chap 2.

[35] "The two streams of jurisprudence, though they run in the same channel, run side by side and do not mingle their waters." – *Ashburner's Principles of Equity* (2nd ed, 1933), at 18.

[36] For a discussion of the problems of assignment and building schemes in registered land see Part IV, *infra*.

method is concerned, the benefit of the covenant can be assigned when it can be shown that the covenant was originally taken for the benefit or protection of land owned by the covenantee at the date of the covenant.[37] The obvious difficulty with this method is that – like other technicalities – it can again be a trap for the unwary. The conveyancer must remember to expressly assign the benefit of the covenant on the first conveyance from the original covenantee. Once the land has been conveyed it is not possible to assign the benefit of the covenant subsequently.[38] It has been suggested in *obiter dicta* in *Miles* v *Easter*[39] that once this has been done in the first conveyance, there is no need for any subsequent assignment. If this is correct, the assignment on the first conveyance effects a delayed annexation. However, given the personal nature of assignment, it seems more likely that a new assignment is required on each conveyance of the land.[40] If this view is adopted, there is the obvious risk of the chain of assignments breaking at some point in time.

So far as the third method is concerned, the requirements for a building scheme as laid down in the leading case of *Elliston* v *Reacher* were originally quite stringent. These requirements have been relaxed more recently in *Re Dolphin's Conveyance*.[41] Given that this is entirely a matter of equity without any statutory interference, there is no reason why the Singapore courts should not follow the more relaxed requirements which now apply in England – at least in the case of unregistered land. Nevertheless, given the special circumstances which apply to building schemes, this method for passing the benefit of a covenant can only apply in exceptional cases. It is no solution to the general difficulties involved in passing the benefit of a restrictive covenant.

The usual method for passing the benefit of a restrictive covenant is the first – annexation. This has been described as the metaphorical nailing of the covenant to the dominant tenement.[42] Essentially, this is a matter of intention, but certain standard formulae have been accepted as annexing the covenant:

> There are two familiar methods of indicating in a covenant of this kind the land in respect of which the benefit is to enure. One is to

[37] *Miles* v *Easter* [1933] Ch 611 at 632.

[38] The reason why assignment is permitted is to enable the covenantee to dispose of his property advantageously. However, where he has already disposed of the property, there is no need to permit assignment. See *Miles* v *Easter*, *ibid* at 632, *per* Romer LJ.

[39] *Ibid*.

[40] See *Re Pinewood Estate, Farnborough* [1958] Ch 280.

[41] [1970] Ch 654.

[42] Gray, *op cit, supra*, note 32, at 1150.

> describe the character in which the covenantee receives the covenant ... a covenant with so-and-so, owners or owner for the time being of whatever the land may be. Another method is to state by means of an appropriate declaration that the covenant is taken 'for the benefit of' whatever the lands may be.[43]

Inevitably cases occur where none of the accepted formulae has been used. Does this mean a purchaser of the dominant tenement cannot enforce the restrictive covenants unless the benefit of them has been expressly assigned to him? It has been suggested in recent years that the benefit of a restrictive covenant can be impliedly annexed and the case of *Marten* v *Flight Refuelling Ltd*[44] is sometimes cited as supporting this view.[45] In this case Wilberforce J (as he then was) quoted some remarks of Collins LJ in *Rogers* v *Hosegood,*[46] which he saw as supporting "the view that an intention to benefit may be found from surrounding or attending circumstances, as indeed is frequently done in practice in the case of ... building schemes".[47]

At most these remarks are *obiter dicta* because on the facts of the case there was no transfer of the benefit of the covenant. The plaintiffs who were seeking to enforce the covenants were not successors in title of the original covenantees. The issue of annexation did not therefore arise.[48] However, going back to first principles, it may be said that since annexation is a matter of intention, implied annexation should in theory be no more objectionable than are implied terms in contracts. The difficulty, however, is in identifying cases where implied annexation might occur. The approach of the courts seems to be that by not using one of the hallowed formulae, the parties have manifested an intention not to annex the benefit of the covenant to the land. There does not appear to be any case in either England or Singapore where implied annexation has occurred.

Another method which has been suggested in recent years for overcoming the absence of one of the accepted formulae for annexation is that of statutory annexation. The argument is that there may exist statutory provisions which

[43] *Reid* v *Bickerstaff* [1902] 2 Ch 305, at 321, *per* Cozens-Hardy MR, applied by the Privy Council in *Jamaica Mutual Life Assurance Society* v *Hillsborough* [1989] 1 WLR 1101 (on appeal from the Court of Appeal of Jamaica).

[44] [1962] Ch 115.

[45] Megarry and Wade, *The Law of Real Property* (5th ed, 1984), at 784.

[46] [1900] 2 Ch 388, 407.

[47] *Supra*, note 44, at 132.

[48] See Ryder, "Restrictive Covenants: The Problem of Implied Annexation", (1972) 36 Conv (NS) 20, at 32-3.

effect annexation automatically. The first provision to be considered is section 6 of the CLPA. This is *in pari materia* with section 62 of the English Law of Property Act 1925. Subsection (1) of section 6 provides as follows:

> A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey with the land all buildings, erections, fixtures, hedges, ditches, fences, ways, waters, watercourses, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance demised, occupied or enjoyed with or reputed or known as part or parcel of or appurtenant to the land or any part thereof.

This section renders it unnecessary to use the "general words" previously used in conveyances to ensure that various rights connected with the land passed to the purchaser on conveyance of the land itself. A restrictive covenant can be characterised as a right appertaining to the land, so it will – like an easement – pass automatically to the purchaser under this section. At first sight the section seems irrelevant to the problem at hand. If a restrictive covenant is annexed to land, then it is a right appertaining to the land. If it is *not* annexed, then it is not such a right. There seems to be nothing in section 6 to effect annexation where other techniques have failed to do so.

In fact, section 6 turns out to possess hidden subtleties of meaning. In *Wright* v *Macadam*[49] the landlord of a flat allowed his tenant to use a coal bunker which was outside the area of the demised flat. At this stage the right was a mere licence. Subsequently the landlord granted a new lease of the flat. Since the lease was a "conveyance" as defined in the English Law of Property Act 1925, section 62 applied to the grant of the new lease. It was held that the licence to use the coal bunker was a right reputed to appertain to the land. It therefore passed on a conveyance of the land. The effect is that what started life as a mere personal licence became an easement, which is an interest in land.

Wright v *Macadam* is a somewhat surprising decision in that what appears to have begun as an act of generosity on the part of the landlord became an obligation imposed on him. This occurred without reference to any expressed intention on his part. It can be justified on the basis that the licence to use the coal bunker was a "right appertaining or reputed to appertain to the land" of the tenant at the time of conveyance. It may seem a somewhat extreme application of section 62, but it has stood as good law for almost fifty years and it is generally assumed to have been correctly decided.

[49] [1949] 2 KB 744.

If section 62 can convert a licence into an easement, then can it convert a restrictive covenant, which is originally personal to the two contracting parties, into an interest in land? The difficulty may perhaps lie in the negative nature of a restrictive covenant, as opposed to the positive nature of a licence. In the case of a licence, one is generally speaking of the right of A to perform some act on B's land. Suppose this is a right to walk over B's land from A's house to the main road. It is not too difficult to see this as a right appertaining to A's land. This is not so easy where one is speaking of an obligation on B to refrain from some activity on his own land. Suppose B, who is the owner of the fee simple in a block of flats and who resides in one flat, agrees with A, the tenant of one of the flats in the block that he will not play loud music after 10 pm. If consideration can be found for this agreement, it may be enforceable at law. But can B's undertaking or covenant be described as a right appertaining to A's land? It is true that A will enjoy more peace and quiet in his flat as a result of the covenant, but so will the tenants of all the other flats within earshot of B's flat. It is submitted that it would be stretching the language of the section to characterise B's covenant as a right appertaining to A's flat. It is possible to draw an analogy with *Wright* v *Macadam*, but that case already stretches the limits of section 62. It is submitted that it cannot be correct to extend the section further.

A more likely candidate for consideration as effecting statutory annexation is section 78 of the Law of Property Act 1925. This is similar in wording to section 57 of the CLPA, and indeed replaced a section which was *in pari materia* with Singapore's section 57. However, there are differences between the two sections, which may mean that one effects statutory annexation whereas the other does not.

Section 78 reads as follows:-

> *Benefit of covenants relating to land*
>
> (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 use 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.

(2) This section applies to covenants made after the commencement of this Act, but the repeal of section 58 of the Conveyancing Act 1881 does not affect the operation of covenants to which that section applied.

In *Federated Homes Ltd* v *Mill Lodge Properties Ltd*[50] no express annexation clause was used. However, Brightman J held that the covenant was annexed to the land by virtue of section 78. Brightman J drew attention to the fact that section 78 includes "occupiers for the time being of the land" within the definition of successors-in-title and he read this to mean that the effect of the section was to annex to the land the benefit of any covenant made with a purchaser which relates to land. The fact that these words were not found in section 58 of the Conveyancing Act 1881, which was replaced by section 78, meant that it was the intention of Parliament to effect a change in the law. This view has been challenged by Newsom in a detailed study of the legislative history of section 78, which led him to conclude that the section was not intended to effect statutory annexation.[51]

Another difficulty with *Federated Homes Ltd* v *Mill Lodge Properties Ltd* is the contrast which it creates between sections 78 and 79. Section 79, which was discussed above relates to the passing of the burden of a covenant. In *Sefton* v *Tophams Ltd*[52] Lord Upjohn and Lord Wilberforce observed that section 79 of the Act of 1925, relating to the burden of covenants, achieved no more than the introduction of statutory shorthand into the drafting of covenants. One might have thought that section 78, relating to the benefit of covenants, would be interpreted likewise, but Brightman J dismissed the comparison with the words, "Section 79, in my view, involves quite different considerations and I do not think that it provides a helpful analogy."[53]

A potentially more serious problem is that whereas section 79 states that it only applies where the context so permits, section 78 contains no such language. It would appear therefore that it is not possible to contract out of section 78. If *Federated Homes Ltd* v *Mill Lodge Properties Ltd* is correct, this gives rise to an extraordinary situation. Before the 1925 Act, it was necessary to use an appropriate formula to annex the benefit of a covenant to land. Now annexation is not only automatic but compulsory. A solution to the problem was found in *Roake* v *Chadha*[54] where it was expressly agreed

[50] [1980] 1 WLR 594.
[51] See Newson, "Universal Annexation", (1981) 97 LQR 32, at 40 *et seq.*
[52] [1967] 1 AC 50, 73 and 81.
[53] [1980] 1 WLR 594, 606.
[54] [1984] 1 WLR 40.

that a particular covenant should not enure for the benefit of any subsequent purchaser unless the benefit of the covenant was expressly assigned. Judge Paul Baker QC, sitting as a High Court Judge, held that on this basis it did not "relate to land" and therefore section 78 did not apply. This is an ingenious solution to an awkward problem. Leaving aside cases like *Roake* v *Chadha*, where in effect the parties have expressly contracted out of section 78, it seems that the section has abolished the "half-way house" previously recognised in cases like *Miles* v *Easter*,[55] *ie,* a covenant which benefits land and which can therefore be assigned, but which is not annexed to land. The law has thus been simplified greatly, but one cannot avoid some amazement at the fact that so much has been achieved indirectly by a section, which on a plain reading seems designed merely as conveyancing shorthand.

How many of these developments are relevant in Singapore, which retains section 57 of the CLPA, which is *in pari materia* with section 58 of the English Conveyancing Act 1881? Section 57 reads as follows:

> *Covenant to extend to executors, etc*
>
> (1) A covenant relating to freehold land shall be deemed to be made with the covenantee, his heirs and assigns, and shall have effect as if heirs and assigns were expressed.
> (2) A covenant relating to leasehold land shall be deemed to be made with the covenantee, his executors, administrators and assigns, and shall have effect as if executors, administrators and assigns were expressed.
> (3) This section shall apply only to covenants made on or after 1 August 1886.

The section speaks of "heirs and assigns" and distinguishes between freehold and leasehold land. However, section 35 of the CLPA abolishes the distinction between freehold and leasehold land for the purposes of devolution on death. It seems the draftsman in the Straits Settlements was content to follow the English model before him[56] even though the wording was anachronistic in the local context as a result of section 35.

The local courts have not as yet had the opportunity to decide whether or not *Federated Homes Ltd* v *Mill Lodge Properties Ltd* applies in Singapore. However, the issue arose in England with reference to the 1881 Act in

[55] *Supra*, note 37

[56] Section 58 of the English Conveyancing Act 1881 distinguishes between "land of inheritance" and "land not of inheritance".

J Sainsbury plc v *Enfield London Borough Council*[57] where Morritt J had to consider a restrictive covenant entered into in 1894, which was therefore governed by section 58. No annexation formula was used and the judge took the view that section 58 did not effect statutory annexation. He gave two reasons for this conclusion. First, the reference to "occupiers of the land" did not appear in section 58 and it was this difference in wording which led Brightman J to conclude that section 58 effected statutory annexation. Secondly, section 58 implies into conveyances words which were previously set out expressly and the effect of which had been considered in *Renals* v *Cowlishaw*[58] as being insufficient to annex the covenant to the land. Given that section 58 was only enacted three years after this case, it would be very surprising if by enacting in section 58 that "A covenant ... shall be deemed to be made with the covenantee, his heirs and assigns, and shall have effect as if heirs and assigns were expressed", Parliament should have intended to effect annexation when the Court of Appeal had already decided that such words if expressed did not suffice.[59] *J Sainsbury plc* v *Enfield London Borough Council* is a conservative reading of section 58, but it is hardly surprising that the judge resisted the temptation to make new law, which would have had no effect on future cases, but which would have altered retrospectively the meaning of conveyances made between 1881 and 1925 in England. In Singapore the issue is different in that future conveyances would be effected were a court to decide that section 57 effected statutory annexation.

In *Renals* v *Cowlishaw*[60] a short *ex tempore* judgment was given at first instance by Hall VC, which was adopted by the Court of Appeal. It has been cited with approval on many occasions. Trustees were the owners of a mansion house and certain residential property known as the Mill Hill estate and certain pieces of land adjoining the estate. The trustees sold two of these adjoining pieces to the predecessors in title of the defendants in 1845. The conveyance contained certain restrictive covenants, which it was alleged the defendants had broken. The covenants were made with the trustees "their heirs, executors, administrators, and assigns", but the conveyance did not state that these covenants were for the protection of the residential property of the trustees, nor did it make any reference to other adjoining pieces of land. At the same time, the trustees sold other pieces of land adjoining the Mill Hill estate to other purchasers. The conveyances contained identical restrictive covenants. In 1854 the trustees sold the Mill Hill estate

[57] [1989] 2 All ER 817.
[58] (1878) 9 Ch D 125, aff'd (1879) 11 Ch D 866.
[59] *Supra*, note 57, at 824-5.
[60] *Supra*, note 58.

itself to the predecessors in title of the plaintiff. The 1854 conveyance did not contain similar covenants to those contained in the 1845 conveyances, nor did the 1854 conveyance refer to the 1845 conveyances or to the restrictive covenants contained in those conveyances. It was alleged by the plaintiffs that the intention of the restrictive covenants was to protect and maintain the value of the Mill Hill estate.

In his judgment Hall VC laid out the basic elements which have become accepted doctrine in this area. After referring to the case of a building scheme, he said,

> A purchaser may also be entitled to the benefit of a restrictive covenant entered into with his vendor by another or others where his vendor has contracted with him that he shall be the assign of it, that is, have the benefit of the covenant. And such covenant need not be express, but may be collected from the transaction of sale and purchase. In considering this, the expressed or otherwise apparent purpose or object of the covenant, in reference to its being intended to be annexed to other property, or to its being only obtained to enable the covenantee more advantageously to deal with his property, is important to be attended to. Whether the purchaser is the purchaser of all the land retained by his vendor when the covenant was entered into, is also important. If he is not, it may be important to take into consideration whether his vendor has sold off part of the land so retained, and if he has done so, whether he has so sold subject to a similar covenant: whether the purchaser claiming the benefit of the covenant has entered into a similar covenant may not be so important.[61]

Applying these principles to the case at hand, Hall VC said,

> [I]n order to enable a purchaser as an assign (such purchaser not being an assign of all that the vendor retained when he executed the conveyance containing the covenants, and that conveyance not shewing that the benefit of the covenant was intended to enure for the time being of each portion of the estate so retained or of the portion of the estate of which the Plaintiff is assign) to claim the benefit of a restrictive covenant, this, at least, must appear, that the assign acquired his property with the benefit of the covenant, that is, it must appear that the benefit of the covenant was part of the subject-matter of the purchase.[62]

[61] At 129.
[62] At 130.

> On appeal, James LJ used slightly wider language saying,
>
> To enable an assign to take the benefit of restrictive covenants there must be something in the deed to define the property for the benefit of which they were entered into.[63]

However, one should not read too much into this wider language which was said in an *ex tempore* judgment containing only five sentences, in which James LJ also said that he entirely concurred with every word of the judgment of Hall VC.

The *ratio* of *Renals* v *Cowlishaw*[64] covers only the case where the vendor, who takes the benefit of certain restrictive covenants, sells only part of his property to the plaintiff. There is little, if anything, in the judgments – even by way of *obiter dicta* – to suggest that the interpretation adopted in *Renals* v *Cowlishaw* should be applied in every case where a restrictive covenant is made with the vendor, "his heirs and assigns". Yet this is how *Renals* v *Cowlishaw* was applied in *J Sainsbury plc* v *Enfield London Borough Council*.[65] One can appreciate that where a vendor owns a large estate which he breaks up and sells in pieces, taking a restrictive covenant in the conveyance on the first sale, it may be difficult to determine exactly which, if any, part of the land he retains is intended to have the benefit of this restrictive covenant.[66] This is the problem discussed in *Renals* v *Cowlishaw*. Of its nature, it is a problem which is unlikely to arise often in Singapore.

Applying *Renals* v *Cowlishaw* across the board to every case where a covenant is made with heirs and assigns – as was done in *J Sainsbury plc* v *Enfield London Borough Council* – is problematical. On the face of it by expressly covenanting with the "assigns" of the covenantee, the covenantor is assuming an obligation towards successors in title. Yet according to *J Sainsbury plc* v *Enfield London Borough Council* the words do not have this effect. The successors in title cannot sue successors in title of the covenantor in equity. If this were a rule of law, one could understand it, even though one might advocate a change in the law. However, according to *J Sainsbury plc* v *Enfield London Borough Council*, this occurs because it is the intention of the parties. Although the parties have said that the

63 (1879) 11 Ch D 866, 868.

64 *Supra*, note 58.

65 *Supra*, note 57.

66 In *Federated Homes Ltd* v *Mill Lodge Ltd*, *supra,* note 50, at 606, Brightman LJ declared that "if the benefit of a covenant, is on a proper construction of a document, annexed to the land, *prima facie* it is annexed to every part thereof, unless the contrary clearly appears".

covenantor covenants with successors in title, they do not really mean this because they have not used one of the accepted formulae for annexation.

If the words used in the conveyance – or implied in Singapore by section 57 of the CLPA – do not effect annexation, then what do they mean? One is tempted to argue that the use of these words must show that assignment is possible on a subsequent conveyance of the dominant tenement. However, according to *Miles* v *Easter,*[67] assignment is possible only where the covenant is expressly taken for the protection or benefit of land owned by the covenantee at the date of the covenant, the assignment must be contemporaneous with the transfer of the dominant land and the dominant land must be ascertainable. From 1881 to 1926 the words "heirs and assigns" were implied in all restrictive covenants in England. If the words were sufficient to ensure subsequent assignability, why did *Miles* v *Easter* lay down additional conditions?

If the words used expressly in *Renals* v *Cowlishaw* and implied by section 57 neither effect annexation nor guarantee assignability, what effect do they have? Clearly they negative any idea that the covenant might be intended to be purely personal and so incapable of assignment in any circumstances. However, even without these words, a covenant relating to land in a conveyance of the freehold would not normally be taken as being purely personal without some other indication in the language of the conveyance or the surrounding circumstances to support this conclusion. If *J Sainsbury plc* v *Enfield London Borough Council* is correct, one is left with the conclusion that the words used expressly in *Renals* v *Cowlishaw* are virtually devoid of any meaning. If section 57 of Singapore's CLPA is taken as a legislative endorsement of this interpretation of *Renals* v *Cowlishaw*, the conclusion is that the legislature enacted a section containing 76 words, which provides that there should be inserted into every restrictive covenant a string of virtually meaningless words.

Moreover, if *J Sainsbury plc* v *Enfield London Borough Council* is correct, when the words "and assigns" are added to the covenantor's obligation, they mean one thing. When added to the covenantee's obligation, they mean another. When the covenantor contracts on behalf of himself and his assigns, the burden of the covenant runs with the covenantor's land.[68] When he covenants with the covenantee and his assigns, the benefit does *not* run with the covenantee's land. It is to be hoped that when the opportunity presents itself, the Singapore courts will not follow *J Sainsbury plc* v *Enfield London Borough Council* with the result that section 57 will effect statutory annexation in Singapore.

[67] *Supra*, note 37.
[68] See *supra* Part II.

It may be noted at this point that the difficulty addressed by the English case of *Roake* v *Chadha*[69] can be resolved more simply here. Section 57 does not provide for contracting out, but neither does it prohibit it. In the absence of an equivalent to the English section 78, there is no contrast to be drawn here with a parallel section which expressly permits contracting out. Section 57 is completely neutral in its language and there seems to be no reason to assume that contracting out is not permitted.

Perhaps the strongest reason for following *J Sainsbury plc* v *Enfield London Borough Council* is that any change would alter retrospectively the meaning of conveyances entered into previously. As against this, it should be noted that *Federated Homes Ltd* v *Mill Lodge Properties Ltd* decided in 1979 altered retrospectively the meaning of conveyances executed in England since 1925. Writing shortly after the decision in January 1981 Newsom predicted dire consequences.[70] However, there does not appear to be any evidence that any problems did occur in practice in England. It is interesting to note that while remaining critical of *Federated Homes Ltd* v *Mill Lodge Properties Ltd* in the current edition of Preston and Newsom's Restrictive Covenants,[71] the editor does not suggest that any practical problems have actually occurred as a result of the retrospective nature of the decision.

IV. Registered Land

The Land Titles Act[72] provides for restrictive covenants to be entered as notifications on the land-register against the title of the land which is burdened with the restriction. Unless so notified, a restrictive covenant does not bind assigns of the affected land.[73] The Registrar shall not enter a notification of a restrictive covenant unless it clearly indicates the dominant and servient land.[74] The "dominant land" is defined as "the land to which the benefit of a restriction is annexed", while the "servient land" is defined as "the land subject to the burden of a restriction".[75] These definitions do no more

69 *Supra*, note 54.
70 See Newsom, "Universal Annexation?" (1981) 97 LQR 32, at 50.
71 Preston & Newsom's *Restrictive Covenants Affecting Freehold Land* (8th ed, 1991), edited by GL Newsom, chap 2.
72 Cap 157, 1994 Rev Ed.
73 S 139.
74 S 139(2)(b).
75 S 138.
76 Ricquier suggests (*op cit*, *supra,* note 3, at 175) that this definition suggests that only where the covenant contains an annexation formula can the benefit pass. However, if s 62(1) effects statutory annexation, then the benefit of the restriction is "annexed". By the same token,

than repeat the requirements that exist under the general law.[76] The use of the word "annexed" in the definition of "dominant land" does not imply a preference for any particular form of annexation. So long as the statutory requirements for notification are complied with, any form of annexation recognised at general law will be effective under the Act. However, the Act does insist on some form of annexation. If the benefit of the covenant has passed by assignment, it has not been annexed to the land.[77] In such a case the restriction cannot be notified on the register. If the original covenanting party is still the registered proprietor of the servient tenement, the covenant can be enforced against him.[78] However, a purchaser[79] of the servient tenement will not be bound by the restrictive covenant.

Restrictive covenants notified under the Act cease to be enforceable after twenty years from the date of entry of the notification. It is, however, possible to extend the life of a restrictive covenant for successive periods of ten years by lodging an instrument of extension, so long as this is done before the restrictive covenant expires.[80] This is a practical provision which saves the register from being cluttered up with restrictive covenants which no longer serve any useful purpose.

Some of the difficulties relating to the passing of the benefit and the burden of restrictive covenants are solved by section 62(1) of the Land Titles Act, which provides as follows:

> *Covenants in instruments: Words of succession implied*
>
> (1) In instruments registered under the provisions of this Act, unless a contrary intention is expressed, covenants relating to land shall

should the courts accept that implied annexation is possible, then the benefit of the restriction is "annexed" within the meaning of the definition of "dominant land".

77 Unless assignment effects delayed annexation (see text *supra*, at note 39), in which case the restrictive covenant can be notified under s 139 after the assignment.

78 Under s 46(2)(b) a registered proprietor cannot rely on his indefeasibility of title to avoid enforcement against him of any contract to which he is a party.

79 If the subsequent registered proprietor of the servient tenement is not a "purchaser" within the meaning of s 4 of the Act then under s 46(3) he is the same position as his immediate predecessor. It is possible to argue that a restriction on the user of registered land only binds "assigns of the land affected thereby" if it is notified under s 139. On this reading, even a donee of the servient tenement would escape the restrictive covenant. This seems contrary to the general scheme of the Act which is to favour purchasers only. The solution is to recognise that there can only be a "restriction" within the meaning of s 138 where there are also "dominant land" and "servient land" within the meaning of s 138. Where the benefit of a covenant is assigned to a purchaser, it is not annexed to land and there is no "dominant land" under the statutory scheme. S 139 does not therefore apply to such a restrictive covenant.

80 S 141.

> be deemed to be made by the covenantor and his successors in title with the covenantee and his successors in title and shall have effect as if such successors were expressly referred to therein.

So far as passing the *burden* of a covenant is concerned, section 62(1) is the missing Singapore equivalent to section 79 of the English Law of Property Act 1925.[81] In registered land one starts from the assumption that the burden of a restrictive covenant is intended to run with the land. It is only where there is something in the language of the covenant, which makes it clear that it is intended to bind only the covenantor, that one will reach the conclusion that the burden does not run with the land. The position therefore is the exact reverse of that which obtains in unregistered land.

So far as passing the *benefit* of the covenant is concerned, section 62(1) seems merely to reproduce in modern language the provisions of section 57 of the CLPA.[82] If the views expressed above in relation to section 57 are adopted, then both section 57 and section 62(1) provide for statutory annexation. If, however, *J Sainsbury plc* v *Enfield London Borough Council* is followed in Singapore, then neither provision effects statutory annexation.

In unregistered land, where a developer of land has entered into a series of restrictive covenants with his purchasers, the court may infer a reciprocity of benefit and burden between the developer and the purchasers and between the purchasers *inter se*. This has the effect of creating a local law for preserving the character of the neighbourhood. This is known as a "scheme of development" or "building scheme".[83] Any owner of a lot included in the scheme can enforce the covenants against the owner of any other lot in the scheme. However, in registered land, it is necessary to notify the restrictions against each servient tenement, failing which they will not be enforceable against subsequent purchasers of the servient tenements. No instrument creating restrictive covenants is to be notified by the Registrar

81 See *supra,* text at note 12.

82 Ricquier states (*op cit*, *supra,* note 3, at 175) that the formula in s 62(1) has more in common with s 78 of the English Law of Property Act 1925, than with s 57 of the CLPA and that it therefore provides a form of voluntary statutory annexation. With respect, this conclusion seems doubtful. S 78 of the English Act and s 62(1) use similar modern language to provide that the benefit of a covenant should pass to successors in title. However, s 78 differs from its Singapore equivalents in providing that the words "successors in title" include the owners and occupiers for the time being of the land. It is submitted that s 62(1) is no more likely – or unlikely – than s 57 to provide for statutory annexation.

83 The requirements for a scheme of development were laid down in precise terms in *Elliston* v *Reacher* [1908] 2 Ch 374. These requirements have been relaxed more recently, see *Re Dolphin's Conveyance* [1970] Ch 654.

84 S 139(1) and (2)(b).

unless it clearly indicates the dominant and servient land.[84] Given the practical difficulties of meeting these requirements in such a case, it would seem that schemes of development have no place in registered land in Singapore.[85]

V. Conclusion

If nothing else, this study of the rules relating to the passing of the benefit and burden of restrictive covenants should have convinced even the most casual reader of the extraordinary complexity of this area of the law. The English courts have endeavoured to simplify this subject in recent years and this article has argued that the Singapore courts are free to adopt a similar approach. In the meantime, there remains some measure of uncertainty as to the rules for the passing of the benefit of restrictive covenants in Singapore. It is to be hoped that the local courts will have the opportunity of resolving this question in the not too distant future.

In the meantime, it should be pointed out that virtually all the problems considered here can be avoided by careful drafting. Different rules of construction apply to the question of the passing of the burden of restrictive covenants in registered and unregistered land. However, the problem can be avoided by stating clearly in the conveyancing documentation whether the burden of the covenant is, or is not, to pass to successors in title. Such a clear statement will displace the rules of construction which would otherwise apply. The problem is slightly more difficult when one turns to the rules for the passing of the benefit of a restrictive covenant. To be sure that the benefit passes, one should use one of the accepted annexation formulae. However, the absence of such a formula will not guarantee that the benefit will not pass, as the Singapore courts may choose to follow *Federated Homes Ltd* v *Mill Lodge Properties Ltd*.[86] To ensure that the benefit does not pass, one should use language similar to that which proved effective in the case of *Roake* v *Chadha*.[87]

Barry C Crown*

[85] This is the view of Baalman, *The Singapore Torrens System* (1961), at 223. Tan, *op cit*, *supra,* note 3, at 450, refers to New South Wales cases granting limited recognition to schemes of development in Torrens system land, but the wording of the New South Wales statute is less demanding than that of the Singapore Act, which leads her to conclude that there would seem to be no scope for the operation of schemes of development in land governed by the Singapore Act.

[86] *Supra*, note 50.

[87] *Supra*, note 54.

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