

Chapter 21: Escaping from restrictive covenants

Assessment question

In 1990, Lewis bought three adjoining properties in rural Bassetshire, and became registered proprietor of those three properties. The three properties were Hill Top Farm (500 acres), Riverview Farm (400 acres), and Coombe Manor. Coombe Manor consists of a 50-room mansion and a large ornamental garden.

In 2000, Lewis sold Coombe Manor to Sabina. The Land Transfer to Sabina included a restrictive covenant under which she promised not to use Coombe Manor for any business, commercial, or professional purposes. The covenant was expressed to be 'for the benefit of the land retained by Lewis'.

In 2010, Lewis sold Hill Top Farm to Raj. Neither the contract of sale nor the land transfer made any mention of the right to enforce the restrictive covenant over Coombe Manor.

In 2013, Lewis sold Riverview Farm to Tariq. The land transfer in Tariq's favour expressly included a special clause giving Tariq the right to enforce the restrictive covenant over Coombe Manor.

Earlier this year Dan bought Coombe Manor from Sabina. He has obtained planning permission to convert Coombe Manor into a hotel. However, both Raj and Tariq are threatening proceedings for an injunction. Raj has written saying, 'Your guests will trespass all over my fields', while Tariq has said, 'If you offer me enough money, I will release the covenant.'

Advise Dan.

Would your advice be different if, as a result of the development of a new city, Coombe Manor and the two farms are now on the edge of an urban area?

Specimen answer

The restrictive covenant entered into by Sabina 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 Dan provided it has been protected by a 'notice' entered on the register of title (s.32 LRA 2002). If no such 'notice' has been entered, the restrictive covenant will not be binding (s.29 LRA 2002).

The next issue to consider is: who is/are the dominant owner(s)? Raj (and possibly Tariq) will argue he is dominant owner by virtue of annexation. 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 and "easily ascertainable" from looking at the surrounding circumstances. Hill Top Farm and Riverview Farm were not expressly mentioned in the 1998 transfer, but it is surely obvious that those farms were intended to be dominant. Lewis had no other land in the area. There seems to have been *prima facie* annexation of the covenant to those two farms.

Crest Nicholson leaves open whether annexation is presumed to be only to the whole of the dominant land, or whether annexation to each and every part is to be presumed. Dan should argue for annexation to the whole only. Policy of the law should be to limit the number of dominant owners and make them easily identifiable. If

Dan succeeds on this point, Raj is not a dominant owner – annexation is destroyed by virtue of sub-division (see *Russell v Archdale*). However, Tariq will be dominant owner (it seems) by virtue of the assignment rules. Raj will argue that annexation is presumed to the parts, and that therefore the right to enforce the restrictive covenant passed to him automatically when he bought part of the dominant land.

In view of risk of litigation by Raj (and Tariq), Dan should not just go ahead and convert. Raj (perhaps Tariq) will seek an interim injunction. Dan should consider s. 84(2) LPA 1925 proceedings in the High Court to establish dominant owners, and/or try to 'buy out' both Raj and Tariq. At first sight, one might think of offering less to Raj as his claim to be dominant owner is questionable. But on the other hand, Raj may be somewhat reluctant to be bought out, given the tone of his letter.

If Coombe Manor and the two farms are now on the edge of an urban area, Dan should consider proceedings in the Upper Tribunal under 84(1) LPA 1925. Under s. 84(1)(a), where the restriction may be regarded by the Upper Tribunal as 'obsolete', this is unlikely to succeed as the farm (and ornamental) land is not surrounded by urbanisation. Section 84(1)(aa) looks promising in view of the overall planning situation, because the restriction obstructs a reasonable user. Against Raj in particular, Dan will argue that the covenant no longer secures practical benefits of substantial value. Raj is worried about trespassers from the hotel, but he may actually have many trespassers from the nearby city.

It is suggested that money will be adequate compensation for both Raj and Tariq.