HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, GUMMOW, KIRBY AND HAYNE JJ

FORESTVIEW NOMINEES PTY LTD — FIRST APPELLANT

SILKCHIME PTY LTD — SECOND APPELLANT

AND

PERPETUAL TRUSTEES WA LTD — RESPONDENT

Forestview Nominees Pty Ltd v Perpetual Trustees WA Ltd (P45/1997)
[1998] HCA 15
4 March 1998

ORDER

1. *Appeal allowed in part.*

2. *Vary the order of the Full Court of the Federal Court of Australia dismissing the appeal so as to set aside Order 2 of the orders made by Carr J on 6 December 1995.*

3. *Otherwise appeal dismissed with costs.*

On appeal from the Federal Court of Australia

Representation:

D M J Bennett QC with D M Stone for the appellants (instructed by Williams & Hughes)

P G Hely QC with B Dharmananda for the respondent (instructed by Mallesons Stephen Jaques)

CATCHWORDS

Forestview Nominees Pty Limited v Perpetual Trustees WA Limited

Real property (WA) – Torrens system – Restrictive covenant – Enforceability of – Application by successors in title of burdened land for declaratory relief that restrictive covenant not enforceable – Intention of parties to covenant to exclude enforcement of restrictive covenant by tenant of benefited land – Consistency with the doctrine in *Tulk v Moxhay* – Restrictive covenant enforceable.

Equity – Restrictive covenant – Principles upon which the doctrine in *Tulk v Moxhay* rests.

Transfer of Land Act 1893 (WA), s 129A.

1 GAUDRON, McHUGH, GUMMOW, KIRBY AND HAYNE JJ. This appeal is brought from the Full Court of the Federal Court[1] (French, Einfeld and R D Nicholson JJ). The Full Court upheld the grant by a judge of the Federal Court (Carr J)[2] of declaratory relief, the effect of which was to confirm that a restrictive covenant upon an area of land at Warwick, a suburb of Perth, was effective according to its terms.

The facts

2 The second appellant, Silkchime Pty Ltd ("Silkchime"), is registered proprietor of an estate in fee simple of the land in certificate of title vol 2003 folio 201 ("the burdened land"), which was issued on 15 June 1994 under the *Transfer of Land Act* 1893 (WA) ("the Transfer of Land Act"). By transfer registered 27 January 1995, Silkchime acquired the burdened land from the first appellant, Forestview Nominees Pty Ltd ("Forestview"). Silkchime and Forestview are associated companies. Forestview acquired the burdened land from National Mutual Life Association of Australasia Limited ("National Mutual") by transfer registered on the same day. The certificate of title to the burdened land shows it as subject to a restrictive covenant ("the restrictive covenant") which was created by transfer F582167 ("the transfer"), registered 15 June 1994. The transfer was by National Mutual to the respondent, Perpetual Trustees WA Limited ("Perpetual"), of an area of land ("the subdivided land") adjoining the burdened land. The subdivided land increased the holding of Perpetual in respect of an area upon which the Warwick Grove Shopping Centre is erected ("the Shopping Centre land"). The subdivided land and the Shopping Centre land (with certain plant, equipment and other assets) were bought by Perpetual from National Mutual under a contract made 16 September 1993. The contract stated the total purchase price as $55.8 million, of which $500,000 was allocated to the subdivided land. The conveyance of the subdivided land was delayed by the need to subdivide the parcel comprising the subdivided land and the burdened land retained by National Mutual.

3 The burdened land is an area of some 3.9 hectares adjoining the benefited land. The benefited land comprises the Shopping Centre land and the subdivided land. Silkchime wishes to develop a retail shopping centre on the burdened land, or to lease it to a third party to do so. Perpetual contends that such activities would

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1 *Forestview Nominees Pty Ltd v Perpetual Trustees WA Ltd* (1996) 70 FCR 328.

2 *Forestview Nominees Pty Ltd v Perpetual Trustees WA Ltd* (1995) 133 ALR 465.

contravene the prohibitions on use of the burdened land which are imposed by the restrictive covenant.

4 In the Federal Court, the appellants sought against the respondent declaratory relief that the restrictive covenant was not effective in its terms and, in particular, that it did not bind them as successors to National Mutual as registered proprietor of the burdened land. By cross-claim, Perpetual sought rectification of the covenant should it be held unenforceable in its original form. In the event, the Federal Court did not deal with the cross-claim because of the view taken as to the enforceability of the restrictive covenant.

The restrictive covenant

5 Section 129A of the Transfer of Land Act provides that "by instruments in an approved form" restrictive covenants may be created and made binding in respect of land under that statute "so far as the law permits". It is accepted that the restrictive covenants referred to in s 129A are those supported by the equitable doctrine derived from the decision of Lord Cottenham LC in *Tulk v Moxhay*[3]. In this way, by force of the statute which establishes the Torrens system in Western Australia[4], the principle of indefeasible title by registration and an equitable doctrine devised in nineteenth century England are both accommodated.

6 The doctrine in *Tulk v Moxhay* has been said to evince the appreciation by courts of equity that the market value of land may be affected by activities upon adjacent parcels as much as by the uses to which the land itself can be put, and that certain arrangements designed to protect such value and which go beyond the frame of contract may be enforced in equity if not at law[5]. In *Tulk v Moxhay* itself, the Lord Chancellor said[6]:

> "Here there is no question about the contract: the owner of certain houses in the square sells the land adjoining, with a covenant from the purchaser not to

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3 The decision is variously reported: (1848) 2 Ph 774 [41 ER 1143]; (1848) 1 H & Tw 105 [47 ER 1345]; 18 LJ Ch 83.

4 *Bahr v Nicolay [No 2]* (1988) 164 CLR 604 at 612-613, 629-630, 652-653.

5 Cornish and Clark, *Law and Society in England 1750-1950*, (1989) at 149-151; Reno, "The Enforcement of Equitable Servitudes in Land: Part 1", (1942) 28 *Virginia Law Review* 951 at 970.

6 As reported by Phillips, (1848) 2 Ph 774 at 777 [41 ER 1143 at 1144].

> use it for any other purpose than as a square garden. And it is now contended, not that the vendee could violate that contract, but that he might sell the piece of land, and that the purchaser from him may violate it without this Court having any power to interfere. If that were so, it would be impossible for an owner of land to sell part of it without incurring the risk of rendering what he retains worthless."

Hence the statement by Kitto J in *Pirie v Registrar-General*[7] that:

> "it is basic to the doctrine of *Tulk v Moxhay*[8] that it applies only to a restriction created to preserve the value of other land, and that the restriction is not enforceable against derivative owners except for the protection of that other land".

7 The text of the restrictive covenant is set out in the judgment of French J[9]. Clause 2 is expressed as follows:

> "Covenant binds successors in title
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> The covenants made in clause 1 by the Transferor ('the Restrictive Covenant') are made for itself and its successors in title as the registered proprietor or proprietors of the Burdened Land or any part or parts of it with the intent that the Restrictive Covenant will enure only for the benefit of the Transferee and its successors in title as the registered proprietor or proprietors of the Benefited Land or any part or parts of it. Without limiting the generality of this clause 2, the Restrictive Covenant will not enure for the benefit of any tenant for the time being of the Benefited Land or any part or parts of it."

8 It should also be noted that s 129B(1) of the Transfer of Land Act deals with the discharge of restrictive covenants and, so far as relevant, states:

> "Notwithstanding anything contained in this Act to the contrary... any covenant or agreement affecting or restricting the use of land may be discharged or modified by agreement by all persons interested in the land

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7 (1962) 109 CLR 619 at 628.

8 (1848) 2 Ph 774 [41 ER 1143].

9 (1996) 70 FCR 328 at 331-333.

affected by such covenant or agreement consenting to such discharge or modification."

Clause 4.4 of the restrictive covenant provides:

"For the purpose of section 129B of the Transfer of Land Act 1893, the registered proprietor of the Benefited Land for the time being and the registered proprietor of the Burdened Land for the time being covenant with each other that the Restrictive Covenant is entered into for the benefit of the registered proprietor of the Benefited Land and its successors in title and is not entered into for the benefit of any other person. Without limiting the generality of the foregoing, the Restrictive Covenant is not entered into for the benefit of any tenant for the time being of the Benefited Land."

9 The covenant containing the restrictions imposed upon the burdened land was given by National Mutual "as the registered proprietor" of that land and is expressed as made for National Mutual "and its successors in title as the registered proprietor or proprietors of the Burdened Land or any part or parts" thereof. The covenant was given for the benefit of Perpetual "as the registered proprietor" of the benefited land "and its successors in title as the registered proprietor or proprietors of the Benefited Land or any part or parts" thereof. The restrictions set out in cl 1 of the restrictive covenant are expressed in terms which are negative in substance as well as in form. With certain exceptions, the restrictions forbid use of the burdened land for "the retail sale of goods", and also "market stalls" and "showrooms". Further, Carr J held that the restrictions are such as to benefit or enhance the value of the benefited land and that in consequence the restrictive covenant "touches and concerns" the benefited land[10]. It would appear to follow that the restrictive covenant complies with the requirements of the *Tulk v Moxhay* doctrine as stated in the leading modern authorities, *Marquess of Zetland v Driver*[11] and *Pirie v Registrar-General*[12], and would bind the appellants as successors in title of National Mutual who took with notice of the restrictive covenant[13].

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10 (1995) 133 ALR 465 at 479.

11 [1939] Ch 1 at 8-9.

12 (1962) 109 CLR 619 at 628-629.

13 No question arises here as to the principles by which common building schemes are enforced.

10 However, the restrictive covenant is expressed in cl 2 and cl 4.4 to enure only for the benefit of Perpetual and its successors in title as registered proprietors of the benefited land and not to enure for the benefit of any tenant. The apparent objective in so drawing the covenant was to confine to the registered proprietors of the benefited land the commercial advantage of the legal authority to bargain at any later stage for the variation or discharge of the burden of the restrictive covenant in accordance with s 129B(1) of the Transfer of Land Act.

11 The appellants, Forestview and Silkchime, contended before Carr J and the Full Court that the restrictive covenant was unenforceable against them as successors to National Mutual by reason of a fatal defect in the attachment of benefit of the restrictive covenant. Before this Court, they renewed the submission that because the restrictive covenant is expressed in terms that it "will not enure for the benefit of any tenant for the time being of the Benefited Land or any part or parts of it", it does not touch and concern that land and so fails to satisfy a requirement of the general law which is imported by s 129A of the Transfer of Land Act.

12 The dispute does not arise by reason of any attempted enforcement of the restrictive covenant by such a tenant against the appellants. Rather, the appellants' challenge to the validity of the restrictive covenant beyond such force it has as a covenant between the parties who created it, National Mutual and Perpetual, is founded upon the denial to such tenants of the benefit of the covenant. That denial is said to be repugnant to the nature of a *Tulk v Moxhay* restrictive covenant.

The *Tulk v Moxhay* doctrine

13 In order better to appreciate the particular issue which arises on this appeal, it is appropriate further to look to the equitable precepts which underpin the *Tulk v Moxhay* doctrine.

14 Contrary to the view taken by Sir George Jessel MR in *London and South Western Railway Co v Gomm*[14], little assistance is to be derived from the "principle

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14 (1882) 20 Ch D 562 at 583. See also *In re Nisbet and Potts' Contract* [1905] 1 Ch 391 at 396-397; *Quadramain Pty Ltd v Sevastapol Investments Pty Ltd* (1976) 133 CLR 390 at 403-404.

of general Equity jurisprudence"[15] that equity follows the law[16] so that the doctrine derived from *Tulk v Moxhay* is an equitable analogue of the law of easements or the rules which, at common law under the doctrine in *Spencer's Case*[17], control leasehold covenants. Any such analogy must be seriously imperfect. For example, if there is privity of estate, absence of notice would be no answer to a claim for breach of a covenant running with the land at law[18], whereas a purchaser for value without notice of a legal estate has an answer to the enforcement of a *Tulk v Moxhay* covenant[19]. (As regards Torrens system land, the particular indefeasibility provisions applicable to the land burdened by the restrictive covenant may determine the continued enforceability of the restrictions[20]. No such questions arise in the present case.)

15 Further, the negative easements (notably those of light and support) which were recognised at common law were strictly limited and defined, the common law being wary of long-term inhibitions to the realisation of the full potential of the servient tenement[21]. Indeed, it was these perceived limitations in the law of real property as it then stood which precipitated the decision in *Tulk v Moxhay* itself. It may be said that here, as elsewhere, particularly in the development of equitable remedies in addition to or in substitution for damages, equity intervened

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15 *Motor Terms Co Pty Ltd v Liberty Insurance Ltd* (1967) 116 CLR 177 at 184.

16 See *Delehunt v Carmody* (1986) 161 CLR 464 at 473.

17 (1583) 5 Co Rep 16a [77 ER 72].

18 See *London County Council v Allen* [1914] 3 KB 642 at 668-669.

19 *In re Nisbet and Potts' Contract* [1905] 1 Ch 391 at 397-398; *Wilkes v Spooner* [1911] 2 KB 473 at 486.

20 See *Re Arcade Hotel Pty Ltd* [1962] VR 274 at 280-287; *Pirie v Registrar-General* (1962) 109 CLR 619 at 627-628, 636; *Mercantile Credits Ltd v Shell Co of Australia Ltd* (1976) 136 CLR 326 at 338, 342-343, 352; *Burke v Yurilla SA Pty Ltd* (1991) 56 SASR 382 at 386-390; Baalman, "Common Building Schemes and the Torrens System", (1953) 27 *Australian Law Journal* 366.

21 Behan, *The Use of Land as Affected by Covenants*, (1924) at 45-47; Hayton, "Restrictive Covenants as Property Interests", (1971) 87 *Law Quarterly Review* 539 at 541-542.

to supplement the perceived deficiencies of the common law[22]. The reasoning of Lord Cottenham LC in *Tulk v Moxhay* amounts to a rejection of the submission of counsel for the defendant in that case that the law had offered adequate means to secure the protection of the value of the covenantee's land. Counsel[23] had submitted[24]:

> "The land might, no doubt, have been secured for the use of the occupiers of the houses in the neighbourhood, if such had been the contract between the parties. Mr Tulk might, if he had thought it necessary, have employed the intervention of [express] trustees, or created a term of years, or conveyed a fee-simple conditional, reserving a right of re-entry, or have secured the same object by other legal means. But he did not do so."

16 Several concerns of equity have been involved in the development of the *Tulk v Moxhay* doctrine. No particular one is determinative of the various requirements of that doctrine as they have been formulated. Nevertheless, they provide guidance for the resolution of fresh issues as they arise. Thus, in *Brunner v Greenslade*[25], Megarry J said:

> "[E]quity, in developing one of its doctrines, refuses to allow itself to be fettered by the concept upon which the doctrine is based if to do so would make the doctrine unfair or unworkable. After all, it is of the essence of a doctrine of equity that it should be equitable, and, I may add, that it should work: equity, like nature, does nothing in vain."

His Lordship went on to emphasise that, in dealing with restrictive covenants, "equity readily gives effect to the common intention notwithstanding any technical difficulties involved"[26].

17 We have referred, as an objective of the doctrine, to the importance attached to the preservation of the value of the benefited land against activities, not only of the covenantor, but also of third parties dealing in the burdened land. This may be

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22 See *Rhone v Stephens* [1994] 2 AC 310 at 317.

23 Mr R Palmer, later Lord Selborne LC.

24 (1848) 1 H & Tw 105 at 109 [47 ER 1345 at 1347].

25 [1971] Ch 993 at 1006.

26 [1971] Ch 993 at 1006.

compared with equity's protection of goodwill by the injunction to restrain passing off[27] and, as decided in *Trego v Hunt*[28], to restrain solicitation by a vendor of customers of the business which the vendor has sold.

18 On the other hand, it has not been necessary for a plaintiff seeking to restrain breach of a restrictive covenant to show, nor has it been an answer for a defendant to deny, that the activities of a defendant in a particular case threaten to reduce the value of the benefited land. Rather, as Parker J pointed out in *Elliston v Reacher*[29], with reference to *Doherty v Allman*[30], the absence of proof of substantial damage is not by itself sufficient to deny injunctive relief and, in exercising its discretion, a court of equity is bound to consider all the circumstances of the case. In particular, the negative character of the covenant assists the case for its enforcement by injunction[31], even where the parties to the suit are not those bound at law as the original covenantor and covenantee.

19 The identification of the basis upon which equity supports the carriage of the burden of a restrictive covenant by a party other than the covenantor has been a matter of some difficulty.

20 The basis was said to rest upon what in 1877 Fry J called "the equitable doctrine of notice"[32], whereby "a person who takes [the land] with notice that such a covenant has been made, shall be compelled to observe it"[33]. In *Rhone v*

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27 *AG Spalding & Bros v AW Gamage Ltd* (1915) 32 RPC 273 at 284-285.

28 [1896] AC 7.

29 [1908] 2 Ch 374 at 395. See also *Osborne v Bradley* [1903] 2 Ch 446 at 450-451; Behan, *The Use of Land as Affected by Covenants*, (1924) at 149.

30 (1878) 3 App Cas 709.

31 See the discussion of principle by Mason J in *Dalgety Wine Estates Pty Ltd v Rizzon* (1979) 141 CLR 552 at 573-574, 576.

32 *Luker v Dennis* (1877) 7 Ch D 227 at 235-236. See also *Cox v Bishop* (1857) 8 De G M & G 815 at 821 [44 ER 604 at 607].

33 *Leech v Schweder* (1874) 9 Ch App 463 at 475 per Mellish LJ. See also *Cooke v Chilcott* (1876) 3 Ch D 694 at 701 per Malins V-C; and cf *Quadramain Pty Ltd v Sevastapol Investments Pty Ltd* (1976) 133 CLR 390 at 396.

Stephens[34], Lord Templeman reviewed the later course of English authority which rejected "the equitable doctrine of notice" as a doctrinal basis. As indicated earlier in these reasons, acquisition of a legal title for value and without notice provides an answer to the assertion of a *Tulk v Moxhay* covenant[35]. Moreover, the mere existence of notice is not, in general, the occasion for the creation or imposition of any fresh equitable obligation[36]. Finally, the present case concerns land held under Torrens title, where the doctrine of bona fide purchaser of a legal title for value and without notice of an equitable interest is not immediately applicable[37].

21 In *Lumley v Wagner*[38], decided shortly after *Tulk v Moxhay*, in addition to the injunction directed to a recalcitrant opera singer, the plaintiff obtained an injunction restraining the rival entrepreneur, Frederick Gye, from accepting without the plaintiff's consent her professional services during the existence of her agreement with the plaintiff[39]. The liability of a defendant who knowingly procures a breach of contract, or knowingly interferes with the due performance of a contract, has been described by the Privy Council as having the same underlying rationale as that of a third party who deliberately interferes in the relationship of trustee and beneficiary[40]. In *Manchester Ship Canal Company v Manchester Racecourse Company*[41], Vaughan Williams LJ held that equity would restrain a threatened breach of a contract to sell land by performance of a subsequent contract by the defendant with a third person who had full knowledge of the first contract. The case was "within the principle of *Lumley v Wagner*"[42]. In giving the judgment

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34 [1994] 2 AC 310 at 318-321. See also *Ashburn Anstalt v Arnold* [1989] Ch 1 at 26.

35 *In re Nisbet and Potts' Contract* [1905] 1 Ch 391 at 397-398; *Wilkes v Spooner* [1911] 2 KB 473 at 486.

36 cf *Royal Brunei Airlines v Tan* [1995] 2 AC 378 at 386-387.

37 See *Bahr v Nicolay [No 2]* (1988) 164 CLR 604 at 612-613, 629-630, 652-654.

38 (1852) 1 De G M & G 604 [42 ER 687].

39 (1852) 1 De G M & G 604 at 607-608 [42 ER 687 at 689].

40 *Royal Brunei Airlines v Tan* [1995] 2 AC 378 at 386-387.

41 [1901] 2 Ch 37 at 51.

42 [1901] 2 Ch 37 at 51.

of the Court of Appeal, his Lordship said that the third party was a necessary party to the suit to enjoin breach of the first contract and continued[43]:

> "[I]f the defendant, thus brought in, comes and insists on his right to have the second contract carried out, we do not see why the injunction should not be granted against him"[44].

22 Authorities such as these were relied upon by Professor Harlan F Stone[45] as indicating a basis upon which equity restrains breaches of a restrictive covenant by successors to the covenantor. He suggested that the position of the covenantee differed in matter of form rather than principle from that of the purchaser under the first contract, and continued[46]:

> "The [purchaser] has the equitable right to compel the vendor to do something with his property, namely, convey it to the [purchaser], whereas the covenantee has the right to call upon the covenantor to refrain from using his property in a particular manner. The covenant, as a matter of interpretation, may mean only that the covenantor is personally bound to this course of conduct, or it may mean that the undertaking is that the use of the land, whether by the covenantor or others, shall be permanently restricted in the manner indicated by the covenant. If the latter construction is the correct one, can equity, consistently with its settled doctrines, refuse to impose upon the subsequent taker of the land the duty of refraining from any act interfering with the enjoyment of the covenantee's equitable right acquired by his covenant? And this is precisely what equity does do in enforcing the restrictive covenant."

However, this explanation cannot supply a foundation for all the cases. In particular, where the successor to the covenantor acquires an equitable rather than a legal interest in the burdened land, then, even if the successor did so without

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43 [1901] 2 Ch 37 at 51.

44 See also *Goldsbrough, Mort & Co Ltd v Quinn* (1910) 10 CLR 674 at 697; *Re Rutherford* [1977] 1 NZLR 504 at 508-509; *Potter v Ferguson* [1979] 1 NSWLR 364 at 373-374.

45 "The Equitable Rights and Liabilities of Strangers to a Contract", (1918) 18 *Columbia Law Review* 291 at 301-302.

46 "The Equitable Rights and Liabilities of Strangers to a Contract", (1918) 18 *Columbia Law Review* 291 at 301-302 (footnote omitted).

notice of the restrictive covenant, the successor nevertheless is bound by the earlier equitable obligation[47].

23 A more satisfactory explanation as to the passing of the burden of restrictive covenants may be that favoured by Ames[48]. In his view, the burden is imposed upon successors to the covenantor "upon the same principle that the grantee of a guilty trustee ... is bound to convey the *res* to the *cestui que trust*". There would be "the like injustice, if the purchaser with notice, or the volunteer, were allowed to profit at the expense of the *cestui que trust* or [the covenantee] by ignoring the trust ... or the restrictive agreement". Accordingly, equity imposes upon the successor to the covenantor "a constructive duty" which is "coextensive" with the express duty of the covenantor to the covenantee. The position of successors to the covenantor with respect to the burden of the covenant thus rests not upon any legal principle of privity of estate but upon "the equitable principle of privity of conscience"[49].

24 We turn to consider the particular point at issue in this appeal, with respect to the necessary incidents for the attachment of the benefit of a restrictive covenant.

The benefit of the restrictive covenant

25 At common law, save as between landlord and tenant, where special rules apply[50], the burden of covenants did not run with the covenantor's land[51]. In some circumstances, the benefit might run with the land but, in particular, when the

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47 *Rogers v Hosegood* [1900] 2 Ch 388 at 404-405; *In re Nisbet and Potts' Contract* [1906] 1 Ch 386 at 406.

48 "Specific Performance For and Against Strangers to the Contract", (1904) 17 *Harvard Law Review* 174 at 183; see also Giddings, "Restrictions Upon the Use of Land", (1892) 5 *Harvard Law Review* 274 at 281.

49 Abbot, "Covenants in a Lease Which Run with the Land", (1921) 31 *Yale Law Journal* 127 at 131; Reno, "The Enforcement of Equitable Servitudes in Land: Part 1", (1942) 28 *Virginia Law Review* 951 at 973. See also Behan, *The Use of Land as Affected by Covenants*, (1924) at 39-42; *Ashburner's Principles of Equity*, 2nd ed (1933) at 368-369.

50 *Rhone v Stephens* [1994] 2 AC 310 at 316-317.

51 *Austerberry v Corporation of Oldham* (1885) 29 Ch D 750; *Regent Oil Co Ltd v J A Gregory (Hatch End) Ltd* [1966] Ch 402 at 433.

covenant was taken, the covenantee was required to have an estate in the land to which the covenant was intended to attach. A successor of the covenantee could not enforce the covenant unless that party held the same estate in that land or in some portion of that land[52]. Hence the statement that whilst the phrase "runs with the land" was devised by the common law, "the benefit of a covenant runs at *law* not with the land but with the covenantee's estate in the land"[53].

26 One result was that, if the plaintiff took only as lessee of the covenantee, the covenant was not enforceable against the covenantor[54]. Further, if the covenant was taken by a covenantee having at that time but an equitable interest in the land (such as an equity of redemption), in the contemplation of the common law the covenantee was a stranger to the land so that the benefit was collateral to it and did not attach or pass with any legal estate[55].

27 In *Grant v Edmondson*[56], Romer LJ said in relation to the position at common law that:

> "in connection with the subject of covenants running with land, it is impossible to reason by analogy. The established rules concerning it are purely arbitrary, and the distinctions, for the most part, quite illogical."

By contrast, the Court of Appeal in Chancery in describing the approach of equity had said[57]:

> "The questions which have arisen with respect to the devolution of the benefit of [restrictive] covenants ... have been decided ... without reference to any technical distinctions depending upon the covenants running or not running [at law] with the land."

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52 *Rogers v Hosegood* [1900] 2 Ch 388 at 395-396.

53 Bailey, "The Benefit of a Restrictive Covenant", (1938) 6 *Cambridge Law Journal* 339 at 350.

54 *Westhoughton Urban Council v Wigan Coal & Iron Co* [1919] 1 Ch 159 at 170-171.

55 *Webb v Russell* (1789) 3 TR 393 at 402 [100 ER 639 at 644].

56 [1931] 1 Ch 1 at 28.

57 *Keates v Lyon* (1869) 4 Ch App 218 at 223.

28 Accordingly, in dealing with the passing of the benefit of restrictive covenants, equity did not act upon any close analogy with the common law. Rather, it had regard to the intention of the parties creating the covenant and did not regard objections drawn from common law doctrine necessarily as sufficient to defeat that intention where it was clear. Thus, in *Rogers v Hosegood*[58], the covenantees were the mortgagors only of the land in question. As such, they did not hold the legal title, which was vested in the mortgagees[59]. The covenant was expressed as having been made with the intent that the benefit thereof enured to the mortgagors, their heirs and assigns and others claiming under them for all or any of the land in question[60]. The Court of Appeal rejected the submission that, because it had not been taken by the mortgagees as well as the mortgagors, the

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58 [1900] 2 Ch 388.

59 *Coroneo v Australian Provincial Assurance Association Ltd* (1935) 35 SR (NSW) 391 at 394.

60 [1900] 2 Ch 388 at 389.

benefit of the covenant would pass with the equitable but not the legal title to the land[61]. The Court said[62]:

> "That a court of equity, however, would not regard such an objection as defeating the intention of the parties to the covenant is clear; and, therefore, when the covenant was clearly made for the benefit of certain land with a person who in the contemplation of such a court was the true owner of it, it would be regarded as annexed to and running with that land, just as it would have been at law but for the technical difficulty."[63]

29 Again, in equity where a restrictive covenant is taken by a freeholder in favour of that person and the assigns of any person deriving title under that party, the covenant later may be enforced by a lessee despite the absence of privity of estate between the lessee and the predecessor in title[64]. Here also effect is given to the intention of the parties to the covenant by denying the analogy of the common law rules which would have fixed upon the absence of privity of estate.

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61 [1900] 2 Ch 388 at 404.

62 [1900] 2 Ch 388 at 404.

63 See also *Besinnett v White* [1926] 1 DLR 95 where the covenantee who enforced the covenant had taken it as a purchaser who had not then received a conveyance of the freehold and *Long v Gray* (1913) 58 Sol Jo 46 where the Court of Appeal rejected the submission that the restrictive covenant was unenforceable because it had not been entered into with anyone possessed of the legal fee simple; it was sufficient that the covenant was taken by the tenant for life and the trustees who alone had the power of sale. See further Behan, *The Use of Land as Affected by Covenants*, (1924) at 111-112; *Preston and Newsom's Restrictive Covenants Affecting Freehold Land*, 8th ed (1991) at 66-67.

64 *Taite v Gosling* (1879) 11 Ch D 273. Likewise, the covenant may be enforced by an equitable owner such as a successor under the will of the covenantee who has not yet obtained a legal title (*Newton Abbot Co-operative Society Ltd v Williamson & Treadgold Ltd* [1952] Ch 286 at 290; *Earl of Leicester v Wells-Next-The-Sea Urban District Council* [1973] Ch 110 at 117-118) and by the party for whom the benefit of the covenant is held by a trustee (*Lord Northbourne v Johnston & Son* [1922] 2 Ch 309 at 317; *Marten v Flight Refuelling Ltd* [1962] Ch 115 at 140); cf *Quadramain Pty Ltd v Sevastapol Investments Pty Ltd* (1976) 133 CLR 390 at 411-413.

Rather, the parties to the covenant must have manifested therein an intention that the benefit of the covenant does run with the land concerned[65].

30 It is apparent from the above authorities that the requirement in equity that the benefit of the restrictive covenant was intended to run with the land concerned expresses, in particular, the conclusion that equity did not, by analogy, import the common law requirement of privity of estate. The requirement is an expression, rather than a denial, of the preference of equity for intention over form and to the giving effect to the intention evinced in the terms of the restrictive covenant in question. It has rightly been said that the question of the intention of the parties "is at the heart of the matter"[66].

31 It follows that the basis upon which equity deals with the attachment to the benefited land and the transmission of the benefit of restrictive covenants is that which was identified by Ames nearly a century ago. He said that the right of third persons to the benefit of restrictive covenants is the result of the just and simple principle[67]:

> "that equity will compel the promisor to perform his agreement according to its tenor. If the restrictive agreement, fairly interpreted, was intended for the sole benefit of the promisee, only he can enforce it. If on the other hand it was intended for the benefit of the occupant or occupants of adjoining lands, then such occupant or occupants may compel its specific performance."

The outcome in the present case

32 The respondent was correct in the submission that the question whether a covenant touches and concerns or is capable of benefiting particular land differs from that as to who is within the scope of the covenant and thus entitled to enforce it. The phrase "touch and concern" was used at common law to determine whether

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65 *Renals v Cowlishaw* (1878) 9 Ch D 125; (1879) 11 Ch D 866. See also Bailey, "The Benefit of a Restrictive Covenant", (1938) 6 *Cambridge Law Journal* 339 at 353-355.

66 Hayton, "Restrictive Covenants as Property Interests", (1971) 87 *Law Quarterly Review* 539 at 563.

67 "Specific Performance For and Against Strangers to the Contract", (1904) 17 *Harvard Law Review* 174 at 183.

covenants ran with the leasehold estate under the doctrine of *Spencer's Case*[68] and to determine whether the benefit of a covenant ran with a freehold estate[69] under the principles indicated earlier in these reasons. In dealing with restrictive covenants, equity stipulates that the question whether benefited land is touched and concerned is answered by asking whether there is the necessary benefit[70]. That, as we have indicated, was how Carr J approached the present case.

33 In the present case, under common law principles, tenants of the benefited land would be unable to enforce the covenant because they would lack privity of estate with Perpetual. In equity, authority to enforce the covenant is derived from the intention of the parties to the covenant, as evinced by its terms. It would have been open to provide in the covenant for enforcement by parties lacking privity of estate with Perpetual. However, in the present case, clearly the intention of the parties was not to do so. The question then is whether that expression of intention is repugnant to the principles which support the doctrine in *Tulk v Moxhay* with respect to the passing of the benefit of restrictive covenants. The exclusion of tenants, as a manifestation of the intention of the parties, is an expression rather than a denial of those principles.

34 The primary judge found that the value of the benefited land was enhanced by the restrictive covenant and concluded that this meant that the covenant "touches and concerns" the benefited land[71]. It does not follow that, because the leaseholders cannot enforce the covenant and the freeholder may choose not to do so, the covenant cannot affect the value of any leasehold interests therein. Limitations upon the power of enforcement will be but a factor to be taken into account in the process of valuation. So also would be the covenant in any lease which, as between landlord and tenant, denied any otherwise subsisting entitlement of the lessee to assert rights of enforcement which were within the terms of a restrictive covenant.

35 We conclude that the primary judge and the Full Court were correct in rejecting the submission that the restrictive covenant did not meet the requirements

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68 (1583) 5 Co Rep 16a [77 ER 72].

69 *Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board* [1949] 2 KB 500 at 516.

70 *Rogers v Hosegood* [1900] 2 Ch 388 at 395; *Marten v Flight Refuelling Ltd* [1962] Ch 115 at 136-137.

71 (1995) 133 ALR 465 at 494.

of the *Tulk v Moxhay* doctrine. That result makes it unnecessary to consider the alternative submission that, in any event, the deficiency which the appellants sought to expose would be made good by s 47 of the *Property Law Act* 1969 (WA)[72]. No occasion arises to consider whether the reasoning of the English Court of Appeal in *Federated Homes Ltd v Mill Lodge Properties Ltd*[73] is applicable to the construction of s 47 and, if so, whether it should be followed.

Orders

36 The orders made by the primary judge, the appeal against which was dismissed by the Full Court, included three declarations. In this Court the relief sought by the appellants includes the setting aside of those declarations.

37 The declaratory orders were as follows:

> "1 On its true construction, the restrictive covenant ('**Restrictive Covenant**') contained in Transfer F582167 and notified in relation to the estate and land comprised in Certificate of Title Volume 2003 Folio 201 ('**Burdened Land**') is effective and enforceable as a restrictive covenant relating to the estate and land comprised in Certificate of Title Volume 2001 Folio 1000, Certificate of Title Volume 1980 Folio 428, Certificate of Title Volume 1399 Folio 004 and Certificate of Title Volume 1980 Folio 430 (together '**Benefited Land**').

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72 Section 47 states:

> "(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 has effect as if those successors and other persons were expressed.
>
> (2) For the purposes of subsection (1) 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 the land of the covenantee intended to be benefited.
>
> (3) This section applies only to covenants made after the coming into operation of this Act."

73 [1980] 1 WLR 594 at 604-607; [1980] 1 All ER 371 at 378-381; cf *Rhone v Stephens* [1994] 2 AC 310 at 321-322.

2 On its true construction, the Restrictive Covenant binds the owner of the Burdened Land and its successor in title and any person deriving title under the owner or its successors in title, including any owner, lessee, sub-lessee or occupier, of the Burdened Land.

3 The Restrictive Covenant 'touches and concerns' the Benefited Land."

It follows from the conclusions stated above that the attack on declaration 1 fails. Declaration 3 was probably unnecessary, its effect being subsumed by the first declaration, but may properly be allowed to stand.

38 There remains the second declaration. This deals not with any question of validity, but with a point of construction as to the provisions of the restrictive covenant with respect to the passing of the burden thereunder.

39 National Mutual as the then registered proprietor covenanted "that it will not use the Burdened Land for any purpose involving" the stated activities. The covenant was expressed as being made for National Mutual and its successors in title as the registered proprietor or proprietors of the burdened land or any part or parts of it. The appellants are such successors in title but they contend that "subsidiary or derivative interest holders" in the burdened land, such as any tenants in a retail shopping centre which was developed in the future on the burdened land, would not be bound or affected by the restriction.

40 The effect of the second declaration made by Carr J was to deny that proposition and assert the contrary.

41 However, no such existing or proposed tenant or other subsidiary or derivative interest holder is a party to the present proceeding. The immediate, and live, question concerns the enforceability of the covenant by Perpetual against Silkchime as present registered proprietor of the burdened land.

42 Declaration 2 answered what, as matters presently stand, is a hypothetical question in relation to circumstances that have not occurred and may not happen[74]. In oral submissions, the respondent did not press the contrary view with any enthusiasm. Declaration 2 should not have been made.

43 The appeal should be disposed of by allowing the appeal and ordering that the order by the Full Court dismissing the appeal to it be varied so as to set aside

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74 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-582.

Order 2 of the orders made by Carr J on 6 December 1995. Otherwise the appeal to this Court should be dismissed. The appellants should bear the costs of the appeal.