THE COURT OF APPEAL

UNAPPROVED
Appeal Number: 2018/188

Collins J. **Neutral Citation Number [2023] IECA 185**
Whelan J.
Noonan J.

BETWEEN/

JACKSON WAY PROPERTIES LIMITED

PLAINTIFF/RESPONDENT

- AND -

THOMAS KEVIN SMITH AND MAIREAD SMITH

DEFENDANTS/APPELLANTS

-AND -

DUN LAOGHAIRE RATHDOWN COUNTY COUNCIL

NOTICE PARTY

JUDGMENT of Ms. Justice Máire Whelan delivered on the 21st day of July 2023

Introduction

1. This is an appeal against orders made by Mr. Justice Keane of the 9th March, 2018 on foot of a judgment delivered on the 16th February, 2018 wherein he granted a declaration that the burden of a restrictive covenant recited in the said order as specified in the parcels of a deed of transfer of the 2nd June, 1947 made between Thomas Vincent Murphy (the covenantee) of the one part and John Hugh Wilson (the covenantor) of the other part was not at the date of the said order and had not been as of the 14th June, 2000 (the operative

date) annexed to the lands comprised in Folio 4940 of the Register of Freeholders County Dublin (referred to hereafter solely for convenience as "the servient lands") being the lands now vested in the respondent, Jackson Way Properties Limited ("Jackson Way"). He further granted a declaration that the servient lands were not on the date of the order and had not been as of the operative date bound by or otherwise subject to the said covenant together with a declaration that the appellants, Mr and Mrs Smith ("the Smiths") were not on the said dates entitled to enforce the said covenant against the servient lands or against the respondent as the registered owner of same. A consequential cost order was made with a stay in respect of execution of same on terms.

2. The 14th June 2000 (the operative date) acquires importance since on that date Dun Laoghaire Rathdown County Council ("the Council"), the notice party, caused Notice of Intention to Treat to be served on Jackson Way in respect of a compulsory purchase order of part of the servient lands. If the covenant was validly annexed to or assigned with the dominant lands the appellants may pursue a claim to an interest in the award of the arbitrator said to be the sum of €12,860,700.

General observations

3. The dispute between the parties has its origins in 1947 when the covenantee, then the owner of certain unregistered lands comprising about 16 acres (Priorsland) and circa 129 acres of registered lands (Folio 1849) in Carrickmines, Co Dublin, sold part (108 acres, 2 roods, 17 perches) of the lands in Folio 1849 to the covenantor. The lands retained by the covenantee after 1947 comprised the entire of Priorsland and the balance of about 20 acres in Folio 1849 (collectively referred to hereafter solely for convenience as "the dominant lands"). By the 1947 instrument in the parcels the covenantor covenanted to *"not at any time hereafter erect any building on the sold lands"* but failed to identify the lands (if any) for the benefit of which it was created. It failed to expressly annex the benefit of the restrictive

covenant to any lands retained by the covenantee. The parties to this appeal are successors in title to the original covenantor and covenantee.

4. The issues in this appeal thus engage the rule in *Tulk v Moxhay* (1848) 2 Ph. 774 which relates to the enforceability of restrictive covenants over freehold land. The rule was devised by courts of equity and developed over time so that the benefit of a restrictive covenant over freehold land, which at common law was not assignable, could run with the servient lands for the benefit of the dominant land and bind successors in title of the original covenantor. The rule was abolished by s.49 of the Land and Conveyancing Law Act, 2009 in relation to assurances entered into on or after 1 December 2009. Positive and negative covenants are now fully enforceable against successors in title. The 2009 Act, Chapter 4, is not engaged in this instance, however, since the creation of the covenant predates the 2009 statute.

5. It is a fundamental principle of land law that a restrictive covenant affecting freehold land created prior to 1 December 2009 can only be enforced by a successor in title to the original covenantee for the benefit of the dominant (retained) lands against either the original covenantor (or their successors in title) on the basis that the successor in title to the original covenantee is entitled to the benefit of the said covenant. To establish such entitlement it must be demonstrated that the benefit of the covenant was either validly annexed to the dominant lands or, if not, that the covenantee's successor in title, the dominant owner, has taken an express assignment of the benefit of the restrictive covenant together with (arguably, part or) all of the dominant lands for the benefit of which it was originally granted by the covenantor. In the instant case no express annexation in the 1947 instrument of the covenant to all or any part of the dominant lands is persuasively contended for as having ever been validly effected. Neither is it established that there has been an express and

effective assignment of the benefit of the restrictive covenant to a successor in title of the original covenantee who acquired the dominant lands in 1956.

6. A central issue in this appeal is whether annexation of certain covenants created in the deed of 1947 can be implied, on various alternative bases advanced on behalf of the Smiths, in respect of lands now in their beneficial ownership comprising Priorsland and about one third of an acre of Folio 1849 or whether, as Jackson Way contends, the trial judge was correct in reaching his conclusions that the covenant was not annexed to the dominant lands on the operative date and does not bind the servient lands and is not enforceable by the Smiths.

Background

7. As alluded to above, the dispute between the parties has its origins in the approval by the Notice Party of the South Eastern Motorway Scheme on 19 October 1998 which necessitated the acquisition of certain lands, including, *inter alia,* part of the servient lands owned by Jackson Way. As the High Court judgment records, the Council and Jackson Way were unable to reach agreement with regard to the appropriate level of compensation payable in respect of the lands to be compulsorily acquired. The matter was submitted to arbitration and on the 12th November, 2003 the arbitrator awarded Jackson Way €12,860,700 in respect of the compulsory acquisition of its interest in part of the servient lands subject to the terms as therein specified. The M50 motorway now traverses the lands.

8. It was contended by Jackson Way in the context of the compensation claim that whilst the servient lands in Folio 4940 were subject to two burdens registered on Part 3 of the Folio, the first registered on the 5th June, 1947 by the covenantor John Hugh Wilson with the covenantee *"his heirs executors administrators and assigns that he the said Hugh Wilson (sic) his heirs executors administrators and assigns will not at any time erect any building on the property herein."* and a further burden at entry no. 4 registered on the 29th March,

1962 modifying the 1947 covenant, the burdens created by the said instruments no longer affected the servient lands in Folio 4940.

9. Thereafter in December 2009 the Smiths lodged a rival compensation claim with the Council seeking compensation in the sum of €5,850,000 as the asserted value of their interest in the covenant over lands compulsorily acquired. On the 8th March, 2010 Jackson Way instituted plenary proceedings contending, *inter alia*, for a declaration that the aforementioned covenants were at all material times personal to the covenantee, the vendor of the lands, and seeking consequential declarations including that the burden of the covenants registered on Part 3 of Folio 4940 were not as of the operative date annexed to any lands retained by Thomas Vincent Murphy in 1947, that the Smiths were not entitled to enforce the said covenant against Jackson Way's lands in Folio 4940 nor were same ever subject to the said covenant. It was asserted that the covenant was at all material times personal to the original vendor Thomas Vincent Murphy. Jackson Way sought declaratory orders that either restrictive covenants affecting the lands in Folio 4940 were of no benefit to the Smiths for various reason. In the alternative it sought an order pursuant to s. 50 of the Land and Conveyancing Law Reform Act, 2009 discharging or modifying the covenant on various grounds as no longer affected the development or use of the lands in Folio 4940.

<u>Relevant Prior Title</u>

10. Thomas Vincent Murphy (the covenantee) purchased a dwelling house and premises at Priorsland, Carrickmines, County Dublin on the 24th March, 1942. Said property was described in the said deed as *"ALL THAT AND THOSE the mansion house and premises known as Priorsland together with the yard stables out offices garden pleasure grounds and meadowlands thereon to belonging containing in all sixteen acres and two roods… situate at Carrickmines …"* The title was unregistered.

11. Approximately two years later on the 15th February, 1944 the covenantee was registered as owner of the lands in Folio 1849 which comprised about 129 acres. At the time same comprised part of Hinchogue Estate. The latter lands were adjacent to the lands at Priorsland he had previously purchased on the 24th March, 1942. The appellants contend that since February 1944 Priorsland and the lands in Folio 1849 had effectively been treated as one land holding. The maps suggest that both properties were contiguous or adjoining.

12. The title to Priorsland was subsequently registered in 1979 in Folios 11237 and 9455 of the Register County Dublin.

Creation of the restrictive covenant in 1947

13. The covenantee effected a sale of part of the lands in Folio 1849 by a disposition of 108a. 2 r. 17 p. acres to John Hugh Wilson by a transfer deed of the 2nd June, 1947. The sold lands are described in the Schedule as *"[p]art of the lands of Carrickmines Great containing 108 a. 2r. 17p. edged in red and marked 'A' in the Land Registry Map annexed hereto."* The net effect of this disposition was that the covenantee retained the balance of the lands in Folio 1849 and continued as owner of same and Priorsland. The 1947 transfer instrument reserved a right of way for the benefit of the dominant lands in the following terms:

> "*Reserving unto the said Thomas Vincent Murphy his heirs Executors Administrators and assigns a right of way from the laneway through the Farm yard to the lands retained by the said Thomas Vincent Murphy marked X Y. on the map mentioned in the said Schedule such right of way to include a right to drive cattle and other animals along it…"*

The 1947 map annexed demarks the route of the right of way and the portion of the sold lands which became the servient tenement over which the right of way ran. The right of way was registered on the 5th June, 1947 as a burden on Part 3 of the purchaser's newly opened Folio 4940 which had been carved from Folio 1849. The burden provides: -

"The right of Thomas Vincent Murphy the registered owner of the part of the townland of Carrickmines Great shown as Plan 21 edged red on the Registry Map of the townland (O.S. 26,26/2) and of the part of the townland of Brennanstown shown as Plans 3, 4 and 5 on the Registry Map of the townland (O.S.26) his heirs, executors, administrators and assigns to pass and repass and to drive cattle and other animals over the property herein by the way coloured yellow on the Plan thereof."

14. The 1947 transfer instrument also created a restrictive covenant the nature and effect of which is the central dispute in this appeal. The operative part of the 1947 Deed creating the restrictive covenant provides: -

"AND the said John Hugh Wilson hereby also covenants with the said Thomas Vincent Murphy his heirs executors administrators or assigns that he the said Hugh Wilson his heirs executors administrators and assigns will not at any time hereafter erect any building on the said lands."

15. Entry no. 3 on the servient Folio 4940 states: -

"5th June 1947 No. 275-6-47. The covenant contained in Instrument No. 275-6-47 by John Hugh Wilson with Thomas Vincent Murphy referred to at Entry No. 2 above his heirs, executors, administrators and assigns that he the said John Hugh Wilson his heirs, executors, administrators and assigns will not at any time erect any building on the property herein."

The *"property herein"* is the lands in Folio 4940 and that is uncontroversial.

The Smiths' Title

<u>1956</u>

16. As the High Court Judge noted (para. 8) in 1956 "*for property management purposes*", the original covenantee transferred all of his property at Carrickmines adjacent to the sold

lands to a holding company the Bedford Company ("Bedford"). On the 12th December, 1956 it was registered as owner of the lands in Folio 1849.

1962

17. In early 1962 the covenantor John Hugh Wilson sought modification of the restrictive covenant affecting the servient lands. Same was sought from Thomas V Murphy in the first instance to facilitate the sale of servient lands to permit the construction of a private dwelling house on the servient lands together with relevant out offices and appurtenances. The documents comprised in the 1962 dealing are of relevance to the key issue between the parties – annexation. Their significance derives from a series of distinct steps taken including steps arising directly from queries raised by the Land Registry with the covenantor in February, 1962 as to whether the 1947 Covenant was "*a personal covenant*" or "*if it was annexed to the lands in Folio 1849*" and if the latter, whether there was "*no other lands to which it was annexed*". In manifest response to those queries, and at the evident behest of the covenantor, the covenantee furnished an affidavit 6th March 1962 deposing as to the intentions in creating the restrictive covenant and identifying the extent of the dominant lands to which the covenant was intended to be annexed as including Priorsland and Folio 1849. Some days later both the original covenantor and covenantee executed a deed modifying the covenant and further - and significantly - the covenantor thereupon accepted and lodged with the Land Registry the affidavit of the covenantee addressing the specific queries raised by the Deputy Registrar concerning the nature of the covenant and, were it not personal to the covenantee, the identity of the lands to which it was annexed along with the Deed of Modification.

18. The Deed of Modification of the 1947 covenant was executed on the 13th March, 1962 between Bedford and Thomas Vincent Murphy of the one part and John Hugh Wilson of the other part. It recites the 1947 deed of transfer to the covenantor and that the sold lands were

then registered on Folio 4940. It recites the covenant on the part of the covenantor *"not at any time to erect any building on the said property which said covenant appears as a burden at item 3 of Part III on said Folio"* and that on the 12th December, 1956 the covenantee *"... transferred all his lands at Carrickmines to The Bedford Company"*.

19. The substance of the covenant and the its modification was in the operative part of the 1962 Deed stated thus; *"restricting any building insofar as same relates to the portion of the property marked 'A' on the map thereof lodged herewith and thereon surrounded by a green verge line ..."* and the purpose of the modification is specified as being *"... to enable a building to be erected thereon and provided that any such building to be erected shall be a private dwellinghouse only together with all necessary outoffices ....".* The deed of modification was registered as a burden in Part 3, Folio 4940.

20. I observe that s. 45(3) of the Local Registration of Title (Ireland) Act, 1891 may have been the statute under reference in the 1962 Note of the Deputy Registrar. That subsection, which came into operation in this jurisdiction on the 1st January, 1892, provided: -

> "*Any covenant or condition registered under this section may be modified or discharged by order of the court on proof to the satisfaction of the court that the covenant or condition does not run with the land, or is not capable of being enforced against the owner of the land, or that the modification or discharge thereof will be beneficial to the persons principally interested in the enforcement thereof.*"

21. Jackson Way contended in the within proceedings that the 1962 deed was not effective to modify the 1947 covenant and further, that it was not effective to annex either the benefit or the burden of the covenant to any lands to which it had not previously annexed. As stated above, the modification of the 1947 covenant was registered as a burden on Part 3 of Folio 4940, the affected lands, on the 29th March, 1962.

22. It falls to be determined whether the 1962 dealing in its totality constitutes admissible evidence so as to establish that there was a common intention on the part of the original covenantor and original covenantee that the covenant created in 1947 would be annexed to the lands of the covenantee so as to comply with the rule in *Tulk v Moxhay* and, if so, the identity of the lands of the covenantee to which it was annexed. Briefly put the overarching issues in this appeal include:

i. What lands, if any, of the covenantee, were intended by the parties to the 1947 Deed to benefit from the restrictive covenant or was it merely personal to the covenantee?

ii. If the covenant was intended to be annexed to land, whether any assurance entered between the original covenantor and original covenantee achieved the effect of expressly annexing the benefit of the covenant to the dominant lands or any part thereof.

iii. If not, whether by implication, by act and operation of law, statute or otherwise the covenant came to be annexed to some or all of the lands retained by the covenantee in 1947 part of which (Priorsland and less than one third of an acre of Folio 1849) vested in the Smiths in 1983 and whether such rights are enforceable by the Smiths as successors in title to the original covenantee.

23. A transfer was registered on the 29th March 1962 whereby John Hugh Wilson transferred the servient lands to George Ernest Treacy. By a transfer of the 8th September, 1964 Bedford transferred the dominant lands to one Thomas Kevin Mallon and thereby Thomas Vincent Murphy and Bedford ceased to have any interest in same.

The Smith Lands

24. The Smiths came to be registered as owners of the dominant lands in 1983 (part of the lands owned by the original covenantee in 1947). Same are now comprised in 3 folios; Folio

1849, 9455F and 11237F, County Dublin They contend in this appeal that the covenant is annexed to all their lands in the three folios. Jackson Way asserts that even if the benefit of the covenant is found to be annexed to lands of the appellant same must, at most, be limited to the two small plots (1/3 of an acre approx.) as now comprise the part of Folio 1849 in the ownership of the appellants but excludes any of the lands of Priorsland (Folios 9455F and 11237F) which the Smiths own. The exercise of identifying the lands to which the benefit of the covenant was annexed by implication only arises if it is first determined that such annexation was intended to and did occur and that the covenantee in 1947 owned lands capable of benefitting from same. Central to the Smiths' arguments asserting implied annexation of the covenant to lands retained by the covenantee is the legal import of a series of events, documents and instruments which took effect in 1962, including an affidavit of the original covenantee of 6th March 1962, a Deed of Modification executed 13 March 1962 and ancillary documents all of which were availed of by the covenantor and lodged in the Land Registry in 1962 in support of securing a modification of the 1947 covenant and a sale of land.

Litigation between Jackson Way and the Council

25. Jackson Way came to be registered as owner of the covenantor's Folio 4940 on the 5th July, 1994. In the context of the compulsory purchase process between Jackson Way and the Council, proceedings were brought by Jackson Way seeking enforcement of the arbitration award in respect of acquisition of part of the servient lands. Laffoy J., in a judgment delivered on the 25th May, 2009 [2009] IEHC 266, held that it was not open to the court to make a determination as to whether the covenant and modification appearing as burdens on Part 3 of Folio 4940 any longer affected that property without the Smiths being before the court thereby necessitating the institution of the within proceedings.

The Claim of Jackson Way

26. Jackson Way asserted that as of the operative date the covenant did not bind the said subject lands and accordingly that the burdens at entries number 3 and 4 in Part 3 of Folio 4940 require to be cancelled. It contended that the covenant did not as of the operative date benefit the lands in Folio 1849 or the Smiths, the registered owners of same. In pleadings, in evidence before the High Court and in legal submissions, it was contended that on a proper construction of the instrument of transfer of the 2nd June 1947,

(i) The covenant was a purely personal one for the benefit of Thomas V. Murphy and neither the burden nor the benefit of same ran with any lands.

(ii) The covenant was void for uncertainty insofar as the claim was advanced that it was a burden or benefit in respect of any lands, it having failed to define with sufficient particularity either the lands it burdened or benefitted.

(iii) The benefit of the covenant was not annexed to any land. If Thomas V. Murphy had intended in 1947 that the covenant should benefit and thereby be annexed to any lands he retained, the deed was not effective for that purpose as the dominant lands were not defined or insufficiently defined in the deed.

(iv) The benefit of the covenant had not been expressly assigned to the Smiths. There had not been an unbroken chain of valid assignments from the original covenantee Thomas Vincent Murphy whereby the covenant would validly run with the covenantee's lands.

(v) Since the identity of the lands intended to be bound by the restrictive covenant was uncertain the covenant could not run with any lands and accordingly was not a burden affecting Folio 4940.

Arguments of Jackson Way regarding absence of annexation

27. In their submissions and arguments Jackson Way advanced the contention that since the benefit of the covenant was not expressly annexed to the retained lands (which it said is confined to Folio 1849) by the 1947 transfer instrument to any lands and where no lands intended to benefit from the covenant were either defined by or identifiable in the 1947 transfer instrument, the ensuing consequence as a matter of law was that the benefit of the covenant was not annexed to any lands.

28. It was contended that had the benefit of the covenant annexed to the retained lands in Folio 1849 or Priorsland - or both - it only annexed to such lands in their entirety and could not continue to bind the servient lands for the benefit of part only of same. Thus, its argument went, since the Smiths, on the operative date, were not the owners of the whole of the retained lands in Folio 1849/Priorsland that could have benefitted from the covenant in 1947, the benefit had ceased to be annexed to any of the dominant lands and they were not entitled to the benefit of the covenant or to enforce same for the benefit of any lands they held.

29. It was contended that even if the benefit of the covenant was annexed to any lands in the ownership of the Smiths, the character of the retained lands had materially changed as of the operative date and now constituted development land.

30. It was further argued that if the benefit of the covenant was annexed to the Smith lands or part thereof, same was unenforceable by reason of the fact that the totality of the lands in Folio 1849 now in the Smiths' ownership measuring 0.154 acres and 0.165 acres respectively comprised less than one third of an acre was too small or insignificant to benefit from the covenant. Further that the size, shape and dimensions of the said parcels of the Smith land were not capable of being affected by either the performance or any breach of the said covenant and that consequently, a breach of the covenant could have no impact on the value of any part of the Smith lands. Same were of such dimensions as not to be capable on their

own of any development that might be prejudiced by any breach of the covenant on the part of Jackson Way, and as a result the covenant was unenforceable. The High Court found, and it does not appear to be in contest, that the residual elements of the lands in Folio 1849 in the two parcels were absorbed into and formed part of the Priorsland property (since 1979 the lands in Folios 11237 and 9455 Co. Dublin, as stated above).

31. Jackson Way contended that even were the court to find that the benefit of the 1947 covenant was annexed to any lands in the ownership of the Smiths, they were nonetheless now neither entitled to the benefit of same nor to seek to enforce same and same were required to be cancelled pursuant to s.19 Registration of Title Act, 1964, or otherwise.

32. In the alternative, Jackson Way sought orders pursuant to s. 50 of the Land and Conveyancing Law Reform Act, 2009 (the 2009 Act) assessing damages in lieu of enforcement (which entitlement was denied) discharging the covenant in whole or in part or otherwise modifying same so that it did not bind or affect the Jackson Way lands comprised in Folio 4940. Issues concerning s.50 were not before this court in this appeal.

Arguments of the Smiths

33. The Smiths contended that the covenant registered as a burden in Part 3 of Folio 4940 in 1947, as subsequently modified by the Deed of Modification executed on the 13th March, 1962, was, as of the operative date, in full force and effect and was annexed to the entirety of the Smith's lands as the dominant lands. In their written submissions and arguments, they asserted entitlement to the benefit of same as successors in title to the original covenantee as being annexed to the Smiths lands. They claim that the benefit of the covenant was annexed both to the part Folio 1849 they own and Priorsland (now in Folios 11237 and 9455) - being all of the Smith lands - and same runs as a burden with the servient lands and binds the respondent as successors in title to the 1947 covenantor. Arguments were advanced asserting

on various bases implied annexation of the benefit of the covenant to the dominant lands and that the latter encompassed the lands comprised in all three of the Smith folios aforesaid.

34. Significant weight is attached by the Smiths to the events and acts of the covenantor and covenantee in 1962 leading to execution of the instrument of modification of the 13th March, 1962 and surrounding circumstances and documentation, including the documents lodged with the Land Registry in respect of the dealing whereby the modification of the covenant was registered as a burden on the servient folio. They contend, which is not controversial, that it was effective to modify the 1947 covenant, but further, and more controversially, also argue that the benefit of the said covenant was thereby acknowledged by both the original covenantor and original covenantee to have been annexed to the dominant lands so as to bind the servient lands and be enforceable by successors in title of the original covenantee against successors in title of the covenantor for the benefit of the dominant lands;

> "*Which property for clarity includes the house and lands known as Priorsland, Carrickmines, County Dublin.*"

35. The Smiths contended that the identity of the extent of dominant lands (to include Priorsland) was ascertainable and/or known to Jackson Way when it purchased Folio 4940. They contend that since Jackson Way had negotiated with and obtained releases of the burden of the covenant from other third parties who owned other plots or parts of the lands in Folio 1849, who were in each case successors in title to the original covenantee, the seeking and obtaining of such releases in 1990 constituted an acknowledgment by Jackson Way that the burden of the covenant was and continued to be annexed to all parts of the lands in Folio 1849 and to be a burden running with the servient folio and binding Jackson Way as successor in title to the original covenantor.

36. In their arguments and submissions before the High Court the Smiths disputed the construction of the 1947 instrument advanced at para. 33 of the Statement of Claim (outlined above) that the covenant was, *inter alia,* purely personal, was neither annexed to nor ran with any land, was void or had never been assigned. They contended that *"the deed of 1947 as modified by the deed of 1962 should properly be construed to reflect the intention of the parties thereto."* (para. 20 Amended Defence). It was further contended that such a construction would lead to the following determinations: -

(a) That the covenant was not expressed to be a purely personal covenant for the benefit of Thomas V. Murphy and that, by implication the parties to the 1947 and 1962 instruments intended that both the benefit and the burden of the covenant would run with the dominant and servient lands respectively and bind successors in title to *"each party"*. It was contended:

> *"In so far as the deed of 1947 might not have expressed the full intent of the parties at the time the intent that the covenant be annexed to and benefit the Smith lands was expressed and acknowledged by the deed of 1962"*

(b) That the deed of 1947, confirmed by the instrument of 1962, by necessary implication intended to benefit the entirety of the lands then owned by the covenantee and as now comprise the Smith lands.

(c) Insofar as the 1947 instrument failed to clearly define the subject lands and the dominant lands in respect of the covenant, both were clarified and confirmed by the 1962 instrument.

(d) That since, as they contended, the benefit of the covenant has been validly annexed to the entire of the Smith lands same was enforceable at the suit of the appellants without the necessity of the covenant having been expressly assigned to the Smiths when they purchased same in June 1983.

(e) There is an unbroken chain of assignments to the defendants, which carries with it the benefit of the covenant annexed to the lands.

(f) The Smiths invoked the provisions of sections 6 and/or 58 of the Conveyancing Act, 1881 in support of a contention that on the operative date the benefit of the covenant was by statute annexed to the entire of the Smith lands.

37. The Smiths disputed that either the character of the dominant lands had materially altered or that same had lost their nature or character or otherwise had changed such that the covenant no longer affected the burdened lands. Further, the Smiths contended that Jackson Way had been guilty of unconscionable/ inexcusable delay which amounted to laches, this entitling them to the reliefs sought. The latter line of argument was rejected by the trial judge (para.101/102 of Judgment) and has not been cross-appealed. The Smiths disputed that Jackson Way was entitled to maintain an application pursuant to s. 50 of the 2009 Act.

Judgment of the High Court

38. Following a five day hearing the High Court judgment was delivered on the 16th February, 2018. Keane J. usefully distilled the reliefs sought by Jackson Way at para. 2, as *"various declarations that would, if granted, establish that the covenant is of no benefit to… ('the Smiths') either because it is no longer valid or because they have no entitlement to enforce it."* He noted the alternative claim pursuant to s. 50 of the 2009 Act discharging/modifying the covenant in whole or in part. Having reviewed the terms and tenor of the covenant in the 1947 deed, he noted that Jackson Way was the owner of the lands conveyed by Mr. Wilson in 1947 and that the Smiths held the title *"to two small portions of the retained lands, both of which now form part of the lands surrounding their family home, known as Priorsland"*. In the course of a detailed judgment the devolution of title to both the dominant and servient lands from 1947 onward was considered in detail. It was noted that after the sale of over 108 acres to John H. Wilson in 1947 the covenantee

subsequently assured the balance of the lands remaining in Folio 1849 to Bedford *"for property management purposes"* in 1956 – a finding not appealed against.

Analysis of 1962 modification of the covenant

39. The High Court noted that the original covenantee and covenantor agreed to a modification of the covenant *"in early 1962" "to allow Mr Murphy (sic) to construct a substantial dwelling house on part of the lands in Folio DN 4940"*. I think that is possibly a typographical error, it appears that it was Mr. Wilson or rather, an individual who purchased a plot from him, namely George Ernest Treacy who acquired the plot by a transfer March, 1962, who proceeded to construct the dwelling house after the restrictive covenant had been modified. Nothing turns on this, however.

40. The court (paras. 9 – 14) considered the surrounding documentation, particularly engagements by and on behalf of the covenantor and his solicitors with the Chief Clerk of the Land Registry from and after January 1962. The modification of the covenant is considered by the High Court judge at paras. 9 - 14 inclusive of his judgment. It is noted that on the 31st January, 1962 Mr. Wilson's solicitor wrote to the Chief Clerk of the Land Registry. That letter is set forth in detail. It recalled a then recent interview with the senior legal assistant in the Land Registry: -

> "*...in connection with the covenant restrictive of building which is registered as a burden against the lands registered on the above folio.*"

The judgment observes (para. 9) that said letter notes that the covenantee, Mr. Murphy –

> "*... has now agreed that this covenant be modified to allow the erection of a private dwellinghouse .... and we have now ascertained that Mr. Murphy has not since sold any of his lands at Carrickmines which he owned at the date of the sale to Mr. Wilson.*"

The writer requests the Chief Clerk to let them know *"…if the Registrar would be prepared to modify this covenant on lodgement of an affidavit by Mr. Murphy verifying that he has not sold any of his adjoining lands and on lodgement of a Deed of Modification of Covenant duly executed."*

41. A week later on the 7th February, 1962 the covenantor's solicitor again writes to the Chief Clerk clarifying that the covenantee had in 1956 formed a company *"…to hold all his property at Carrickmines"*. (para. 11) It was indicated that the original covenantee and that company (Bedford) were both agreeable to a modification of the covenant. In connection with the proposed dealing the Deputy Registrar next prepared a memo or note which was duly signed by the Registrar dated the 24th February, 1962. It raised the key issues as to the covenant in the 1947 instrument was *"a personal covenant"* or *"if it is annexed to the land in folio 1849"* if the latter, whether there was "*no other land to which it was to be annexed"*.

42. The judgment notes (para. 12) that the author states: -

> "*However, whether it is or not, I do not think that Section 45(3) [of the Local Registration of Title (Ireland) Act, 1891] prevents me from accepting a release from the covenantee and the present registered owner. In this regard, if Rule 108 of the Land Registration Rules, 1946, appears to prevent such cancellation, I think I may safely relax this regulation under Rule 210 of the same Rules.*"

The judgment further notes (para. 12) that the 1962 Land Registry Note provides: -

> "*If evidence is produced either that this covenant is personal; or if it is annexed to the land in folio 1849, Dublin, that Mr. Murphy or the present registered owner have (sic), in fact, no other land to which it was to be annexed; and further that there is no building scheme involved; a Deed from Mr. Murphy and the Bedford Company modifying the covenant will be accepted.*"

43. The judgment (para. 13) recites in detail the affidavit of the covenantee Thomas Vincent Murphy of the 6th March, 1962 and its averments including – that by the 1947 deed part of his lands had been transferred to John Hugh Wilson and that same were now registered in Folio 4940. That no formal contract was entered into in 1947 in respect of the sale of part to Mr. Wilson *"... but it was verbally agreed that a covenant restrictive of all building on the lands sold be inserted in the Deed."*

That –

> "*The sole purpose of this restrictive covenant was to preserve the amenities of my residence at Priorsland, Carrickmines and to ensure privacy for me and my family in the enjoyment of said residence and the lands adjoining it which were retained by me.*"

He avers that there never had been, nor was there any building scheme contemplated in relation to the lands either sold or retained *"save the erection of one private dwellinghouse"*.

44. The trial judge in his judgment reviews the devolution of title to the Smiths lands and observed that the residual parts of Folio 1849 comprised *"less than one third of an acre"* and that same were *"... now effectively part of the Priorsland property."* (para. 18)

45. The court considered (paras 19/20) correspondence from the appellants' legal advisers in 1995 and 2009. In the letter of 9th November 1995 to the effect that the covenant had been entered into *"for the benefit of Thomas Vincent Murray* (*sic*)". In a subsequent letter dated 25th March 2009 to the Land Registry it was noted that in March 2009 wherein it had been asserted in respect of the Smith lands *"all of our clients' property ... enjoy the benefit of a Restrictive Covenant ... which is registered as a burden at entries number 4 and 5 of Part 3 of Folio DN4940 prohibiting the erection of any buildings on the lands ..."* The judgment recalls that in 2009, the Smiths were asserting that the purpose of the 1995 letter *".. was not to define or delimit the lands benefiting from the Restrictive Covenant and it did not seek to*

do so". The letter went on to assert that the entire of the Smith land comprising the three folios aforesaid were *"... entitled to the benefit of the Covenant and they are entitled to enforce the Covenant."*

46. In the course of his judgment, Keane J. (para. 29) distilled from the pleadings, written submissions and arguments made on behalf of Jackson Way the following key assertions: -

(a) The 1947 covenant was purely personal to the original parties and neither the burden or the benefit of same ran with any land.

(b) That the 1947 covenant was void for uncertainty since it failed to *"define, sufficiently or at all, the lands it affects and the lands it benefits"*.

(c) The benefit of the 1947 covenant was not annexed to any land and, in particular, was not annexed to the part of the Smith land comprised in Folio 1849 and it could not pass without express agreement.

(d) The benefit of the covenant had not been expressly assigned to the Smiths as successors in title to the original covenantee and there was a lack of an unbroken chain of assignments of the benefit of the covenant through successors in title from the original covenantee Thomas Vincent Murphy to the Smiths.

(e) Were the benefit of the covenant annexed to the lands in Folio 1849 or any other lands it was attached to the said lands in their entirety and therefore did not attach to the small remaining part of the lands in Folio 1849 that remained in the ownership of the Smiths.

(f) If the benefit of the covenant was annexed to Folio 1849 or any other lands the character of same had materially changed to that of development land prior to the operative date of the 14th June, 2000.

(g) The remaining lands in Folio 1849 in the ownership of the Smiths was *"too small and insignificant to benefit from the covenant or to be adversely affected by any breach of it"*.

(h) The Smiths had abandoned any benefit conferred on their lands by the covenant when they subsequently applied for rezoning of the said lands from agricultural to residential user.

(i) The Smiths should be deemed to have abandoned any benefit conferred on their lands by the covenant or entitlement to enforce same by reason of their failure to take steps to restrain the construction of dwelling houses on parts of the Jackson Way lands.

(j) If the covenant be found valid and the Smiths entitled to rely on same, Jackson Way asserted that it was entitled to an order under s. 50 of the 2009 Act for the discharge or modification of the said covenant as constituting unreasonable interference with the user and enjoyment by Jackson Way of the lands in Folio 4940.

47. The court noted (para. 30) that the Smiths contested that the covenant was purely personal in nature and contended in their submissions and arguments and by their amended defence that whether from the surrounding circumstances or by operation of law or s. 58 of the Conveyancing Act, 1881, the covenant was impliedly annexed to and intended to run with the entire of the Smith lands comprised in the three folios and ever a part of same. It was asserted that the said folios constituted *"the dominant lands"* to which the benefit of the restrictive covenant was annexed and that the burden ran with the lands comprised in Folio 4940. It was asserted that there had been no change in the character of the dominant lands nor any step taken on the part of the Smiths to render the covenants unenforceable or to

invalidate same. The entitlement of Jackson Way to invoke remedies pursuant to s.50 of the 2009 Act was contested.

48. The judgment reviews the relevant law governing restrictive covenants of freehold land in this jurisdiction noting (at para. 32): -

> "*At common law, the general rule was that the burden of a freehold covenant did not run with the land to bind a successor of the original covenantor, subject to limited exceptions, none of which is relevant here.*"

Keane J. noted that –

> "*...the law of equity developed a special rule whereby the burden of a restrictive covenant could be enforced against successors in title, known as the rule in Tulk v Moxhay, after the leading English case ...Lord Cottenham LC held that the covenant could be enforced against a purchaser of the burdened land on notice of it...*" (para. 32)

At para. 33 of the judgment the trial judge characterised the issue between the parties thus:-

> "*…whether, in equity, the burden of the covenant runs with the Folio DN4940 lands for the benefit of either the lands in Folio DN1849 lands, or as the Smiths contend, both the Priorsland House property and the Folio DN1849 lands.*"

49. Citing an extract from Preston and Newsom, *Restrictive Covenants Affecting Freehold Land* (10th edn., Sweet & Maxwell, 2013), the judge concluded that the covenant in the 1947 deed *"... was not personal to the original parties in the narrow sense of being incapable of transmission by either."* (para. 34) Jackson Way has not cross-appealed against that determination.

50. The court noted that as regards the running of the benefit of the covenant for the lands of the covenantee in equity, the benefit of a restrictive covenant is enforceable both by the

original covenantee and his successors in title subject to the requirement that the covenant in question should "*touch and concern*" the lands of the covenantee. The judge observes –

> "*... a party seeking the aid of equity in the enforcement of a restrictive covenant had to establish that he was the current holder of the land to which the benefit related and also that the benefit had passed to him.*" (para. 35)

This is in substance reflected in the statement of the law in that regard to be found in Wylie, *Irish Land Law,* (5th ed., Bloomsbury Professional, 2013) at para. 21.29 as referenced by Keane J. in his judgment.

51. The judgment notes at para. 36 that the original covenantee had parted with both Priorsland and the remaining lands in Folio 1849 to Bedford in 1956 without *"effecting the express assignment of the benefit of the covenant to that company ..."*. He inferred that *"... there can have been no express benefit capable of onward assignment to the Smiths, when, in 1983, they acquired both Priorsland and the two remaining plots of land comprising Folio DN1849, nor was any such purported express assignment made to them."*

Annexation

52. The judge then considered the arguments advanced on behalf of the Smiths concerning annexation and the counter-arguments put forward on behalf of the respondent. He noted that the issue was whether in equity the burden of the covenant ran with the servient lands in Folio 4940 and in the absence of assignment the benefit of the covenant ran with the dominant lands in equity by means of annexation. He observed that annexation can occur in one of three ways *"only two of which are potentially relevant here."* (para. 37):

> "*... The first is where annexation occurs by the use of express words to that effect in the deed creating the covenant. The second is where annexation of the benefit of the land can be implied; either from the surrounding circumstances of the case, if they*

> *indicate with reasonable certainty that the covenant was taken for the benefit of the land, or by law.*"

The court noted that in support of their contention that implied annexation of the covenant to the dominant lands was effected by act and operation of law, the Smiths relied on the operation of sections 6 and 58 of the Conveyancing Act, 1881. Keane J. analysed the contentions made on behalf of the Smiths that there was express annexation of the benefit of the restrictive covenant to the entirety of the dominant lands which they asserted to be all the Smith lands currently held on foot of the three folios.

Exceptions and Reservations

53. In assessing the contentions that the language in the 1947 deed was effective to achieve an express annexation of the covenant to the lands of the covenantee, the judgment cited excerpts from Wylie, *Irish Land Law* and Preston and Newsom, *Restrictive Covenants Affecting Freehold Land*, together with the decision of Greene L.J. in the English Court of Appeal, *Drake v. Gray* [1936] Ch. 451, at 456 concerning methods of indicating the identity of the lands in the ownership of the covenantee for the benefit of which the covenant is annexed. At para. 42 the judge observed that the covenant under the 1947 transfer instrument had identified two portions of land in the earlier operative parts of the instrument; firstly, the part of the lands comprised in Folio 1849 that were being transferred to Mr. Wilson and secondly, the lands being retained by the vendor and *"…which are identified in the context of the creation of a right of way over the transferred lands …"*.

54. The judge then observed at para. 43: -

> "*… the deed specifically identifies transferred lands and retained lands. However, it does not in terms specify any land to benefitted by the covenant, nor does it recite that the covenant is to benefit any specific land or that it is entered into with Mr. Murphy as the owner of any specific land (beyond those to be transferred), apart*

from a reference to the lands retained by Mr. Murphy in the distinct context of the creation of a right of way from the laneway to them over the transferred lands in favour of Mr. Murphy, his heirs, executors, administrators and assigns."

55. Further, with specific reference to the map annexed to the 1947 deed the judge observed: -

"The map in the schedule to the 1947 deed confirms that the lands retained are the remaining part of the lands described in Folio DN1849, quite separate from the adjoining Priorsland property." (para. 43)

"His heirs, executors, administrators and assigns"

56. The court then considered whether the operative words in the 1947 instrument creating the restrictive covenant whereby the covenantor was expressed to covenant with the covenantee *"his heirs, executors, administrators and assigns"* that the covenantor *"... his heirs, executors, administrators and assigns will not at any time hereafter erect any building on the said lands"* were effective to annex the covenant to the lands of the covenantee. The judge considered the decision of the English Court of Appeal in *Renals v Cowlishaw* (1879) 11 Ch. D. 866 (*Renals*) wherein the said court upheld the decision of Hall V. C., the latter judgment having been reported at (1878) 9 Ch. D. 125. Having reviewed the judgment of Hall V.C. in *Renals* - as subsequently affirmed by the Court of Appeal - and the commentaries on that judgment to be found in Preston & Newsom and the academic article by Professor H.W.R. Wade published in the Cambridge Law Journal, 1972, "Covenants – A Broad and Reasonable View" 1972 B, 31(1) C.L.J. 157 and having alluded to the treatment of the judgment in *Renals* in subsequent decisions including the House of Lords in *Spicer v Martin* (1888) 14 App. Cas. 12 HL at 24, *Rogers v Hosegood* [1900] 2 Ch. 388 (at 396) (Farwell J.) and *Miles v Easter* [1933] Ch. 611 (at 628) (a decision of the English Court of Appeal), the judge noted with regard to the formulation in a deed where a covenant is

expressed to be made with a vendor/a covenantee *"his heirs, executors, administrators and assigns": -*

> *"The jurisprudence identifies two problems with the use of such words at issue. The first is that they do not make clear whether the benefit of the covenant is to run with certain unspecified lands of the covenantee, which lands are to be identified by inference from the language of the deed or from the surrounding facts at the time when it was made, or is simply to enure to the personal benefit of the covenantee and anyone to whom he chooses to assign the benefit of the covenant in any subsequent dealing with his own lands."* (para. 49)

57. Having considered the identity of words between the operative language under consideration by Hall V.C. in *Renals* and in the instant case, Keane J. observed: -

> *"The words at issue in both … stand in contrast to those of the restrictive covenant in Rogers v Hosegood [1900] 2 Ch. 388, recognised in Megarry and Wade …as comprising the classic formula …*
>
> > *'with intent that the covenant may enure to the benefit of the vendors their successors and assigns and others claiming under them to all or any of the lands adjoining'* "

The court noted (para. 51) that it had been acknowledged by the Smiths that the 1947 deed did not expressly annex the benefit of the covenant to either the covenantee's lands in Folio 1849 or to Priorsland. Rather, the Smiths' principal argument is that it impliedly annexed the benefit of the covenant to both.

<u>Implied annexation</u>

58. The court then turned to consider whether the benefit of the restrictive covenant had been annexed by implication to the covenantee's lands. Keane J. noted that in *Rogers v Hosegood*, Farwell J. *"was prepared to accept (at 396) that the formula 'all or any of their*

lands adjoining or near to the said premises', permitted the identification of the relevant lands by implication, 'with due regard to the nature of the covenant and the surrounding circumstances.' " Keane J. considered the decision of Romer L.J. in *Miles v Easter* which held that an intention to benefit other lands of the vendor would be readily inferred "*where the existence and situation of such land are indicated in the conveyance or have been otherwise shown with reasonable certainty*", before Romer L.J. qualified that proposition by observing further that "*it is impossible to do so from vague references in the conveyance or in other documents laid before the Court as to the existence of other lands of the vendor, the extent and situation of which are undefined*." (paras 54 and 55 of the judgment of the High Court) (emphasis added).

"Clearly identified"

59. At para. 56, Keane J. cited an excerpt from the judgment of Upjohn J. in *Newtown Abbot Cooperative Society v Williamson and Treadgold Limited* [1952] 1 Ch. D. 279, where at 283 he had observed: -

> "*In this difficult branch of the law one thing, in my judgment is clear, viz. that in order to annex the benefit of a restrictive covenant to land so that it runs with the land without express assignment on a subsequent assignment of the land, the land for the benefit of which it is taken must be clearly identified in the conveyance containing the covenant."*

Marten v Flight Refuelling

60. The court noted that the Smiths had placed significant reliance on the decision of Wilberforce J. in *Marten v Flight Refuelling Limited* [1962] Ch. 115. However, Keane J. considered that the facts of the latter case *"… were some distance away from those in the present case and, indeed, those of Renals v Colishaw.*" (para. 57) He considered the reasoning of Wilberforce J. in *Marten,* concluding at para. 62: -

"*Although I have no difficulty in accepting the decision in Marten as good law, it does not avail the Smiths in this case for several reasons. First, the covenant in Marten did not use the bare 'heirs and assigns' formula that is at issue here which was found to be ineffective in Renals v Cowlishaw. Hence, there is no suggestion in Marten that Renals ... is, or has become, bad law. Second, it would have been difficult on the facts of Marten to construe the trustees of the Critchel estate as having covenanted for personal benefit, rather than for the benefit of the Critchel estate lands, so that a key issue in both this case and Renals v Cowlishaw was absent there. Third, in Marten, it was the original covenantees – the trustees – who were seeking to enforce the covenant, together with Mrs. Marten, as their successor in title, so that, as Preston and Newsom points out (at para. 2 – 36), it was not strictly a case of annexation at all. And fourth, the established unity of the Critchel estate left no doubt in Marten about the identity of the lands that were in benefit under the covenant."* (para. 62)

Extrinsic evidence

61. Keane J. turned at para. 63 *et seq.* to consider the issue of the admissibility of extrinsic evidence as to the identity of the lands that are to benefit from a restrictive covenant. He characterised the issue as being *"…whether, taking a broad and reasonable view of the proof of the identity of the lands that are to benefit from the covenant, their existence and situation can be shown with a reasonable certainty by extrinsic evidence."* He noted the history of the devolution of ownership and in particular that the original covenantee Mr. Murphy had acquired Priorsland in 1942 and the quite separate, *"though immediately adjacent, Hinchogue Estate (Folio DN1849) lands in 1944".* He noted that pursuant to the 1947 deed the covenantee had retained approximately 18 acres of the lands in Folio 1849. He characterised the issue as being *"whether, in the acknowledged absence of express words,*

there is any proper admissible extrinsic evidence capable of establishing whether the lands to benefit were the remaining Folio DN1849 lands or both those lands and Priorsland?" (para. 64)

62. At para. 66 he observed: -

> *"… addressing the implied annexation question on its merits, it is plainly not enough that both Priorsland and the remaining Folio DN 1849 lands were capable of benefitting from the covenant at the time of the 1947 deed."*

Whilst he considered it not to be in dispute that the restriction on building on the sold lands under the covenant *"touches and concerns"* both Priorsland and the retained lands in Folio 1849 *"…Cozens-Hardy MR made clear in Reid v Bickerstaff [1902] 2 Ch. 305, … that it was irrelevant that performance of the covenant would greatly benefit the plaintiff's land and that it did not suffice that annexation of the covenant would make the plaintiff's lands more valuable …"* (para. 66)

The court noted that the Smiths were relying on the affidavit of Thomas V. Murphy sworn on the 6th March, 1962 including paragraph 3 thereof (cited above) in support of their contention that the said covenantees *"… purpose in requiring the covenant to be included in the 1947 deed is a surrounding circumstance probative of the identity of the land that was to benefit under the covenant, and that the extrinsic evidence of that purpose appears, albeit ex post facto…"* in the said averment. (para. 67)

63. In his judgment Keane J. identified a number of difficulties with the arguments being advanced on behalf of the appellants. *"The first is that it assumes an intention on the part of Mr. Murphy to benefit particular land, rather than to obtain a personal benefit for himself as covenantee."* (para. 68) He further noted that *"…it appears to contradict the general rule that extrinsic evidence is not admissible to add to, vary or contradict the terms of a deed*

and, more particularly, that the construction of a deed cannot be controlled by the antecedent or subsequent acts of the parties."

"something in the deed to define the property"

64. Keane J. noted that there was an exception to the general rule which admits of extrinsic evidence to explain the meaning of words where a latent ambiguity exists. He did not consider that such an exception was engaged in the instant case. The trial judge preferred the line of jurisprudence starting with *Renals* in 1878, noting that in the latter case the English Court of Appeal (James L.J.) had stated "*… there must be something in the deed to define the property for the benefit of which the [restrictive covenants] were entered into*". He further cited *Marquess of Zetland v Driver* [1939] Ch. 1 where the English Court of Appeal (Greene M.R., Luxmoore and Farwell JJ.) identified at p. 8 of the judgment that one of the conditions of annexation was that *"the land which is intended to be benefitted must be so defined as to be easily ascertainable…"* Citing Preston and Newsom (para. 2-34) and *Rogers v Hosegood*, Keane J. noted that in this context *"'ascertainable' does not mean that the land must be fully defined in the covenant deed."* (para. 72)

65. Keane J. analysed the third difficulty he had identified in respect of the contention on the part of the Smiths that the 6 March 1962 affidavit of Mr. Murphy was admissible by way of extrinsic evidence to demonstrate annexation. At para. 73 Keane J. observed concerning the said affidavit: -

> "… *It does not seem to me to be capable of resolving the fundamental uncertainty about:*
>
> *(a) whether the covenant was for Mr. Murphy's personal benefit or the benefit of particular land; and*

> (b) *if it was the latter, whether the land to be benefitted was Priorsland, the retained land in Folio DN1849, or any part thereof, or both Priorsland and the retained lands in Folio DN1849, or any part thereof."*

He considered that the 1962 affidavit of Mr. Murphy "*fails to clarify in which of the alternative ways just described those aims were to be put into effect i.e. personally; through his ownership of the remaining Folio DN1849 lands; through his ownership of Priorsland; or through his ownership of both of those properties.*" (para. 73) He further emphasised at para. 74 of the judgment "*that the 1962 deed of modification again fails to identify any lands to which the benefit of the covenant is annexed."*

66. Noting the contention advanced on behalf of the Smiths that the involvement of Bedford in the execution of the 1962 assurance "*as successor in title to Mr. Murphy in respect of all his lands at Carrickmines"* implied an agreement or acknowledgment that the benefit of the covenant was annexed to both the Priorsland property and the remaining lands in Folio 1849, the judge observed: -

> "*… but that submission disregards the countervailing implication that Mr. Murphy's involvement in the execution of that deed, more than five years after the transfer by him of the relevant lands to the Bedford company, might equally evidence an agreement or acknowledgment that the benefit of the covenant was personal to him."*

He concluded that the execution of the 1962 deed of modification did nothing to address, "*much less clear up, the innate uncertainty created by the 1947 deed*."

67. The judge noted at para. 76 that releases from the burden of the covenant over the Jackson Way lands in Folio 4940 that had been executed subsequently (1990) by various owners of parts of the lands in Folio 1849, which had been retained by the original covenantee Thomas V. Murphy in 1947 and had subsequently come to be acquired by various purchasers as successors in title to the original covenantee and who granted releases

in respect of the burden of the 1947 covenant for the benefit of Jackson Way and the lands in Folio 4940, did not amount to extrinsic evidence or probative evidence as had been contended on behalf of the Smiths. He observed: -

> "*In both instances, the step concerned appears to have been taken for the avoidance of doubt. That doubt would have to be eliminated, rather than circumvented, to establish the annexation to the relevant lands of the benefit of the covenant."*

68. Keane J. agreed with the decision of Chadwick L.J. in *Crest Nicholson Residential (South) Limited v McAllister* [2004] 1 EWCA Civ. 410, WLR 2409 as endorsing the requirement articulated in the *Marquess of Zetland* decision (*supra*) that the lands to benefit from a restrictive covenant should be so defined as to be *"readily ascertainable"*.

Local Registration of Title (Ireland) Act, 1891

69. The court then turned to consider the relevant provisions of the Local Registration of Title (Ireland) Act, 1891, as amended. Keane J. noted regard to the 1962 deed of modification in particular that same had been registered as burden on Part 3 of the servient Folio 4940. Concerning the relevance of the 1962 affidavit of the original covenantee Mr. Murphy, he noted (para. 79) that it: -

> *"... forms part of the latter instrument by being placed with it on the Land Registry file, for all the reasons I have already set out I am satisfied that inspection of those entries on the relevant register does not permit the ascertainment of the land (if any) for which the benefit of the covenant was taken or of the identity of the person or persons (if any) who were entitled to enforce it. Thus, the failure of the covenant to identify the land for the benefit of which it was taken is not a mere technical breach of an arcane rule, but rather the source of a very real practical problem.*"

He accordingly concluded that it was not possible *"to establish that the benefit of the restrictive covenant contained in the 1947 deed and modified by the 1962 deed is annexed by implication to any land"* (para. 80).

70. The court then turned to arguments advanced on behalf of the Smiths that the benefit of the restrictive covenant had been annexed both to the covenantee's lands at Priorsland and to the part retained by him in Folio 1849 whether by implication by statute and in particular by virtue of either ss. 6 or 58 of the Conveyancing Act, 1881.

Section 58(1)

71. The judge noted that section 58(1) had been repealed by s. 8(3) of the Land and Conveyancing Law Reform Act, 2009 with effect from 1 December 2009. He further noted that s. 58 *"…was a deeming provision whereby a covenant relating to land was deemed to be made with the covenantee, his heirs and assigns and was to have effect accordingly*." He considered that in the academic article written by Professor Wade, the author had *"speculated"* that the measure had been intended to remedy a *"mistake"* made in *Renals v Cowlishaw* and where Professor Wade had opined "*that its effect was to annex the benefit of any such covenant to the land of the covenantee.*" Keane J. rejected that view as unorthodox and one that had "*never found acceptance in the jurisprudence*". At para. 83, he further noted that Preston and Newsom had taken the opposite view, citing their conclusions in light of English jurisprudence pertaining to restrictive covenants created prior to the 1st January, 1926 in that jurisdiction (the date of commencement of the provisions of the English Law of Property Act, 1925).

> "*The cases in respect of covenants made before 1926 thus have the common theme that technical words such as "heirs" do not themselves annex the benefit of the covenant and that the intention to annex must be established by construction of the instrument containing the covenant."*

72. At para. 87 Keane J. noted the language of s. 78 of the Law of Property Act, 1925 which had in effect replaced s. 58 of the 1881 Act in England and Wales. He noted the observations in *Federated Homes Limited v Mill Lodge Properties Limited* [1980] 1 All ER 371 where Brightman L.J. had observed that the wording of section 78(1) of the 1925 Act was *"significantly different"* from the wording of its predecessor, s. 58(1) of the 1881 Act. Brightman L.J. had observed of s. 58(1) of the 1881 Act: -

> "*The section was confined, in reality to realty, to the covenantee, his heirs and assigns, words which suggest a more limited scope of operation than is found in section 78."*

Keane J. noted that Brightman L.J. had cited Professor Wade's 1972 article with approval in regard to the construction of s. 78 of the 1925 Act but had not done so in respect of the professor's views regarding section 58 of the 1881 Act.

Section 58 Conveyancing Act 1881 – Deemed annexation

73. In regard to the issue as to whether it could be said that the covenant created in the 1947 deed can be deemed to be annexed to the lands retained by the covenantee in 1947 by way of implication pursuant to statute, Keane J. considered the most persuasive authority on the issue to be the judgement of the English High Court (Morritt J.) in *J. Sainsbury plc v Enfield LBC* [1989] 1 WLR 590 (para. 90 *et sequitur*). The covenant in question had been created in 1894 and thus the provisions of the Conveyancing Act, 1881 including s. 58, potentially governed the issue rather than the provisions of the Law of Property Act, 1925, which did not have retrospective effect. Morritt J. had expressed a view that s. 58 of the Act of 1881 was *"in radically different terms"* from s. 78 of the 1925 Act. Morritt J. had further observed: -

> *"The principle of that case [Federated Homes Limited] cannot be applied to section 58 of the Act of 1881. There are no words in section 58 capable by themselves of*

> *effecting annexation of the benefit of a covenant. All that section did was to deem the inclusion of words which both before and after the enactment of section 58 had, with the exception of Mann v Stephens, 15, Sim. 377, been consistently held to be insufficient without more to effect annexation of the benefit of a covenant."* – (Cited by Keane J. at para. 92)

Keane J. accepted the analysis of Morritt J. in *J. Sainsbury plc* as "*a correct statement of the law*" (para. 93) and concluded "*that the benefit of the covenant in the 1947 deed has not been annexed to the Smiths' land by operation of law under s. 58 of the Conveyancing Act 1881"* (para. 94).

s.6 of the 1881 Act

74. The court then considered the alternative argument that there had been an annexation by operation of law by virtue of s. 6 of the Conveyancing Act, 1881. Keane J. noted commentary by Professor Wade in his 1972 article to the effect that s. 62 of the Law of Property Act, 1925 "*which re-enacted in material part s. 6 of the Conveyancing Act 1881, did not appear to have been invoked in any of the cases as passing the benefit of a covenant*." (para. 97). The judge ultimately noted that reliance by the Smiths on s. 6 of the 1881 Act as operating to annex to the benefit of the covenantee's land by statutory implication the benefit of the covenant was "*not seriously pressed in argument at trial*". The trial judge concluded at para. 100: -

> "*In my judgment there are now no persons entitled to the benefit of the covenant contained in the 1947 deed and the benefit of that covenant is not annexed to any land, either express or by implication."*

He observed accordingly that it was –

> "*… unnecessary to consider either the various contingent issues already described or the quite extensive evidence called on each side to address certain of them, such*

as whether there had been a material change in the character of the land in the neighbourhood, or whether there had been some action or election on the part of the Smiths that would otherwise affect the validity of the covenant."

Notice of Appeal

75. The Smiths in their notice of appeal identify 16 separate grounds as follows: -

(1) That the court had erred in "*holding that the Plaintiff was not bound by the covenant contained in the deed of 1947 and registered as a burden on the folio of the Plaintiff*." It was contended that the judge had erred in holding that the covenant was not for the benefit of the Smiths as successors in title to the original covenantee "*whether at common law or in equity*" and in that regard the central issue identified on the first ground was stated thus *"Whether the decision in Renals .v. Cowlishaw 9 Ch D 125, is good law in Ireland. Whether the covenant for the benefit of heirs, executors, administrators and assigns applies to the Defendants as successors. The Trial Judge did not refer to the Appellants' submissions that the case of Smith .v. River Douglas Catchment Board [1949] 2 KB was to the contrary."*

(2) The court had erred in holding that the covenant was not annexed to the Smiths' adjoining lands including Priorsland. It was contended that the benefit of a covenant, if not expressly assigned to a subsequent owner of the original covenantee may nevertheless be or become annexed to the lands of the covenantee such that it is enforceable by subsequent owners of the covenantee's interest without express assignment. It was contended that the trial judge, having earlier accepted the said proposition in his judgment, had gone on to hold on the interpretation of the documents that the covenant had

not been annexed to the Smith lands. The issue for determination was stated thus: -

> "*By what evidence or by what interpretation of documents may it be implied that a covenant has become annexed to the lands of the Covenantee"* and *"Whether documents subsequently executed by the covenanting parties are permissible as evidence of the original intention to annex*."

(3) That the High Court erred in rejecting extrinsic evidence as identifying the lands intended to benefit from the restrictive covenant reliance was placed on the decision in *Marten v Flight Refuelling Limited* [1962] Ch. 115 as *"a governing authority on the identification of lands to which a restrictive covenant may be identified."* It was contended the trial judge had wrongly distinguished the said decision from the facts of the present case and the issue for determination is *"[w]hether the identity of lands to benefit from the restrictive covenant can be identified such that the covenant may be annexed to them"*.

(4) The judge erred in not having regard to the surrounding circumstances of the deed of 1947 in ascertaining the intention of the parties as to annexation and in not inferring annexation of the restrictive covenant from the deed itself "*in the light of surrounding circumstances*". The issue for determination is whether *"the surrounding circumstances"* in 1947 are capable of implying that the covenant was annexed to the covenantee's lands in the balance of Folio 1849 and/or his adjoining house and gardens Priorsland.

(5) The judge erred in construing the words "*the lands retained by the said Thomas Vincent Murphy*" as being limited to the remaining part of the lands described

in Folio 1849 alone so as to exclude the adjoining unregistered Priorsland Estate – (para. 43 of the High Court judgment). Rather the said words, it was contended, ought to be construed as describing *"both the remaining registered lands and also Priorsland"*. The issue being whether on a true construction of the 1947 deed the covenant was capable of benefitting both the lands in Folio 1849 and the house and lands known as Priorsland.

(6) Whether the covenant was personal to Thomas Vincent Murphy as the trial judge determined or for the benefit of all the lands then owned or retained by the said Mr. Murphy as covenantee.

(7) That the trial judge had erred at para. 67 of the judgment in not accepting the averment of the original covenantee Thomas V. Murphy in an affidavit sworn in 1962 that the purpose of the covenant was to preserve the amenities of his residence at Priorsland, it falling to be determined in this appeal *"whether the intent of parties to a Deed may be explained or elaborated upon by those parties (in a way not inconsistent with that Deed) at a later date."*

(8) Whether the trial judge had erred at paras. 70 and 71 of the judgment in holding that there must be something within the deed itself to identify the lands in question intended to benefit from the covenant, it being contended that the issue to be determined based on the submissions and arguments of the appellants was whether the identity of the lands intended to benefit from a restrictive covenant can be identified by evidence outside the terms of the deed.

(9) The trial judge was said to have erred in not holding that the identity of the lands to benefit from the covenant may be determined by implication from the surrounding circumstances. It was contended on behalf of the appellants that

the identity of lands to benefit from a restrictive covenant may be ascertained by implication from the surrounding circumstances.

(10) The trial judge had erred at para. 74 in placing reliance on the fact that the 1962 deed of modification had failed to identify the lands intended to benefit from the covenant. It was contended that the judge was in error *"… in failing to hold that the lands were adequately identified by the supporting documentation lodged with the Land Registry*" in 1962. An issue raised is whether documentation "*in support of registration by the original Covenantor, expressly acknowledging or by necessary implication acknowledging the benefit of the covenant, binds the successors in title to the original Covenantor*."

(11) The trial judge had erred (para. 75 of judgment) in failing to hold that the execution in 1962 of the deed of release by Bedford which said company was a successor in title to the original covenantee, was recognition by the covenantor that the benefit of the covenant had by annexation passed to a successor in title to Thomas Vincent Murphy. It was contended that the execution of the said instrument with Bedford by Mr. Wilson, the original covenantor, constituted a recognition or acknowledgment that the benefit of the 1947 covenant had become annexed to the covenantee's lands and bound the covenantor (and the plaintiff as successor in title to the original covenantor) without express assignment of the benefit.

(12) The judge had erred in failing to place reliance on the fact that Jackson Way had obtained releases of the 1947 covenant from successors in title of the covenantee in respect of various plots of land which had originally been in the ownership of Thomas V. Murphy the original covenantee. It was contended

that evidence of the procuring by Jackson Way of such a release in respect of other lands bound Jackson Way, to the benefit of the appellants.

(13) The judge erred in determining that the 1962 affidavit of the original covenantee Thomas V. Murphy was not probative as to the identity of the lands held by the covenantee as of the date of the creation of the covenant in 1947 and which were capable of benefitting from the said covenant.

(14) The trial judge had erred in holding that an inspection of the registry file in the Land Registry would not identify the lands in respect of which the benefit of the covenant "*could have intended to be taken*" elsewhere. This ground of appeal is characterised as raising an issue as to whether such inspection would have demonstrated "*the existence of lands retained by the Covenantee and the continuance of the covenant for the benefit of a successor*."

(15) Ground 15 contends that the High Court erred in not holding that the covenant was for the benefit of the original covenantee and subsequent heirs or assigns by reason of statute having regard to s. 58 of the Conveyancing Act, 1881 and whether the said section effectively overruled the decision in *Renals v Cowlishaw* (if it applies at all).

(16) It is contended that the trial judge erred in holding that the deed of 1962 together with subsequent releases obtained by Jackson Way from owners of parts of the original covenantee's retained lands in Folio 1849 had been taken by Jackson Way "*for the avoidance of doubt*", it being contended that same constitute evidence of subsequent dealings by Jackson Way with the burdened lands such as to demonstrate the continuance of the benefit of the covenant.

There is no cross-appeal. Jackson Way asserts that the trial judge correctly applied well established authority and legal principles in relation to the relevant issues arising that arose, and did not err in his analysis or in his determination in respect of the issues raised.

The arguments of Jackson Way

76. In a detailed reply and comprehensive submissions, Jackson Way contends that the trial judge did not err in his findings, applied the correct legal principles on the basis of findings of fact made by him on the evidence. It was further contended that the findings of primary fact made by him were fully supported by the evidence and the judge drew the correct inferences from the said evidence. It asserts that the judge correctly applied the authorities in relation to each issue and authorities not followed were distinguishable from material facts of the instant case. It was also asserted that the trial judge correctly rejected the arguments and submissions of the Smiths and carefully considered differing academic view and authorities before rejecting their arguments. Briefly put, Jackson Way make the following points;

i. *Renals v. Cowlishaw* is good law in this jurisdiction for the proposition that the words "*heirs, executors, administrators and assigns"* were insufficient to effect annexation of a restrictive covenant to lands of a covenantee. It was not sufficient to show that the lands of the covenantee were capable of benefitting from the covenant to establish annexation. *Rogers v Hosegood, Miles v Easter* and *Lamb v Midac Equipment Ltd* [1900] 2 Ch. 288 were relied upon.

ii. The land to benefit must be ascertainable from the original deed. *Marquess of Zetland v Driver, Newton Abbot Co-Operative v Williamson & Treadgold, Shropshire County Council v Edwards* (1982) P. & C.R. 270*, J. Sainsbury plc v Enfield, Crest Nicholson Residential (South) Ltd v McAllister* [2004] EWCA Civ 410*, Belmont Securities Ltd v Crean* (Unreported, High Court, O'Hanlon J. 17th

June 1988), *Miles v Easter, Marten v Flight Refuelling Ltd* and *Adam v Shrewsbury* [2006] 1 P. & C.R. 27. It was immaterial whether Jackson Way could through investigations in the Land Registry identify potential successors in title of covenantee "*who might potentially benefit from the covenant*", *Belmont Securities v Crean* cited as authority. *Marten v Flight Refuelling* (Wilberforce J) on this point was distinguishable and Wilberforce J. had followed *Miles v Easter* on the issue of ascertainment of the identity of the lands intended to benefit from the restrictive covenant.

iii. In regard to construction of the 1947 Deed, it was contended, citing Wylie & Woods, *Irish Conveyancing Law*, that a deed is not equated to a contract between the parties to which the ordinary principles of contractual interpretation as laid down in *Investor Compensation Scheme v West Bromwich* [1998] 1 WLR 896 (adopted in this jurisdiction in *Analog Devices v Zurich Insurance Company* [2005] IR 274)*, Moncrieff v Jamieson* [2008] 4 All ER 75*, ETG Developmens v Noah* [2008] EWCA Civ. 259, *O'Donnell v Ryan* (1854) 4 ICLR 44*, Adam v Shrewsbury*, *St Luke's and St Anne's Hospital Board v Mahon (*Unreported, High Court, Murphy J., 18th June 1993) [page 12 *et seq*.]

iv. The 1962 instruments were inadmissible by way of extrinsic evidence to establish the intention to create a restrictive covenant for the benefit of and annexed to lands of the covenantee and the identity of the said lands. Citing authorities including *Irish Conveyancing Law*, *Re Wogans Ltd* [1993] IR 157, *Whitworth Street Estates Ltd v Miller* [1970] A.C. 583, *Burrowes v Hayes* (1834) Hay & Jon 597, *Douglas v Allen* (1842) 2 Dr & War 213, *Igote Ltd v Badsey Ltd* [2001] 4 IR 511, *Readymix (Eire) v Dublin County Council* (Unreported, Supreme Court, 30th July 1974), it was said that the Smiths were impermissibly seeking to rely on

subsequent acts in 1962 as an aid to construction. Even if the 1962 Deed is admissible it does not state that the covenant was intended to benefit any particular land. The 1962 Affidavit of Mr T.V Murphy is inadmissible as amounting to an attempt to rely on evidence of the covenantee's subjective intention and as such is inadmissible as an aid to the construction of a contract. Even if the averment/s are admissible same do not resolve the ambiguity as to whether the covenant was intended to personally benefit the covenantee or to benefit land of the covenantee and if the latter the identity of same. The said affidavit suggests that the covenant was only intended to protect personal interests of the covenantee.

v. The arguments of the Smiths regarding the construction of s.58 (and s.6) of the Conveyancing Act, 1881 are said to be novel and to have been consistently rejected by the courts. *Federated Homes* was correct in finding that s.78 of the English Law of Property Act, 1925 was "*significantly different"* from the wording of s. 58 of the 1881 Act. Academic views concerning the intended ambit of s.58, including that it was intended to assist annexation and counteract the effect of *Renals v. Cowlishaw* – this was "*an alternative and minority view*".

vi. The covenant did not " *touch and concern*" the covenantee's land in order for the benefit of same to run with the dominant lands and bind successors in title of the covenantor. Reliance was placed on *Re Ballard's Conveyance* [1973] Ch. 473. A restrictive covenant is presumed to be annexed to all of the covenantee's lands and every part thereof. If some is sold it ceases to be enforceable by a successor in title such as the appellants in the instant case "…*because it will not touch and concern all of the land*" (para. 93, respondent's submissions) *Lord Northbourne v Johnston & Son* [1922] 2 Ch. 309.

The Law

77. A restrictive covenant is generally understood to constitute a legally binding contractual obligation by the covenantor as owner of land (the servient land) restricting or controlling user of the same in a specified manner for the benefit of other lands (the dominant lands) in the ownership of the covenantee. Professor J.C.W. Wylie, *Wylie on Irish Land Law,* Chapter 21.01 characterises it thus: -

> "*A 'Covenant' is a promise under seal, i.e. contained in a deed, and like all contractual obligations is enforceable between the parties according to the normal rules of contract law*."

A restrictive covenant validly created gives rise to an interest in land in the nature of an incumbrance, and an equitable burden sometimes referred to as "*a paramount right*" which inheres in the land that takes the benefit of it. It has been long held to be analogous to a negative easement, *per Spencer's Case* (1583) 5 Co. Rep 16a., *London & South Western Railway v Gomm*, (1882) 20 Ch D. 562 at p.583, *Re Nisbet & Potts' Contract* [1905] 1 Ch. 391 at p.397 and *Reid v Bickerstaff* [1909] 2 Ch.305 at 320. As such it is enforceable by the original covenantee and their successors in title for the benefit of the benefited lands against the original covenantor and their successors in title as against the servient lands. It shares critical indicia with a negative easement, as Preston & Newsom observe at para. 1.12, including:

i. It burdens one piece of land for the benefit of another;

ii. It is negative or restrictive in nature;

iii. The burden operates only in equity;

iv. Unity of seisin and ownership of dominant and servient tenements may operate to extinguish it.

78. In the case of restrictive covenants affecting freehold land a distinction is required to be drawn between the burden and the benefit of the covenant. At common law the benefit of the covenant ran with the dominant lands and passed to the assignee of the covenantee, whether or not the covenant was expressed to be made not only on behalf of the covenantor but also of his assignees. The benefit of a validly annexed covenant was also considered to pass automatically on the sale of dominant lands whether or not the assignee of the covenantee even knew of the existence of the covenant at the time of the assignment. This operated subject to two key provisos: firstly, the covenant must "*touch or concern*" the lands of the covenantee and secondly, the original contracting parties could be considered to have intended that the benefit of the covenant would pass to the assigns and not to be merely personal to the original covenantee. However, the burden of such covenant did not pass at common law to the assignee of the covenantor, irrespective of whether the latter had notice of the covenant or not.

Tulk v Moxhay

79. As between the original covenantor and covenantee the conveyancing transaction is primarily one of contract and governed by the principle of privity of contract. The significant difficulty with restrictive covenants of freehold land at common law, as stated above, was that neither a covenantee nor his assign could either directly or indirectly enforce a restrictive covenant against the assignee of a covenantor, even if the latter took with notice of the burden of the relevant covenant affecting the burdened lands. It was always possible for the benefit, as opposed to the burden, of a covenant to run with the land automatically. Some authorities cite *The Prior's Case* (1368) 14 Co. Litt. 385a as authority also for the said proposition. Over time equity modified the said rules, firstly by allowing the benefit of a covenant to be assigned as a *chose in action* whether or not it concerned land. Secondly, equity "*follows the law*" in allowing the benefit of certain covenants to be annexed to the

land so as to run with the land without express assignment. Thirdly, by virtue of the decision in *Tulk v Moxhay*, it was recognised in equity that, subject to certain conditions being met, the burden of a restrictive covenant could run with the burdened land which would remain subject to it and which would bind successors in title of the original covenantor. The net effect of the decision in *Tulk v Moxhay* was that the effectiveness and enforceability of the burden of a covenant over the covenantor's land was no longer limited to the period during which the original covenantor retained ownership of the burdened lands but, provided the necessary preconditions were satisfied, might in equity also continue indefinitely to bind the owner for the time being of the servient lands and operate at a time when there was neither privity of contract nor privity of estate between the original owners of the *dominant* lands and the *servient* lands.

80. By virtue of the decision in *Tulk v Moxhay* a restrictive covenant that complies with the necessary requirements gives rise to an interest in land in favour of the covenantee that is purely equitable in nature and operates for the benefit of the dominant lands as such. The prerequisite indicia were essentially that the restrictive covenant was required to be negative and made for the benefit of lands that belonged to the covenantee. A key determination of Lord Cottingham in *Tulk v Moxhay* (which is now abolished in this jurisdiction in respect of restrictive covenants created after 1 December 2009*)* was that the restrictive covenant could be enforced, by injunction if necessary, against a subsequent purchaser of the burdened lands unless he was a *bona fide* purchaser for value without notice of the said covenant. Key aspects of the *Tulk* decision will be returned to later in the context of considering the admissibility and relevance of a series of documents and instruments which came into existence in 1962 and which underpin and comprise the dealing whereby a dealing came to be registered in Part 3 of the servient Folio in 1962 modifying the earlier burden registered in 1947 and the import, if any, of same.

81. Megarry and Wade, *The Law of Real Property,* (6th edn., Sweet & Maxwell, 2000) notes that since the decision of *Formby v Barker* [1903] 2 Ch. 539 *"... it has been settled that equity will enforce a restrictive covenant against a purchaser only if it was made for the protection of other land*." The authors note at para. 16-035: -

> "*It was said that the new principle was 'either an extension in equity of the doctrine of Spencer's Case to another line of cases, or else an extension in equity of the doctrine of negative easements; ... But in reality the rule was a new departure, and eventually it was recognised that a new type of equitable interest had been created*."

The decision of *Re Nisbet and Potts' Contract* [1905] 1 Ch. 391 at 396 and on appeal [1906] 1 Ch. 386 is cited as authority confirming that proposition.

82. Thus, as Megarry and Wade note at para. 16-036, by virtue of the decision in *Tulk v Moxhay,* as subsequently construed by courts of equity, it was established that an equitable interest in the nature of a negative covenant could run with the servient land only where –

(1) The covenant was restrictive in nature;

(2) Two plots of land were concerned: one bearing the burden and the other receiving the benefit; and

(3) On the facts, the defendant could not set up the overriding defence in equity of being a purchaser of the legal estate for value without notice.

83. It is uncontroversial in the instant case that covenant is undoubtedly negative for, as with the tenor and terms of the covenant in *Tulk v Moxhay* itself, it merely binds the covenantor to refrain from building but does not require him to perform any positive act. The 1947 deed gave effect to three distinct transactions: -

(i) The sale of part of the lands comprised in Folio 1849, described in the Schedule, by Thomas V. Murphy to John H. Wilson.

(ii) The express reservation of a right of way over part of the sold lands to for the benefit of the lands retained by the vendor. The route of the said right of way was marked "X" and "Y" on the map annexed to the transfer, and

(iii) The restrictive covenant made by the purchaser John Hugh Wilson with the vendor Thomas Vincent Murphy not at any time thereafter to erect any building on the sold lands.

The first and second transactions were unremarkable and the transfer was clearly effective to assure same.

The nature of a restrictive covenant of freehold land

84. Jackson Way argues that the jurisprudence in respect of the creation, annexation and assurance of the benefit of negative easements are not material to the issues in this appeal and that "*a very different question*" (para. 43 of the respondent's submissions) is at issue in the instant case. Whereas a good deal of authority has alluded to the approach of treating the benefit of a restrictive covenant annexed to land as analogous to a negative easement, the English Court of Appeal in *Re Nisbet and Potts' Contract* [1906] 1 Ch. 386 had to consider the nature of the obligation created by a restrictive covenant entered into by the owner of land. Collins M.R. considered that the nature of the obligation created by a restrictive covenant was analogous to a negative easement which was binding upon the land in equity and was paramount even to the title of a dispossessed owner whose interest had been extinguished by acts of adverse possession. Thus, the court held that a squatter, who had extinguished the title of the freehold owner of the servient lands by acts of adverse possession, nevertheless took subject to the restrictive covenants and was bound by them and they were enforceable against him by the owner of the dominant lands:

> *"... an obligation created by a restrictive covenant is in the nature of a negative easement, creating a paramount right in the person entitled to it over the land to*

which it relates. If that is so, then, in the present case, the squatter, by his squatting, simply acquired a right to land subject to this incident. Of course, the burden of that incident must pass to all persons who subsequently become assignees of the land, and the squatter is not entitled to hand it over freed from the obligation that was imposed on the person whose title he has ousted by his possession."

In considering this proposition Collins M.R. observed: -

"*I do not think that there was anything inconsistent in the view taken by Sir George Jessel with the law as laid down in the leading case of Tulk v Moxhay, though, no doubt, words are used there pointing to the equity as arising from the injustice which would accrue if a person who had acquired land at a reduced price by reason of its user being subject to a restriction were afterwards enabled to pass on that land to other persons freed from that restriction, receiving in return a fair price*."

85. Romer L.J. at p. 870 of *Re Nisbet and Potts' Contract* also agreed. Upholding the decision of Farwell J. in the court below, he observed of restrictive covenants: -

"... I think the law is that such a covenant, when validly created, binds the land in equity, and can be subsequently enforced as against subsequent owners of the land, subject only to the limitation that, being equitable, it cannot be enforced as against a bona fide purchaser of the land – that is to say, of the legal estate - without notice. This was clearly pointed out by Sir George Jessel M.R. in London and South Western Ry. Co. v Gomm."

An excerpt from the latter judgment was cited with approval, wherein Sir George Jessel had observed: -

"*… it does not matter whether it proceeds on analogy to a covenant running with the land or on analogy to an easement. The purchaser took the estate subject to the equitable burden, with the qualification that if he acquired the legal estate for value*

without notice he was freed from the burden. That qualification, however, did not affect the nature of the burden; the notice was required merely to avoid the effect of the legal estate, and did not create the right, and if the purchaser took only an equitable estate he took subject to the burden, whether he had notice or not."

In his separate judgment in *Re Nisbet and Potts' Contract,* Cozens-Hardy L.J. observed at p. 872: -

"*The benefit of a restrictive covenant of this kind is a paramount right in the nature of a negative easement not in any way capable of being affected by the provisions of the Statute of Limitations on which the squatter relies*."

86. It is to be noted that the Law Reform Commission, *Report on Land Law and Conveyancing Law: Positive Covenants over Freehold Land and Other Proposals* (LRC 70-2003), identifies certain material distinctions between easements and freehold restrictive covenants including, for instance, at p. 7 where it is noted: -

"*… A freehold covenant is to be contrasted with similar rights enjoyed by a landowner over a neighbour's land such as an easement, like a right of way. An easement usually exists as a legal right which remains enforceable against a successor in title of the land burdened by it however the successor acquired the land. By contrast, in theory, a freehold covenant may cease to be enforceable if the burdened land has passed to a bona fide purchaser of the legal title without notice of the covenant.*"

Leaving aside the aspect of the *bona fide* purchaser for value without notice - an issue not arising in this appeal - the substance of the common features between negative easements and restrictive covenants are significant and have material relevance to aspects of this appeal. In the case of freehold covenants created after the coming into operation of the Land and Conveyancing Law Reform Act, 2009, such a covenant created now becomes a legal interest

in the servient lands. Freehold covenants created after the 1st December, 2009 are governed by Part 8, Chapter 4 of the 2009 Act which represents a significant development in the proximate alignment of the rules governing both easements and freehold covenants. It is noteworthy that both are statutorily expressed to be exceptions to the statutory restriction on the creation of legal estates and interests as is provided by s. 11(4)(a) and (b) of the 2009 Act. The said subsection provides an exhaustive list of the legal interests in land which may be created or disposed of.

Assignment of the burden of a freehold restrictive covenant

87. Jackson Way is an assignee of the original covenantor's land Folio 4940, in part. It is not in contention that the formulation of the covenant expressed in the 1947 transfer is negative in nature in the classic sense, "*will not at any time hereafter erect any building on the said lands*". The assignee of the covenantor is bound by the burden of the covenant only if certain specific conditions are satisfied.

88. Firstly, that the covenant is negative in nature. The decision frequently cited as authority for this proposition is *Haywood v Brunswick Permanent Benefit Building Society* (1881) 8 QBD 403. The decision of Farwell J. in *Re Nisbet and Potts' Contract,* (as affirmed by the Court of Appeal), requires detailed consideration, particularly where he observes;

> "… *if the covenant be negative, so as to restrict the mode of use and enjoyment of the land, then there is called into existence an equity attached to the property of such a nature that it is annexed to and runs with it in equity: Tulk v Moxhay. This equity, although created by covenant or contract, cannot be sued on as such, but stands on the same footing with and is completely analogous to an equitable charge on real estate created by some predecessor in title of the present owner of the land charged. Such a charge was created in its inception by contract between A and B, the lender and the borrower, but when B has sold the land charged to C, A cannot sue C on the*

contract to repay, but can only enforce the charge against the land. This is the basis of the decision of the Court of Appeal in Haywood v Brunswick Permanent Benefit Building Society… effect is given to the negative covenant by means of the land itself. … In London and South Western Railway Co. v Gomm Sir George Jessel states that in his view the doctrine is either an extension in equity of Spencer's Case to another line of cases, or else an extension of equity of the doctrine of negative easements, but that, whatever it was, 'the purchaser took the estate subject to the equitable burden, with a qualification that if he acquired the legal estate for value without notice he was freed from the burden.." (p.396/7)

On appeal, Collins M.R. stated at p. 399;

"…I have come to the conclusion that the learned judge's judgment is right. In point of fact, so exhaustive does his judgment appear to me to be, that I should not venture to add or substitute anything of my own for it, except that I feel bound, in deference to the very able arguments which have been addressed to us, to give my decision in my own language."

He then observed directing his consideration to the position on the date that the squatter had extinguished the freehold title in the servient lands;

"Now, if the land was not so discharged from the obligation of the covenant, then the burden of that covenant remained on the land to which the squatter had become entitled simply through the extinguishment of the right of the dispossessed owner to turn him out; and inasmuch as that burden still continued to be imposed on the land, notwithstanding the squatter's acquisition of it, every person who took that land from the squatter would take it subject to the obligation of that covenant, unless he could prove that he was a purchaser for value without notice."

89. The second condition to be met for binding assignees of the original covenantor is that the covenant must be made for the protection of lands retained by the covenantee. As Megarry and Wade (*opus cit.*) succinctly observe at para. 16-044:

> "*It is axiomatic that the justification for converting a personal covenant into an equitable incumbrance is to enable the covenantee to preserve the value of other land of his in the neighbourhood.*"

As is outlined in the headnote, *London County Council v Allen & Ors*. [1914] 3 K.B. 642 offers clear authority for the proposition that:

> *"An owner of land, deriving title under a person who has entered into a restrictive covenant concerning the land, which covenant does not run with the land at law, is not bound in equity by the covenant even if he took the land with notice of its existence, if the covenantee is not in possession of or interested in land for the benefit of which the covenant was entered into. In such a case the doctrine of Tulk v Moxhay [1848] 2 PH. 774 does not apply."*

***London County Council v Allen* [1914] 3 K.B. 642**

90. The English Court of Appeal in its judgment in *London County Council v. Allen* also approved the decision of Sir George Jessel M.R. in *London and South Western Railway Co. v Gomm*. At p. 405 of said judgment, Jessel M.R. had observed: -

> "*These observations, which are just as applicable to the benefit reserved as to the burden imposed, shew that in equity, just as at law, the first point to be determined is whether the covenant or contract in its inception binds the land. If it does, it is then capable of passing with the land to subsequent assignees; if it does not, it is incapable of passing by mere assignment of the land. The benefit may be annexed to one plot and the burden to another, and when this has been once clearly done the benefit and the burden pass to the respective assignees, subject, in the case of the*

burden, to proof that the legal estate, if acquired, has been acquired with notice of the covenant."

Scrutton J. observes of the jurisprudence (at p.1020): -

"*This makes land bound or benefitted by the covenant essential to bind or benefit assigns."*

Scrutton J. noted with approval the dictum of Jessel M.R. in *Gomm* to the effect: -

"*These authorities – Renals v Cowlishaw and Child v Douglas –*

> *'establish the proposition that, when the benefit has been once clearly annexed to one piece of land, it passes by assignment of that land, and may be said to run with it, in contemplation as well of equity as of law, without proof of special bargain or representation on the assignment. In such a case it runs, not because the conscience of either party is affected, but because the purchaser has bought something which inhered in or was annexed to the land bought.*" (emphasis added)

91. In issue in the instant case is whether, given the undoubted deficiencies in the operative part of the 1947 transfer instrument originally creating the restrictive covenant, it can properly be said to have been made for the protection of ascertainable lands retained by the original covenantee Thomas V. Murphy, such that when Jackson Way purchased the lands in Folio 4940 it took subject to the burden. This in turn involves a consideration of the ambit of the material evidence as to intention, conduct, title and otherwise that it is properly receivable in evidence, whether by way of extrinsic evidence or otherwise, to demonstrate the contemporaneous intention of the covenantor and the covenantee as to the nature of the covenant and whether it was effectively acknowledged to be annexed to defined lands of the covenantee at the date of execution of the original transfer on the 2nd June, 1947 so as to bind the respondent as the covenantor's successor in title.

92. The decision in *London County Council v Allen* is authority for the proposition that at the date of creation of the covenant the covenantee should have an estate or interest in some land *"…adjoining or in any manner affected by the observance or non-observance of the covenant contained in the deed"* (p. 653). Within the operative part of the 1947 transfer directed towards the covenant against building there was reference to "*the said lands*". Demonstrably those words pertain to the sold or servient lands which later came to be registered in Folio 4940. Thus, there are two apparent deficits in the 1947 instrument from the point of view of assigns and successors to the original covenantee. Firstly, it is unclear from the 1947 instrument, read alone, whether the covenant was intended to be personal to the covenantee or annexed to the benefit of some or all of his adjacent lands and secondly, if the latter, which of his said lands were intended to benefit from the covenant.

Extrinsic evidence

93. The primary means of ascertaining the intentions of parties and the identity of the subject property to be burdened and the benefiting property is by considering the instrument executed by the original covenantor and original covenantee. If it was thereafter validly modified evidence of same may be admissible. The Smiths assert that the constituent documents and instruments in the 1962 dealing which underpinned the registration of a modified covenant on Folio 4940 comprises such admissible evidence.

94. It is not in dispute in the instant case that in the 1947 transfer a clear restrictive covenant was excepted and reserved but it did not expressly provide that the covenant was for the benefit of any identified lands. All the indications are that the covenantee and his advisers did not advert to the requirements for the creation of a valid restrictive covenant that would run with and bind successors in title of the burdened/servient lands sold to Mr. Wilson comprise in Folio 4940. Neither was it adverted to that the identity of the benefitting/dominant lands was required to be specified, particularly if it were intended by

the covenantee that same would run with and be enforceable by successors in title to his interest in the property. This may have arisen, it seems reasonable to assume, because no contract for sale was ever entered into prior to the execution of the 1947 transfer. Significantly, Mr. Murphy avers to this fact in an affidavit of the 6th March, 1962 where he avers: -

> "2. *No formal Contract was entered into at the time of the said Sale, but it was verbally agreed that a covenant restrictive of all building on the lands sold be inserted in the Deed.*"

This averment is receivable in evidence as tending to support the fact averred to in circumstances where that affidavit was provided to the covenantor at the latter's request in response to enquiries from the Land Registry directed to the covenantor and the Registrar of Titles and accepted by the covenantor in March 1962 without demur and availed of to lodge a dealing of which it formed an integral part (together with a further suite of documents) which sought to achieve three key objectives;

i. Address the queries of the Deputy Registrar as to the nature of the covenant created by the parties under the 1947 Deed;

ii. Effect the modification of the restrictive covenant over part of the servient lands for the benefit of a purchaser from the servient owner;

iii. Procure the consent and concurrence by joinder in the deed by Bedford (as well as the original covenantee) to the granting of the said modification as assignee and the successor in title to the legal estate of the dominant owner.

Evidence of Intention of the Parties to the Deed

95. *Norton on Deeds*, (2nd Edition, Sweet & Maxwell, 1928) p. 52 cites Plumer M.R. in *Cholmondeley v. Clinton* (1820) 2 Jac. & W. 1.:

"*…if the meaning and intention of the grantor be clearly manifested on the face of the instrument, as to the person or character intended to be the object of grant, and if the words which he has made use of to convey his meaning will admit of an interpretation conformable to it, though contrary to their correct technical sense, there is no case or dictum to be found which requires the Court to adopt the technical sense, in opposition to the actual meaning of the parties: on the contrary, the authorities uniformly demand that preference be given to intent, over technical import and form."*

The deficits in the 1947 deed were clearly identified by the Land Registry in 1962. It was not possible to ascertain from the face of the Deed whether the Covenant excepted and reserved was, in the words of the Deputy Registrar " *a personal covenant*" or "*if it was annexed to the lands in folio 1849*" and if the latter, whether there was " *no other lands to which it was annexed*". The respondent asserts that the consequence is that the covenant purported to have been reserved was void or in the alternative purely personal to the original covenantee and thereby no longer affect the servient lands. Thus the intention of the parties is established by three instruments of 1947 and 1962.

96. Norton at p.141 states the rule as to admissibility of extrinsic evidence where the deed is silent on a matter thus;

"*Evidence is admissible of any collateral agreement as to any matter on which the deed is silent, and not inconsistent with the terms of the deed, and whether constituting a condition precedent to the attaching of the obligation under the deed or not."*

The decision of Lord Watson in *Barton v Bank of New South Wales* (1890) 15 App. Cas. 379 is cited;

"*Where there is simply a conveyance and nothing more, the terms upon which the conveyance is made not being apparent from the deed itself, collateral evidence may easily be admitted to supply the considerations for which the parties interchanged such a deed; but where in the deed itself the reasons for making it, and the considerations for which it is granted, are fully and clearly expressed, the collateral evidence must be strong enough to overcome the presumption that the parties in making the deed had truly set forth the causes which led to its execution*"

97. There were three separate transactions effected within the 1947 Deed. Two of them were perfectly clear - the lands to be conveyed and the reservation of the easement are clear from the face of the 1947 Deed. The nature of the covenant reserved is nowhere to be ascertained from a perusal of the deed and the said deed is entirely ambiguous on its face in relation to the intention of the parties in relation to the covenant. The position is not assisted by the fact that there was no written contract between the parties in 1947.

Norton on Deeds states the rule in such circumstances at page 151;

"Prima facie, it would appear that the subsequent admission as to the true meaning of a deed by, or the subsequent conduct of, a party to, or person claiming under a deed cannot be received to explain or alter the construction of a deed; but where there is any ambiguity in the deed , or where only secondary evidence of the deed is available, semble, such admissions or such conduct may properly be received in order to show the true meaning of the deed in which the ambiguity occurs or of which primary evidence is not forthcoming." (emphasis added)

98. Wylie and Woods in their text observe at para. 17.19: -

"*The general rule is that extrinsic evidence is not admissible to add to, vary or contradict the terms of a deed. The construction of a deed cannot be controlled by the antecedent or subsequent acts of the parties, nor, indeed, by the terms of the*

> *contract or the draft conveyance. However, there are several well-known exceptions to this rule."*

In such circumstances "*The intention of the parties must be collected from the language of the instrument, and may be elucidated by the conduct they have pursued*." *per* Park J. in *Chapman v Bluck* (1838) 4 Bing. N.C. 187 at p.195. At p. 196 of the said judgment it provides that "…*the subsequent conduct of the parties is evidence to assist in shewing upon what terms the Plaintiff was put into possession*.", so cited with approval in Norton pp 152/153. Those principles are applicable to the instant facts and are engaged in evaluating the 1947 Deed which was amended by the instruments created in 1962 and lodged in the Land Registry and the unequivocal conduct of the covenantor, all of which are admissible to assess whether the covenantor and his successors in title are bound by of the averments in the affidavit of the original covenantee of 6 March 1962 and precluded from denying that the benefit of the covenant annexed to Priorsland and Folio 1849.

99. Where, as here, the 1947 Deed is ambiguous as to what lands were intended to benefit, *Norton on Deeds* states at p. 549:

> *"Ambiguous words in a covenant are to be taken most strongly against the covenantor, per Bayley J., Fowle v Walsh 1882 1 B & C 29 at p. 35"*

100. The decision in *Revenue Commissioners v Moroney* [1972] IR 372 is also of some assistance. Kenny J., whose decision was affirmed on appeal by the Supreme Court, held that extrinsic evidence was admissible to refute the contents of a receipt clause in a deed which in substance acknowledged receipt of payment of a sum by way of consideration for the benefit of the grantor. The relevant extract from his judgment is cited by Wylie and Woods at para. 17.20: -

> "*It is not necessary to give authority for the proposition that evidence may be given to show that, despite the receipt, the consideration was not paid. Similarly, evidence*

is admissible when it is relevant to explain the circumstances in which the deed was executed and to establish that the parties did not intend that the purchase price mentioned in the deed should ever be paid."

101. The Smiths placed reliance on the decision of Rubin J. in *Shropshire County Council v Edwards* (1983) 46 P. & C.R. 270. The County Council by summons sought a declaration that land comprised in a 1908 conveyance was no longer subject to certain covenants. The court had to construe a conveyance which had contained the express grant of an easement and where the structure indicated that in the words of the judge: -

"…Clause 2 reads 'The Corporation hereby covenants with the vendor that the Corporation their successors and assigns will supply the vendor his heirs and assigns by meter… with water from the conduit head for the use of Nobold House….'"

The judge observed –

"Nobold House is still there and speaks for itself and, in my judgment, on the available extrinsic evidence, there is no difficulty in ascertaining what land was occupied by Samuel Atherton with Nobold House."

Rubin J. had no difficulty in accepting that extrinsic evidence was receivable to identify the retained lands to which the benefit of the covenant was annexed.

<u>1962</u>

102. It is clear that the two legal instruments lodged as part of the dealing in the Land Registry by the covenantor in support of registration of the 1962 modification of the covenant as entered on Part 3 of the Folio were instruments relating back to and intended to vary and also clarify the contemporaneous common intention of the parties to the original 1947 deed and when read together the 1962 Deed and Affidavit, and surrounding documents lodged in support of the dealing are extrinsic evidence, and admissible for the purposes of:-

(a) Confirming that the 1947 covenant was not intended to be personal.

(b) Confirming that the parties to the 1947 Deed intended to create a covenant which would annex to lands of the covenantee;

(c) Identifying the lands of the covenantee intended to be benefitted as both Priorsland and Folio 1849; and

(d) Evidencing implied annexation of the said covenant to the benefitting lands of Thomas Vincent Murphy;

(e) Confirming that the covenant ran with the dominant lands for the benefit of the covenantee's assign Bedford;

(f) Confirming that the burden of the covenant ran with and bound the servient lands and the successors in title to the original covenantor Mr Wilson.

The act of the original covenantor Mr. Wilson in procuring joinder of Bedford in the 1962 Deed, together with his own execution of it, evidences *per se* that the company was a necessary party to the modification Deed because, as assignee of the original covenantee, the company enjoyed enforceable rights annexed to the land it acquired in 1956 over the entire servient lands which could only be modified or varied by the express concurrence of Bedford and its joinder in the deed along with the original covenantee. The precise identity of the lands to which the said covenant was annexed was provable and proven by extrinsic evidence and the affidavit of 1962 lodged unamended in the Land Registry by the covenantor establishes the identity and extent of the said dominant lands and is binding on the covenantor's successors in title, Jackson Way, in all respects.

103. With regard to the admissibility of extrinsic evidence, reliance had been placed by the Smiths on *The Shannon Limited v Venner Limited* [1965] 2 WLR 718. The decision of the English Court of Appeal provides a useful analysis as to the correct approach to the construction of a deed of conveyance where identification of the dominant tenement in an easement is concerned. The case concerned whether a deed creating or purporting to create

a right of way had sufficiently identified the owner or occupier of the dominant tenement for the benefit of which the said easement was created. The dominant tenement was not identified in the conveyance at all. It was held that extrinsic evidence was admissible the concerning the circumstances in which the conveyance was executed.

Danckwerts L.J. in the Court of Appeal observed:

> *"It is sufficient to refer to the words of Upjohn L.J. giving the judgment of the court, in Johnstone* v. *Holdway. He repeated the quotation by Wright J. in Callard* v. *Beeney, of the observation of Lord Wensleydale in Waterpark* v. *Fennell : "The construction of a deed is always for the court; but, in order to apply its provisions, evidence is in every case admissible of all material facts existing at the time of the execution of the deed, so as to place the court in the situation of the grantor. Upjohn L.J. went on to say: "In our judgment, it is a question of the construction of the deed creating a right of way as to what is the dominant tenement for the benefit of which the right of way is granted and to which the right of way is appurtenant. In construing the deed the court is entitled to have evidence of all material facts at the time of the execution of the deed, so as to place the court in the situation of the parties."*

Danckwerts L.J. continued at pp 691/692;

> *"That is the situation in the present case, and we are entitled to have the benefit of the evidence of the surrounding circumstances. A document intended to have legal effect is not executed in a vacuum. It is drafted and executed to deal with the situation in which the parties find themselves. Of course, if the words used in the deed are perfectly clear, they must be given their meaning, and extrinsic evidence is not admissible, because that would be contradicting the terms of the deed."*

He noted that Counsel had *"... contended…that, in admitting extrinsic evidence of the surrounding circumstances, the court was liable to fall into error by allowing the mind of*

the court to be affected improperly by the circumstances before the court had considered the terms of the deed. But, so far as this court is concerned, no such process is involved. Of course, the deed must be looked at, and then, if the meaning is not plain, the court is entitled to consider the surrounding circumstances so as to see whether light as to the construction is to be gained from these."

The queries from the Land Registry in February 1962 demonstrate the extent to which the meaning was not plain as to the lands intended to benefit from the covenant from the terms of the 1947 Deed.

"Surrounding circumstances"

104. The importance of *The Shannon* is the detailed analysis carried out by the court in regard to the extent to which extrinsic evidence is receivable to address questions of identification of the benefiting lands. The court looked at the approach that had been adopted in the lower court whose decision was under appeal, noting that in reference to the question of the identification of the dominant tenement, the trial judge said:

> *"'This question depends on the construction of the conveyance read in the light of the surrounding circumstances.*'

> *Having made that perfectly correct observation, however, the judge proceeded to the conclusion that the words of the conveyance in this regard were perfectly clear. This is where we must part company from the judge. In our judgment, the identification of the dominant tenement is not clear or sufficient in the deed. In our view, the deed does not in its terms identify the dominant tenement at all. The deed, indeed, is not a well-drawn document in this respect. Proper conveyancing practice requires ... identification of the owner or owners or occupier or occupiers of identified dominant land for the benefit of which the easement is created."*

The judgment continued –

> "*An argument was put forward that there was no dominant tenement, and the right was merely a licence personal to the plaintiff company. But this argument cannot be convincing. It is most improbable that the document could have been intended to create such an unsatisfactory situation.*"

That statement applies equally to the 1947 Deed.

Such arguments are reflective of the position adopted by the respondent in the instant case to the effect that the dealings and documents entered into by the original covenantee and covenantor demonstrate the creation of a personal covenant not intended to be annexed to any retained land of the covenantee.

105. The court noted the arguments advanced by the respondent to the effect that: -

> "*in the absence of a statement identifying the dominant tenement, there must be a presumption, or possibly an inference, that the land actually conveyed by the deed must be the dominant tenement.*"

The assessment of the Court of Appeal however was: -

> "*That may be so in the absence of evidence causing an inference that some other land was the dominant tenement for the benefit of which the easement was created, but it cannot be an irrebuttable presumption*."

The court had regard to the language of the deed and considered same ".. *taken in conjunction with the facts…assisted the conclusion that the dominant tenement was the whole of the plaintiffs' land, including the land previously acquired… Accordingly, the plaintiffs were entitled to the declaration sought.*" (p. 693)

106. *The Shannon* confirms that direct evidence of the intention of one party in respect of words used in a Deed is generally inadmissible. However, the issue in the instant case is a different one. What the 1962 Dealing in its entirety shows, when read with the 1962 Affidavit and the surrounding documentation including the communications from the Land Registry,

is that the covenantor and covenantee both acknowledge that they had reached a consensus or prior accord before they executed the 1947 Deed for the express reservation of a restrictive covenant over the sold lands for the benefit of the covenantee's retained lands, Priorsland and Folio 1849, for the benefit of the covenantee and his successors in title and intended to bind the covenantor and his successors in title and run as a burden over the sold land. The 1947 executed deed did not achieve that. The subsequent conduct and acts of the parties in 1962 and the instruments executed by them and lodged by the covenantor in the Land Registry as the dealing whereby the 1962 Burden was registered on Part 3 of the Folio as outlined above is consistent only with a continuing acknowledgment by both as to their common intention that such a prior accord and consensus between the covenantor and covenantee underpinned the 1947 Deed and was acted upon as such by both parties at all times thereafter. Thereby, on the facts of the instant case, the 1962 Dealing, as counsel for the Smiths correctly emphasised at the hearing of this appeal, was part of the "instrument" registered in Land Registry in 1962 in respect of the burden and was admissible to prove the common intention of both parties to the 1947 Deed that the latter Deed was intended to create a covenant as the appellant contends. Decisions such as *FSHC Group Holdings v. GLAS Trust* [2019] EWCA Civ. 1361 make clear the admissibility of evidence of a continuing common intention in circumstances such as those presenting in the instant case where, as Leggatt L.J. observed, "*...on the equitable doctrine that a party will not be allowed to enforce the terms of a written contract, objectively ascertained, when to do so is against conscience because it is inconsistent with what both parties in fact intended (and mutually understood each other to intend) when the document was executed."* The latter decision accords with the views expressed by Hardiman J. in *Boliden Tara Mines v Cosgrove & Ors.* [2010] IESC 62.

107. Further the operation of the doctrine of election requires that the 1947 and 1962 Deeds as well as the 1962 Affidavit be read together to construe the 1947 covenant for the reasons stated below. The judgment in *The Shannon* did take into account relevant factors which obtained at the date of execution of the deed in 1930 in the context of the creation of the right of way for the benefit of the retained lands, including that there was no physical division between the land conveyed and the land previously acquired by the plaintiff company and that the extension of a factory was in contemplation at the date of the grant. In my view that reflects the correct approach where the primary Deed or instrument is silent on a critical aspect of the transaction.

> "*The material fact was the contemplation of extension of the plaintiff company's factory, which is nonetheless a relevant factor in the situation, even if ultimately the project should be abandoned*."

The Court of Appeal further considered the decision of *Thorpe v Brumfitt* (1873) L.R. 8 Ch. App. 650, a decision of the English Court of Appeal, as being relevant in respect of two points in ascertaining the intention of the parties at the date of execution of the deed: -

> *"(1) that the court can have regard to the surrounding circumstances, and*
>
> *(2) that the court is not debarred from applying common sense."*

108. The very fact that Mr. Wilson in registering the dealing in the Land Registry in 1962 accepted without demur the affidavit of the covenantor sworn on 6 March 1962 is evidence that is probative of and acknowledges a common intention and understanding of both parties in 1947 to create a restrictive covenant to be annexed to and for the benefit of Priorsland and Folio 1849 and that same be and constitutes admissible extrinsic evidence that they both intended that the benefit and the burden respectively of the restrictive covenant would run with the respective lands and bind successors in title of the covenantor. Though the issues regarding the 1947 deed were raised in the first instance by the Registrar in the Land

Registry, it is clear that the covenantee and Bedford went about addressing the query and removing any ambiguity as to the intention of the parties to the 1947 deed at the behest and for the benefit of the covenantor. The 1962 Affidavit of Thomas V. Murphy the original covenantee was accepted by the covenantor Mr. Wilson and was lodged in the Land Registry as part of the dealing. That unequivocal act on the part of the covenantor in the context of the transaction in 1962 represents a clear acknowledgment by the covenantor, the predecessor in title of Jackson Way that the benefit of the covenant was always intended to be annexed to the identified retained lands of the covenantee. It makes clear the original intention in 1947 that the dominant lands or benefitting lands comprised all of the lands retained by the original covenantee, being Priorsland and the residue of the lands in Folio 1849. The purchaser from the covenantor in 1962, Mr Tracey, took with full notice of those facts and the import of same was that the covenant was clarified and corrected to accord with the common intentions of the parties to the 1947 Deed. Mr Tracey was bound by same as were all successors in title including the respondent.

109. Nugee L. J. accepted an argument in *Bath Rugby Ltd. v. Greenwood* [2021] EWCA Civ. 1927 in relation to establishing implied annexation, *"... that once the intention is found, extrinsic evidence can be used to identify the land benefited. That I accept...*" (para. 53) The identity of the retained land to which the benefit of the 1947 Covenant was intended to annex is ascertainable from the March 1962 Deed when read alongside the March 1962 Affidavit which were lodged in the Land Registry to modify the covenant. The entire dealing and its constituent documents are admissible extrinsic evidence.

110. In the context of the admissibility of extrinsic evidence, *Shropshire* determined, *inter alia,* that so long as the general preconditions for a covenant running with the dominant land were fulfilled, the benefit of the covenant would run despite the absence of express words of annexation. It found that, on the available extrinsic evidence before the court in that case,

the land retained by the covenantee for the benefit of which the restrictive covenant was to be annexed *"was clearly ascertainable".* Further, that express words to annex the benefit of the covenantee's benefitting lands with which it was to run, though highly desirable, were unnecessary and that –

> *"if, on the construction of the instrument creating the restrictive covenant, both the land which was intended to be benefitted and the intention to benefit that land, as distinct from benefitting the covenantee personally, could be clearly established, then the benefit of the covenant would be annexed to that land and run with it, notwithstanding the absence of express words of annexation."*

111. In the instant case we know that there was no contract apart from a parol agreement in 1947. We have the original vendor/covenantee's recollection, almost 15 years after execution of the 1947 deed as to what was intended to be achieved in regard to the restrictive covenant-

> "*… to preserve the amenity of my residence at Priorsland, Carrickmines and to ensure privacy for me and my family in the enjoyment of the said residence and the lands adjoining it which were retained by me*."

That language expressly encompasses not alone the balance of the sold lands in Folio 1849 but also the lands at Priorsland where the vendor resided being the entire lands retained by Thomas V. Murphy in 1947.

112. The contents of the affidavit do not operate *per se* as a deed of rectification nor as a matter of law could its contents, given their unilateral nature, operate to supplement the 1947 transfer instrument. As such, in my view it is not an instrument that standing alone is captured by s. 53(1) of the Conveyancing Act, 1881 which provided: -

> "*53(1) A deed expressed to be supplemental to a previous deed, or directed to be read as an annex thereto, shall, as far as may be, be read and have effect as if the*

deed so expressed or directed were made by way of indorsement on the previous deed, or contained a full recital thereof.

(2) This section applies to deeds executed either before or after the commencement of this Act."

113. *Wolstenholme's Conveyancing and Settled Land Acts* (10th edn., 1913 as reprinted in 1981 by Professional Books Limited) note the following at p. 126 in reference to s. 53 of the *Conveyancing Act 1881*: -

"*The enactment of this section, though not necessary, seemed required to introduce the practice of using, instead of an indorsed deed, a separate deed in a similar form referring to but not reciting the previous deed. Acceptable recitals are required though reference to the previous deed need only be such as clearly to identify it. For this purpose the date and the parties, with some explanation of the nature of the principle deed in order to make the supplemental deed intelligible, will be sufficient (see Fourth Schedule, Form II).*

Significantly, the Wolstenholme note on s.53(1) continues "… *This section only speaks of a deed supplemental to another deed. <u>But any document may also be made supplemental to a deed or a will or to any other document</u>*." (emphasis added)

114. On the facts as established in the instant case, the entire 1962 dealing and its constituent elements, including the Affidavit of Thomas V. Murphy of 6 March 1962 by the conduct of the covenantor were rendered and became documents "*supplemental*" to the 1947 Deed. The documents comprised in the 1962 registered dealing including the affidavit upon lodgement of same by the covenantor in the Land Registry were constituted documents that came into existence and were acknowledged and applied by the covenantor as evidencing the common intention of the parties to the 1947 deed so as by implication to effect annexation of the 1947 covenant to Priorsland and Folio 1849.

115. The affidavit of Thomas Vincent Murphy of the 6th March, 1962 was not by itself effective by operation of law to vary, modify, amend or rectify the 1947 deed. In the instant case the indenture of the 13th March, 1962 was so executed and met the requirements of s. 53 of the Conveyancing Act, 1881. However, the documents leading to and comprised in the 1962 dealing which gave rise to registration of the dealing of 29 March 1962 required to be read together in chronological order to understand the consequences arising in equity from the covenantor's affidavit and whether an estoppel by conduct, by representation arose from the treatment by the covenantor of the affidavit.

116. I am satisfied that when the covenantor, Mr Wilson lodged the dealing he acknowledged, accepted and held himself out as bound by the legal consequences of the averments including by virtue of para 3 of Mr. Murphy's affidavit, that in 1947 both parties had intended and understood that:

i. The covenant reserved was not intended to be personal, it was intended to be annexed to all the lands retained by the vendor;
ii. Same included Folio 1849 and Priorsland;
iii. The covenant *"touched and concerned"* the retained lands;
iv. It was intended to run with the dominant lands for the benefit of successors in title of the covenantee and to bind successors in title of the covenantor.

117. Were it the case that the averment at para. 3 in the affidavit of the 6th March, 1962 of Thomas V. Murphy had been expressly incorporated into the operative part of the indenture made on the 13th March, 1962 between Bedford, Thomas Vincent Murphy of the one part and John Hugh Wilson of the other part, then it would have operated as an express rectification in law. In the circumstances, it operated by implication to like effect and bound

the covenantor and his successors in title, and the relevant 1962 dealing fixed all successors in title with notice of the annexation of the covenant to Priorsland and Folio 1849.

118. The Affidavit of Mr Murphy of 6th March 1962 constitutes the "*evidence*" required by the Land Registry. I am satisfied that the averment at para. 3 is unequivocal in deposing that the covenant was annexed to all the lands retained by Mr Murphy in 1947, being Priorsland as well as Folio 1849 Dublin. The affidavit averred unequivocally to the existence of a covenant of a kind which "*touched and concerned*" the identified lands and as such, was a covenant which was enforceable by Mr Murphy and his successors in title. Mr Wilson unequivocally approbated the affidavit and lodged it in the Land Registry as part of the dealing to modify the restrictive covenant, making its contents available for interested parties to see and in doing so, held himself out by his conduct and the representation, his silence and inaction constituted as unequivocally assenting to the relevant averments which conduct gives rise to an unequivocal and conclusive estoppel against him and his successors in title, including the respondent. If he disagreed with anything therein, he had an obligation to disclose same both to Thomas V. Murphy and the Land Registry. If he disclosed any disagreement with the averment the 1947 deed, it could then have been the subject of a rectification suit by Mr Murphy and it is not likely that the consent of Mr Murphy and Bedford to modification would have been forthcoming. His successors in title are now, in turn, estopped from reprobating the acknowledged effect of same to effect annexation of the covenant to Priorsland and Folio 1849.

Equitable doctrine of election

119. In my view the equitable doctrine of election operates against Jackson Way being "*allowed to approbate and reprobate*" in regard to the import of the 1962 dealing. As Hilary Biehler comments in *Equity and the Law of Trusts in Ireland* (7th edition, Round Hall, 2020 p. 1025);

> *"The doctrine comes into operation where a testator or donor purports to confer a benefit on a donee and in the same instrument purports to transfer some of the donee's property to a third party."*

120. Reliance is placed on the academic writings of Histead "Election in equity: the myth of mistake" (1998) 114 L.Q.R. 621 at p. 634 where he outlies that a beneficiary receives a gift by will or deed which also disposes of some of his own property and where the circumstances of the case permit the court to conclude that the donor would not have wanted the beneficiary to receive the gift and also keep the his own property. In such a case the court implies a condition that the beneficiary gives up his property before he receives the gift.

121. The doctrine is directly applicable to the 1962 dealing whereby, as the parties agreed, the covenantor took the benefit of the modified covenant which immediately enhanced the value of the servient lands in Folio 4940 and enabled subsequent sale to take place by the Jackson Way's predecessor in title, Mr Wilson, whereby part of the servient lands were no longer affected by the burden of the covenant, where, as here, the totality of the instruments executed by the parties in 1962 and lodged by the covenantor in the Land Registry and the dealing subtending registration of the burden in Part 3 of the Folio in March 1962 also by virtue of the affidavit accepted and agreed to by the covenantor and lodged by him in the Land Registry had the further significant, separate and distinct legal effect of confirming the parties' common intention of annexing the benefit of the covenant to the retained lands the 1947, the doctrine of election enables enforcement of same. It thereby created mutual rights and obligations operating upon both the covenantor and his successors and the covenantee and his successors. Biehler at p.1025 cites the Irish case of *Williams v Mayne* [1867] Ir 1 Eq. 519 at 530 as one authority for this proposition, where Walsh M.R. stated:

> "*In giving effect to an election, the Court professes to enforce a duty; there being two benefits which it is inequitable in the party electing to claim together, it compels him, on the condition of obtaining one, to relinquish the other*" .

122. Thereby any entitlement of the original covenantor to assert from 1962 onwards that the 1947 covenant was not annexed to the and ran for the benefit of the lands in Folio 1849 and Priorsland or did not bind the lands of the covenantor in Folio 4940 or did not bind the covenantor's successors in title and bound the latter's successors in title ceased to be available in equity by virtue of the election that took effect once the 1962 Deed and Affidavit were lodged in the Land Registry and the valuable benefit of the modification of the covenant vested in the covenantor and his successors.

Estoppel

123. Spencer-Bower & Turner, *The Law Relating to Estoppel by Representation*, (3rd ed., Butterworths, 1977) at para. 56 note concerning the "*duty of holder of title to property*";

> "*Where a person having a title, right or claim to property of any kind, perceives that another person is innocently, and in ignorance, conducting himself with reference to the property in a manner inconsistent with such title , right or claim, it is the duty of the former to undeceive the other party forthwith; if he omits to do so , and if all other conditions of a valid estoppel are satisfied , he is precluded from exercising or asserting his right or title or claim as against such other party on any subsequent occasion."*

The authors cite several authorities, including *Savage v Foster* (1723) 9 Mod. Rep. 35 at 37 also *Gregg v Wells* (1839) 10 Ad. & El. 90 where Littledale J. stated at p. 96:

> *"…a party who culpably and negligently stands by, and allows another to contract on the faith or understanding of a fact which he can contradict, cannot afterwards*

> *dispute that fact in an action against the person whom he has himself assisted in deceiving.”*

124. The evidence indicates that the covenantor accepted the covenant was intended to operate and did operate, as deposed to by the covenantee in the 6 March 1962 affidavit, and in lodging it as part of the dealing it was part of a transaction which not alone modified the covenant but also confirmed annexation of the covenant to clearly identified subject lands and bound successors in title of the covenantor. If the original covenantor did not so implicitly accept, then on an alternative basis an estoppel by conduct arising from his silences and representations by his accepting the affidavit and lodging it in the Land Registry arose. Either way, the outcome is the same: the covenant runs with and binds the lands in Folio 4940 for the benefit of the lands in the 3 Folios now comprising the Smith lands.

Registered land

125. The lands sold to John H. Wilson in 1947 comprised part of the lands in Folio 1849 and as such was subject to the Local Registration of Title (Ireland) Act, 1891. Section 34(1) of the said Act provided: -

> “*The Register shall be conclusive evidence of the title of the owner to the land as appearing thereon; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document, or matter relating to the land; but nothing in this Act shall interfere with the jurisdiction of any court of competent jurisdiction based on the ground of actual fraud or mistake, and any such court may upon such ground make an order directing the Register to be rectified in such manner and on such terms as it thinks just.*”

126. In light of the statutory provisions, the registration of a covenant as a burden on the servient lands, in this instance the lands in Folio 4940, operates as fixing any future purchaser with notice and precludes an assertion that they are a *bona fide* purchaser without notice.

Equity looks to the intent not the form

Equity imputes an intention to fulfil an obligation

127. Lord Templeman speaking in the House of Lords in *Rhone v Stephens* [1994] 2 WLR 429, having considered the judgment of Lord Cottenham LC in *Tulk v Moxhay,* emphasised that the essence of a restrictive covenant is that the purchaser of the property subject to it is buying with an inbuilt limitation which deprives that purchaser of certain of the rights ordinarily inherent in freehold ownership. The issue is not whether the burden of a restrictive covenant runs or is deemed to run with the land but "… *whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased*." The operation of equity via the doctrine of *Tulk v Moxhay,* itself a pure creature of equity, circumvented the rigour of the common law and enforces the restrictive covenant against an assignee of the original covenantor by preventing or restraining him from exercising a facet of the general rights of ownership that in fact he never acquired in the first instance.

<u>The running of the burden against successors of the original covenantor</u>

128. As stated above, an assignee of the original covenantor's land is bound by a restrictive covenant where four preconditions are met.

(1) The covenant is negative in nature.

(2) The covenant was made for the protection of lands retained by the covenantee.

(3) The burden of the covenant must have been intended to run with the covenantor's land, and

(4) The burden of the covenant runs in equity only.

In my view all of the said preconditions are established by virtue of the 1947 Deed, and 1962 Deed and Affidavit in light of the evidence of surrounding circumstances and for the reasons

stated above. The fact that Bedford was party to the 1962 Deed, taken in conjunction with the affidavit, in light of the surrounding circumstances and the conduct of the covenantor outlined above effectively amounted to an acknowledgment by the covenantor that "*the benefit of the covenant was part of the subject-matter of the purchase*" which Bedford had acquired under the 1956 Deed, within the meaning of *Renals v Cowlishaw*. As such it ran with the dominant lands and bound successors in title of the covenantor.

Extent of lands to which annexation of benefit applies

Rogers v Hosegood

129. The decision in *Rogers v Hosegood* [1900] 2 Ch. 388 of the Court of Appeal affirmed the judgment of Farwell J. in the English High Court and is authority for the proposition that when the benefit of a restrictive covenant has been clearly annexed to one piece of land (the benefitting land) there is a presumption that it passes by any assignment of that land to a purchaser and it may be said to run with the land in equity as well as at law, without proof of special bargain or representation on the assignment of that land.

> "*The covenant in such a case runs with the land because the assignee has purchased something which inhered in or was annexed to the land which he bought. The purchaser's ignorance of the existence of the covenant does not defeat the presumption, though it may be rebutted by proof of facts inconsistent with it*."

130. In *Rogers,* the covenant entered into by the purchaser of a site was that no more than one dwelling house would at any time be erected or stand upon the sold plot and that usage of the property would be for a private residence only. Of relevance is that Collins L.J. at stated at 407-408;

> "*When, as in Renals v Cowlishaw, there is no indication in the original conveyance, or in the circumstances attending it, that the burden of the restrictive covenant is imposed for the benefit of the lands reserved, or any particular part of it, then it*

> *becomes necessary to examine the circumstances under which any part of the land reserved is sold, in order to see whether a benefit, not originally annexed to it has become annexed to it on the sale, so that the purchaser is deemed to have bought it with the land…"* (emphasis added)

The 1962 Affidavit, for all the reasons stated above, provides probative and admissible evidence of the relevant circumstances attending the creation of the covenant in 1947 and the common intention of the parties to that deed.

131. Farwell J. had held in *Rogers v Hosegood* in the English High Court at p. 394: -

> "*I do not think it necessary to call in aid the analogy of easements, ... on the authority of London and South Western Ry. Co. v Gomm. The accurate expression appears to me that the covenants are annexed to the land, and pass with it in much the same way as title deeds, which have been quaintly called the sinews of the law: Co Litt. 6a. Thus the right to sue on such covenants passes to the heir and not to the executors; the assignee of such covenants could sue at law in his own name in the days when the assignee of no other chose in action could do so. …*"

Jackson Way asserts that the covenant did not *touch or concern* the land of the vendor. The approach of Farwell J. to that aspect in *Rogers v Hosegood* is instructive;

> *". Adopting the definition of Bayley J. in Congleton Corporation v Pattison (1808) 10 East, 130, 135, the covenant must either affect the land as regards mode of occupation, or it must be such as per se, and not merely from collateral circumstances, affects the value of the land. ."*

Intention to annex and estoppel

132. At p. 402 the Court of Appeal (Collins L.J.) observed: -

> "*The authorities in equity shew that when the intention is that a covenant shall benefit the covenantee as owner of his land, the benefit will go with the land. There may be an estoppel in favour of an assign: Morton v Woods (1869) 4 Q.B. 293. When possession of property is taken upon certain terms, the grantee <u>and those claiming under him</u> are estopped from disputing those terms. ... In equity the question is, who is in substance the owner of the land. This is implied in the cases relating to restrictive covenants. If once there can be shewn an intention to annex the covenant to the land, it must be taken in equity to pass with the land: Child v Douglas Kay, 560; Western v MacDermott L.R. 1 Eq. 499 at 506; 2 Ch. 72. The conveyances to the Duke express an intention that the benefit of a covenant should go with the land of the covenantees, and, moreover, there are the general words in the conveyances to Sir. John Millais. The cases relating to apparent easements are analogous; general words have been held to pass such easements. In London and South Western Ry. Co. v Gomm 20 Ch. D. 562, 583 Jessel M.R. treated a restrictive covenant as in equity analogous to a negative easement. The right to restrain the Duke from committing a breach of his covenant will pass under the word 'rights' in the conveyance to Sir John Millais. <u>The question is one of intention, and the intention is clear in the present case</u>. The covenant was intended for the protection of the remaining property of the partners, and if Sir John Millais had purchased the whole of that remaining property he could clearly have enforced the covenant. It is expressed in the deed that the covenant is to enure for the benefit of all or any of the lands retained."* (emphasis added)

On the admissible extrinsic evidence there is probative evidence of the common intention of the parties to the 1947 Deed as at the date of its execution. It is consistent only with

annexation of the covenant excepted and reserved in the 1947 Deed annexing to Priorsland and Folio 1849 and being intended to bind successors in title of the covenantor.

133. The Court of Appeal considered in *Rogers* that;

> "*The real and only difficulty arising on the question – whether the benefit of the covenants has passed to the assigns of Sir John Millais as owner of the part purchase by him on March 25, 1873, there being no evidence that he knew of these covenants when he bought*." (p. 403/404 of judgment.)

The court observed that: -

> "*…the difficulty is narrowed, because by express declaration on the face of the conveyances of 1869 the benefit of the two covenants in question were intended for all or any of the vendor's lands near to or adjoining the plot sold, and therefore for (among others) the plot of land acquired by Sir John Millais, and that they 'touched and concerned' that land within the meaning of those words so as to run with the land at law we do not doubt."* (emphasis added)

The difficulty identified was that the covenants in question in the relevant deeds were made with the mortgagors only:

> *'.. and therefore in contemplation of law were made with strangers to the land: Webb v Russell 3 T.R. 393; 1 R.R. 725 to which, therefore, the benefit did not become annexed. 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. We think this is the plain result of the observations of Hall V.-C. in the well-*

> *known passage in Renals v Cowlishaw, of Jessel M.R. in London and South Western Ry. Co. v Gomm, and of Wood V-C in Child v Douglas, which, we agree with Farwell J., are untouched on this point by anything decided in the subsequent proceedings in that case*." (emphasis added)

By analogy equitable principles operate in the instant case such that the covenant is to be regarded as annexed to Priorsland and Folio 1849 and binds the owners of Folio 4940.

134. The court in *Rogers* noted concerning the decision in *Renals v Cowlishaw*:-

> "*… But when, as here, it has been once annexed to the land reserved, then it is not necessary to spell an intention out of surrounding facts, such as the existence of a building scheme, statements at auctions, and such like circumstances, and the presumption must be that it passes on a sale of the land, unless there is something to rebut it, and the purchaser's ignorance of the existence of the covenant does not defeat the presumption. We can find nothing in the conveyance to Sir John Millais in any degree inconsistent with the intention to pass to him the benefit already annexed to the lands sold to him. We are of opinion, therefore, that Sir John Millais's assigns are entitled to enforce the restrictive covenant against the defendant, and that his appeal must be dismissed*."

135. The said observations in the decision in *Rogers v Hosegood* are of direct material relevance in the following respects; it demonstrates that the 1947 covenant when considered alongside the entire 1962 dealing, was capable of benefitting, the lands retained by the vendor and to - "*affect the land as regards mode of occupation, or it must be such as per se, and not merely from collateral circumstances affects the value of the land"* and further extrinsic evidence is admissible to show that both covenantor and covenantee intended the benefit of same to be annexed to the vendors lands: "*The authorities in equity show that when the intention is that a covenant shall benefit the covenantee as owner of his land, the*

benefit will go with the land". The covenant *"touched and concerned"* the 1947 vendor's land and from a perusal of the 1962 dealing coupled with the 1947 instrument it did *"appear that the benefit of the covenant was part of the subject matter of the purchase"*.

Tulk v Moxhay and the Doctrine of Notice

136. Historically, academic commentators suggest that since the decision in *Spencer's Case* (1583) 5 Co Rep. 16a, an exception was carved out of the general prohibition on creating covenants which ran with lands, which exception was confined to contracts where the relationship of landlord and tenant was created and by virtue of same the burden of the tenant's covenants passed by way of assignment of the lease. Between 1583 and the decision of Lord Cottingham in *Tulk v Moxhay* [1848] it is generally understood that this exception was strictly confined to leases and in particular that the burden of a covenant could not run with freehold land.

137. The novel aspect of the decision in *Tulk v Moxhay* is that in effect it established that a covenant made by a purchaser of freehold land with the vendor for the benefit of retained lands of the vendor was enforceable against any successor in title of the original covenantor. It will be recalled that the defining consideration of Lord Cottingham in *Tulk v Moxhay* which warranted the granting of the perpetual injunction was that the purchaser from the covenantor had bought with notice of the restrictive covenant prohibiting building.

138. There is a significant factual overlap between *Tulk v Moxhay* itself and the instant case. Under the original 1808 instrument, the original purchaser covenanted with regard to retaining the ground and square garden (Leicester Square) *"... in an open state, uncovered with any buildings*". The defendant, successor in title to that original covenantor, purchased by way of a deed which contained no similar covenant with his vendor. However, he admitted that he had purchased with notice of the covenant contained in the 1808 deed. If anything, the Smiths are in a stronger position in the instant case than Moxhay was in 1848.

As the law was understood prior to 1848, the burden of such a covenant was incapable of running with freehold land. At that time there was clear authority from the courts of equity that notice of such a covenant did not confer upon a court of equity jurisdiction to enforce such a covenant by injunction against a successor in title to the original covenantor and that point had been decided by Brougham L.C. in *Keppell v Bailey* (1834) 2 My. & K. 517, at 547.

139. It is significant that the defendant in *Tulk v Moxhay* had purchased part only of the lands conveyed in 1808. Lord Chancellor Cottenham stated: -

> *"That this court has jurisdiction to enforce a contract between the owner of land and his neighbour purchasing a part of it, that the latter shall either use or abstain from using the land purchased in a particular way, is what I never knew disputed."*

That observation as I understand it is directed primarily to the original covenantor and covenantee and, of course, where the doctrine of privity of contract obtains.

He continues: -

> "*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 use it for any other purpose than as a square garden*."

The relevance of Notice

140. Sight must not be lost also of the rationale which drove Lord Cottenham to his conclusion;

> "*It is said that the covenant being one which does not run with the land, this court cannot enforce it; but the question is, not whether the covenant runs with the land but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased*."

Thus, Lord Cottenham attaches supervening weight to the doctrine of notice as well as other equitable principles.

141. In light of the extrinsic evidence and burden registered on Part 3 of Folio 4940F in March 1962 it is clear that the covenantor understood that he was acknowledging that the 1947 instrument created a restrictive covenant which was required to be disclosed on the Folio and which ran as a burden with the lands in Folio 4940 and which was annexed to the dominant lands when Bedford was registered as owner of the dominant lands. As such it bound the successors in title of the covenantor. Section 69(1)(k) of the Registration of Title Act, 1964 provided: -

> "(1) *There may be registered as affecting registered land any of the following burdens, namely –*
>
> '...
>
> *(k) Any covenant or condition relating to the use or enjoyment of the land or of any specified portion thereof.*'"

That subsection has been the subject of amendment by virtue of s. 48 of the Land and Conveyancing Law Reform Act, 2009, however same is not relevant in the context of any issue arising in this appeal.

142. It will be recalled that Lord Cottenham in *Tulk* observed: -

> "*That the question does not depend upon whether the covenant runs with the land is evident from this, that if there was a mere agreement and no covenant, this court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased.*"

The Lord Chancellor is there looking at the position of the original covenantor and the primary consideration in this transaction is whether, in his dealings with the original

covenantee by the mechanism of the 1947 assurances, coupled with the 1962 instruments assurances, an equity came to be attached to the burdened property in Folio 4940 that ran with and was binding on successors in title of the covenantor including Jackson Way and operated for the benefit of the entire of the lands retained by the original covenantee, namely Priorsland and the lands in Folio 1849. In my view, for all the reasons stated above, it is established that it did by implication.

Section 58(1) of the Conveyancing Act, 1881– Statutory Annexation

143. This subsection provides: -

> "(1) *A covenant relating to land of inheritance, of devolving on the heir a special occupant, shall be deemed to be made with the covenantee, his heirs and assigns, and shall have effect as if heirs and assigns were expressed."*

Wolstenholme's text (*supra*) published in 1913 observes at p. 130 concerning this subsection: -

> "*In cases other than those between landlord and tenant it is doubtful whether the obligation of any covenant not involving a grant runs with the land at law, independently of the Judicature Act, 1873 sections 2, 24, 25(11); see Austerberry v Oldham Sup; Knight v Simonds [1896] 2 Ch. 294, 297; Rogers v Hosegood ... but it does run in equity, except as against a purchaser for value without notice and with the legal estate, where the intention is clear that the assigns should be bound: see Tulk v Moxhay [1847] 2 Ph. 774, where the assigns were mentioned: Wilson v Hart [1866] 1 Ch. 463, where the assigns were not mentioned; and see Fawcett and Holmes [1889] 42 Ch. D. 150 where they were mentioned in the affirmative part of the covenant but not in the negative part: and provided that the covenant is merely restrictive of the user of land and can be enforced by injunction and imposes no pecuniary obligation*:"

It is further stated "*And there is some land to which the benefit of the covenant is annexed*". The decisions in *Haywood v Brunswick Building Society* (1881) 8 QBD 403 at 408, *London and South Western Railway Company v Gomme, Austerberry, Re Nisbet and Potts' Contract* [1905] 1 Ch. 371, *Wilkes v Spooner* [1911] 2 KB 473 are all referenced.

In *Wylie on Irish Land Law,* the author observes at para. 21.23 concerning s. 58: -

> "*The traditional view was that this provision was a mere 'word-saving' provision and was not intended to alter the common law rule. 'Heirs and assigns' were the appropriate words to use in 1881 to indicate that the benefit was intended to pass to successors in title. However, in England s. 58 of the 1881 Act was replaced by s. 78 of the Law of Property Act 1925, which uses the apparently wider phrase 'successors in title and the persons deriving title under him or them'. It has been suggested that this enables persons not succeeding to the same estate to enforce covenants. Section 58 of the 1881 Act is repealed as regards covenants entered into after 1 December, 2009 by the Land and Conveyancing Law Reform Act 2009. The replacement provisions in ss 48 and 49 of that Act make it clear that freehold covenants can be enforced by whoever holds for the time being the 'dominant' land benefitted by the covenant and for these purposes the 'dominant owner' includes 'persons deriving title from or under that person.'*"

S.78 of 1925 Act is not relevant

144. It is generally considered that in England the judgment of Brightman L.J. in *Federated Homes v Mill Lodge Properties* [1981] WLR 594 gave effect to a new doctrine of statutory annexation based on s. 78 of the Law of Property Act, 1925. It is urged on this court by the Smiths that there is no material distinction between the latter section of the English act and the operative relevant legislation in this jurisdiction, namely s. 58(1) of the Conveyancing

Act, 1881 which, though repealed by virtue of the Land and Conveyancing Law Reform Act, 2009 still applies as far as the subject instruments 1947/1962 in this case are concerned.

145. Once the benefit of the covenant was annexed to lands of the covenantee in the first instance, an express assignment of the benefit of a restrictive covenant is not necessary for same to run with the lands for the benefit of assignees of the dominant land such as the Smith lands. In such an event the benefit will pass automatically on a conveyance of the land, without express reference in the relevant assigning instrument because it is annexed to the land and runs with it. I respectfully differ with the trial's judge's analysis and reasoning in regard to the admissibility and legal import of the 1962 instruments which I am satisfied for all the various reasons stated in this judgment that the instruments must be read together and establish annexation of the covenant to Priorsland and Folio 1849 and that the burden runs with and bind successors in title of the covenantors.

146. An argument is advanced that the covenant came to be annexed to the entirety of the lands held by Mr. Murphy in 1947 and that this was achieved by act and operation of law including by statutory annexation pursuant to s. 58(1) of the Conveyancing Act, 1881.

147. I find the analysis of Brightman L.J. in *Federated Homes* (p. 604/605) persuasive – at least insofar as s.58 is concerned. He observed concerning s. 78 of the Law of Property Act, 1925 that "… *the wording is significantly different from the wording of its predecessor section 58(1) of the Conveyancing Act 1881*." I agree with that statement. He further noted that *"The distinction is underlined by section 78(2), which applies section 78(1) only to covenants made after the commencement of the Act."* He further observed "*Section 58(1) of the Act of 1881 did not include the covenantee's successors in title or persons deriving title under him or them, or the owner or occupiers for the time being of the land of the covenantees intended to be benefitted.*"

Brightman L.J. further observed in relation to s. 58 of the 1881 Act: -

> "*The section was confined, in relation to realty, to the covenantee, his heirs and assigns, words which suggest a more limited scope of operation than is found in section 78.*"

148. Viewing the English statutory measure (section 78) in its legislative context, it is necessary to have regard to the substantial developments that occurred in English land law following World War I. Those developments were alluded to by the House of Lords in *Beswick v Beswick* [1968] A.C. 58, when considering a different 19th Century statutory provision – s. 5 of the Real Property Act, 1845 - which had been repealed by Schedule 7 to the Law of Property Act, 1925 and replaced by s. 56 of the latter Act, observing: -

> "*Then came the great changes in the law of real property; the Law of Property Act, 1922, and the Law of Property (Amendment) Act, 1924. The researches of counsel have not revealed any amendment by those Acts to section 5 of the Act of 1845. The Law of Property Act, 1925 was a consolidation Act consolidating those and many earlier Acts…*"

I consider it of significance that in decisions made after the coming into operation of s. 58 of the Conveyancing Act, 1881 and prior to the 1925 Act - a period of over 40 years - or in English cases subsequent to 1925 where s. 58 of the 1881 Act continued to apply - at no time was it suggested that s. 58 in its operation was capable of achieving annexation of a covenant to lands retained by the covenantee where the original covenantor and covenantee had otherwise failed to achieve same, as for instance in *Forster v Elvet Colliery Company Limited & Ors.* [1908] 1 KB 629. Likewise, in *Miles v Easter* the Court of Appeal upholding the High Court did not in any sense suggest that s. 58 could statutorily and by operation of law achieve annexation. That provision would potentially have been relevant in *Miles* if it was amenable to such a construction since the conveyance containing the restrictive covenant under consideration had been created in 1908.

J. Sainsbury plc v Enfield concerned a deed created in 1894, whereby purchasers of the land entered into certain covenants with the vendor including that they would "… *not …do or permit to be done anything thereon which may be or become a nuisance annoyance or disturbance to the occupiers of neighbouring or adjacent premises…*". The issue was whether the benefit of those covenants was annexed to certain land retained by the vendor so as to be enforceable by successors in title to such retained land.

Morritt J. considered it necessary;

> "*in the light of the relevant circumstances to see whether the purchasers' covenants were given for the benefit of the retained land …*
>
> *The purchasers' covenants related to land of inheritance and consequently, pursuant to section 58(1) of the Conveyancing and Law of Property Act, 1881, are 'deemed to be made with the covenantee, his heirs and assigns, and shall have effect as if heirs and assigns were expressed.*'

149. Noting that it was not contended that the case concerned a building scheme nor that the benefit of the purchasers' covenants were expressly assigned on the subsequent sales of the retained land by the covenantee, Morritt J. continued: -

> "*It is common ground that the retained land was capable of being benefitted by the covenants and was sufficiently identified so as to enable annexation of the benefit of the covenants if annexation was intended. The requisite intention is that the covenants should enure for the benefit of the retained land: compare Miles v Easter [1933] Ch. 611, 628.*
>
> *The issues between the parties are;*
>
> 1. *From what facts or by what documents may such intention of annexation be inferred or expressed?*

2. *Is the requisite intention manifested by such facts or documents as may be considered?*
3. *Irrespective of intention, was the benefit of the covenants annexed to the retained land by virtue of section 58 of the Conveyancing and Law of Property Act 1881?"*

150. Morritt J. considered the decision of Brightman L.J. in *Federated Homes Limited v Mill Lodge Properties Limited* where the court decided that in the case of a covenant relating to land of the covenantee in the sense that it touched and concerned the said land, the effect of s. 78 of the 1925 Act was to cause the benefit of the covenant to run with that land and be annexed to it. He cited with approval the judgment of Brightman L.J., particularly at pages 604-605 of *Federated Homes* where it was held that the wording of s. 78 of the 1925 Act was "*significantly different from the wording of its predecessor section 58(1) of the Conveyancing Act 1881*." The judge noted that notwithstanding the decision in *Federated Homes*, the defendants sought to argue that s. 58 of the 1881 Act had the same effect at s. 78 of the 1925 Act. It was noted that: -

> *"The same point was taken in Shropshire County Council v Edwards, 46 P. & C.R. 270 but not decided."*

Morritt J. noted: -

> "*In Renals v Cowlishaw… and Reid v Bickerstaff [1909], … the covenants to which I have referred were entered into before section 58 of the .. 1881 [Act] came into force on 31st December 1881*."

Thus s.58 was of no relevance in those cases. The judgment makes clear that whereas the covenants under consideration in the cases *Ives v Brown* [1919] 2 Ch. 314 and *Miles v Easter* were entered into at a time when section 58 of the 1881 Act was in operation the section was not considered or referred to in either case. Further, although it was alluded to in the Court

of Appeal in *Forster v Elvet Colliery Co. Limited*, he observed that Forster "*was not concerned with annexation of the benefit of covenants relating to freehold land.*" Furthermore, whilst the judges in the Court of Appeal in *Forster* did make reference to s. 58, when the matter was subsequently appealed to the House of Lords, no reference was made to section 58 of the 1881 Act.

151. The Smiths take issue with observations of Morritt J. in *Sainsbury,* cited with approval by Keane J. at para 91 in the judgment under appeal, where he observed: -

> *".. in view of the date of the decision in Renals v Cowlishaw, it would be very surprising if by enacting in section 58(1) of the Act of 1881 that*
>
> > *'A covenant ... shall be deemed to be made with the covenantee his heirs and assigns, and shall have effect as if heirs and assigns were expressed.'*
>
> *Parliament intended to effect annexation when the Court of Appeal had already decided that such words if expressed did not suffice."*

152. Morritt J. further expressed the view that the overall effect of the amendments made by the Law of Property Acts of 1922 and 1924 was to cater for the difficulty expressed by Farwell LJ. In *Forster v Elvet Colliery Co. Limited* – where he had found that reading into a covenant the words in section 58(1) in respect of the deed under consideration in that case would mean "*[s]uch a covenant could not run with the land, but I do not think this can affect the right of the owners, as it has not been suggested that the covenant are with owners and occupiers jointly*."

153. Morritt J. further observed in regard to the decision in *Federated Homes*:

> "*The principle of that case cannot be applied to section 58 of the Act of 1881. There are no words in section 58 capable by themselves of effecting annexation of the benefit of a covenant. All that section did was to deem the inclusion of words which both before and after the enactment of section 58*

> *had, with the exception of Mann v Stephens, 15 Sim. 377, been consistently held to be insufficient without more to effect annexation of the benefit of a covenant.*"

Conclusions regarding s.58, 1881 Act

154. No valid basis has been identified for deviating from the well-established approach to the construction of s. 58(1) of the Conveyancing Act of 1881 as a deeming provision. The section deems covenants *".. to be made with the covenantee, his heirs and assigns"* so that they *".. shall have effect as if heirs and assigns were expressed".* There is nothing identified in the decisions in *Federated Homes Limited v Mill Lodge Properties* of the English Court of Appeal, or indeed the other authorities urged on the court, including *Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board* [1949] 2 KB 500, that would warrant deviating from the established construction of section 58. Even if the analysis of Brightman L.J. in *Federated Homes* is correct as regards s.78, a matter on which I express no view, the material distinctions - including but not limited to all of those identified by Brightman L.J. in *Federated Homes* - in the language and provisions of the two sections are of such significance that the proposition that the earlier section be construed by analogy with s.78, a construction that would have the effect of substantially aligning the effect and import of s.58(1) with the analysis of s.78 was never imposed on the subsection which was a part of the law for almost 130 years – and for instruments executed prior to 1 December 2009 remains so. The trial judge was correct in rejecting this line of argument. The principle in *Federated Homes* in that respect cannot be applied to section 58. Thus, I am satisfied that the appellants have not established that a statutory annexation of the benefit of the covenant by virtue of s.58.

<u>Section 6 of the Conveyancing Act, 1881</u>

155. Section 6 of the 1881 Act operates as a statutory deeming clause applicable to conveyances coming within its operation.

> "6(1) *A conveyance of land shall be deemed to include, and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof."*

The section does not enlarge the rights of a purchaser under a contract and takes effect subject to any contrary intention appearing on the face of the deed. The position has since the repeal of s. 6 come to be governed by s. 71 of the Land and Conveyancing Law Reform Act, 2009.

156. With regard to the Smiths' arguments that s. 62 of the Law of Property Act, 1925 (a successor provision to s. 6 of the Conveyancing Act, 1881) was effective to carry the benefit of a personal restrictive covenant, I do not agree that they afford any assistance to the Smiths. Rubin J. observed in *Shropshire County Council v Edwards* that whilst both sides in the case before him sought comfort from *Federated Homes Limited v Mill Lodge Properties Limited*, on the issue of s. 62 of the 1925 Act, (which reiterates s. 6(1) of the 1881 Act): -

> *"The inference I draw is that all three members of the Court of Appeal [in Federated Homes] decided to remain silent on this highly debatable point under section 62, since a determination was not necessary for the decision of the case before them. I propose to follow their example."*

157. As Neil Maddox in his text, *Land and Conveyancing Law Reform Act 2009: A Commentary* (Round Hall, 2009) observes in his annotation to s. 71 of the 2009 Act: -

> "*This section re-enacts section 6 of the Conveyancing Act, 1881 subject to some alteration. Section 6 was designed to reduce the number of words which were necessary to include in a conveyance of land and to make unnecessary the inclusion of a long list of the rights included in the conveyance.*"

158. I am satisfied that, as noted by Wylie & Woods, *Irish Conveyancing Law*, section 6 of the 1881 Act operated to imply into conveyances the descriptions and matters specified in the section. Wylie in the second edition of that work stated at para. 18.54: *"This section was included in the Act in furtherance of its policy of shortening conveyances."* It did not operate in the manner contended for by the appellants and did not obviate the necessity of using appropriate words to expressly at the point of its creation annex the benefit of a restrictive covenant for the benefit of the lands retained by the covenantee which it was intended to benefit. I have been unable to find any authority where section 6(1) of the Conveyancing Act, 1881 has ever been applied in the manner contended for by the Smiths. This ground of appeal fails also.

<u>The running of the benefit of a restrictive covenant with the dominant lands</u>

159. Thomas V. Murphy was entitled to sue the original covenantor under the rules of privity of contract. Further, he was entitled to sue successors in title of the original covenantor if the burden had passed to them. The right to sue to enforce the benefit of a covenant is contingent on the covenantee retaining some or all of the lands and that the said lands are capable of benefitting from the covenant. The principle of touching and concerning land derives from the rules of common law, annexation is a principle derived from equity. The principles are to a significant extent interchangeable as the judgments in *Rogers v Hosegood* illustrate.

Entitlement of assignee from dominant owner to enforce a Restrictive Covenant

160. There are but three valid ways in which a landowner who is not the original covenantee and is successor in title to lands of the said covenantee is entitled to the benefit of the restrictive covenant;

1. As assign of the lands to which the covenant was previously validly annexed.
2. As an express assign of the benefit of the covenant taken from the original covenantee with some or all of the dominant lands.
3. Pursuant to the operation of a scheme of development.

There was no initial express assignment of the benefit of the covenant to any successor in title of the original covenantee. Neither does a building scheme fall to be considered on the facts of this case. The sole aspect for consideration was whether the Smiths, as *per* 1 above, are entitled to assert that when they took an assignment of the Smith lands, they did so with the benefit of the covenant annexed to same. Hence in the absence of establishing implied annexation, this ground of appeal must fail.

<u>The passing of the benefit of a restrictive covenant</u>

161. Whereas arguments on the issue abound in the academic literature including in the writings of Professor Gray, Professor of Law, University of Cambridge as for example *Elements of Land Law* (5th edn., Oxford University Press, 2008) at paras 3.3.4 and 3.3.8 on the one hand and Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies* (5th edn., LexisNexis Butterworths, 2014) on the other, there is nothing to be gained from embarking on an overly detailed analysis of these varying views. Suffice to say that from the Irish perspective, to ensure enforceability the successor in title to the covenantee should have "*a like estate*" in some part of the lands that benefitted from the original covenant. Further, there is no established basis for placing reliance on the provisions of the Superior Courts of Judicature Ireland Act, 1877, as some authors suggest, it being now well established in this

jurisdiction that the said statute merely at best fuses the administration of law and equity but the two systems remain substantially separate. Thus, it continues to be the law that, provided the restrictive covenant "*touches and concerns*" the land of the covenantee the burden of the covenant passes in equity whereas the benefit passes at law.

Megarry and Wade (*opus cit.*) at para. 16-057 observed in regard to the relevant statute: -

> *"…it ought to make no practical difference whether the benefit passes under the rules of law or of equity, since the same court can enforce both.*"

162. Referring to the decision in *Rogers v Hosegood* [1900] 2 Ch. 388 Megarry and Wade observe (para. 16-057): -

> *"In one leading case the court was prepared to allow the benefit to run with the benefitted land at law even where the defendant, being a successor of the covenantor, was liable only in equity. Equity here merely follows the law.*"

Intention of the parties

163. The Court of Appeal, upholding the said decision in a judgment of the court read by Collins L.J., identified the intention of the parties as being critical to the issue of annexation:-

> "*A difficulty, …, in giving effect to this view arises from the fact that the covenants in question in the deeds … were made with the mortgagors (sic) only, and therefore in contemplation of law were made with strangers to the land … to which, therefore, the benefit did not become annexed. 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 the 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. We think this is the plain result of*

> *the observations of Hall V.-C. in the well known passage in Renals v Cowlishaw … of Jessel M.R. in London and South Western Railway Co. v Gomm … and of Wood V-C in Child v Douglas, which, we agree with Farwell J., are untouched on this point by anything decided in the subsequent proceedings in that case*."

164. In England since the decision in *Federated Homes Limited v Mill Lodge Properties Limited* many of the rules of equity have become irrelevant. Nevertheless for reasons stated in this judgment, I am satisfied that the decision in *Federated Homes* cannot be availed of by the Smiths. No statutory alchemy of the kind contended for on behalf of the Smiths can be derived from either s. 6 or s. 58 of the Conveyancing Act, 1881.

165. Therefore, the rules of equity governing the running of the benefit of a restrictive covenant with the benefitting land must be and were complied with before it can be demonstrated that Jackson Way hold the lands in Folio 4940F subject to the burden of the covenant, in particular, that the Smiths are assigns of the freehold estate in the land to which the benefit of the covenant was annexed.

166. I do not think it to be controversial ultimately on the facts of this case in light of the extrinsic evidence I consider to be admissible, applying "*common sense*" in the mode of Wilberforce J. in *Marten,* to conclude that it is shown that the Smith lands are in part of the dominant lands Priorsland and Folio 1849 and the covenant is capable of benefitting and did "*touch and concern*" the said lands and the covenantor intended the benefit to run with and bind the lands in Folio 4940 for the benefit of assigns of the original covenantee – such as Bedford.

The running of the benefit and burden in equity

167. *Wylie on Irish Land Law* makes reference to *Renals* as follows;

> *"The plaintiff could show that he owned some interest in the land benefited by the covenant and that the benefit had been expressly assigned to him, or at least that*

> *when he acquired the land it was agreed between him and the assignor that he was to have the benefit of the covenant*." (para. 21.31) (emphasis added)
>
> "*It was* not *enough simply for the covenant to be made with the covenantee 'his heirs and assigns', since this did not necessarily relate to a particular piece of land*." (para. 21.35) (emphasis in original)

The 1962 dealing and the execution by Bedford is probative of the fact that Bedford was intended to have the benefit of the covenant when the title vested in it in 1956.

The 1962 dealing

168. The approach of the court where, as here, the deed does not expressly annex the benefit of the covenant being created to any lands and where it is not expressed to be personal to the covenantee is illustrated by Bennett J. in *Miles v Easter* otherwise referred to as *Re Union of London and Smiths Bank Limited Conveyance* [1933] Ch. 611, whose judgment was upheld on appeal where no fault was found with his approach to that aspect. In that case the deed had been executed in June 1907. In the context of determination of the issue as to whether there had been an implied annexation of the benefit of the restrictive covenant to the sold lands the court observed at p. 632: -

> *"I will assume in favour of the defendants that the purchasers' covenants were entered into for the benefit of protection of land owned by the Shoreham Company on October 23, 1908. I can find nothing in the deed to define the property for the benefit of which the covenants were entered into*." (emphasis added)

169. This is illustrative of the fact that restrictive covenants are generally expected to be intended to benefit land rather than be personal in nature unless the contrary is stated. The documents and material comprised in the 1962 dealing independently corroborate the common intention of the parties to the 1947 Deed to so effect annexation to the entire of the retained lands of the vendor so as to run with and bind the successors in title of the

covenantor who thereafter became owners of servient lands in Folio 4940. I am satisfied that the 1962 evidence, including procurement of the necessary execution by Bedford, a successor in title to the covenantee, of the deed in all the circumstances so establishes that it binds the respondent as successor in title to the covenantor and for the reasons outlined below the 1962 dealing and all its constituent documents are receivable in evidence. Whether by virtue of extrinsic evidence, estoppel by deed and/or by conduct or by virtue of the equitable doctrine of election or any or all of same not alone is annexation to be implied but also its operation so as to bind the successors in title to the original covenantor.

The 1962 instruments

170. The two 1962 instruments, read together when considered in the light of surrounding and all attendant circumstances, including:

a. The joinder of Bedford in the deed;

b. The active acceptance and acquiescence of the covenantor in the averments in the affidavit of the covenantee;

c. The reliance upon and lodgement by the Covenantor in March 1962 of both Deed and Affidavit together in the Land Registry in respect of the creation of a modified burden in Part 3 of the Folio fall to be read together,

establish that the covenantor effectively bound himself and his successors in title as owners of Folio 4940 with the burden of the covenant and that it was intended as a burden to run with the lands – save to the extent to which same was expressly modified by Bedford and the original covenantor in 1962.

Counsel for the Smiths correctly laid a good deal of emphasis on the fact that both 1962 documents were an integral part of the “instrument” registered in the Land Registry in 1962 to give effect to the burden which achieved not alone a modification of the burden from the covenantor’s perspective but also for the benefit of the covenantee and his successors in title,

a binding acknowledgment as to the extent of the lands in respect of which there was a continuing common intention to benefit from the restrictive covenant as including Priorsland and Folio 1897 and that it was intended to and did ran with the covenantor's lands so as to bind him and his successors in title. There is force in that argument on the unusual facts of this case where the original parties entered upon a subsequent conveyancing transaction in 1962 and thereby both acknowledged the common intention of the parties to the 1947 deed and varied same in part.

Implied annexation "surrounding circumstances" and " common sense"

171. *Megarry and Wade*, referred to above make clear that annexation of a covenant to dominant lands can be gleaned from a construction of the instrument creating it and having regard to the surrounding circumstances. The unusual feature in the instant case is that the original covenantor and covenantee executed a later instrument in 1962 and the covenantor deposed the affidavit which the covenantor accepted and lodged. It is those documents collectively that fall to be considered in light of the surrounding circumstances in determining that implied annexation did take place. At para. 16.062 the authors observe: -

> *"It has now been clearly recognised that annexation may be implied rather than express."*

The decisions in *Shropshire County Council v Edwards, Sainsbury Plc v Enfield LBC* at 597, *Re W & S (Long Eaton) Limited* (1989), [1994] J.P.L. 840 and the Privy Council decision of *Jamaica Mutual Life Assurance Society v Hillsborough Limited* [1989] 1 W.L.R. 1101 at 1105 and 1106 are cited.

The authors continue –

> *"Although express words of annexation are highly desirable they are not necessary."*

172. In that regard the decision of Wilberforce J. in *Marten v Flight Refuelling Limited* [1962] Ch. 115 at 133 is cited as authority for the proposition that where the connection with

the benefited land is obvious, to insist upon express words would involve "*not only an injustice but a departure from common sense*". The principle of having regard to "*common sense"* or *"business common sense"* in the construction of a formal legal instrument has found clear support in the decision of the Supreme Court in *The Law Society of Ireland v M.I.B.I.* [2017] IESC 31, including that of O'Donnell J. (as he then was) where he cites with approval the dictum of Diplock L.J. in (as he then was) in *Gurtner v. Circuit* [1968] 2 Q.B. 587 that "… *if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense*." That narrow principle does apply to the course of dealing engaged in by the original covenantee and original covenantor in ascertaining the true common intention of the parties and the identity of the lands intended to benefit from the covenant. The evidence in my view shows, that the covenant was annexed to the dominant lands and bound the servient lands and successors in title of the covenantor and by lodging the documents intrinsic to the 1962 dealing fixed successors in title and all interested parties with notice that the covenant was annexed to the said dominant lands and ran with same so as to bind successors in title of the covenantor, including Jackson Way.

173. The Smiths sought to place reliance on a line of authority which might conveniently be suggested to have derived from the decision of Lord Hoffmann in *Investors' Compensation Scheme Limited v West Bromwich Building Society* [1998] 1 WLR 896 which in substance contended that a broad approach be taken to the admission of extrinsic evidence and interpreting in particular the 1947 deed as amended. The said decision has given rise to a substantial corpus of authorities, both in this jurisdiction and in the neighbouring jurisdiction including the landmark decision of the *Law Society of Ireland v M.I.B.I. (supra)* where O'Donnell J. aptly observed at para. 1: -

> "*The legal ideal aspires to clarity, certainty and precision, but much of the business of the courts, particularly in the interpretation of contracts or statutes involves a consideration of ambiguity*."

174. Care and reserve needs to be exercised in applying the full spectrum of that line of jurisprudence to the construction of a deed, having regard to the significant consequences attending on such transactions and, in particular, the fact that third parties come to rely on such deeds and Land Registry dealings in the context of creating securities, settlements and in the creation of incorporeal and other rights over same, such that a cautious approach is warranted to the implication of terms into such instruments.

175. However, the Supreme Court has made clear in *Law Society v M.I.B.I.* that to achieve justice between the parties, relevant documents are to be considered in light of the material context. In *Desmond Murtagh Construction Ltd. (in Receivership) and Ors. v Hannon* [2014] IESC 52 McKechnie J. observed, in the context of resolving a dispute in a conveyancing transaction: -

> "61. *This issue, which is one of interpretation, falls to be decided by reference to the appropriate principles which in my view were set out concisely by Keane J. in Kramer v. Arnold [1997] 3 I.R. 43 at pg. 55 where the learned judge said:*
>
> > *'In this case as in any case where the parties are in disagreement as to what a particular provision of a contract means, the task of the Court is to decide what the intention of the parties was, having regard to the language used in the contract itself and the surrounding circumstances.'*
>
> *The approach therefore is to have regard to the nature of the document in question and to consider the words used, by reference to the context in which they are stated."*

Those cases are not inconsistent with the dictum in *Marten v Flight Refuelling* and are applicable to the facts of this case. Further, where, as here the 1947 Deed was reformed by

the 1962 Deed, Affidavit and dealing to give effect not alone to the agreed modification of the burden of the covenant but also to expressly confirm the both the original covenantor and original covenantee had the same actual common intention in 1947 with regard to creating a restrictive covenant to be annexed to and for the benefit of Priorsland and Folio 1849 and the benefit to run with the said lands and the burden to bind Folio 4940 and the original covenantor's successors in title, the 1947 Deed was required to be read and understood with and subject to the 1962 Deed, Affidavit and dealing and subject to the latter. The decision of Hardiman J. in *Boliden Tara Mines v Cosgrove & Ors.* is entirely more relevant than the line of authorities relied upon by the respondent and derived from *Investors' Compensation Scheme Limited v West Bromwich Building Society* [1998] 1 WLR 896. *Boliden Tara Mines v Cosgrove,* which is binding on this court and cites with approval *Joscelyne v. Nissen* [1970] 2 QB 86, is more apposite and necessitates that the covenant in the 1947 Deed must be read with the 1962 Deed, the 1962 Affidavit and all documents as formed part of the *instrument* and dealing registered in the Land Registry in 1962 in order to determine the respective rights of the parties and the continuing common intention of the original covenantor and original covenantee by the said 1962 instruments and dealing irrevocably acknowledged to which the parties hereto, their respective successors in title, are bound in equity both as to the benefit and the burden.

Equitable doctrine of election

Part of the dominant lands – ***touch and concern***

176. The covenant did and does *touch and concern* the land since the covenant inherently affected the value of the land and increased and enhanced the marketability of the covenantee's interest in the land, *"the question which has to be determined in all such cases is: may the land to which the benefit purports to be attached be reasonably regarded as*

capable of being affected by the performance or the breach of the obligation in question, as the case may be?"

177. For my part, having considered the detailed and thorough analysis to be found in successive editions of *Wylie's Irish Land Law* and Wylie and Woods on *Irish Conveyancing Law* on the statutory effect of ss. 6, 58 and 63 of the Conveyancing and Law of Property Act, 1881, I have no difficulty in concluding where, as here, the covenant was already validly annexed to the entire lands of the covenantor/ Bedford and inhered in the dominant lands on the date on which same were sold on to subsequent purchasers, the combined operations of ss.6, 58 and 63 of the 1881 Act operated to automatically carry the benefit of the restrictive covenant as integral to each such assurance and vest the benefit of same in the purchaser as integral to ownership of the purchased part of the dominant lands without any express words to that effect in the deed. Those sections did not create any new interests and could not avail the appellant as regards the construction of the 1947 Deed as a basis for asserting statutory annexation *ab initio*. However, once implied annexation was established to have occurred – as it clearly did in 1962 – the sections were effective thereafter to carry the benefit of the already annexed covenant with each assurance of part unless express words to the contrary were found in the assurance and there are none such.

The substance of s. 63(1) of the Conveyancing Act, 1881 provides:

> "*Every conveyance of shall, by virtue of this Act, be effectual to pass all the estate, right, title, interest, claim, and demand which the conveying parties respectively have, in, to, or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same."*

The restrictive covenant was an interest in the lands in sale which the vendor had title and power to convey and thereby automatically passed in the absence of words to the contrary in the deed.

178. Since the covenant inhered in the dominant lands at the time of sale by the original covenantee/ Bedford, it was enjoyed with the land *"at the time of the conveyance*" within s.6 and therefore being in the nature of a privilege, right or advantage appertaining to or reputed to appertain or enjoyed with the lands conveyed automatically passed to the purchaser by the general words implied into all conveyances by s.6.

179. The effect of s.58 of the Conveyancing Act, 1881 is more restrictive but nonetheless it is available to the appellants because they took the same estate as the original covenantor – a freehold registered title. By virtue of the operation of s.58(1) there is a presumed intention ascribed to the vendor that the benefit of the covenant annexed to the property purchased would run with and vest in the purchaser of part. The practical consequences of the combined effect of the said statutory provisions is that since the covenant "*touched and concerned*" the part of the lands purchased by the Smiths and was not merely collateral to it, the benefit of the covenant remained annexed to and inhered in the Smith lands and every part thereof at the date of purchase no evidence of a contrary intention on the part of the vendor having been proven. Jackson Way's arguments to the contrary are unsustainable.

180. If we go back to Lord Cottenham LC at p. 778 of the judgment in *Tulk v Moxhay*, he succinctly sets forth the position which in my view applies to successors in title of the covenantor on the established facts in this case.

> "*If an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased.*"

181. A construction that tends towards extinguishment of the benefit of a restrictive covenant merely because the dominant owner previously exercised their lawful entitlement to effect a disposition of part only or to partition the benefiting lands does not appear to be warranted. There are several subsequent authorities demonstrating that at all material times from and

after the decision in *Tulk v Moxhay* it was uncontroversial but that the burden of a restrictive covenant ran with all parts of partitioned burdened lands. Such cases include *Morland v Cook* (1868) L.R. 6 Eq. 252 and *Cooke v Chilcott* (1876) 3 Ch. D. 694.

Ascertainment of identity land intended to benefit where implied annexation arises

182. There was a good deal of argument concerning the standard of proof required to establish the identity of the particular lands of the covenantee to which annexation of the benefit was intended to take place. In *Shropshire County Council v Edwards* Rubin J. suggested, citing earlier authority, that same be "*clearly established"*. The trial judge, whilst observing that he had no difficulty in accepting as good law the decision in *Marten v Flight Refuelling Ltd*, distinguished same from the instant case favouring the line of authority advanced on behalf of the respondent which relied, *inter alia*, on *Miles v Easter*, where Romer L.J. considered that an intention to benefit other land of the vendor would be readily inferred;

> "*…where the existence and situation of such land are indicated in the conveyance or have been otherwise shown with reasonable certainty, it is impossible to do so from vague references in the conveyance or in other documents laid before the Court as to the existence of other lands of the vendor, the extent and situation of which are undefined*."

183. He also cited Upjohn J. in *Newtown Abbot Cooperative Society v Williamson & Treadgold Ltd* where the judge observed at p.283 "*…the land for the benefit of which it is taken must be clearly identified in the conveyance containing the covenant."*

Decisions of the English Courts are of limited assistance on the issue, as is illustrated by the decision of the English Court of Appeal in *Bath Rugby Ltd v Greenwood* [2021] EWCA Civ. 1927 (delivered after this appeal was heard), where three distinct views were expressed including Nugee L.J.;

"51. I accept that there is no particular formula required."

Nugee L.J. considered that whilst no particular formula was required the exercise remained one of interpreting the document not of inferring intentions from surrounding circumstances alone.

On the other hand, King L.J. in that case considered that the land intended to benefit should be defined in the instrument so as to be *"easily identifiable"*

184. In *Marten*, Wilberforce J. had considered a series of decisions supporting the position that the benefit of a restrictive covenant can be annexed to the retained lands benefiting lands of the covenantee notwithstanding that no express words of annexation were used in the original deed creating the restrictive covenant. In that regard he cited Swinfen Eady M.R. in *Westhoughlon Urban District Council v Wigan Coal and Iron Co. Limited* [1919] 1 Ch. 159, Court of Appeal, *Renals v Cowlishaw*, *Rogers v Hosegood* and other decisions. He also considered *Miles v Easter* [1933] Ch 611, at 619 and then stated at p. 131 -

> "*It shows that the court's opinion was that the existence and situation of the land to be benefited need not be indicated in the conveyance, provided that it can be otherwise shown with reasonable certainty, and the natural interpretation to place on these latter words is first that they may be so shown by evidence dehors the deed, and secondly, that a broad and reasonable view may be taken as to the proof of the identity of the lands. This general approach would, I think, be consistent with the equitable origin and character of the enforcement of restrictive covenants, which should not be constricted by technicalities derived from the common law of landlord and tenant.*"

That approach readily accords with the approach of the Supreme Court in *Law Society v M.I.B.I.* and the other decisions of that court referred to above and is applicable in the instant case.

185. The suggestion in some authorities such as *Marquess of Zetland v Driver* that the land intended to be benefitted should be "*easily ascertainable*", a remark which also found favour in the judgment of Chadwick L.J. in the English Court of Appeal in *Crest Nicholson Residential (South) Limited v McAllister* [2004] 1 W.L.R. 2409, may be viewed as an approach not in line with any identified Irish jurisprudence where the burden of proof in a civil matter such as this is to establish the identity, nature and extent of the lands intended to be benefited by the annexation of the covenant and which was retained by the covenantee on the balance of probabilities. Aphorisms such as "*easily ascertainable*" are freighted with subjectivity, subject to significant variation and lack certainty and clarity, matters which are undesirable in the context of conveyancing. I do not think that the line of authority relied upon represents good law in this jurisdiction, nor has any basis been identified for deviating from the well-established civil burden of proof.

186. In my view the property rights of the parties in this case fall to be determined in accordance with of the general principle expressed in *Renals v Cowlishaw* - to *"enable an assign to take the benefit of restrictive covenants there must be something in the deed to define the property for the benefit of which they were entered into"* but with due regard to developments in the law including law of evidence and the applicability of equitable principles as same has evolved over the ensuing 145 years.

187. The language in *Renals* is directed to ascertainability of the benefitting lands and a subsequent line of authority veering towards formulations connoting total or absolute certainty as to the identity of the lands to which the benefit is annexed cannot be said to derive from any express statement in *Renals* itself. Such formulations (e.g. *clearly ascertainable)* are unduly technical and narrow and do not accord with the burden of proof in civil claims in this jurisdiction and the relevance of the principle of equity that is engaged that *equity looks to the intent rather than the form.* They post-date independence. The

appropriate interpretative approach now is informed also with due regard to s.2(1) and (2) of the European Convention in Human Rights Act, 2003 in light of Article 1 of the First Protocol to the Convention. The approach to ascertainment of property rights of parties to litigation is also informed by the relevant provisions in the Constitution including Articles 40 and 45. I am satisfied that there is force in the dictum of Wilberforce J. in *Marten* cited by the trial judge.

188. I am not satisfied that it is distinguishable in the manner considered by the trial judge, however. The holding on the facts of this case (which concerns a dwelling house and curtilage in the three Smith folios) contrasts starkly with the 7,500 Acres comprised in the Critchel Estate under consideration in *Marten*. In light of the unequivocal subsequent acts and deeds of the parties in 1962, coupled with the extrinsic evidence outlined above, such an approach is not warranted in light of the conduct of the covenantor in 1962 as outlined above. To ignore or exclude the said evidence would involve a significant injustice to the appellants and be a clear departure from common sense.

No requirement at law that the deed must identify lands to which benefit is annexed

189. The Smiths place reliance on the fact that the principle that the deed creating the covenant ought to expressly identify the benefitting lands of the covenantee was rejected by the English Court of Appeal in *Smith and Snipes Hall Farm Limited v River Douglas Catchment Board* [1949] 2 KBD 500 at p. 508 where Tucker L.J. observed: -

> "*As to the requirement that the deed containing the covenant must expressly identify the particular land to be benefitted, no authority was cited to us and in the absence of such authority I can see no valid reason why the maxim 'Id certum est quod certum reddi potest' should not apply, so as to make admissible extrinsic evidence to prove the extent and situation of the lands of the respective landowners adjoining the Eller Brook situate between the Leeds and Liverpool Canal and the River Douglas.*"

In that case as Lord Denning observed at p. 517: -

> "*It is true that the agreement did not describe the lands by metes and bounds, but it did give a description of them which was capable of being rendered certain by extrinsic evidence; and that is sufficient*."

However, I do not find that decision particularly helpful since to a significant extent the reasoning is bound up with s.78 of the Law of Property Act, 1925 which has no application in this case. Further it appears to me that it has received mixed reviews in courts in other jurisdictions. I reference it only because the appellants complain that it was not referenced by the High Court Judge. I see no basis for faulting his judgment in that regard, however.

Sale of Part

190. Jackson Way contends that the covenant, if established to have been annexed, is unenforceable since the Smith land now comprises only part of the lands that originally benefitted from same. A series of authorities are offered, but in my view, they are wholly distinguishable as they concern extensive estates and where it could not be shown that at the time of creation of the covenant it was intended to benefit the entire land. For all the reasons stated above I am satisfied that contention is not correct and the annexed covenant did not cease to inhere in the dominant lands by subsequent subdivision of the dominant lands.

191. Jackson Way places reliance on the decision in *Re Ballard's Conveyance* [1937] Ch. 473, an authority for the proposition that extrinsic evidence as to the capacity of the estate retained to benefit from the covenant is admissible *i.e.* the identity of the lands of the covenantee, but that such evidence is not admissible to show an intention to benefit the estate. The latter decision is wholly distinguishable from the facts in the instant case and further is of doubtful authority in this jurisdiction, particularly insofar as it purports to suggest that the benefit of the covenantee's restrictive covenant will not operate for part only

of the retained lands of the original covenantee in the particular circumstances obtaining in this case for all the reasons stated above.

192. It was contended on behalf of Jackson Way that for the restrictive covenant to have survived and be enforceable by the respondent against the appellant as owner for the time being of the servient lands, the fact that the retained lands in 1947 as comprised part of the lands in Folio 1849 having been over time subdivided and sold off, the covenant no longer survives or affects the residue of the lands as now comprise the Smith lands. It appears to me that, for the reasons stated above, undue weight and an unduly narrow construct is being accorded to one aspect of the judgment of James L.J. in the Court of Appeal in *Renals v Cowlishaw* which comprises in all less than half a dozen sentences and it is clear that the Court of Appeal concurred with the judgment of Hall V.C. Hence, some caution is to be taken in interpreting or construing the *ex tempore* Court of Appeal judgment beyond its affirmation of the decision of the lower court. In fact Hall V.C. clearly countenances the disposition by the covenantee of part of the lands to which a restrictive covenant is annexed and the benefit passing and it is noteworthy for instance that he observes: -

> *".. Whether the purchaser is the purchaser of all the land retained by his vendor when the covenant was entered into, is also important. If he is not, it may be important to take into consideration whether his vendor has sold off part of the lands so retained, and if he has done so, whether he has so sold subject to a similar covenant: whether the purchaser claiming the benefit of the covenant has entered into a similar covenant may not be so important."*

193. Once the benefit of the restrictive covenant is validly annexed to the covenantee's lands - as it has been established by implication and as was acknowledged by the original covenantor and covenantee in 1962 in a manner which binds the covenantor's successors in title for the benefit of the covenantee's successors in title, it runs with the said lands and

every part thereof. *Renals* is not authority for the indivisibility of the dominant lands as a prerequisite to the running of the benefit of a restrictive covenant on a sale to a subsequent purchaser.

194. In my view, having due regard to the provisions of section 6 of the Conveyancing Act, 1881 in circumstances where the said provision was applicable and operative when the original covenantor and original covenantee disposed of their respective interests in the dominant and servient lands, it appears to me that the benefit of the restrictive covenant which was already validly annexed by implication to the part sold along with the parts being retained of the covenantee's lands ran with the sold part of the benefiting lands by operation of law. No satisfactory evidence establishes that the covenant was not capable of benefiting the entire of the Smith lands. Folio 1849 is incorporated into Priorsland now. The rights under the covenant which inhere in the land, in my view, are captured by the deeming effect of s. 6 at the time of sale by Bedford in 1964 but do not enlarge the rights of the original covenantee or a purchaser from the original covenantee.

195. The decision in *J. Sainsbury Plc. v Enfield* turns on its own facts and in particular the approach taken by the High Court (Morritt J.) to the surrounding circumstances said to prevail at the date of creation of the annexation of the restrictive covenant to the retained lands of the covenantee in 1894 are wholly and materially different to the facts in the instant case. In particular, in *J. Sainsbury Plc* there was clear evidence that the covenantee at the time of creation of the covenant did not intend to retain any land at all but was in the business of effecting a sale and disposition of the entire which was an extensive estate in the due administration of the estate of the deceased registered owner. No part of the lands was retained at all nor were such parts ever been intended to be retained by the original vendor who sold in his capacity as legal personal representative.

196. That crucial fact fundamentally distinguishes the decision in *J. Sainsbury Plc* from the instant case, where the original covenantee retained Priorsland and Folio 1849 continued in beneficial occupation and possession of the lands.

197. Although the trial judge cites at para. 40 the decision of Greene L.J. in *Drake v Gray* [1936] Ch. 451, there is also in that case the observations of Romer L.J. at p. 465:

> *"Most of the cases that have come before the Court have been cases where a covenant has been entered into by a vendor for the benefit of, say, the A.B. estate for the time being. There, of course, no intention is shown that the benefit should enure for any particular part of the estate; but where one finds not "the land coloured yellow" or "the estate" or "the field named so and so" or anything of that kind, but "the lands retained by the vendor," it appears to me that there is a sufficient indication that the benefit of the covenant enures to every one of the lands retained by the vendor, and if a plaintiff in a subsequent action to enforce a covenant can say: "I am the owner of a piece of land that belonged to the vendor at the time of the conveyance," he is entitled to enforce the covenant. For these reasons it appears to me that Luxmoore J. arrived at a right conclusion, and that this appeal fails."*

198. The continuing common intention to annex the covenant to both Priorsland and Folio 1849 in the instant case, as demonstrated by the 1947 and 1962 Deeds coupled with the 1962 affidavit, provide, in my view, a "*sufficient indication*" that the benefit of the covenant was intended to enure to the entire of Priorsland and so much of Folio 1849 as is now owned by the appellants and which is incorporated into the curtilage of Priorsland. The natural inference of the affidavit of 1962, accepted and lodged by the covenantor, is that it was designed to benefit Priorsland as a whole as well as Folio 1849. Were it necessary to do so, I am satisfied that the tenor of the annexation was effective to achieve annexation to each and every part of Priorsland and Folio 1849 retained and owned by the covenantee in 1947.

199. A construction supporting the proposition that disposal of part leads to loss of the benefit of the covenant - in the absence of words in the assurance by the covenantee to a purchaser of part to that effect - is not supported by any Irish authority opened to the court and runs counter to the constitutional guarantee accorded to private property under Article 40.3.2 and Article 43 of the Constitution. The covenant is a vested right standing separate from the title to the land itself. Once annexed it runs with the land on subsequent assignment including assignment of part. The dictum of Romer L.J. in *Miles v Easter* at 628, insofar as it contradicts earlier authority ought not to be followed in this jurisdiction. To hold that the purchaser of part could be divested of a property right which has been held since *Re Nisbet and Potts' Contract* [1906] to constitutes an equitable interest in land and which inheres in its ownership based on what were correctly considered by Browne-Wilkinson V.C. in *Allen v Veranne Builders Ltd* (1988) NPC 11 to be merely *obiter* remarks in *Miles v Easter* would run counter to the constitutional protections afforded to private property and require a construction of the nature of the property rights inherent in a restrictive covenant in an manner not compatible with Article 1 of the First Protocol to the European Convention on Human Rights.

200. The scope and ambit of the covenant was uncertain in *Re Ballard's Conveyance.* The case is entirely distinguishable and does not assist the respondent. It is authority for the proposition that where a restrictive covenant purports to have been annexed to land so as to run with it, and which does not or cannot or is incapable, on the facts, of "*concerning or touching* " the part or parts of the land, the annexation is ineffective, and the covenant does not run with the land on a sale of part and cannot be enforced by any owner of the land other than the original covenantee. It is entirely distinguishable from the instant case in circumstances where the holding in *Re Ballard's Conveyance* comprised 1,700 acres.

201. Further, I am satisfied that, in contrast both to *Re Ballard's Conveyance* and *Drake v Gray,* the covenant did in fact "*touch and concern*" the entire and every of the lands Priorsland and Folio 1849 owned by Thomas V. Murphy in 1947 and every part of same was capable of benefitting from same or was otherwise in equity annexed to the entire of the lands retained by the original covenantee in 1947. The 3 Folios as now comprise the Smith lands are occupied as one single unit. Thus on the facts of this case the position is governed by the decision of *Rogers v Hosegood* where the English Court of Appeal made clear in considering and applying the *Renals* doctrine to the facts before it, that once the benefit of the restrictive covenant had become clearly annexed to one piece of land, and in my view it did, and was clearly affirmed and acknowledged in 1962, there is a presumption that it passes by an assignment of that land without proof of special bargain or representation (p. 408). That presumption has not been rebutted by the respondents. The court's view was that *"it inheres or is annexed to the land"*. The benefit of the restrictive covenant inhered in and was annexed to the entire of the 1947 retained lands. Further it is clear from the language used in the 1962 Affidavit, in light of the relatively compact size of the retained lands (when compared to holdings under consideration in authorities being relied upon by the respondent; e.g. *Ballard's Conveyance*) that the covenant was annexed for the benefit of the entire of the retained lands and every part thereof and was intended and was in fact *ab initio* annexed to the entire scope and ambit of the lands intended to benefit.

Conclusions

202. I am satisfied in light of the conduct of the covenantor in 1962, having regard to the operation of the equitable doctrine of election in regard to same, together with the further principles outlined above including estoppel, that the court is entitled to have regard not alone to the 1947 deed but also to the 1962 dealing in its entirety and the conduct of the covenantor towards the original covenantee, his assign Bedford and the Land Registry in

procuring and registering the 1962 Deed and Affidavit in regards to same and take into account extrinsic evidence, not alone to establish that the common intention of the parties in 1947 was to benefit the retained lands of the covenantee but also, extrinsic evidence can be used to identify the extent of the land intended to be benefited. The true terms of the agreement are to be gleaned from the 1947 Deed when read with the 1962 Affidavit and Deed and the related correspondence when considered in light of the conduct of the parties in accordance with *Kramer v Arnold.* The 1947 Deed was in fact modified in 1962 not alone as to the operation of the covenant but to explicitly confirm annexation of the benefit to the retained lands and that the burden ran with and bound successors in title of the covenantor.

203. I am satisfied on the evidence in light of the authorities that on the construction of the 1947 instrument creating the restrictive covenant, read together with the 1962 Affidavit and Deed of Modification, when read in light of the surrounding circumstances identify with certainty both the land which intended to be benefited and an intention to benefit that land, as distinct from benefitting the covenantee personally. The benefit of the covenant was thereby confirmed by implication to have been intended to and have been annexed to land which now incorporates the entire of the Smith lands and to run with it so as to bind successors in title of the covenantor, notwithstanding the absence of express words of annexation in the original 1947 deed.

Conclusions with regard to grounds of appeal

(1) The trial judge erred in holding that Jackson Way was not bound by the covenant contained in the deed of 1947 registered originally as a burden on Folio 4940 at Entry No. 3 as thereafter amended by the 1962 dealing registered as a burden in Part 3 in the said Folio.

The statement of Hall V.C. in *Renals v Cowlishaw* as upheld by the Court of Appeal that in order for the successor in title of the covenantee to claim the benefit of the

covenant "*it must appear that the benefit of the covenant was part of the subject-matter of the purchase*" holds good, but it is capable of being established by implication and extrinsic evidence is admissible for all the reasons identified above to demonstrate the contemporaneous common intention of the original covenantee and covenantor with regard to: -

(a) The identity of the lands to benefit;

(b) The intended beneficiary.

(c) Annex the covenant to identified lands of the covenantee.

(d) That the burden of the covenant was intended to run with and bind successors in title of the covenantor.

From a conveyancing perspective where the clear terms of a restrictive covenant are set forth, it is to be readily inferred, in the absence of language indicating that the benefit of the covenant was purely personal in nature for the covenantee, that same was to benefit some lands retained by the covenantee. Extrinsic evidence can be received by the court to identify the nature and extent of the lands in the ownership of the covenantee at the relevant date, and which were the subject matter of agreement between the covenantor and covenantee as having been intended to be the benefitting lands to which the restrictive covenant in question was intended to be annexed. In the alternative the 1962 Deed and Affidavit in light of surrounding circumstances and conduct of the covenantor operated to not alone modify the covenant but also bound the covenantor and his successors in title to the terms of the 1962 affidavit and confirmed annexation of the covenant to the retained lands of the covenantor both Priorsland and Folio 1849.

In my view, in the absence of language to the contrary, upon the disposal of the dominant lands to which the benefit of the restrictive covenant is annexed, the benefit

of the said covenant will *"pass with it in much the same way as title deeds, which have been quaintly called the sinews of the land" per Rogers v Hosegood* [1900] 2 Ch. 388 *per* Farwell J. at 394. Just as the benefit of the title deeds pass with each part of the lands, likewise the benefit of the covenant passes. It is a practical consequence of annexation of the benefit to the entire dominant land that upon the subsequent assignment of all or part in the absence of a contrary intention the benefit of the covenant passes and inheres in the part sold unless a contrary intention appears in the deed. Where a covenant has been validly annexed to land of the covenantee, it is not necessary to expressly assign the benefit of the covenant in a sale of part or the entire.

(2) I am satisfied that the 1962 evidence is admissible and supports the fact that, as in substance the original covenantor and original covenantee acknowledged and agreed by virtue of the documents lodged by the covenantor in respect of the dealing registered in Part 3 of Folio 4940 in March, 1962, the restrictive covenant was validly annexed to the entire retained lands and that fact represented the common intention of the original covenantor and original covenantee in 1947 and that position was affirmed and confirmed by the covenantor both by the execution of the subsequent deed in 1962 to which Bedford, as successor in title to the legal estate of the original covenantee, had joined and the affidavit accepted and lodged by the covenantor in the Land Registry. The 1962 executed documents coupled with the conduct of the covenantor constitute admissible extrinsic evidence which were effective to confirm the identity of the benefitting lands as comprising not alone the balance of the lands in Folio 1849 retained by the covenantee in 1947 but also the Priorsland property. Whereas the affidavit executed by the original covenantee deposing as to the purpose of the 1947 restrictive covenant was not executed by the original covenantor, it was actively

accepted by the original covenantor, lodged in the Land Registry in respect of a dealing to modify the burden of the said restrictive covenant in respect of part of the burdened lands. The conduct of the said covenantor John Hugh Wilson in accepting the said affidavit without demur and lodging same in support of the deed of modification of the covenant which was being effected for his benefit and the benefit of the burdened lands, actively acquiesced in the said averments and by lodging the said affidavit as part of the said dealing, irrevocably acknowledged the averments in the said affidavit, and in particular that: -

> *"the sole purpose of this restrictive covenant was to preserve the amenities of my residence at Priorsland, Carrickmines and to ensure privacy for me and my family in the enjoyment of the said residence and the lands adjoining it which were retained by me*."

Thus, and further by his execution of the indenture of the 13th March, 1962 with Thomas Vincent Murphy and Bedford acknowledged that the intention and purpose deposed to by Thomas Vincent Murphy in substance represented the common intention of both parties at the date of execution of the 1947 deed. Otherwise, there would have been no reason to proceed to execute a deed of modification in circumstances where the legal title had passed to Bedford. The said dealing is admissible as extrinsic evidence to demonstrate:

(i) The identity of the lands in respect of which it was the common intention of the covenantor and covenantee that the restrictive covenant be created in 1947; and

(ii) Was evidence that it had been the common intention of the parties that the benefit of the said covenant be annexed to Priorsland as well as the lands retained by the covenantee in Folio 1849, as of 1947.

(iii) The burden of the covenant ran with the lands in folio 4940 and bound successors in title to the original covenantor including Jackson Way.

The 1962 dealing, including the affidavit and documentation were easily or readily obtainable by purchasers, and a purchaser in the position of Jackson Way was fixed with notice of their content and import and took with the benefit of the modification of the covenant but also, under the doctrine of election, subject to the burden of same. Hence, the respondent purchased not alone with full notice of the existence of the covenant but with full notice that the original covenantor had actively acknowledged and further actively acquiesced in the clarification embodied in the dealing such that the restrictive covenant had been acknowledged by the covenantor to have been validly annexed to the lands of the covenantee in question as the said documentation confirmed.

(3) I am satisfied that the identity of the lands intended to benefit from the restrictive covenant were clearly identified such that the covenant was readily intended and understood as between the original parties to be annexed to Priorsland and Folio 1849 in 1947 and as and from 1962 all third parties were fixed with notice of and took with the burden of same and a consideration of the dealing on the Folio constitutes valid extrinsic evidence identifying the lands intended by the original covenantor and original covenantee to benefit from the restrictive covenant. As was observed by Ungoed-Thomas J. in *Stilwell v Blackman* [1968] Ch. 508, the effect of the jurisprudence is not to compartmentalise covenants and "*put the equitable principles which govern the assignment of restrictive covenants into three or four completely separate strait jackets, in which each is a completely separate law to itself*." (p. 524). There can be no doubt but that the extrinsic evidence derived from the 1962 dealing point only in one direction, namely that the parties to the 1947 deed had a common

intention that the benefit of the restrictive covenant be annexed to the entirety of the retained lands of the original covenantee Thomas Vincent Murphy and the covenantor acknowledged same in 1962 so as to bind himself and his successors in title as owners of Folio 4940 which is subject to the burden. It appears to me that the totality of the evidence points clearly in the direction of a conclusion that the annexation of the benefit of the restrictive covenant recited in the 1947 deed to the entirety of the retained lands of the original covenantee can be implied from the "*surrounding circumstances*" of the case and in particular the documentation and material comprised in the 1962 dealing since, in the language of Wylie, *Irish Land Law* at para. 21.36: -

> ".. *they indicate[d] .. with reasonable certainty that the covenant was taken for the benefit of that land*."

The principle in *Marten v Flight* accords with the jurisprudence of the Supreme Court referred to in this judgment.

(4) The surrounding circumstances as obtained in 1947, as acknowledged and confirmed by the covenantor an covenantee in 1962, include the identity of the lands retained by the vendor is a factor which can be taken into account along with other factors in support of a conclusion that the covenant in the 1947 deed was intended by the parties thereto to be annexed to the entirety of the covenantee's retained lands comprising the balance of Folio 1849 and Priorsland house and gardens.

(5) I am satisfied that on a proper and fair construction, the language in the instrument which refers to "*the lands retained by the said Thomas Vincent Murphy*" in the operative part of the 1947 deed, as subsequently confirmed, acknowledged and agreed by both the original covenantee and covenantor in 1962, was capable on the said date of including not alone the part of the lands retained in Folio 1849 but also Priorsland. Insofar as there was a deficit in identification of the lands retained to which the benefit

of the restrictive covenant was intended to annex, same was subsequently cured on foot of the deeds and instruments executed by the parties in respect of the 1962 modification of the restrictive covenant and its registration as part of the 1962 dealing binds successors in title of the covenantor so as to feed any estoppel arising. The benefit was intended by the parties and confirmed and acknowledged by the original parties thereafter and Bedford to benefit both the lands retained by Thomas Vincent Murphy in Folio 1849 and the lands and dwelling known as Priorsland. Further, I am satisfied that the covenant created in 1947 and intended to be annexed to the entire retained lands of the covenantee and same and all parts thereof were capable of benefitting from the said restrictive covenant registered as a burden in Part 3 of Folio 4940 in 1947.

(6) I am satisfied that there is no evidence to suggest that the covenant created in 1947 on foot of the instrument was intended to be personal to Thomas Vincent Murphy, as the respondent contends. The 1962 dealing is admissible and establishes that the intention was that the covenant be annexed to Priorsland and Folio 1849. I am not satisfied however that the reference to the place of abode of the covenantee in the said indenture which was "*on immediately adjacent lands*" could be said, in and of itself, to be dispositive of the issue as to whether the covenant in question was personal to Thomas Vincent Murphy. On a true construction of the entirety of the documents, and including the 1962 dealing, the covenant was annexed to and inhered in the entire of Priorsland and Folio 1849, the legal effect of which binds Jackson Way as successors in title to the original covenantor and was so intended.

(7) The affidavit of Thomas Vincent Murphy is receivable in evidence and the averments not alone bound the deponent but in this instance also bound the covenantor by reason

of his unequivocal subsequent conduct in acknowledgment of same, and in turn binds and his successors in title in circumstances where:

(a) The affidavit came about in circumstances where an issue was raised by or on behalf of the Chief Registrar in the Land Registry as to whether the covenant in the 1947 instrument was "*a personal covenant; and enforceable by Mr. Murphy the former owner of the lands in folio 1849, Dublin; or a restrictive covenant enforceable by him and his successors as such owners*." The said query raised, in addition to whether the covenant was personal, "*… if it is annexed to the land in folio 1849, Dublin, that Mr. Murphy or the present registered owner have (sic), in fact, no other land to which it was to be annexed*". The documents lodged in 1962 by the covenantor incorporates the joint and common response of the parties to those specific queries. The affidavit was sworn on the 6th March, 1962, less than two weeks subsequent to those issues being raised and signed off on by the Registrar in the Land Registry, and it is clear that the affidavit was lodged by the covenantor for the purposes of clarifying and addressing those specific matters and in substance on any reading of the affidavit it clarifies and confirms;

(i) That the 1947 covenant was never intended to be a personal covenant and

(ii) It was intended by the parties to be annexed not alone to the lands in Folio 1849 but also to Priorsland.

(iii) It ran as a burden over Folio 4940 save to the extent modified and bound successors in title of the covenantor.

A counsel of perfection would have considered incorporating the details from the 6 March 1962 affidavit into the deed of modification of covenant executed on the 13th

March, 1962. Instead, the covenantor John Hugh Wilson did the next best thing, by accepting the affidavit and actively acknowledging his assent to its terms in taking the unamended affidavit and lodging it in the Land Registry for all interested parties to consult. He thereby expressly by his said conduct acknowledged the correctness of same and adopted the averments therein contained and in substance accepted that the benefit of the restrictive covenant over his lands in Folio 4940 was annexed to and had been intended to be annexed to and held for the benefit of the entirety of the retained lands of Thomas V. Murphy. The said affidavit in my view was adopted and its averments actively acquiesced in by the covenantor as representing the common intention of the parties at the date of execution of the 1947 deed as regards its intended effect and for identifying the lands in respect of which the restrictive covenant was intended to be annexed.

(8) An approach to the interpretation of a deed which requires, in light of decisions such as *Marquess of Zetland,* that there must be something within the original deed itself to identify the lands in question intended to benefit from the covenant is unduly restrictive. Ultimately, the burden of proof in determining such a matter is on the balance of probabilities the identity of lands to which the benefit of a restrictive covenant is annexed may be established by implication on the balance of probabilities by probative evidence emanating from outside the express terms of the instrument creating the covenant in the first instance. The respondent could, did and can rely on the 1962 dealing to demonstrate that the burden of the covenant was relaxed as against part of the servient lands and at least by virtue of the equitable doctrine of election cannot now be heard to complain where the appellants rely on the said dealing and its constituent documents when read together to evidence the identity of the dominant lands to which the benefit of the covenant was intended to be annexed in 1947.

(9) The identity of the lands to benefit from the covenant were in this instance capable of being ascertained by implication from the surrounding circumstances as outlined above.

(10) The lands intended to benefit were clearly identified by the 1962 dealing, particularly the affidavit sworn on 6 March 1962 which for all the reasons above stated binds the covenantor and his successors in title on the said issue. The unequivocal conduct of John H. Wilson in lodging the affidavit of the original covenantee in the Land Registry amounts to an express acknowledgment of the veracity and correctness of the averments therein contained insofar as the intention of the parties that the restrictive covenant created in the 1947 instrument was intended to be annexed to all the retained lands of Thomas V. Murphy as of that date and further, that the benefit of the said covenant would bind the successors in title of the original covenantor.

(11) The conduct of John H. Wilson in entering into and executing the deed of modification of the restrictive covenant in 1962, which deed was, *inter alia*, with Bedford, as successor in title to the original covenantee, gave rise to an estoppel by deed and also by conduct whereby John H. Wilson acknowledged that the restrictive covenant was annexed to the retained lands and ran with and continued to bind the burdened lands in Folio 4940. The joinder of Bedford acknowledged that it held an interest in the dominant lands to which the covenant was annexed and with which it ran and the burden of which affected the servient lands and which the company had capacity to modify. Taking the step of seeking a modification of the covenant imported the following irrevocable acknowledgments on the part of the original covenantor that:

(a) The 1947 restrictive covenant was not personal to the covenantee.

(b) Notwithstanding the original covenantee had divested himself of the legal interest in the property, the burden of the covenant ran with and bound the burdened lands in 4940 and was enforceable by Bedford;

(c) The restrictive covenant continued in full force and effect for the benefit of the successor in title to the original covenantee, namely Bedford.

(d) It bound the covenantor and his successors in title.

(12) I am satisfied that the trial judge in all the circumstances was entitled, for all the reasons he stated, to come to a view that no adverse inference was necessarily to be drawn from the fact that Jackson Way sought and obtained releases of the restrictive covenant from successors in title of the covenantee in respect of other parcels of land which had originally formed part of the lands in Folio 1849. I am not satisfied that those measures amount to "*persuasive evidence*" that the covenant was annexed to other parts of the lands that were originally retained by Thomas Vincent Murphy 1947 and comprised part of the lands in Folio 1897 at that time. There was no sufficient evidence in one direction or another as to the dominant intention animating the steps being taken by the respondent in the context of obtaining the said releases. It was not unreasonable therefore for the judge to assess that one potential scenario was that the said releases were obtained "*for the avoidance of doubt*".

With regard to the identity of the lands under reference by the deponent Thomas Vincent Murphy in the 1962 affidavit, I am satisfied that in circumstances where issues such as the nature and extent of the lands of the covenantee to which the restrictive covenant was annexed could and should routinely have been raised as requisitions on title in the context of a conveyancing transaction where some or all of the lands in Folio 4940 were being purchased.

I am satisfied that the said lands were adequately identified by the supporting documentation lodged and is comprised within the dealing in the Land Registry registered on Folio 4940 on the 29th March, 1962. The registration of the dealing in and of itself fixed the respondent with notice of the existence of a burden. It was thereafter a matter for them to consider the dealing to ascertain the nature and extent of the said burden of which they had notice.

(13) With regard to ascertainment of the identity of the dominant lands to which the benefit of the covenant was intended to be annexed in 1947, I am satisfied that the 1962 Affidavit of the covenantee is in all the circumstances receivable in evidence and the covenantor's successors in title are estopped by his conduct from now denying that the covenant was annexed to Priorsland and Folio 1849. The trial judge erred in determining otherwise.

(14) The trial judge erred, for all the reasons stated in this judgment, in considering that an inspection of the 1962 dealing and an inspection of the Land Registry File would not identify the extent of the lands retained by the covenantor/vendor Thomas V. Murphy in 1947 to which the covenant was intended to be annexed. Same show that the lands comprised Priorsland and Folio 1849 and the said material is admissible as extrinsic evidence for all the reasons stated above.

(15) I am satisfied that the ambit and effect of s. 58 of the Conveyancing Act, 1881 is well settled. No valid basis has been identified whereby it could be reasonably construed that s. 58 applies to the 1847 deed to in substance reverse, alter or in any sense vary the effect of *Renals v Cowlishaw*. The said provision is a deeming provision which, with the entirety of the said Act, was abolished on the coming into operation of the Land and Conveyancing Law Reform Act on the 1st December, 2009. The appellant had identified no valid basis whether by analogy or otherwise, whereby s. 58(1) can

be successfully invoked for the purposes of advancing a contention that the said statutory provision operates to annex the retained lands where the vendor sells part and where the benefit of a restrictive covenant where the relevant words required to do so are not by the said instrument expressly provided. It did not in effect give rise to any automatic statutory annexation of the restrictive covenant to the dominant lands in 1947 in the manner contended for. Neither is there any valid basis for invoking s. 6 of the Conveyancing Act, 1881. For all the reasons outlined above statutory annexation of the restrictive covenant did not arise in 1947.

(16) The Deed of 1962 was not taken and cannot be construed as having been obtained "*for the avoidance of doubt*". It conferred substantial benefit on the covenantor who elected to avail of and approbate its benefits. Neither he nor his successors in title can reprobate the obligations and implications clearly intended to operate reciprocally for the benefit of the covenantee and the dominant lands, now the Smith lands. The respondent is precluded by estoppel and the doctrine of election from denying that the burden of the covenant runs with the lands in Folio 4940 and binds it as successor in title to the covenantor.

I would allow the appeal and set aside the order of the High Court.

Consequential step

204. In the circumstances there will be a declaration as against the respondent that the restrictive covenants at Part 3 of Folio 4940 entry no. 4 as modified by a deed of modification of covenant dated the 13th March, 1962 and the entire dealing in respect of which same was registered as of the 14th June, 2000 in full force and effect and was annexed to and operated for the benefit of the lands of the Smiths comprising the lands more particularly identified at Parcel 1, Parcel 2 and Parcel 3 of the Schedule to a defence delivered on the 8th December,

2010 and being the lands comprised in Folios 1849 County Dublin, 11237F County Dublin and 9455F County Dublin.

Costs

205. In the premises the appellants having been entirely successful, the order of the High Court falls to be set aside and in regard to costs, the appellants are entitled to the costs in this court and the court below in the provisional view of the court. If the parties contend for an alternative order with regard to costs, and any issue otherwise arising as to the form of the order to be made, submissions are to be made in writing within 21 days from the date of delivery hereof setting forth the basis and all relevant factors being advanced in support of same.

206. Collins and Noonan JJ. concur with the within judgment.