

Chapter 20: Freehold covenants

Assessment question

In 1994, Adele owned two neighbouring properties, numbers 3 and 5 Abingdon Way. In June 1995, Adele decided to sell 3 Abingdon Way to Emilia, and included in the conveyance were a number of covenants. Emilia had covenanted:

1. to only use the property as a private dwelling house;
2. to pay a reasonable proportion towards the costs of the maintenance of the common private driveway between 3 and 5 Abingdon Way; and
3. to repaint the fence white every five years.

Adele sold 5 Abingdon Way to Tamir in November 2010. Earlier this year, Emilia sold 3 Abingdon Way to Raul. Raul is now planning to open a Spanish Tapas bar; he has painted the fence red and yellow and he is refusing to pay £5,000 towards the costs of repairing the driveway.

Advise Tamir as to whether he can enforce the covenants against Raul.

Specimen answer

At first instance, it is worth considering whether the covenants entered into by Emilia are positive or negative. Once this has been established, Tamir will want to know whether the covenants bind successor in title. Covenant 1: restrictive covenant; covenant 2: positive covenant; covenant 3: positive covenant. The advice will focus on the rules in equity regarding the transmission of the benefit and burden of a covenant.

Covenant 1

In equity, for the burden of a restrictive covenant to pass from Emilia to Raul, the four criteria set out in *Tulk v Moxhay* must be satisfied (see 20.5 for discussion of each of these elements):

1. The covenant must be negative in substance.
2. The covenant must, at the date of the covenant, be made to benefit the dominant land retained by the covenantee (the dominant land would be the property owned by Adele and the covenant would benefit the dominant land).
3. The covenant must touch and concern the dominant land (it is not a personal covenant).
4. The covenant must be made with an intent to burden the servient land.

In relation to the last point, the restrictive covenant entered into by Emilia is presumed to be made on behalf of successors and throws a continuing burden on the land (s. 79 LPA 1925). This covenant will be binding upon Raul provided it has been protected by a 'notice' entered on the register of title or, in the case of unregistered land, as a Land Charge. We can safely assume that the burden of the covenant will be transmitted to successors in title, i.e. Raul.

The next issue is whether the benefit of the covenant will benefit Tamir. In equity, there are three alternative ways in which the benefit will pass to successors in title: annexation, assignment, and building schemes.

Regarding annexation, under *Federated Homes* a restrictive covenant entered into after 1925 was automatically annexed to each and every part of the land (i.e. all the land) which the covenantee retained in the vicinity of the servient land. In *Crest Nicholson*, the Court of Appeal held that for there to be a valid statutory annexation

under s. 78 LPA 1925, the dominant land must either be clearly spelt out in the conveyance itself, or the dominant land must be mentioned in the conveyance itself or “easily ascertainable” from looking at the surrounding circumstances. 5 Abingdon Way would obviously be intended to be the dominant land. There seems to have been *prima facie* annexation of the covenant to 5 Abingdon Way.

Covenant 2

The second covenant involves a contribution to the maintenance costs of a common private driveway between 3 and 5 Abingdon Way. This is a positive covenant which imposes a burden on Raul, requiring him to pay towards the costs, but also it provides him with the benefit of using a well-maintained driveway. The burden of a positive covenant does not pass to successors in title in either common law or in equity. However, in equity the burden of a positive covenant may be transmitted where there is a reciprocal benefit and burden of covenant (*Halsall v Brizell*; *Rhone v Stephens*). In this case, the burden of the positive covenant is capable of binding Raul, and he must contribute to the costs (as long as the covenant has been registered).

Having considered the passing of burden of the positive covenant, it is also necessary to consider whether the benefit of this covenant will be transmitted to Tamir. In this regard, see the discussion above (Covenant 1) on the transmission of the benefit of a covenant in equity.

Covenant 3

The positive covenant requires Raul to paint his fence; this covenant does not have the same characteristics as Covenant 2 where there was a reciprocal benefit and burden of the positive covenant. Positive covenants do not bind successors in title in either common law or in equity. Tamir is advised that he cannot enforce this covenant against Raul.