Neutral Citation Number: [2007] IEHC 219

THE HIGH COURT

RECORD NO. 2006/81 CA

BETWEEN

CARDIFF MEATS LIMITED

PLAINTIFF

AND
P.J. McGRATH AND MARY McGRATH
AND THOMAS McGRATH

DEFENDANTS

AND
RINGMAHON COMPANY AND DUNNES STORES

THIRD PARTIES

Judgment of Mr. Justice Roderick Murphy dated the 26th day of June, 2007.

1. Pleadings

1.1 Parties
The plaintiff is a limited liability company having its registered office at Finglas Shopping Centre at Cardiffsbridge Road in Finglas. Its principal, John O'Dwyer, is a butcher. The defendants are the registered owners of Folio County Dublin 61046 F. By indenture of lease made 30th June, 1998 between Mallgate Limited of the first part and Dunlavin Bacon Company of the second part and in consideration of the rent, terms and conditions and covenants contained therein the predecessor to the defendants let, for a term of 35 years, the shop and premises known as Unit 8.

By transfer dated 16th December, 1991 Mallgate Limited transferred their freehold interest in that folio to the defendants.

The plaintiff claimed to have complied fully with the terms and conditions of the lease and has discharged all rents, rates and service charges retained thereunder. It was at all material times a term and/or condition of the said lease that the defendants covenanted to provide or cause to be provided the maintenance service in respect of the demised premises.

The plaintiff alleged that the defendants had failed, refused and/or neglected the maintenance and services outlined in the lease. Particulars were outlined in a letter to the defendants dated 13th May, 2003 in relation to the failure to cleanse, repair, renew, maintain and decorate, to maintain services, lighting, insurance, traffic control.

The third parties are successively the holders of the freehold title.

A preliminary issue has arisen as to their liability in relation to the maintenance and services of the common areas. This third party issue was heard after the plaintiff gave evidence.

1.2 Circuit Court proceedings
By equity civil bill dated 11th July, 2003, the plaintiff claimed damages for negligence, breach of contract and nuisance and an injunction requiring the defendants to carry out work as required pursuant to the provisions of the Fourth Schedule to a lease between the parties dated 30th June, 1998. A further injunction was requested restraining the defendants from maintaining the common areas of Finglas Shopping Centre in such manner as to constitute a nuisance to the plaintiff.

By third party notice dated 1st June, 2004 the defendants claimed an indemnity against the third parties, both unlimited private companies, which notice was re-issued on 17th May, 2004. The second named third party (the notice party) is the successor of the first named third party.

On 8th October, 2004 the Circuit Court made an order by consent extending the time for the delivery of a defence by the third party.

On 12th October, 2004 solicitors for the third party served a notice for particulars on the plaintiff. In reply dated 20th January, 2005, the plaintiff referred to a freehold conveyance of 1st August, 1986 between H. Williams (Tallaght) Limited and Mallgate Limited (more particularly referred to in 2.0 below) in relation to whether there was a contractual or other legal relationship between those parties. The third party was well aware of its contractual obligations pursuant to the same conveyance whereby the third party, as successors to H. Williams (Tallaght) Limited is obliged to provide the defendants, as successors to Mallgate Limited, the services referred to therein. The defendants, in turn, were contractually bound to provide the said services for and on behalf of their various tenants, including the plaintiff.

By defence dated 13th October, 2005 it was denied that the defendants were entitled to be indemnified by the third party and that the third party was obliged to provide services at the shopping centre where the plaintiff was a tenant.

By order dated 1st March, 2005 the Circuit Court ordered that the issues between the plaintiff, the defendant and the notice party be tried together.

A further third party notice was issued against Dunnes Stores on 12th May, 2005 and the matter was set down for trial and heard by the Circuit Court which refused the plaintiff's claim.

1.3 Appeal
By notice of appeal dated 27th March, 2006 the plaintiff appealed to the High Court. The grounding affidavit of Mr. Miller, on behalf of the plaintiff, referred to the proceedings being in the nature of a test case being taken by the plaintiff on behalf of other tenants of small shopping units in what he termed the Dunnes Stores Shopping Centre in Finglas. The proceedings concerned the ongoing failure on the part of the defendants to provide services to the shopping centre in accordance with the covenants in the leases concerned which had resulted in the shopping centre deteriorating into a poor state of repair to such a degree that businesses had suffered considerably, putting the livelihoods of the tenants at risk. It was averred by Mr. Miller that there was a serious crime, drug, graffiti, flooding, vandalism and other problems at the shopping centre which arose as direct consequences of the failure on the part of the defendant to provide services which included security. The defendant said that the obligation to provide these services rested with the third party, a matter that was disputed by the third party.

The appeal came before this Court on 8th May, 2007.

2. Freehold Title

2.1 -Conveyance of 1986
By indenture made 1st August, 1986 between H. Williams (Tallaght) Limited, Three Guys Limited and Mallgate Limited, certain premises were granted conveyed and assigned on to the purchaser together with a covenant with the purchaser and its assigns that the vendor would provide the services subject to payment by the purchaser of the service charges. The lands sold comprised nine units in the Finglas Shopping Centre, including the plaintiff's premises.

The services to be provided by the vendor were detailed in the Fifth Schedule in relation to maintenance, repair of the common areas including the car park, public toilets, plant, lifts, heating, cooling and ventilation equipment, cleaning equipment, as well as internal telephones, public address systems (if any) and piped music systems (if any). In particular the vendor covenanted to provide for the control of traffic on the public and service areas and the policing of common parts of the shopping centre if necessary.

2.2 Burden
The Land Registry Folio 11559 F notes as part on the burdens and notices of burdens in relation thereto the following entry:

> 012-05-MAR-1987 – the property is subject to the covenants specified in Instrument No. 87DN03036 made between H. Williams (Tallaght) Limited (formerly Tesco Stores (Ireland) Limited) of the one part and Mallgate Limited of the other part, relating to the use and enjoyment of the property.

2.3 Conveyance to Ringmahon
The deed of conveyance made on 28th July, 1988 between H. Williams (Tallaght) Limited (In Receivership), Lawrence Crowley (the Receiver), Aviette Limited (the Purchaser) and Ringmahon Company (the Sub-Purchaser) vested the freehold of folio 11559 F in the Sub-Purchaser.

2.4 Transfer
By Land Registry transfer of 16th December, 1991 the lands comprised on Folio 61045 F were transferred to the first, second and third named defendants, subject to the ten leases in the Third Schedule thereto, including the lease of 30th June, 1989.

2.5 Conveyance to Dunnes Stores
Finally, by assignment, transfer and conveyance of 24th August, 2000, Ringmahon granted and assigned, *inter alia*, the premises comprised on Folio 11559 F to Dunnes Stores.

3. Leasehold Title

3.1 Grant of lease
By indenture of lease made 30th June, 1989 between Mallgate Limited and Dunlavin Bacon Company Limited Unit 8 was demised for a period of 35 years, subject to the rents, covenants and conditions therein to the plaintiff's predecessor in title.

In particular the lessor covenanted to provide services identical to those detailed in the Fifth Schedule to the Conveyance of 1st August, 1986 between H. Williams (Tallaght) Ltd. and Mallgate Limited, subject to payment by the lessee of the service charges calculated by the latter's auditor's certificate.

3.2 By deed of assignment dated 7th September, 1990 Dunlavin Bacon Company Limited assigned and transferred its interest in the lease to the plaintiff for the unexpired residue thereof. Lessees were obliged to reimburse Mallgate by way of service charges calculated on the basis of auditor's certificates.

4. The plaintiff's evidence
The plaintiff is the successor in title to Dunlavin Bacon Company Limited and is a craft butcher. The plaintiff's principal, Mr. John O'Dwyer, gave evidence of fitting out Unit 8 in 1989. He dealt with Mallgate in the first few years in relation to services. However, maintenance changed drastically and security was of poor quality in recent years. He referred to an association of lessees who formed themselves as Finglas Traders and dealt with the first named defendant in relation to the common areas.

At a meeting on 14th September, 1999 with the defendants, a budget of over IR£100,000 was discussed in relation to which the tenants' contribution would be IR£49,000. The balance was to be provided by Dunnes Stores whose architect had made the proposal. The plaintiff contributed 5% of the total contribution to services. He agreed that he got audited reports but not invoices or any breakdown. They were promised that one of their members could see invoices but nothing appeared to come of that.

In relation to that budget a reduction IR£35,000 was discussed but no agreement would appear to have been reached.

On 31st May, 2001, six years ago, the first named defendant wrote on behalf of the defendants saying that they were no longer management agents. Nonetheless it appeared that, up to 17th January, 2002, they were still acting as managers.

Services deteriorated to such an extent that the plaintiff consulted his solicitors on 12th August, 2002 with regard to the compliance with the covenants in the lease.

A week later, on 19th August, 2002 the first named defendant wrote to say that Dunnes Stores were responsible for the maintenance. Correspondence ensued between the plaintiff's solicitors and Dunnes Stores in relation to the sharing of security between the Dunnes Stores security staff and the security of the car park and common areas. It appeared that the security staff's first loyalty was to Dunnes Stores.

Mr. O'Dwyer agreed that tenants had a role in the budget and that the lease required a payment of a contribution for services rendered. He said there was never any problem with traders paying service charges. He agreed that in 1998 and 1999 the defendants had a proposal to refurbish but that it would cost IR£335,000 as a result of the lack of previous maintenance. The tenants could not afford such capital expenditure.

While there was a budget he said that traders had no final say in the budget. They wanted proper security. Many shops did not trade late because there was no security.

He disagreed that the centre was in a rundown area. It had a large car park for 300 cars but inadequate security leading to

vandalism. The security men were always in Dunnes Stores despite the meetings though they would assist in emergencies if asked.

Lack of maintenance and services led to a decrease in turnover. Mr. O'Dwyer tried to sell his interest but failed to get any bids.

5. Liability of third parties
The third parties, Ringmahon and Dunnes Stores, sought a direction from the court as to whether they could cross-examine Mr. Dwyer. The issue of the privity between the third parties and the plaintiff was raised.

It seemed to the court that, notwithstanding that the third party was issued for hearing before it, that there were two somewhat discrete actions: the plaintiff suing for specific performance of the covenants in his lease as against the defendants, and the defendants' claim against the third parties. It seemed appropriate to deal with the latter first without the intervention of the plaintiff. The matter proceeded in relation to the third party issue only.

Third party notice is in the following terms:

> "TAKE NOTICE that this action has been brought by the Plaintiff against the Defendants wherein the Plaintiff claims that the Defendants have failed, refused and neglected to provide service charges under and pursuant to an Indenture of Lease dated the 30th of June, 1988, which Lease was originally entered into between the Plaintiffs predecessors in title and the Defendants' predecessors in title as appears in the endorsement of Claim, a copy whereof annexed herewith.
>
> AND FURTHER TAKE NOTICE that the Defendants claims against you to be indemnified against the Plaintiffs claim in its entirety, and/or to seek an indemnity in respect thereof, including in respect of costs, in such manner as this Honourable Court shall determine, on the grounds that pursuant to your breach of contract, negligence and creation of a nuisance you have failed, refused and neglected to provide maintenance and service charges which you are obliged to do as the successor in title to H. Williams (Tallaght) Limited under and pursuant to an Agreement dated the 1st of August, 1986, which services are particularised in the fifth Schedule of the said Agreement.

6. Third parties' submissions:
6.1 A covenant is positive if it involves the expenditure of money or the taking of action.

> "A covenant not to permit a path to become overgrown is positive because it imposes a positive duty to clear the path, either through spending money to employ someone to do so, or by the owner of the servient tenement doing so through their own labour."
>
> (Lyle: Land Law, 694)

The fact that expenditure may be recouped (in whole or in part) does not alter the position. The covenant still remains positive. Enforcement of a positive covenant lies in contract: enforcement of a negative covenant lies in property.

6.2 The registration of a covenant as a burden on the Folio does not render a covenant which is otherwise unenforceable enforceable. (McAllister: Registration of Title, 219, 220)

6.3 The burden of a positive freehold covenant such as the grantor's covenant detailed in the Fifth Schedule to the indenture of 1st August, 1986 is not enforceable against the grantor's successors in title. (*Rhone v Stephens* [1992] 2 A.C. 310; *Gaw v CIE* [1953] I.R. 232; Law Reform Commission: Land Law and Conveyancing Law: Positive Covenants over freehold land and other proposals (LRC-70-2003 and Law Reform Commission: Report on Modernisation of Land Law and Conveyancing (LRC-74-2005).

Such a covenant is unenforceable despite the drafter's attempts to make the covenant run with land and be enforceable against successors. *Durham v Amberwood Investments* [2002] 58 O.R. (3d) 481.

6.4 Among the conditions required to satisfy the pure principle of benefit and burden are the following:

> (a) The condition (i.e. positive covenant) must be relevant to the right;
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> (b) The defendant must have the option of giving up the right and thus avoiding the obligation. Thus, in *Rhone v. Stephens* the principle of benefit and burden did not apply because, while at first sight the obligation to repair a roof might be linked to the easement of support to the roof conferred by an adjoining cottage, that easement of support could not be given up.
>
> (c) In all cases the "right" (i.e. the benefit) was in the nature of an easement. While an easement running with the land attaches to the land and binds successors, a covenant to pay the service charges, being a positive covenant, is not enforceable against the defendants as successors.

7. Defendants' submissions
7.1 Immediately prior to the Transfer dated 1st August, 1986 all of the Shopping Centre was on Folio 11559F County Dublin and this land was enjoyed subject to and with the benefit of 'the Leases' defined in the Transfer which continue to be registered as burdens on the Folio. The property leased consisted of the individual units (other than the anchor unit now owned by Dunnes Stores) together with the easements relating the 'the Common area'.

Each of the Leases therefore covered land and incorporeal hereditaments affecting (i) the land transferred to Mallgate Limited in 1986, and (ii) the land retained by the vendor to Mallgate Limited which has since been transferred to Dunnes Stores. The burdens registered on both Folio 11559F (parent Folio) and Folio 61046F (subsequently transferred by Mallgate Limited to the McGraths) reflect this by listing the Leases as burdens on both folios.

Each of the Leases is in much the same terms as the subsequent lease dated 30th June, 1989, Mallgate Limited –to– Dunlavin Bacon Company Limited and includes covenants by the then owner to provide the services listed in the Fourth Schedule to the Dunlavin Lease. The plaintiff, Cardiff Meats Limited, is assignee of this lease. These covenants solely relate to the Common Areas over which

the lessees under the leases were given easements by way of lease and they touch and concern the land of these lessees as covenantees. The predecessor in title of Dunnes Stores could not fully rid itself of these obligations to the lessees under the Leases to provide services relating to the Common Areas which it retained (along with the anchor unit) by the expedient of selling off the bare plot of ground covered by each of the units leased. At the same time it had the problem that service charge was payable to the lessor under the leases with remedies of the lessor for recovery including action on contract and forfeiture of the leases for failure to pay which were of no assistance to anybody other than the lessor. Put another way, severance of the land comprised in the reversion created problems in relation to enforcement and apportionment of benefit and burden of the reciprocal obligations to provide the services and collect the service charge. In order to get around this the parties devised an estate scheme. Mallgate Limited did not own any part of the Common Areas to which these covenants relate and on the splitting of the superior interest in the land leased the predecessor of Dunnes Stores Limited retained a responsibility to comply with these covenants.

7.2 The recitals in the 1986 Transfer refer to the development of the estate as a Shopping Centre. It was the intention of the parties to that assurance that this should continue after the sale to Mallgate Limited. Mallgate Limited was now assuming a role as lessor under the leases with a right to look to the lessees for the service charge. At the same time, the covenants by which it became bound as lessor to provide services related to land it did not own. There was a reciprocal interest in Mallgate Limited getting a promise from the vendor to provide 'the services' listed in the Fifth Schedule (being identical to the promise made to the lessees in the leases) and in the vendor getting Mallgate's promise to pay over 'the service charges' being 'the amount of the contribution referred to at Clauses B.1(c) and (d) of the Leases'. This reciprocal benefit and the corresponding burden was necessary as part of the 'estate scheme' devised for the continued operation of the shopping centre and Dunnes Stores as successor in title got (and took) the benefit of this arrangement. The benefit was that as far as the tenants were concerned the services were being provided by the assignee of the reversion to the leases. The assignee was also taking immediate responsibility to these lessees for providing the services and for collecting the service charge. In return, Dunnes and its predecessor being the owners and occupiers of 'the Common Areas' and the only person entitled to provide the services in relation to these areas agreed to provide the services.

The 1986 Transfer did not give any easement to Mallgate Limited or its sequels in title to go onto the common areas to provide services. The defendants, as successors to Mallgate Limited, have no rights to renew or repair or clean anything on these areas or make decisions to paint or put security men on malls without the consent of Dunnes Stores, the notice party.

7.3 The evidence would be that in practice this arrangement operated from the time that the defendants took over on the basis they were both the landlords of the shop units and managing agent. The lessees, and later lessees from Mallgate Limited and the defendants, of the units all agreed to pay service charges as per clauses B.1(c) and (d) of the leases. The notice party allowed the defendants to arrange the services and retained an effective control and veto on what was provided. Rather than pay over the amount collected from lessees to the notice party and let that party provide the services, the defendants retained the amounts paid by their lessees (calculated as per the leases) and sought the balance from the notice party in the ratio of their rateable valuation to that of the total lettable space in the centre. This arrangement continued until the defendants resigned as managing agents and asked the notice party to provide the services as per Clause 5(c) of the 1986 Transfer.

7.4 The notice party is obliged to provide the services for at least as long as the leases subsist. Their obligation is a burden reciprocal to a benefit which they have obtained and continue to enjoy. They cannot, having had the advantage of and approbated the arrangement for fourteen years. They cannot now say that they have no obligations. There is more than one way in which a person may be bound by a contract which he has not originally entered into. He may be bound, as in this case, because the obligation is reciprocal and he has acquired a right subject to a liability: see the case of *Halsall v. Brizell* (1957) 1 Ch 169. One may become bound because he has adopted the rights and duties under a contract made by another as his own. This has also occurred in this case. Novation of a contract may be express or implied and where parties in business are acting in a way which is referable to a contract they are taken to be bound. An example of this is the person who acquired the interest of a lessee under a lease by adverse possession and at the same time complies with the rent obligations and other covenants. Counsel referred to *Chatworth Investments Ltd. v. Cussins (Contractors) Ltd*. [1969] 1 All E.R. 143 and *Tito v. Waddell (No. 2)* 106 at 286-7.

7.5 Counsel submitted that land may come to a successor in title subject to burdens in all sorts of ways. The burdens may be indemnities charged on land as a result of a partial assignment or they may be mortgages or they may be restrictive covenants. The general rule of privity of contract (*Rhone v. Stephens* [1994] 2 A.C. 310 is an example of this rule applied to positive covenants to carry out acts on the land of another) is thus qualified. It is not always necessary that a right which is reciprocal to an obligation must be such as to come within the theoretical proposition that the person can by forsaking his right abandon his obligations.

In this case an announcement was made by the third party at an interlocutory hearing that it was no longer looking for service charges from the defendants. The third party have the benefit of assumption by another of obligations to provide services under the outstanding leases and the remittances of contribution to services for years. They took with notice of the leases and the reciprocal arrangements and got the benefit of service charge payable both under 'the Leases' and later under the Mallgate and McGrath leases.

8. Decision of the court

8.1 Covenants relating to land have been discussed in several Law Reform Commission reports.

The consultation paper; Reform and Modernisation of Land Law and Conveyancing Law, of October, 2004 (LRC CP 34-2004) at 7.03 explains:

> "Whenever a landowner sells off part of the land (e.g. where a house owner has a very large garden and sells off part of it as a building plot), or sub-divides the land (e.g. where a developer divides a large building site into plots, upon each of which a new house will be built, i.e. the typical housing estate), it is usual to impose various covenants on the purchasers of the parts sold off. These may be restrictive or negative in nature (e.g. restricting the future use of the parts sold off to private residential purposes) or positive (e.g. requiring maintenance and repair of the boundary walls and fences). Since these covenants are being imposed on freehold as opposed to leasehold owners, the intention usually is that they will bind successors in title indefinitely. However, the law relating to freehold covenants was never developed properly and is subject to serious flaws. The most serious of these are that, first, the burden of a positive covenant does not 'run with the land' (i.e. bind a successor in title to the original covenantor) and, secondly, the burden of negative covenants only runs in equity only (under the rule in *Tulk v. Moxhay*) so that the person entitled to enforce the covenant (the original covenantee or a successor in title), does not have a legal right. This has important practical significance, because, generally speaking, equitable rights are more vulnerable than legal ones, and may turn out to be unenforceable against a successor in title. This is an area of law which has long needed major reform."

Substantial reform was recommended in a proposal for a Bill following the precedent of s. 10(4)(b) of the State Property Act, 1954 which provides that covenants made of State land "shall be equally binding on, and enforceable against, any person claiming through

or under the original grantee as if the grant had been made to that person".

The recommendations relating to freehold covenants were made to correct what had been long recognised as a major defect in our land law and conveyancing system.

In additional to rendering such covenants (which are frequently created as between neighbouring landowners) fully enforceable against successors in title, the proposed Bill also introduces provision to facilitate the discharge of modification of old covenants which have become obsolete or an unreasonable interference with the use and enjoyment of neighbouring land.

The Land and Conveyancing Law Reform Bill, 2006 was passed by Seanad Éireann but has now lapsed with the end of the 29th Dáil. Chapter 4 dealing with freehold covenants provides as follows:

> "47.-(1) Subject to sub-section (3), the rules of common law and equity relating to the enforceability of a freehold covenant (including the rule known as the rule in *Tulk v. Moxhay*) are abolished."
>
> (2) Subject to sub-section (3), any freehold covenant which imposes in respect of servient land an obligation to do or to refrain from doing any act or thing is enforceable -
>
> (a) by –
> (i) the dominant owner for the time being, or
>
> (ii) a person who has ceased to be that owner, but only in respect of any period when the person was such owner.
>
> (b) against –
> (i) the servient owner for the time being, or
>
> (ii) a person who has ceased to be that owner, but only in respect of acts or omissions which occurred during the period when that person was such owner.
>
> (3) This section –
>
> (a) does not affect the enforceability of –
> (i) a freehold covenant by a person entitled to the benefit of a scheme of development, or,
>
> (ii) a covenant for title under section 77,
>
> (b) takes effect subject to the terms of the covenant or the instrument containing it."

8.2 The 1986 deed, upon which the defendants rely in making their third party claim, does not create any privity of contract as between the defendants and Ringmahon or Dunnes Stores. The defendants are successors in title to Mallgate Limited, the original covenantee under that deed in respect of part of the land. Dunnes Stores is successor to H. Williams (Tallaght) Limited, the original covenantors under the 1986 deed.

The defendants have argued that the third parties have taken the benefit and assumed the burden of the original covenantor and are obliged to provide the services for at least as long as the leases subsist. Their obligation is a burden reciprocal to a benefit which they have obtained and continue to enjoy. They cannot, having had the advantage of and approbated the arrangement for fourteen years, now say they have no obligation. Because of the reciprocal obligations they have a liability having adopted the rights and duties under a contract made by another as their own. Novation of contract may be implied.

While the third party, at an interlocutory hearing, claimed that it was no longer looking for the services charges from the defendants they are bound, notwithstanding, to provide services and are entitled to service charges.

8.4 The defendants rely on *Halsall v. Brizell [*1957] 1 Ch 169 which concerned covenants by the owners to contribute to the upkeep of common roads and sewers. In that case of 1851 a deed had declared trusts of the roads and sewers for the benefit of the owners of the plots.

The issue of the liability of successors in title of the owners using the roads and sewers resulted in a decision of the court that the defendants were bound to accept the burdens of the covenants for contributions in the deed as they desired to take its benefits, e.g. to use the roads leading to their house and to have the use of the sewers which were vested in the plaintiffs.

Upjohn J. held:

> "… insofar as the deed of 1851 purports to make the successors of the original contracting parties liable to pay calls, is it valid or enforceable at all? I think that this much is plain: that the defendants could not be sued on the covenants contained in the deed for at least three reasons. First, a positive covenant in the terms of the seventh covenant does not run with the land. Secondly, these particular positions with regard to the payment of calls plainly infringed the rule against perpetuities. Of course, these parties are not parties to the contract. Finally, it is conceded that the provision for distraining on failure to pay is not valid. A right to distrain can only be annexed to a rent charge which this certainly is not. It is, however, conceded to be ancient law that a man cannot take benefit under a deed without subscribing to the obligations thereunder."

Rhone v. Stephens [1992] 2 A.C. 310 is a more recent authority for the proposition that the burden of a positive freehold covenant is not enforceable against a successors in title to the covenantor.

It is common case that the third party has not taken any benefit since 2001-2. In *Thamesmeade Town Limited v. Allotey* [1998] 30 H.L.R. 1052 Peter Gibson L.J. in the Court of Appeal referred to *Halsall v. Brizell* as authority for the proposition that the defendant could, at least in theory, choose between giving the right and paying his proportion of the cost or alternatively giving up the right and saving his money. In the present case the owners of Thamesmeade could not in theory or in practice be deprived of the benefit of the mutual rights of support if they failed to repair the roof. He concluded:

> "It is apparent therefore that the House of Lords considered *Halsall v. Brizell* not to be an example of the pure principle of benefit in burden, which principle was rejected, but one falling into the Vice-Chancellor's second category of conditional benefit.
>
> The reasoning of Lord Templeman suggests that there are two requirements for the enforceability of a positive covenant against a successor in title to the covenantor. The first is that the condition of discharging the burden must be relevant to the exercise of the rights which enable the benefit to be obtained. In *Rhone v. Stephens* the mutual obligation of support was unrelated to and independent of the covenant to maintain the roof. The second is that the successors in title must have the opportunity to choose whether to take the benefit or, having taken it, to renounce it, even if only in theory, and thereby to escape the burden and that the successors in title can be deprived of the benefit if they fail to assume the burden. On both these grounds *Halsall v. Brizell* was distinguished. Although Lord Templeman expressed his wholehearted agreement with Upjohn's decision. Lord Templeman's description of that decision is limited to the defendant being unable to exercise the rights to use the estate roads and to use the sewers without paying his costs of ensuring that they could be exercised. Nothing was expressly said about the cost of maintaining the sea wall or promenade and it is a little difficult to see how, consistently with Lord Templeman's reasoning and, in particular, the second requirement for the enforceability of a positive covenant, the cost of maintaining the sea wall could fall within the relevant principles.

8.5 The court has considered the extent to which equity is prepared to recognise circumstances in which the burden of a negative covenant affecting leasehold land can run. The principle of *Tulk v. Moxhay*, which depended on notice of such covenant, concerned a covenant that the land conveyed would be kept "as a square garden and pleasure ground, in an open state, uncovered with any buildings". Subsequently the land passed through the hands of various persons until it was purchased by the defendant with notice of the covenant. He claimed he was entitled to build upon the land because he was not a party to the covenant. The plaintiff, who still owned some of the houses surrounding the land obtained an injunction restraining the use of the land for any purpose other than as a garden as the successor in title had notice of the covenant.

In *Austerberry v. Oldham Corporation* [1885] 2 29 Ch D 750 (approved by Dixon J. in *Gaw v. CIE* [1953] I.R. 232), land had been conveyed to trustees for the purpose of building a road. The trustees covenanted to maintain the road and allow the public to use it on the payment of a toll. The Court of Appeal held that the defendants were not bound by the covenant even though they had purchased the land with notice of it. Accordingly, *Tulk v. Moxhay* is confined to negative or restrictive covenants such as those which preclude the use of the land for a specified purpose or prohibit certain activities from taking place on it. Positive covenants, such as contained in *Austerberry,* are not covered by the rule in *Tulk v. Moxhay*.

The enforceability of the burden of positive covenants against successors in title, both in common law and in equity, was considered by the House of Lords in *Rhone v. Stephens* [1994] 2 A.C. 310. In that case a house was divided into two separate dwellings. The roof of the larger dwelling (the house) partly covered the adjoining dwelling (the cottage). The cottage was then sold and in the conveyance the owner of the house covenanted for himself and his successors in title to keep the roof in wind and watertight condition. Both properties were subsequently sold. The cottage owner complained of breaches of the covenant and sought to enforce the same against the owner of the house. The cottage owner was unsuccessful on the basis that a positive covenant was not enforceable either in law or in equity against the covenentor's successors in title.

Lord Templeman, with whom the other Members of the House of Lords agreed, held:

> "At common law a person cannot be made liable upon a contract unless he was a party to it … as between persons interested in land other than as landlord and tenant, the benefit of a covenant may run with the land at law but not the burden: see *Austerberry v. Oldham Corporation* … thus … the conveyance, despite its express terms, did not confer on the owner for the time being of [the cottage] the right at common law to compel the owner for the time being of [the house] to repair the roof or to obtain damages for breach of covenant to repair."

Lord Templeman considered the position in equity. He noted that equity supplements but does not contradict the common law. Having referred to *Tulk v. Moxhay* in which a restrictive or a negative covenant was enforced against a successor of the covenantor he remarked:

> "Equity can thus prevent or punish the breach of a negative covenant which restricts the user of land or the exercise of other rights in connection with land. Restrictive covenants deprive the owner of a right which he could otherwise exercise. Equity cannot compel an owner to comply with the positive covenant entered into by his predecessors in title without flatly contradicting the common law rule that a person cannot be made liable in a contract unless he was a party to it. Enforcement of a positive covenant lies in contract; a positive covenant compels and owner to exercise his rights. Enforcement of a negative covenant lies in property; a negative covenant deprives the owner of a right over property."

Accordingly, it is clear that the courts would have to enforce a personal obligation against a person who is not covenanted in order to enforce a positive covenant, whereas the court will enforce a negative covenant on the basis that the land is subject to a restriction.

The House of Lords in *Rhone v. Stephens* was invited to reverse the *Austerberry* decision. Lord Templeman refused, saying that to do so would destroy the distinction between law and equity and convert the rule of equity into a rule of notice.

> "… to overrule the *Austerberry* case would create a number of difficulties, anomalies and uncertainties and affect the rights and liabilities of people who have for over a hundred years bought and sold land in the knowledge, imparted at an elementary stage to every student of law of real property, that positive covenants affecting freehold land are not directly enforceable except against the original covenantor. Parliamentary legislation to deal with the decision of the *Austerberry* case would require careful consideration of the consequences."

8.6 The court is satisfied that the practice of the parties in relation to services and charges can bind either of them to continue with such practice whether for the duration of the relevant term of the lease or otherwise.

There is no privity of estate between the parties. They are not in a landlord and tenant relationship and, accordingly, none of the law governing the running of leasehold covenants is of any relevance.

8.7 The court is satisfied that neither Ringmahon nor its successor in title, Dunnes Stores, has a liability to the defendants or, indeed, to the plaintiff in respect of the covenant contained in Clause 5(c) of the 1986 deed or to the services listed in the Fifth Schedule hereto.