**Chapter 10**

**Question 1: Is there a continuing role for land covenants as a form of private planning control?**

We consider the role of land covenants in Paragraphs 10.1-10.2 and conclude that there is certainly a continuing role for land covenants despite the extensive scope of public planning and building regulation. Land covenants act at the micro level between neighbouring landowners. As such, they can deal with a greater level of detail and encompass a wider variety of concerns that neighbouring owners may wish to address than public planning policy which operates at a macro level. The large number of land covenants that are registered each year at the Land Registry provide evidence of the important role land covenants continue to play. Indeed, it would be unusual to find any residential estate that is not subject to land covenants.

**Question 2:** **Are restrictive covenants genuine property interests or a peculiar species of personal contract?**

Restrictive covenants are generally based upon an agreement between neighbours or owners whose plots of land are in close proximity. They restrict what the covenantor can do on their land. However, following the 19th century decision in *Tulk v Moxhay* restrictive covenants have developed into a form of equitable proprietary interest, the burden of which can pass to successors in title and person deriving title from the original covenantor provided they are registered at the Land Registry. Their details will appear in the Charges Register as a burden on the land.

To qualify as an equitable interest under the Doctrine of *Tulk v Moxhay*, a restrictive covenant must display certain characteristics. These are examined in Paragraphs 10.6-10.15.

**Question 3:** **Restrictive covenants and easements share some common characteristics. What are their similarities and differences?**

The renown Chancery judge Sir George Jessel in *London and South Western Ry. Co. v Gomm* described restrictive covenants ‘as an equitable extension of either privity of estate or negative easements.’ Restrictive covenants do bear some similarities to both privity of estate and negative easements but there are crucial distinctions and thus the analogies are of limited assistance.

We consider the running of leasehold covenants through the concept of privity of estate in Chapter 7 and note that burden of leasehold covenants may run whether they are positive or negative. This is a fundamental distinction between restrictive and leasehold covenants.

The nature of easements is explored in Chapter 9 particularly at Paragraphs 9.7-9.28. Most easements are positive in character ie they allow the dominant owner to do something on the servient land. However, some are negative in the sense that they restrict what a servient owner could otherwise do on their land for instance a right to light, air or support see Paragraph 9.1. As such they perform a similar function to a restrictive covenant. Indeed, the reluctance of the courts to recognize new forms of negative easements (see Paragraph 9.23) is influenced by the fact that neighbouring owners can address their concerns by creating a suitably framed restrictive covenant – see *Phipps v Pears*.

Both negative easements and restrictive covenants operate between neighbouring landowners and call for at least two pieces of land, commonly referred to as the dominant and servient land. The requirement that a restrictive covenant must benefit adjoining land is also similar to the requirement for accommodation that we explored when considering easements. The analogies between the two interests are thus easy to spot but distinctions do exist particularly in relation to the Acquisition and Defences Questions. Easements may be created by express, implied and presumed grant – see Paragraphs 9.29-9.59. Covenants are based upon the parties’ agreement which is invariably found in the express terms of a deed – see Paragraph 10.22. Easements may exist at law and legal easements are recognised as overriding interests where the land is registered. They will thus automatically bind a future owner of the servient land. By the terms of section 62 of the LPA 1925 the benefit of an easement will also pass automatically to the purchaser of the dominant land. A restrictive covenant as an equitable interest should be registered to bind a future owner of the servient land – see Paragraphs 10.23-10.24.

**Question 4:** **What is meant by annexation? Do you think automatic annexation is justified?**

Annexation is one of the ways in which the benefit of a covenant (including the right to sue) can be passed to a purchaser of the dominant land. The other means are assignment and a building scheme. Each of these methods is explored in Paragraphs 10.26-10.43.

Annexation provides a once and for all attachment of the covenant for the benefit of the owner for the time being of the dominant land. An express annexation, for instance, is achieved in the drafting of the covenant itself. The wording of the covenant must demonstrate an intention that the owner for the time being of the dominant land is entitled to rely upon the covenant to sue the servient owner in the event of breach. Given that the dominant land might be split up and come into the ownership of a number of different people, it is important that the physical extent of the dominant land can be ascertained from the wording of the covenant.

It was held in *Federated Home Ltd v Mill Lodge Properties Ltd* that section 78 LPA 1925 had the effect of automatically annexing the benefit of the covenant to the dominant land in the absence of express words. The decision was controversial, sparking debate amongst conveyancing experts. The case and the controversy surrounding it are examined in Paragraphs 10.34-10.37.

The controversy centres on comparison between section 78 and section 79 LPA 1925 which provides that the burden of a covenant is intended to run, unless a contrary intention is expressed. This provision has been much more restrictively construed by the courts so it does not (by itself) achieve the automatic passing of the burden – see Paragraphs 10.8-10.9. Some commentators have argued that section 78, like section 79, should have been restrictively construed as well. The supporters of statutory annexation point out that the two sections are worded differently. In addition, section 78 is not expressly subject to a contrary intention, whilst section 79 is. However, the courts have made clear that the benefit of a covenant will not pass to those who are not intended to benefit – see *Roake v Chadha* and *Crest Nicholson Residential South Ltd v McAllister*.

**Question 5: A building scheme is said to be based upon a community of interests. How are those interests identified?**

The requirements of a building scheme are considered in Paragraphs 10.39-10.43.

The rigour with which the requirements of a building scheme have been expressed and implemented has varied over the years. Early cases looked to an intention of mutual enforceability of covenants imposed upon plots within a defined area or estate, a kind of local law displaying a community of interests - see *Renals v Colishaw, Spicer v Martin* and *Reid v Bickerstaff*. *Elliston v Reacher* however articulated this search for intended mutual enforceability as demanding a rather more restrictive approach to the evidence. The *Elliston v Reacher* requirements are clearly articulated and have been influential. Nevertheless, the courts in more recent times have reverted to a more relaxed approach to the required evidence – see for example *Re Dolphin’s Conveyance*.

**Question 6: When should an injunction be granted to remedy the breach of a restrictive covenant?**

The usual remedies granted for the breach of a restrictive covenant are either the grant of an injunction or by the award of damages for the loss the covenantee has suffered. An injunction, whether prohibitive to restrain a threatened breach or mandatory to remedy a past breach, is often the remedy of first choice since the owner of the dominant land normally wants to actually stop the owner of the servient land from acting in a way which breaches the covenant. However, the award of an injunction is a discretionary remedy which the court may decide not to award where damages would be an adequate remedy or where an injunction would cause unnecessary oppression to the covenantor. A practical difficulty is also that the dominant owner must act promptly if they are to obtain an injunction but as we have seen restrictive covenants can raise complex legal issues which can take time to litigate.

The remedies for breach of a restrictive covenant are considered in Paragraphs 10.47-10.52.