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Reform of the Law of Covenants

By Professor John Mee[*] and Alan Murphy[**]

Introduction

As part of the current reform process in respect of land law, it is envisaged that the law on freehold covenants will be radically overhauled. The relevant proposals are contained in sections 46-48 of the Land and Conveyancing Law Reform Bill 2006. This major reforming Bill fell with the dissolution of the Oireachtas prior to the General Election in May 2007 but it has been revived and the debate on its second reading in the Dáil began on October 4th 2007. Since it had passed all stages in the Seanad prior to the election, it is not necessary for it to return to that House. The Bill is expected to pass shortly. The provisions of the Bill relating to covenants did not prove controversial and remained unaltered during their passage through the Seanad. The central aim of the relevant provisions is to allow the burden of positive, as well as restrictive, covenants to pass to successors in title and, more generally, to simplify the rules governing the passing of the benefit and the burden of positive and restrictive covenants. It will be argued in this article that, while it is clearly necessary to reform the law in relation to covenants, there are serious difficulties with the provisions as they are currently drafted.

Background to Reform

The long-standing rule that the burden of positive covenants cannot run to successors in title was restated by the House of Lords in *Rhone v. Stephens* in 1994.[1] As was recently confirmed by Murphy J. in the High Court case of *Cardiff Meats Ltd v. McGrath & Ors*,[2]

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[1] [1994] 2 A.C. 310. See also *Haywood v. Brunswick Permanent Benefit Building Society* (1881) 8 Q.B.D. 403; *Austerberry v. Oldham Corporation* (1885) 29 Ch.D. 750.

[2] [2007] IEHC 219, expressly following *Rhone v. Stephens*. Note also the earlier Irish cases of *Craig v. Greer* [1899] 1 I.R. 258; *Williams & Co. Ltd. v. LSD & Quinnsworth*, unreported, High Court, 19 June 1970 (Pringle J.); *Power Supermarkets Ltd. v. Crumlin Investments Ltd.*, unreported, High Court, 22 June 1981 (Costello J.); *Whelan v. Cork Corporation* [1991] I.L.R.M. 19.

the position is the same in Ireland. The principles of *Tulk v. Moxhay*,[3] whereby restrictive covenants constitute an equitable interest in land, do not apply to positive covenants. Sections 46 to 48 of the 2006 Bill are intended to reform the law in respect of freehold covenants by permitting the running of the burden of positive as well negative covenants. The aim is "to correct what had been long recognised as a major defect in [the Irish] land law and conveyancing system."[4]

The origins of the reform proposals lie in a Law Reform Commission ("LRC") Report of 2003.[5] In the chapter of this Report dealing with covenants, the LRC noted that there was little problem with the rules governing covenants in the landlord and tenant context. The general law, as supplemented by relevant provisions of Deasy's Act 1860[6] and the Conveyancing Act 1881,[7] allows covenants entered into between the original landlord and tenant to be enforced by and against their successors in title. By way of contrast with this "generally satisfactory" position, the law in relation to freehold covenants was regarded by the LRC as being "defective in several respects".[8] One crucial point is that, as has already been emphasised, the burden of a positive covenant is not capable of running to successors in title of the original covenantor. Also, while a restrictive covenant can indeed bind successors in title under the principles of *Tulk v. Moxhay*, a restrictive covenant constitutes only an equitable interest in land. This means its enforcement is subject to the application of equitable principles and the remedies for its enforcement are the equitable remedies of an injunction (or damages in lieu under Lord Cairns' Act 1858). In addition, the equitable rules surrounding the passing of the benefit and the burden of restrictive covenants are complicated and somewhat uncertain. The LRC noted that the problems with the rules concerning freehold covenants mean that, in practice, it is not currently possible to use freehold conveyancing in relation to multi-occupational developments such as blocks of flats and apartment complexes.[9]

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[3] (1848) 2 Ph. 774.
[4] *Cardiff Meats Ltd v. McGrath & Ors* [2007] IEHC 219, para.8.1 *per* Murphy J.
[5] *Report on Land Law and Conveyancing Law: (7) Positive Covenants over Freehold Land and Other Proposals* (LRC 70-2003) (March 2003), pp.3-25. Henceforth, this Report is referred to as "the 2003 Report".
[6] Sections 12-16.
[7] Sections 10 and 11.
[8] 2003 Report, p.5.
[9] *Ibid*, p.9.

Following a brief examination of the issues involved, including reference to existing legislation in Trinidad and Tobago and in Northern Ireland, the LRC recommended legislation which would completely recast the rules in relation to freehold covenants, ensuring that the benefit and the burden of both positive and negative covenants would pass to successors in title.[10] The proposals in the Report form the basis of the relevant sections in the 2006 Bill, although there are some differences in the drafting. The relevant provisions of the 2006 Bill are remarkably succinct. Section 46 provides the definition of certain key terms and section 47 states the new rules. Section 48 introduces a mechanism allowing for the variation or discharge of existing covenants, as exists in many other jurisdictions (although, for reasons of space, this article makes no attempt to assess this provision).

The kernel of the new law (which will apply only to covenants entered into after the new rules come into force) is in section 47(2) which provides as follows:

> "(2) Subject to *subsection (3)*, any freehold covenant which imposes in respect of servient land an obligation to do or to refrain from doing any act or thing is enforceable—
>
> (*a*) by—
>
> (i) the dominant owner for the time being, or
>
> (ii) a person who has ceased to be that owner, but only in respect of any period when that person was such owner,
>
> (*b*) against—
>
> (i) the servient owner for the time being, or

[10] Other jurisdictions have developed special schemes, variously described as commonhold, strata title or condominium legislation, to deal with "multi-occupation developments, like blocks of flats, apartments and the like" and the LRC stated that it would consider this "very complex subject" at a later date: *ibid*, p.16. The English legislation in this area is the Commonhold and Leasehold Reform Act 2002.

(ii) a person who has ceased to be that owner, but only in respect of acts or omissions which occurred during the period when that person was such owner."

Section 47(1) provides that "the rules of common law and equity relating to the enforceability of a freehold covenant (including the rule known as the Rule in *Tulk v. Moxhay*) are abolished." Section 47(3) provides that the section "does not affect the enforceability of … a freehold covenant by a person entitled to the benefit of a scheme of development" for the purposes of the Rule in *Elliston v. Reacher*.[11]

Is it really possible to recast the law in such simple terms? The new approach seems to boil down to the simple proposition that any freehold covenant is enforceable by the owner for the time being of the dominant tenement against the owner for the time being of the servient tenement. This article will argue that the relevant legal issues are rather more complex than the drafting of sections 46 and 47 concede and that, because of a failure to address these issues fully, there are very serious problems with the reform package. The points which will be made in this article can be grouped under two broad headings: first, issues relating to the scope of the legislation and, second, issues relating to enforcement of covenants. Under the first heading, it will be argued that it is a major defect of the legislation that it does not apply to covenants which affect leasehold land but which are not governed by the landlord and tenant rules because they are not made between landlord and tenant (e.g. covenants imposed at the time of the subdivision of a property held on a long leasehold title subject to a ground rent). Next, it will be suggested that the drafting of the section is such that, although the Rule in *Elliston v. Reacher* would be preserved from abolition, the new rules as to the enforceability of positive covenants would not apply to those relying on the Rule. Under the second heading, it will be argued that the Bill is overly simplistic in providing that covenants, whether positive or restrictive, can be enforced by and against the same categories of persons. Amongst the undesirable results caused by this would be that restrictive covenants would no longer be enforceable against mere occupiers of the land without title, and would be enforceable

[11] [1908] 2 Ch. 374; affirmed [1908] 2 Ch. 665. Section 47(3) also clarifies that the section does not affect covenants for title which are dealt with in s.77 of the Bill and that the section takes effect subject to the terms of the covenant.

through an award of damages against persons not responsible in any way for a breach, and that positive covenants would be enforceable against short-term lessees and against mortgages not in control of the land. Finally, it will be suggested that the relevant provisions fail to ensure that a covenant will only be enforceable against a servient owner if the covenant has priority over that owner's interest in the land.

Issues Related to the Scope of the Legislation

(a) Covenants Affecting Leasehold Land and Leasehold/Freehold Land

The provisions of the Bill address only the enforceability of covenants in respect of freehold land, making no provision for cases where leasehold land is involved. The LRC in its 2003 Report stated that "in the case of land held under a leasehold title the covenants will have been contained in the lease when it was originally granted."[12] It went on to note how the law governing covenants in a lease is much more satisfactory than that governing freehold covenants, leading to the need for reforming legislation on freehold covenants. The Commission was, however, incorrect in stating that all of the covenants affecting land held under a leasehold title will be contained in the original lease. It is quite possible, and indeed common where land is being subdivided, for new covenants to be contained in subsequent assignments of the lease by the tenant and his successors in title.[13] This generally occurs more often with land held under long leasehold titles subject to a ground rent than with land held under short leases subject to market rents.

[12] Page 3.

[13] Such covenants, if restrictive, will run in equity to bind the servient land for the remaining duration of the lease. See Lyall, *Land Law in Ireland* (Dublin: Round Hall Sweet and Maxwell, 2nd edn., 2000) p.682; Gray and Gray *Elements of Land Law* (Oxford: Oxford University Press, 4th edn., 2005) pp.809-810. In cases like this, the question arises as to what happens if the lease comes to a premature end due to surrender or merger. In such cases, the covenant is not destroyed but continues to bind the person who now holds both the lease and reversion for as long as it would have been binding on the tenant. The position is different, it seems, if the lease terminates due to forfeiture because of conduct on the tenant's part which involves fault. In such cases, the landlord recovers the property free of the lease and of any interests the leaseholder has created out of it. See the explanation in English Law Commission *Transfer of Land: The Law of Positive and Restrictive Covenants* Law Com. No.171 (1984), pp.109-110. Note also s.77 of the Registration of Deeds and Title Act 2006, amending s.28 of the Landlord and Tenant (Ground Rents) (No.2) Act 1978 which had been interpreted in *Whelan v. Cork Corporation* [1991] I.L.R.M. 19 as destroying third party covenants when a tenant acquired the fee simple under the ground rents legislation.

Prior to the prohibition (subject to exceptions) of the creation of new long leases by the Landlord and Tenant (Ground Rents) (No.2) Act 1978, it was common in Ireland for vendors to grant long leases of land subject to nominal rents, instead of conveying the freehold. Amongst other things, this gave the landowner more flexibility in the imposition of covenants on the purchaser because such covenants, even if positive, would continue to be enforceable against future assignees of the leasehold interest. These leases often involved large holdings of land, and over time the land would inevitably be subdivided, often for development purposes, with the assignor retaining some of the original holding and the assignee obtaining the balance. Further subdivisions would often occur thereafter. On subdivision, it is quite common to see covenants entered into by the assignor and the assignee with each other regulating the future use and enjoyment of both the land transferred and the land retained. The need for such covenants is exactly the same for subdivided leasehold land as it is for subdivided freehold land. It is also worth noting that, notwithstanding the provisions of the Landlord and Tenant (Ground Rents) (No.2) Act 1978 which granted most tenants of such leases the right to buy the freehold of their holdings, a substantial number of such tenants have not availed themselves of this right to date.[14] As a result, it is still quite common to see land held under long leasehold title in Ireland.

These leasehold covenants suffer from the same enforceability defects as covenants affecting freehold land. The rules at common law and in equity on covenants affecting freehold land apply in equal measure to such covenants. This is because the common law and statutory rules allowing the benefit and burden of covenants in a lease to run only apply to covenants entered in to between the landlord and the tenant. They do not apply to covenants entered into later between a tenant and his assignee, or between an assignee and subsequent assignees, as there will be no privity of estate between them. The position is reflected in the comment of Lord Templeman in *Rhone v. Stephens*,[15]

[14] There are various reasons for this. The most common is the fact that a tenant who holds under a long lease with over 80 years left to run is considered to hold a good marketable title and so does not always see the need to purchase the freehold. It can also be costly, particularly if the land is development land. In addition, not all long leases qualify under the legislation so that some tenants will not be able compulsorily to acquire the freehold of their holding.

[15] [1994] 2 A.C. 310, 317.

quoted by Murphy J. in the recent case of *Cardiff Meats Limited v. McGrath & Ors*,[16] that "[a]s between persons interested in land *other than as landlord and tenant*, the benefit of a covenant may run with the land at law but not the burden".[17]

The proposed new legislation should logically apply to covenants affecting leasehold land where the special landlord and tenant rules do not apply. The Bill, however, does not refer to any form of leasehold covenant. Its terms require that both the dominant and the servient tenements must be freehold land. The consequence is that the enforceability of a positive covenant created on the sale of a subdivided piece of land will depend on whether the land is freehold or leasehold. If it is the former, it will be enforceable against all successors in title of the original covenantor. If it is the latter, it will not. This is a major oversight and stems from the failure to recognise that covenants affecting leasehold land include more than just the covenants contained in the original lease.

The question then arises as to whether the existing law, and, in particular, the rule in *Tulk v. Moxhay* which allows the burden of restrictive covenants to run, will continue to apply to such covenants. This will depend on the interpretation of section 47(1) of the Bill which provides that "the rules of common law and equity relating to the enforceability of a freehold covenant (including the rule known as the Rule in *Tulk v. Moxhay*) are abolished." It could be argued that the rules of common law and equity are abolished only insofar as they apply to freehold covenants and that the rule in *Tulk v. Moxhay* survives insofar as it applies to other covenants. Unfortunately, the explicit and unqualified statement that the rule in *Tulk v. Moxhay* is abolished makes this argument more difficult to sustain. It would, of course, be extremely unfortunate if covenants not caught by the new rules could no longer benefit from the old equitable rules. It should also be stressed that, even aside from covenants arising on the subdivision of leasehold land which have been mentioned above, the rule in *Tulk v. Moxhay* has a long-established application in the leasehold context.[18] It is clearly established that *Tulk v. Moxhay* is applicable to cases where a head-landlord seeks to enforce a covenant in the head-lease

[16] [2007] IEHC 219, para 8.5.
[17] Emphasis added. Note also *Whelan v. Cork Corporation* [1991] I.L.R.M. 19, illustrating the applicability of *Tulk v. Moxhay* in the leasehold context.
[18] See Harpum *Megarry and Wade: The Law of Real Property* (London: Sweet and Maxwell, 6th edn., 2000) p.1019: "The doctrine of *Tulk v. Moxhay* applies equally to covenants contained in leases."

against a sublessee. Although there is no privity of estate between the landlord and the sub-tenant, so that the landlord and tenant rules do not apply, the head-landlord can rely on *Tulk v. Moxhay*, with her reversion being accepted as the dominant tenement for these purposes.[19] If section 47 of the Bill actually does abolish *Tulk v. Moxhay* completely, then this aspect of the law of landlord and tenant would be adversely affected too.

The drafting of the new legislation also creates problems where the dominant and servient tenements are held under different titles, one freehold and one long leasehold. Suppose, for example, that a person sells vacant land across the road from her house and imposes a covenant that it shall not be used for any purpose other than agricultural use. Suppose, in addition, that her house is held under freehold title and her land across the road under a long lease (or *vice versa*). "Dominant land" is defined in section 46 as "*freehold* land with the benefit of a covenant to which other *freehold* land is subject".[20] This definition will not be satisfied in the situation under discussion and so it would follow that the covenant will not be enforceable under the new provisions. In addition, even more acutely than in relation to the scenario where both tenements are leasehold, a difficulty arises as to the applicability of the existing equitable rules. Section 47(1) abolishes all of the existing rules relating to the enforceability of a covenant "affecting" freehold land, and the type of covenant under discussion clearly "affects" freehold land.[21] Thus, it would seem that, under the new law, such a covenant will not be enforceable against any of the purchaser's successors in title (and, indeed, it is arguable that it would not even be enforceable against the original purchaser).[22]

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[19] See Wylie *Landlord and Tenant Law* (Dublin: Tottel, 2nd edn., 1998) pp.443-445.

[20] Oddly, by way of contrast, the definition of a servient tenement ("freehold land which is subject to a covenant benefiting other land") includes no requirement that the land benefited must be "freehold land". However, this makes no real difference in light of the definition of "dominant land".

[21] The problem lies in the different wording used in relation to the abolition of the old rules and the creation of the new rules: the rules concerning covenants "affecting freehold land" are abolished but the new rules apply only where both tenements are freehold. This seems to have other consequences as well. Consider the venerable Rule in the *Prior's Case* (1368). This rule of the common law allows the benefit of a covenant to pass automatically to a successor in title if the covenant touches and concerns the land in question. There is no requirement for a servient tenement in respect of this rule since the focus is on the relationship between the covenant and the land which it benefits. As s.47 is currently drafted, it would abolish this longstanding rule, because it is a rule relating to the enforceability of a covenant affecting freehold land, and replace it with nothing (since the new rules require both a dominant and a servient tenement). This does not appear to be intentional. See also n.22 below.

[22] The intention in the legislation was that a covenant would cease to be enforceable by or against the original dominant and servient owners once they had parted with their estate (see 2003 Report, p.15). For this result to be achieved, it would have to be accepted that, amongst the rules "relating to the

What is needed in terms of redrafting the provisions in the Bill to deal with these issues is to ensure that the new rules will apply where the landlord and tenant rules do not, i.e. that they will apply where there is no privity of estate between the parties. In formulating the necessary provision, it must be remembered that covenants in a lease may affect land other than that subject to the lease, so that the non-landlord and tenant rules would need to be applied in respect of enforceability by and against successors in title to the other land (who would be neither landlord nor tenant under the lease).[23] In adjusting the provisions in the Bill, one would have to consider whether to preserve the position in relation to the special application of *Tulk v. Moxhay* in relation to the enforcement of covenants by a head-landlord against a sub-lessee, whereby restrictive, but not positive, covenants can be enforced. Leaving the law unaltered on this point might be the best approach, in light of the overall philosophy of the provisions in the Bill is to avoid tinkering with the relatively satisfactory landlord and tenant rules on covenants.[24]

(b) Schemes of Development

It is provided in section 47(3) that section 47 "does not affect the enforceability of … a freehold covenant by a person entitled to the benefit of a scheme of development" and, in section 46, a scheme of development in defined by reference to the Rule in *Elliston v. Reacher*.[25] The intention appears to be to exempt the Rule in *Elliston v. Reacher* from the provision in section 47(1) which abolishes the existing rules of common law and equity in relation to freehold covenants. However, the way section 47(3) is phrased means that section 47 has no impact on the rights of someone entitled to the benefit of a scheme of development: it is explicitly stated that section 47 (which would otherwise have increased the enforceability of positive covenants in this context) "does not affect the enforceability of a freehold covenant … by a person entitled to the benefit of a scheme of

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enforceability of a freehold covenant" abolished by s.47(1), is the basic rule that a contract is enforceable between the parties to the contract. If this premise is accepted, then any covenant "affecting freehold land" which is not enforceable under the new rules will not be enforceable at all, even in contract law.

[23] See the discussion of the issues in English Law Commission n.13 above, pp.149-151; 282-283.

[24] Note the approach proposed by the English Law Commission *ibid*, p.149.

[25] It is provided that a "scheme of development" means "a building or estate scheme created on a subdivision of land and intended to confer the benefit of covenants on subsequent owners of subdivided parts in accordance with the rule sometimes known as the Rule in *Elliston v. Reacher*".

development". The result would be that the concession made in the context of a scheme of development, i.e. that restrictive covenants are enforceable by and against those who are not strictly speaking successors in title of the original covenanting parties, would not extend to the passing of the burden of positive covenants.[26]

Notwithstanding the fact that this interpretation follows from the clear wording of the section, it does not appear to reflect the intention of the drafters. In its 2003 Report, the LRC discussed the Northern Ireland provisions which, through a legislative restatement of the rules on schemes of development, ensure that the benefit and burden of both negative and positive covenants (of the types covered by the Northern Ireland legislation) can run in the context of such schemes.[27] The LRC concluded that the inclusion of provisions along these lines "would be useful"[28] but, rather oddly, no such provisions appear in the draft legislation in the Report. However, the draft legislation in the LRC's 2005 *Report on Reform and Modernisation of Land and Conveyancing Law*[29] did include the provision referring to the Rule in *Elliston v. Reacher* which occurs in the 2006 Bill and the commentary on the provision in that Report gives no indication that it is intended to limit the running of covenants in the context of a scheme of development to restrictive covenants.[30] On the whole, it appears that the intention of the drafters of the Bill was simply that section 47(3) would preserve the flexibility created by the Rule in *Elliston v. Reacher* and that it was not intended that the new rules on the passing of the burden of positive covenants would be excluded in such cases. If so, the problem could easily be addressed by changing the wording to make this clear.

[26] Compare the comments of the Wilberforce Committee in its *Report on Positive Covenants Affecting Land* (Cmnd. 2719, 1965) p.10.
[27] 2003 Report, pp.15-16, commenting on Property Law (Northern Ireland) Order 1997, Article 34(6) to (8).
[28] *Ibid*, p.16.
[29] LRC 74-2005 ("the 2005 Report").
[30] See 2005 Report, pp.155-157.

ISSUES RELATING TO ENFORCEABILITY

The Persons against whom Covenants Should be Enforceable

The provisions of the Bill are open to criticism on the grounds that the class of persons against whom a restrictive covenant can be enforced is too narrow (although also, in one respect, too broad) and the class against whom a positive covenant can be enforced is too broad. The questions arising in relation to these issues are in fact far more complex than the 2003 Report or the drafting of the relevant provisions of the Bill would suggest. In its instructive 1984 Report on the *Law of Positive and Restrictive Covenants*,[31] the English Law Commission explained the difference in principle between restrictive and positive obligations in the following terms:

> "In the first place, [a restrictive obligation] does not require the taking of positive action or the expenditure of money, so that compliance (unlike compliance with [a positive obligation]) is not in itself onerous. It is therefore reasonable that a very wide class of person should be bound. In the second place, [positive obligations] are complied with if even one person complies with them: provided that *someone* takes the action, or pays the money, compliance is complete. But [restrictive obligations] are not complied with unless everyone complies. It is therefore necessary, as well as reasonable, that the widest possible class of person should be bound."[32]

Bearing this in mind, it is now proposed to consider in turn the cases of restrictive and positive covenants.

(i) Restrictive Covenants

Under s 47, all covenants, including restrictive covenants, can be enforced against the servient owner for the time being. The definition of "servient owner" in section 46 "includes persons deriving title from or under that owner". As is explained in the 2005

[31] Note 13 above.
[32] *Ibid*, p.78.

LRC Report, this means that covenants could be enforced against "e.g. a lessee or mortgagee".[33] There are, however, two other classes of person against whom a restrictive covenant is enforceable under current law – firstly, a person in adverse possession of the land in question and, secondly, a person who is a mere occupier of the land (e.g. as a licensee of the owner) without any title to it. It is important that restrictive covenants would continue to be enforceable against these categories of persons. However, as will be discussed in a moment, the wording of the legislation leaves some doubt over the position of squatters who have not yet extinguished the paper owner's title and clearly fails to address the position of a mere occupier. In addition to neglecting these categories, it also appears that the provisions in the Bill are defective in a different way, in that they fail to focus liability on the person who is actually in breach of the restrictive covenant. The relevant issues will now be discussed in turn.

(a) Squatters

Under the current law, it is well-established that a squatter is bound by restrictive covenants.[34] Whether a squatter would be bound by such covenants under the proposed legislation depends on whether a squatter qualifies as "the servient owner" or someone "deriving title from or under" that owner. This definition appears to be satisfied in relation to a squatter who has acquired the best title to the land upon the expiry of the limitation period. What, however, of a squatter who has not yet extinguished the title of the legal owner? In principle, the squatter acquires a fee simple title as soon as the adverse possession begins, albeit a title that is secondary to that of the paper owner until the expiry of the limitation period. Thus, it could be suggested that an adverse possessor, because she holds a second-best freehold title in the land, from the start falls within the category of "the servient owner", so that the covenant can be enforced against her.[35] However, this seems a little strained and it would be better to clarify the legislation on this point.[36] It is worth noting that the Northern Irish legislation provides explicitly that all squatters are bound by restrictive covenants.[37]

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[33] 2005 Report, p.153.
[34] *In re Nisbet and Potts' Contract* [1906] 1 Ch. 386.
[35] See the discussion of the relevant issues in Law Commission n.13 above, pp.83-84.
[36] It must be remembered that, as the section is currently drafted, the definition of those against whom covenants can be enforced is the same as the definition of those who can enforce covenants, so that e.g. a

(b) Mere Occupiers/Licensees

The second category appears clearly to be overlooked by the legislation. A person who is in occupation of the servient land but does not hold any interest or title in the land should not be permitted to breach a restrictive covenant binding that land. Under current law, a restrictive covenant can indeed be enforced against a mere occupier. This is demonstrated by *Mander v. Falcke*[38] where the defendant argued that, because he had no estate or title to the land bound by a restrictive covenant, the restrictive covenant (which he was violating by running a brothel under the pretence of operating an oyster bar) could not be enforced against him. The Court of Appeal was unanimous in rejecting this argument. Lindley L.J. commented that the defendant "may be neither an assignee nor a purchaser, but he is in occupation, and that is enough to affect him". The judge was "satisfied on principle that a simple occupier comes within the decision … in *Tulk v. Moxhay*."[39]

The wording of the Bill, which makes covenants enforceable against the servient owner and anyone "deriving title from or under that owner", clearly does not capture a mere occupier who has no title. This omission needs to be rectified if the section is not to weaken the existing rules on the enforcement of restrictive covenants.[40]

(c) Persons Not Responsible for the Breach?

Under the two previous headings, it was argued that section 47 was defective in that it failed to make restrictive covenants enforceable against certain classes of person. It is

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decision that covenants can be enforced against a squatter automatically means that a squatter (on any portion of the dominant tenement) can enforce positive and restrictive covenants. In recasting the section, it would be better to make separate choices as to the enforceability of covenants by and against the various relevant categories of persons, drawing distinctions where appropriate between positive and negative covenants.

[37] Property (NI) Order 1997, Art.34(9).

[38] [1891] 2 Ch. 554.

[39] *Ibid*, 557.

[40] In rewording the section to cover this case, it should be remembered that an occupier should not be affected by a covenant if she is in occupation by the permission of someone whose interest has priority to the restrictive covenant. See Law Commission n.13 above, p.81 (para 11.18). The failure of the provisions in the Bill to take account of issues of priority is discussed elsewhere in this article: see text to nn.52-55 below.

now necessary to discuss a problem of overly broad enforceability arising from the current drafting in the Bill.

It has previously been argued that restrictive covenants have traditionally been enforceable against the widest possible class of persons and that this approach should be replicated in the legislation. In implementing this sensible approach, however, one must take into account the fact that the new scheme will have the effect of making legal as well as equitable remedies available for the breach of restrictive covenants. Therefore, common law damages will become available in addition to the current option of an injunction or damages in lieu under Lord Cairns' Act. This creates new complexities because of the different nature of common law damages compared to the equitable remedies currently available for the breach of a restrictive covenant. An injunction is a forward-looking remedy which simply requires the person against whom it is awarded to comply in future with the covenant. Similarly, where it is appropriate to award them, damages in lieu of an injunction are also prospective in nature, compensating for future damage which will occur because no injunction is being awarded. It is assumed under the equitable regime that an injunction will only be granted against someone who has breached (or, in a *quia timet* context, is about to breach) the restrictive covenant. This, and the prospective nature of equitable relief, eliminates the potential for oppression which might arise from the fact that a restrictive covenant can currently be enforced against a very wide range of persons.

Things are different, however, when an award of common law damages becomes possible. It could well suit the dominant owner to seek damages for past loss from a person against whom the restrictive covenant was enforceable, even if that person was not the one who breached the covenant. As section 47 is currently drafted, an obvious example is a mortgagee, who might be a better mark for damages than the servient owner who actually breached the covenant. This is clearly unfair on the mortgagee who will not normally be in a position to monitor the observance of covenants over the land.[41] Another example would be where the land had been subdivided and one of the two new servient owners has breached the covenant; in these circumstances, the current version of section

[41] See Law Commission n.13 above, p.87. Note, however, that it would not be unreasonable to allow a mortgagee to protect his security by *enforcing* a restrictive covenant. This is possible under the current law: see *Regent Oil Co. Ltd. v. J.A. Gregory (Hatch End) Ltd.* [1966] Ch. 402, 433.

47 would allow the dominant owner to proceed against the innocent servient owner for common law damages. To deal with such issues, the English Law Commission proposed an approach whereby no remedy, legal or equitable, would be available against a person unless he or she has personally breached the restrictive covenant or else has "permitted or suffered" another to breach its terms (even if the covenant makes no explicit reference to liability in respect of "permitting or permitting").[42] The English Law Commission proposals also created a more general exemption from liability for mortgagees unless they have taken possession of the land or appointed a receiver. It is unfortunate that the provisions in the Bill take no account of the point under discussion. It is submitted that the issue should be addressed, whether along the lines suggested by the Law Commission or otherwise.

(ii) Positive Covenants

As has been discussed, section 47 makes all covenants, including positive covenants, enforceable against the servient owner and anyone "deriving title from or under" that owner, including a mortgagee or a lessee. Unfortunately, allowing positive covenants to bind such a wide class of persons can clearly lead to injustice and inconvenience.

Consider first the position of a lessee. It is not reasonable that all classes of lessee should be bound by positive covenants. It would be most unfair if (say) students who lease a house for a year were to be bound by a covenant involving an onerous obligation to repair.[43] Lessees under a short lease cannot be expected to investigate their landlord's title. The English Law Commission, in its proposals on this area, suggested that positive covenants should be enforceable only against long leaseholders and suggested that the line should be drawn at leases for more than 21 years.[44] The English Law Commission recognised that there was necessarily an arbitrary element in selecting a particular term of

[42] *Ibid*, pp.86-87. The Law Commission also recommended that common law damages would only be available against a subset of persons bound by the restrictive covenant, essentially those with a freehold interest or a leasehold interest for more than 21 years or the interest of a mortgagee who has taken control of the land by taking possession or appointing a mortgage: *ibid*, pp.94-95. The reasoning was that, given that common law damages could extend to damages for consequential pecuniary loss or even for personal injury, it could be oppressive to make common law damages available against persons with "insubstantial interests".

[43] An example given by Roger Smith *Introduction to Land Law* (Harlow: Pearson Longman, 2007) p.265.

[44] Note 13 above, p.79.

years but felt that "the dividing line of 21 years is well recognised for legal purposes".[45] It would seem necessary for our legislation to include, in the context of positive covenants, some similar exemption for those in occupation under short leases, with the appropriate dividing line being determined in light of the Irish legal context.[46] It should be emphasised that a positive covenant, although not enforceable against a short-term tenant in occupation, would naturally continue to be enforceable against the freeholder who had granted the lease.

Similar issues arise in relation to mortgagees. It is most undesirable that section 47, as it is currently drafted, imposes automatic liability on mortgagees for the performance of positive covenants binding the land.[47] Under the section, there is nothing to prevent a dominant owner from holding the mortgagee accountable for the performance of a positive obligation (which might involve the payment of money) if it seemed that the lender in question would be a better mark than the mortgagor. It is appropriate to allow the enforcement of a positive covenant against a mortgagee only if the mortgagee has assumed control of the land by taking possession or by appointing a receiver.[48] The legislation should establish this rule.

A final cluster of issues arises from the fact that, unless there is a contrary indication in the covenant or the instrument containing it, the benefit and burden of a covenant "will attach to both the whole and any part of the dominant and servient land" because the definition of "land" in section 3 of the 2006 Bill includes "any part of the land".[49] Thus, when the servient land is subdivided, a positive covenant could be enforceable against multiple servient owners with holdings of different sizes. In addition, even outside the context of subdivision, there may be a number of different "persons

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[45] *Ibid*.

[46] Note that Property (NI) Order 1997, Art.34(4) provides for the enforcement of covenants by and against "owners" for the time being and the definition of "owner" Art.34(9) is restricted to persons holding a fee simple or a life estate (and so does not include leaseholders). It includes a squatter who has extinguished the paper owner's title but not a squatter in the course of the limitation period (except, as noted previously, that restrictive covenants can be enforced against all squatters).

[47] This is the case because mortgagees, as explained in the 2005 LRC Report, p.153, fall within the definition of those "deriving title from or under" the servient owner.

[48] This is the approach of the English Law Commission n.13 above, p.87. As was mentioned in the discussion in the previous section on restrictive covenants, the Law Commission in fact favoured a more general rule that the covenants, whether positive or restrictive, would not be enforceable against a mortgagee unless it had taken possession or appointed a receiver.

[49] See 2005 Report, p.153.

deriving title from or under [the servient] owner". In light of this, potentially difficult issues arise in relation to the apportionment of liability and the possibility of someone who complies with a positive covenant seeking contribution from other persons liable. The relevant issues are not mentioned in the LRC documents in relation to the reform of the law on covenants. However, the English Law Commission did make fairly complex proposals covering some of the relevant issues.[50] Given the limitations on space, in the present article it is possible only to note the existence of this set of issues.[51]

Issues Concerning Priority

Section 47 simply states that covenants, of whatever type, are "enforceable" by the current dominant owner against the current servient owner. The LRC argued that the effect of the provision is that freehold covenants will "acquire the status of legal rights, enforceable against successive owners of the 'servient' land, just like easements."[52] Thus, while a restrictive covenant is currently an equitable interest in land, all forms of freehold covenant are intended to acquire the status of legal rights.[53] But what is the relationship between section 47 and the rules in relation to the registration of title and, where unregistered land is at issue, in relation to the registration of deeds? The LRC assumes in its discussion of the effect of the proposed legislation[54] that the enforceability of a covenant would be dependent on its having been registered as a registrable burden in the case of registered land or, in the case of unregistered land, the relevant deed having been registered in the Registry of Deeds. Unfortunately, there is nothing in section 47 of the Bill which directly ensures that this will be the case. It is not provided that restrictive covenants will be enforceable against successors in title in accordance with the standard

[50] See n.13 above, Part XVII.
[51] One further issue can also be mentioned briefly. Section 47(2) of the Bill adds no qualification to the statement that covenants are enforceable against the servient owner for the time being, unlike in relation to former servient owners where it specifies that liability exists only in respect of their period of ownership. It would seem, therefore, that an action could be taken against the existing servient owner for any breaches which occurred during the limitation period of 12 years (see Statute of Limitations 1957, s.11(5)(a)), irrespective of whether she was the servient owner at the time of the breach. This result seems to be unintentional.
[52] 2003 Report, p.16.
[53] Note that s.11(4) of the Bill includes covenants in the list of the legal interests which it will be possible to create.
[54] 2003 Report, p.16.

rules on priority. Instead, it is provided that covenants (which are ultimately promises) are enforceable *simpliciter* against the servient owner for the time being. This direct statement might appear to trump the statement in section 52 of the Registration of Title Act 1964 that a transferee of registered land takes free of registrable burdens which have not been registered. However, one could point to the fact that the Bill elsewhere includes a freehold covenant as a burden which can be registered as affecting registered land[55] and argue that this, albeit in an unsatisfactorily indirect manner, imports the priority rules in the registered land context. In the unregistered land context, the unqualified statement in the Bill concerning enforceability would more clearly appear to trump the priority rules, i.e. the rules relating to the registration of deeds and the non-statutory rules which are still applicable in some cases.

It is difficult to see why the question of the need for registration of a covenant to ensure priority was not made explicit in section 47. It is possible that it was assumed that any covenant would always be registered since it would inevitably be contained in a deed transferring land, which itself would have to be registered to ensure its priority or that, in the registered land context, the covenant would invariably be registered when the transfer itself was registered. However, this takes no account of the possibility that a covenant could be created outside of a deed of transfer, e.g. because it was bargained for at a later stage or was omitted by accident from the original deed of transfer. It would seem desirable that the priority issue be addressed explicitly in the legislation.

Conclusion

This article has argued that further work needs to be done on the proposed overhaul of the law of covenants. One key problem is that the current provisions arbitrarily exclude covenants in relation to leasehold land which are not made between landlord and tenant, in particular covenants imposed upon the subdivision of a property held on a long leasehold title. In relation to such cases, it is not even certain that the existing equitable rules would still apply, since section 47 states explicitly that the rule in *Tulk v. Moxhay* is abolished. In addition, problems are created by the fact that the legislation draws no

[55] The provision in relation to covenants as registrable burdens is Registration of Title Act 1964, s.69(1)(k). Section 119 of the 2006 Bill proposes to add a new paragraph (kk) which would cover freehold covenants as defined in s.46 of the Bill.

distinction between restrictive and positive covenants and takes the crude approach that all covenants can be enforced by and against the same categories of person. This means that restrictive covenants can no longer be enforced against mere occupiers of land, while liability can attach, through an award of common law damages, to persons not responsible for the breach and not in a position to prevent it (including mortgagees of the servient land). It also leads to the unreasonable position that positive covenants can be enforced against those holding under short leases and against mortgagees who have no control over the land. There are also infelicities of drafting in the section which prevent the new rules on the running of positive covenants from applying in the context of the Rule in *Elliston v. Reacher*. Finally, it is not made sufficiently clear in the relevant sections that the enforceability of covenants is dependent on the covenants having priority under the applicable registration system. These issues need to be tackled if the proposed reform is actually to deliver on its potential.