

1. Does a covenantee have the benefit or burden of a covenant?

The covenantee has the benefit of a covenant. They are the person to whom the promise is made. The covenantor, who makes the promise, has the burden.

See: 12.1

2. Abi has the benefit of a covenant entered into by Belinda that Belinda will maintain the fence between their gardens. Belinda has sold her land to Carl. Can Abi oblige Carl to carry out repairs to the fence?

In this scenario, Abi is the covenantee and has the benefit of the covenant. Belinda is the original covenantor, and has the burden. Carl is a successor in title to the original covenantor. The question, therefore, is whether the burden of the covenant has run with the land to Carl, so that he is obliged to carry out the terms of the covenant and repair the fence.

Whilst Belinda owned the land, Abi could have enforced the covenant as a matter of contract. However, there is no contract between her and Carl. The law on the running of the burden of a covenant must be examined.

The burden of a covenant does not run with the land at common law: *Austerberry v. Corporation of Oldham* (1885) 29 Ch D 750. However, the burden of certain covenants does run with the land in equity, under the rules in *Tulk v Moxhay*. Unfortunately, the first of the rules under *Tulk v Moxhay* is that the covenant must be restrictive – that is, it must forbid the doing of something. A covenant which requires the expenditure of money will not be restrictive.

This is a positive covenant, and will not run with the land, so Carl will not be bound by it. Abi could still enforce the covenant against Belinda, but her remedy would be damages, as Belinda is not in a position to repair the fence.

An easement of fencing was established in *Crowe v. Wood* [1971] 1 QB 77, but this is a covenant rather than an easement. In *Sugarman v. Porter* [2006] EWHC 331 (Ch), Peter Smith J refused to construe a covenant to maintain fencing as an easement, on the grounds that it was drafted as a covenant.

Therefore Abi cannot oblige Carl to carry out repairs to the fence.

3. Doug has the benefit of a covenant entered into by Ed that Ed will not build on his land without Doug's consent. Will the benefit of this covenant pass to Fiona if she buys Doug's land? Will the burden pass to Greg if he buys Ed's land?

In this scenario, Doug is the original covenantee and has the benefit of the covenant. Ed is the original covenantor and has the burden. Fiona is the successor in title to the original covenantee, and therefore needs to know if the benefit will run with the

land. Greg is a successor in title to the original covenantor and therefore needs to know if the burden of the covenant will run with the land.

The benefit of a covenant will run with the land both at common law and in equity. In addition, successors in title may have been given the benefit expressly under the Contracts (Rights of Third Parties) Act 1999, if the covenant was made after 11 May 2000. This is a restrictive covenant (it prevents building without consent), so it is more usual to consider the equitable rules for the passing of the benefit and the burden.

The benefit of a covenant will pass in equity if the covenant touches and concerns land of the covenantee *and* the benefit of the covenant was either annexed to the land of the covenantee; *or* expressly assigned to the successor in title; *or* the land in question is part of a building scheme: *Renals v. Cowlishaw* (1878) 9 Ch D 125, 129. This covenant does touch and concern the benefited land as having the right to veto building on the burdened land will increase the value of the benefited land.

The benefit may be expressly assigned to Fiona, or it may be annexed to the land. There is no evidence of a building scheme here.

Assignment must occur at the time the land is transferred to Fiona. Since the covenant was taken for the benefit of Doug's land, and that land is identifiable, the covenant can be assigned.

Annexation means the permanent attachment of the covenant to the benefited land, and is therefore preferable to assignment. There are three types of annexation; express, implied and statutory. Implied annexation is very rare, and will not be considered further.

Express annexation occurs when the covenant indicates an intention that the benefit should become annexed to the land, so that it runs with the land; and the land for which the benefit of the covenant is made is identified or capable of identification; and *either* the covenant is for the benefit of the whole of the covenantee's land and the whole of that land has been assigned to the successors in title *or* the covenant is intended to be for the benefit of each and every part of the covenantee's land. The covenant is, in this case, annexed to the part it actually benefits. We do not know what the wording of the covenant is here, but some words mentioning successors in title and the land to be benefited are essential for express annexation. If the covenant is worded in that way, there may well be express annexation, as it appears that the covenant benefits the whole of Doug's land, and that has been transferred to Fiona.

Statutory annexation occurs under LPA 1925 s.78, as interpreted by *Federated Homes v. Mill Lodge Properties* [1980] 1 All ER 371. As a result of that case, the benefit of any restrictive covenant is annexed to the covenantee's benefited land, provided that the covenant is one that touches and concerns the land. However, this will not apply if the covenant is expressly stated to be personal (*Roake v. Chadha* [1984] 1 WLR 40) or if the benefited land cannot be identified (*Crest Nicholson v. McAllister* [2004] EWCA Civ 410). It is likely that statutory annexation has occurred here unless the covenant is worded so as to be personal to Doug. It is therefore likely that the benefit will pass to Fiona.

The burden of a covenant does not run with the land at common law: *Austerberry v. Corporation of Oldham* (1885) 29 Ch D 750. However, the burden of certain covenants does run with the land in equity, under the rules in *Tulk v Moxhay*. These rules are firstly, that the covenant must be restrictive, secondly that at the date of the covenant, the covenantee owned land that was benefited by the covenant; thirdly that the original parties intended the burden to run with the land to bind successors; and fourthly the covenantor must take with notice of the covenant.

This covenant is restrictive. At the date of the covenant, Doug owned land benefited by the covenant, and this covenant touches and concerns the land. An intention that it should run with the land originally had to be shown by express words, but, since 1925, LPA 1925, s. 79, has implied an intention that the burden of a restrictive covenant should run with the land. Unless the covenant was deliberately written to be personal in nature, this intention will be presumed. Notice is nowadays replaced by registration. The correct registration requirements for the land, whether unregistered or registered, must have been met if Greg is to be bound by the covenant.

In conclusion, it is not possible to say with certainty whether this covenant will run with the land. Much depends upon the intention of the parties at the time the covenant was entered into, and the wording of the covenant. However, restrictive covenants often do pass with the land.

4. What remedies would be open to Fiona if she were to sue Greg for breach of covenant?

Since the burden of a covenant runs in equity only, the remedies for breach of covenant must be equitable. Fiona may be able to get an injunction to stop Greg from building on the land without her consent. To get this remedy, Fiona must act quickly if there is a breach or threatened breach of covenant. If she delays too long, she may be held to have acquiesced to the breach, and get no remedy at all, or damages rather than an injunction: *Gafford v. Graham* (1998) 77 P & CR 73.

Sometimes damages may be awarded instead of an injunction. The leading case on this is *Shelfer v. City of London Electric Lighting Co. Ltd (No. 1)* [1895] 1 Ch 287, in which it was held that If the injury to the [claimant's] legal rights is small, is capable of being estimated in money, and can be adequately compensated by a small money payment, and the case is one in which it would be oppressive to the defendant to grant an injunction, then damages rather than an injunction may be awarded.

See: 12.7.1