**THE HIGH COURT**

**[2010 No. 2379P]**

**BETWEEN**

**JACKSON WAY PROPERTIES LIMITED**

**PLAINTIFF**

**AND**

**THOMAS KEVIN SMITH AND MAIREAD SMITH**

**DEFENDANTS**

**AND**

**DÚN LAOGHAIRE RATHDOWN COUNTY COUNCIL**

**NOTICE PARTY**

**JUDGMENT of Mr. Justice David Keane delivered on the 16th February 2018.**

**Introduction**

1. This plenary action concerns a dispute between neighbouring landowners about the continuing validity and effect of a restrictive covenant – specifically, a covenant not to build - that was created in 1947.

2. The plaintiff, Jackson Way Properties Limited ('Jackson Way'), seeks various declarations that would, if granted, establish that the covenant is of no benefit to the defendants, Thomas Kevin Smith and Mairead Smith ('the Smiths'), either because it is no longer valid or because they have no entitlement to enforce it. Alternatively, Jackson Way seeks an order pursuant to s. 50 of the Land and Conveyancing Reform Act 2009 ('the Act of 2009'), discharging the covenant in whole or in part, or modifying it so that it no longer affects the development or use of the lands concerned. Finally, Jackson Way seeks damages against the Smiths, although that claim was not pursued at trial.

3. In their defence, the Smiths plead that the covenant remains valid; that their lands are entitled to the benefit of it; that Jackson Way's claim to the contrary cannot be maintained in equity; either that s. 50 of the Act of 2009 has no application to the covenant at issue or that Jackson Way has no entitlement in the circumstances to maintain an application under that provision; and that, if the Act of 2009 applies and Jackson Way is entitled to maintain an application under it, the Smiths are entitled to an appropriate level of compensation. The Smiths counterclaim for a declaration that the covenant is, and at all material times was, valid and that they were entitled to the benefit of it.

**The covenant**

4. The covenant is contained in a deed of transfer dated 2 June 1947 ('the 1947 deed') by which Thomas Vincent Murphy transferred to John Hugh Wilson in fee simple part of the lands at Carrickmines, County Dublin, described in Land Registry Folio DN1849, while retaining the remaining lands in that folio. In material part, the deed of transfer states:

> 'AND the said John Hugh Wilson hereby also covenants with the said Thomas Vincent Murphy his heirs executors administrators and 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.'

5. Jackson Way now holds the title to the lands that were conveyed to Mr Wilson. The Smiths hold 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.

**Historical background**

6. In 1942, Mr Murphy, a stockbroker, acquired the unregistered title to the mansion house known as Priorsland House, together with the appurtenant yard, stables, out offices, pleasure grounds and meadow lands, at Brennanstown, Carrickmines, County Dublin, comprising just over 16 acres ('Priorsland').

7. Mr Murphy subsequently acquired the lands in Folio DN1849, comprising just over 127 acres of farmland that had formed part of the Hinchogue House Estate, by a transfer that was registered on 15 February 1944. Those lands are located immediately to the south of Priorsland.

8. As already noted, under the 1947 deed, Mr Murphy transferred just over 108 acres of the lands contained in Folio DN1849 to Mr Wilson, also a stockbroker. The transferred lands were registered as Folio DN4940. The 1947 deed was registered as a burden on that folio, under the designation corded as Instrument No. 275/6/47, being a notice of burden on that folio. The remaining 18 acres in Folio DN1849 were retained by Mr Murphy who, in 1956, transferred them to a property holding company named the Bedford Company for property management purposes.

**The modification of the covenant**

9. It seems that, in early 1962, Mr Murphy and Mr Wilson agreed to a modification of the covenant to allow Mr Murphy to construct a substantial dwelling house on part of the lands in Folio DN4940.

10. On 31 January 1962, Mr Wilson's solicitors wrote to the Chief Clerk in the Land Registry stating:

> 'We refer to our recent interview with the Senior Legal Assistant in connection with the covenant restrictive of building which is registered as a burden against the lands registered on the above folio.
>
> The covenant was contained in the Transfer Deed dated 2nd June 1947 on the purchase of the above registered owner from Mr. Thomas Vincent Murphy. Mr Murphy has now agreed that this covenant be modified to allow the erection of a private dwellinghouse at a cost of not less than £6,000 on portion of the property to be identified by reference to the Official Land Registry map, 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.

In these circumstances we would be much obliged if you could let us 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.'

11. Mr Wilson's solicitors wrote again to the Chief Clerk on 7 February 1962, stating:

'[W]e beg to confirm that we have ascertained from Mr. Thomas Vincent Murphy's Solicitors that in the year 1956 Mr. Murphy formed a Company, namely Bedford Co. Ltd. to hold all his property at Carrickmines. We understand that all Mr. Murphy's property was then transferred to Bedford Co. Ltd. And that the Company is accordingly the proper body to agree to the modification of any covenant. We are informed that they will be agreeable to do this in the manner indicated.'

12. The Deputy Registrar prepared a note in response. It states:

'In this case it is not clear whether the covenant is 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.

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.

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.

The entry of the Deed should be noted at entry 4 of folio 4240 as follows:-

"The covenant at entry No. 3 had been modified to the extent specified in Instr…."'

13. Thomas Vincent Murphy swore an affidavit on 6 March 1962. In it he averred as follows:

'1) By Deed of Transfer dated 2nd June 1947 and made between myself of the one party and John Hugh Wilson of the other part the land now registered in Folio 4940 of the register County Dublin was transferred by me to the said John Hugh Wilson.

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.

3) 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.

4) There has never been, nor is there now, any building scheme contemplated for the lands sold or retained by me, save the erection of one private dwellinghouse.

5) In the year 1956 I transferred all my property at Carrickmines to a holding company namely the Bedford Company. No other dealings with the property have taken place since 1947 and the Bedford Company are still the owners of the property which I transferred to them.

6) I have not transferred any of the property which I owned at the date of the said deed dated 2nd June 1947 to any persons other than the said transfer of all my said property to the Bedford Company.

7) I am agreeable to the said John Hugh Wilson applying for the modification of the covenant restrictive of building in accordance with the Deed lodged herewith.'

14. The Bedford Company, Thomas Vincent Murphy, and John Hugh Wilson made a deed of indenture on 13 March 1962, agreeing both the modification of the covenant to permit the construction of the proposed private dwelling-house on an identified portion of the lands contained in Folio DN4940, Dublin and the amendment of the notices of burden on that folio to reflect that modification ('the 1962 deed'). On 29 March 1962, the 1962 deed was duly recorded as Instrument No. 45/5/62 on Folio DN4940, being a burden or notice of burden on that folio, in the following terms:

'The covenant contained in Instrument No. 275/6/47 by John Hugh Wilson with Thomas Vincent Murphy 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.'

**Acquisition of the Folio DN4940 lands by Jackson Way**

15. The Folio DN4940 lands passed through several hands until, on 8 December 1992, a company named Paisley Park Investments Limited was registered as the full owner of them. On the liquidation of that company, Jackson Way became full owner of the lands by transfer in specie registered on 5 July 1994.

**The Smith's interest in the Folio 1849 lands**

16. Through a series of transactions from 1978 onwards, the ownership of the remaining 18 acres of the Folio DN1849 lands became fragmented. By 1979, the residue of the lands in that folio comprised just two distinct plots: Plan 3 and Plan 4 of Ordnance Survey Ref. 19/2 measuring 0.154 acres and 0.165 acres respectively, or less than a third of an acre in total. On 30 June 1983, the Smiths were each registered as holding a half share in the full ownership of those lands as tenants in common and, on 19 February 2008, the Smiths were registered as joint tenants holding the full beneficial interest in the property.

**The Smiths interest in Priorsland**
17. By indenture of conveyance made on 20 November 1956, Thomas Vincent Murphy conveyed Priorsland to the Bedford Company. By a further indenture of conveyance made on 27 July 1964, the Bedford Company conveyed Priorsland to an individual who acquired the Folio DN1849 lands at the same time. In 1978, all of those lands were transferred again, with the exception of just over 4 acres of the Priorsland property retained by that individual. The Smiths are the current owners of Priorsland, which has now been registered as two adjoining folios; DN9455F and DN11237F.

**The connection between Priorsland and the remaining Folio DN1849 lands**
18. The two remaining plots that comprise Folio DN1849, amounting in aggregate to less than one third of an acre, are now effectively part of the Priorsland property. That has come about because the boundary line between the Priorsland House Estate to the north and the Hinchogue House Estate to the south was once a jagged line running approximately west to east – presumably, along what was then the meandering course of the Carrickmines River. The river is now channelled in a straight line between the properties, leaving some of the old Hinchogue Estate lands on the Priorsland side, including the two small triangles of land that now comprise the only remaining plots in Folio DN1849.

**The Smiths' claim to the benefit of the covenant**
19. On 9 November 1995, the Smiths' solicitors wrote to the Land Registry, stating:

> 'We confirm that we act for Thomas Kevin Smith and Mairead Smith, the registered owners of the property comprised in Folio 1849 Co. Dublin as shown on map plans 3 & 4 of Ordinance Survey Ref. 26/2.
>
> We confirm that our clients' property is directly effected (*sic*) by a covenant created by Instrument Nos.(*sic*) 275/6/47 and modified by Instrument No.45/4/64 referred to at Entries 4 and 5 of Part 3 of Folio DN04940 Co. Dublin.
>
> The covenant in question was entered into for the benefit of Thomas Vincent Murray (*sic*), the owner of the lands shown as Plan 21 on Ordinance Survey Ref. 26 and 26/2 and Plans 3, 4 and 5 on Ordinance Survey Ref. 26. Our clients are the successors in title of Thomas Vincent Murray (*sic*) in respect of the lands shown as Plans 3 & 4 of Ordinance Survey Ref. 26.'

20. Many years later, on 25 March 2009, the Smiths' solicitors wrote to the Registrar of Titles in the Property Registration Authority, stating in material part:

> 'Our clients are the registered owners and occupiers of the property and lands comprised in Folios DN11237F, DN9455F and DN1849. Our clients' property and lands are more commonly known as Priorsland, Carrickmines, Dublin 18.
>
> All of our clients' property comprised in the aforementioned Folios DN11237F, DN9455F and DN1849 enjoy the benefit of a Restrictive Covenant (hereinafter called "the Covenant") which is registered as a burden at entries numbers 4 and 5 of Part 3 of Folio DN4940 prohibiting the erection of any buildings on the lands comprised in Folio DN4940.
>
> We wish to make reference to a letter dated 9th November 1995 written by our office to the Land Registry seeking copies of two Land Registry Instruments Numbers 275/6/47 and 45/4/62, a copy of which letter has been placed on both of those Land Registry Instruments.
>
> The sole purpose of that letter dated 9th November 1995 to the Land Registry was to apply for copies of the two Instruments Numbers 275/6/47 and 45/4/62. The purpose of the said letter was not to define or delimit the lands benefitting from the Restrictive Covenant and it did not seek to do so.
>
> Our clients' position is and has always been that the entire of their property at Priorsland consisting of the house known as Priorsland and its accompanying lands, being all of the property comprised in Folios 11237F, 9455F and 1849 of the Register of Freeholders County Dublin is entitled to the benefit of the Covenant and that they are entitled to enforce the Covenant.'

**The South Eastern Motorway Scheme**
21. While not formally admitted by the Smiths, it does not seem to be in dispute that, on 19 October 1998, the Dún Laoighaire Rathdown County Council ('the Council') made the South Eastern Motorway Scheme 1997, by which the Council was authorised to acquire, among other lands, a portion of the Folio DN4940 lands owned by Jackson Way. The Council served notices to treat on Jackson Way on 14 June 2000, followed by notices of entry on 17 September 2001. The Council took possession of the relevant portion of those lands, amounting to approximately 20 acres, on 3 October 2001.

22. Since the Council and Jackson Way were unable to agree the appropriate level of compensation, the matter was referred to arbitration and, on 12 November 2003, the arbitrator awarded Jackson Way €12,860,700.00 against the Council in respect of the compulsory purchase of its interests in those lands, subject to the easements, wayleaves and right of way identified in that award, together with the costs incurred by Jackson Way in the preparation and submission of its claim and in the conduct of the arbitration.

23. Recital 3 of the arbitrator's award records the claim by Jackson Way that it held a freehold interest in the lands in Folio DN4940 with vacant possession, subject to certain specified easements, wayleaves and rights of way, but that certain burdens recorded on the folio, including those created by the 1947 and 1962 deeds, no longer affected the property, which assertion Jackson Way was to vouch following publication of the arbitrator's award.

24. The M50 motorway now runs broadly northwest to southeast across the lands comprising Folio DN4940 owned by Jackson Way.

25. To date, the Council has not paid any monies to Jackson Way on foot of the said award.

26. On 31 July 2008, Jackson Way issued High Court proceedings against the Council seeking enforcement of the arbitrator's award. Those proceedings bear the record number 648Sp of 2008. An issue arose on the pleadings concerning whether the covenant still existed, affecting the value of Jackson Way's interest in the compulsorily acquired lands, at the material time; see *Jackson Way Properties Ltd v Dún Laoghaire Rathdown C.C.* [2009] IEHC 266 (Unreported, High Court (Laffoy J), 11th March, 2009). Although I have not been shown either, I have been told that, by judgment and order of 25 May 2009, Laffoy J made clear that no issue concerning the validity of the covenant could be determined without first permitting the Smiths an opportunity to be heard. Jackson

Way pleads that it was for that purpose – having considered that judgment or ruling - that it instituted these proceedings against the Smiths on 8 March 2010.

27. On 18th September 2009, the Smiths lodged a compensation claim with the Council for €5,850,000.00 as the value of their interest in the lands compulsorily acquired for the South Eastern Motorway Scheme, that interest being (presumably) the benefit to their lands of the covenant over the Jackson Way lands in Folio DN4049; see *Jackson Way Properties Ltd v Dún Laoighaire Rathdown C.C.* [2015] IEHC 619 (Unreported, High Court (Binchy J), 9th October, 2015).

28. No doubt it was by reference to some or all of the circumstances I have just described that the Council applied - and was permitted - to become a notice party to these proceedings, in which it then offered to provide any assistance the Court might require but otherwise played no active part.

**The arguments**

29. In the written submissions filed on its behalf, Jackson Way summarises the arguments it has advanced in its amended statement of claim as follows:

> (a) The covenant was purely personal to the original parties to it and neither the burden nor the benefit of it run with any land.
>
> (b) The covenant is void for uncertainty in that it fails to define, sufficiently or at all, the lands it affects and the lands it benefits.
>
> (c) The benefit of the covenant is not annexed to any land and, in particular, was not annexed to the Folio DN1849 lands owned by the Smiths so it could not pass without express agreement.
>
> (d) The benefit of the covenant has not been expressly assigned to the Smiths, much less is there any unbroken chain of assignment of that benefit between Thomas Vincent Murphy and the Smiths.
>
> (e) If the benefit of the covenant was annexed to the Folio DN1849 lands or any other lands, it was attached to those lands in their entirety and does not attach to the small remaining part of the original Folio DN1849 lands owned by the Smiths.
>
> (f) If the benefit of the covenant was annexed to the Folio DN1849 lands or any other lands, the character of those lands had materially changed to that of development land prior to 14 June 2000 (the date on which the Council served notices to treat on Jackson Way).
>
> (g) The remaining lands in Folio DN1849 owned by the Smiths are too small and insignificant to benefit from the covenant or to be adversely affected by any breach of it.
>
> (h) The Smiths abandoned any benefit conferred on their lands by the covenant by applying for the rezoning of those lands from agricultural to residential.
>
> (i) The Smiths abandoned any benefit conferred on their lands by the covenant or any entitlement to enforce it when they failed to take steps to restrain the construction of a number of buildings on the Jackson Way lands.
>
> (j) If the covenant is valid and the Smiths can rely on it, Jackson Way is entitled to an order under s. 50 of the Act of 2009, discharging or modifying the covenant on the basis that it constitutes an unreasonable interference with the use and enjoyment by Jackson Way of the Folio DN4940 lands.

30. From the amended defence they have delivered and the written submissions they have filed, the Smiths raise the following arguments in response:

> (a) The covenant was not expressed to be, and was not, a purely personal one.
>
> (b) From the surrounding circumstances or by operation of s. 58 of the Conveyancing Act, 1881, or both, the covenant was impliedly annexed to, and intended to run with, the Priorsland House Estate and the remaining Folio DN1849 lands and every part of those lands. Those lands are thus the dominant lands and the Folio D4940 lands are the servient lands for the purpose and effect of the covenant.
>
> (c) The meaning and effect of the covenant are, thus, certain.
>
> (d) There has been no change in the character of the lands material to the continuing validity of the covenant.
>
> (e) The Smiths have not taken any step nor made any election that renders the covenant unenforceable by them.
>
> (f) Jackson Way is guilty of inordinate and inexcusable delay amounting to laches in seeking equitable relief and, for that reason, the court should exercise its discretion to refuse to grant it.
>
> (g) Jackson Way has no entitlement as servient owner to an order pursuant to s. 50(1) of the Act of 2009 discharging in whole or in part or modifying the covenant as an unreasonable interference with the use and enjoyment of the Folio DN4909 lands.
>
> (h) Alternatively, if Jackson Way has an entitlement to an order under s.50(1) of the 2009 Act, compliance with it will result in quantifiable loss to the Smiths, as dominant owners, so that it must, in justice and with due regard to the property rights of the Smiths, include as a condition, pursuant to s. 50(3) of the Act of 2009, a requirement that Jackson Way pay the Smiths an amount in compensation equivalent to the value of the benefit to them of the covenant

**The Law**

*i. restrictive covenants of freehold land in Ireland*

31. In Wylie, *Irish Land Law, 5th edn*. (Dublin, 2013) ('*Wylie*') (at para. 21.13), Professor Wylie points out that restrictive covenants in respect of freehold land were, until recently, comparatively rare in Ireland because most land was leasehold. In consequence, they have received little judicial attention here. The law of England and Wales concerning the scope of such covenants was substantially altered by the enactment of the Law of Property Act 1925 in a manner that, certainly prior to the coming into force of the Act of 2009, the law of Ireland was not. Thus, the principles of the common law and, more significantly, those of equity that govern the validity and enforceability of restrictive covenants over freehold land entered into prior to 1 December 2009, largely fall to be distilled from a succession of nineteenth, and early twentieth, century English cases.

32. In dealing with restrictive covenants affecting freehold land, a distinction must be drawn between the position at common law and that in equity. 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. As Professor Wylie explains (at para 21.28 of his work, already cited), 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 of *Tulk v Moxhay* (1848) 2 Ph 774, which famously concerned a restrictive covenant to leave uncovered with buildings the lands comprising Leicester Square in London. Lord Cottenham LC held that the covenant could be enforced against a purchaser of the burdened land on notice of it, stating (at 778):

> '[N]othing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being able to escape from the liability which he had himself undertaken.'

33. In this case, Jackson Way concede that the covenant created by the 1947 deed is a restrictive covenant and, conversely, the Smiths make no claim that the burden of the covenant is capable of running with the land at common law. This narrows the issues between the parties to those concerning whether, in equity, the burden of the covenant runs with the Folio DN4940 lands for the benefit of either the Folio DN1849 lands or, as the Smiths contend, both the Priorsland House property and the Folio DN1849 lands.

*ii. personal covenants*

34. Since, in the 1947 deed, Mr Wilson covenanted with Mr Murphy 'his heirs executors administrators and assigns' on his own behalf and that of 'his heirs executors administrators and assigns', the covenant wasis not personal to the original parties in the narrow sense of being incapable of transmission by either. As the leading English work – Preston and Newsom, *Restrictive Covenants Affecting Freehold Land,* 10th edn. (London, 2013) ('*Preston and Newsom*') – puts it (at para. 1-06):

> 'A covenant expressed to be with the covenantee or his "assigns" or by the covenantor on behalf of himself and his "assigns" is evidently not intended to be personal to that extent. Some covenants by their nature are personal to both covenantor and covenantee; others may be personal to one but not both. So far as the covenant is not personal, questions of the running of benefit and the running of burden must be considered.'

I accept that as a correct statement of the law and so it is necessary to next consider the principles that govern the circumstances in which the benefit and the burden of a restrictive covenant run with the land.

*iii. running of the benefit in equity*

35. Equity follows the common law rule that the benefit of a restrictive covenant is enforceable by the original covenantee and his successors in title, subject to the requirement that the covenant should touch and concern the lands of the covenantor. However, as *Wiley* notes (at para. 21.29), having developed the rule in *Tulk v Moxhay,* equity became even more precise in its requirements than the common law. Thus, a further rule developed that 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.

*iv. no express assignment of the benefit*

36. In 1956, Mr Murphy (as original covenantee) parted with both Priorsland and the remaining Folio DN1849 lands to the Bedford Company without effecting the express assignment of the benefit of the covenant to that company in respect of either conveyance. It follows, as Jackson Way argues, that there can have been no express benefit capable of onward assignment to the Smiths when, in 1983, they acquired both Priorsland and two of the remaining plots of land comprising Folio DN 1849, nor was any such purported express assignment made to them.

*v. annexation*

37. The other way in which the benefit of a covenant can run with lands in equity is through annexation. Annexation can occur in one of three ways, only two of which are potentially relevant here. Of those, 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 to 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. As regards the latter, the Smiths contend that the benefit of a covenant runs with the land of the covenantee in every case to which that section applies, including the present one, by operation of s. 6 or s. 58 of the Conveyancing Act 1881.

38. The greater part of the arguments at trial were directed to these issues.

*vi. express annexation*

39. *Wylie* has the following to say about express annexation (at para. 21.35):

> 'Express annexation might be indicated by the wording of the deed of covenant itself. It had, however, to specify the land to be benefited and state that the benefit related to it or that it was entered into with the covenanteee as owner of that land. 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. To avoid difficulties over whether the covenant could reasonably benefit a very large piece of land, it was wise to annex it to the land "or any part" of it.'
>
> (emphasis in original, footnotes omitted)

40. In *Drake v Gray* [1936] Ch. 451 at 456, Green LJ stated:

> 'There are two familiar methods of indicating in a covenant of this kind the land in respect of which the benefit is to enure. One is to describe the character in which the covenantee receives the covenant…a covenant with so-and-so, owners or owner for the time being of whatever the land may be. Another method is to state by means of an appropriate declaration that the covenant is taken 'for the benefit of' whatever the lands may be.'

41. *Preston and Newsom* comments on that dictum in the following way (at para. 2-14):

> 'In practice there are many variations on these phrases; but it is essential to find a clear indication within the pre-1926 instrument of an intention to benefit the property (and the owners thereof merely by virtue of their ownership), as distinct from creating a covenant which
>
> > "would be of use to the covenantee for the protection of [his property] in his hands and for enabling him to dispose of [the property] advantageously to anybody with whom he might deal in future." [*per* Sargant J in *Chambers v Randall* [1923] 1 Ch. 149 at 155]'

42. The covenant in this case identifies two portions of land. The first is that 'part of the lands described in Folio 1849 of the register County Dublin specified in the schedule' that is to be transferred to Mr Wilson. The second is 'the lands retained by the said Thomas Vincent Murphy', which are identified in the context of the creation of a right of way over the transferred lands, expressed 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 to include a right to drive cattle and other animals along it.'

43. The words just quoted appear immediately preceding the words of the covenant in the 1947 deed. Thus, the deed specifically identifies transferred lands and retained lands. However, it does not in terms specify any land to be 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. 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.

44. The insufficiency of a restrictive covenant expressed to be with a vendor his 'heirs executors administrators and assigns' to annex the benefit of it to any lands of that vendor, without more, was established in *Renals v Cowlishaw* (1878) 9 Ch D 125. The essential facts of that case were very similar to those now at issue. By deed of conveyance made in 1845, the trustees of a mansion house and property known as the *Mill Hill* estate, as well as certain adjoining lands, sold some of those adjoining lands in fee simple to one Shaw, who at the same time covenanted on his own behalf and that of 'his heirs, executors, administrators and assigns' with the trustees 'their heirs, executors, administrators and assigns' not to build upon the lands conveyed to him within a certain distance from a particular road leading 'to the *Mill Hill* house and property belonging to the said trustees' and not to carry out any trade or business in any building erected upon those lands, which were to be private dwelling houses only. The covenant did not specify whether it was for the benefit of the contemplated dwelling houses or the *Mill Hill* estate or, indeed, any identified property.

45. Many years later, a successor in title to the *Mill Hill* estate sued a successor in title to part of the lands that had been acquired by Shaw, seeking an injunction against the carrying on, upon that part of the former Shaw lands, of the trade of 'wheelwrights, smiths and bent timber manufacturers', from a premises on those lands at which had been erected a high chimney that emitted thick black smoke. The injunction was sought in reliance upon the terms of the restrictive covenant, the benefit of which, it was argued, should be construed as having been annexed to the *Mill Hill* estate.

46. In a decision later affirmed by the Court of Appeal (*Renals v Cowlishaw* (1879) 11 Ch. D. 866), Hall V.C. held that the use of the words 'heirs, executors, administrators and assigns' was not sufficient, without more, to effect annexation of the benefit of the covenant to the *Mill Hill* estate. Commenting on that decision, Preston and Newsom explains (at para. 2-09):

> 'Indeed, in *Lamb v Midac Equipment Ltd* [1999] UKPC 4; 52 W.L.R. 290 C.A. the Privy Council considered that such words are consistent with the covenant being intended for the benefit of the vendor, as distinct from specific property, and likewise rejected a claim of annexation. "Assigns" might refer to an intention not to pass the benefit to assigns otherwise than by assignment. As pointed out *in Rogers v Hosegood* [1900] 2 Ch. 399 CA; [1900] 2 Ch. 388, the word "assigns" is ambiguous. It can even refer to those to whom the covenantee has previously conveyed adjoining land.'
>
> (citations inserted, footnotes omitted)

47. Professor Wade, while arguing for the broadest possible approach to the transmission of the benefit of restrictive covenants as genuine proprietary interests ([1972B] CLJ 157), has acknowledged (at 173):

> 'As every law student knows, the stock example of how not to annex the benefit comes from *Rennals v Cowlishaw*, where the covenant was made with the vendors "their heirs, executors, administrators and assigns."'

48. In *Spicer v Martin* (1888) 14 App. Cas. 12 HL at 24, Lord McNaughten referred to the the judgment of Hall VC in *Renals v Cowlishaw* as 'of the utmost weight'; in *Rogers v Hosegood* [1900] 2 Ch. 388 (at 396), Farwell J acknowledged it as 'of the highest authority'; and in *Miles v Easter* [1933] Ch. 611 (at 628), the English Court of Appeal described it as a decision that 'has always been regarded as a correct statement of the law.'

49. The jurisprudence identifies two problems with the use of such words in isolation. 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. As Hall VC put it in *Renals v Cowlishaw* (at 129), whenever construing the express words of a covenant or seeking to identify its apparent purpose, it is important to attend to the question of whether the benefit was intended to be annexed to other property or was only obtained to enable the covenantee more advantageously to deal with that property. If it can be established that the benefit was intended to be annexed to other property, the second problem isThe second problem is, of course, that of identifying the lands that are to benefit.

50. The words at issue in both *Renals v Cowlishaw* and the present case, stand in contrast to those of the restrictive covenant in *Rogers v Hosegood* [1900] 2 Ch. 388, recognised in Megarry and Wade, *The Law of Real Property*, *8th edn* (London, 2012) ('*Megarry and Wade*') (at 32-061) as comprising the classic formula. Those words are, that is to say:

> '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'*.
>
> (emphasis added)

51. Thus, as the Smiths acknowledge, the 1947 deed did not expressly annex the benefit of the covenant to either the remaining Folio DN1849 lands or the Priorslandproperty. TRather, the Smiths principal argument is that it impliedly annexed the benefit of the covenant to both.

*vii. implied annexation*

52. The English courts now recognise that annexation may be implied rather than express.

53. In *Shropshire County Council v Edwards* (1982) P. & C.R. 270, Judge Ruben explained (at 277-8):

> 'If, on the construction of the instrument creating the restrictive covenant, both the land which is intended to be benefited and an intention to benefit that land, as distinct from benefiting the covenantee personally, can be clearly established, then the benefit of the covenant will be annexed to that land and run with it, notwithstanding the absence of express words of annexation.'

54. Going back to *Rogers v Hosegood* at the turn of the twentieth century, 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.'

55. In *Miles v Easter* [1933] Ch. 611 (at 631-2), Romer LJ confirmed that an intention to benefit the 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'* (emphasis added), before qualifying that proposition by observing 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.'

56. The case of *Newtown Abbot Cooperative Society v Williamson & Treadgold Ltd* [1952] 1 Ch. D. 279 involved the sale of acertain property by a woman who carried on an ironmonger's business on the opposite side of the street from it in another property named Devonia. The sale of the first property was made subject to a covenant by the purchaser not to use it as an ironmonger's shop. Upjohn J held that there was nothing in the 1923 conveyance at issue that identified land for the benefit of which the covenant was taken and that, while the obvious capability of the vendor's premises opposite to benefit from it was not enough for annexation, it was sufficient to enable the effective assignment of the benefit of the covenant in equity to the vendor's son under her will as part of her personal estate. In the course of his judgment, Upjohn J said (at 283 ):

> '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.'

57. The Smiths place strong reliance on the decision of Wilberforce J in *Marten v Flight Refuelling Ltd* [1962] Ch. 115. But the facts of that case were some distance away from those in the present case and, indeed, those of *Renals v Colishaw*. The case concerned a large agricultural estate of about 7,500 acres in the County of Dorset, known as the *Crichtel* estate. The *Crichtel* estate included within it a farm, *Crook Farm*, of some 562 acres. In 1942, the British Air Ministry requisitioned around 200 acres of *Crook Farm* for use as a military aerodrome. In 1943, the trustees of the *Crichtel* estate, the special executors of its former tenant for life, conveyed *Crook Farm* to one Harding, the person who had been farming it.

58. That conveyance included a restrictive covenant in the following terms:

> 'The purchaser hereby covenants with the vendor and its successors in title (1) that no part of the land hereby conveyed nor any building or erection thereon shall at any time hereafter be used for any purpose other than agricultural purposes without the previous written consent of the vendor or its agent provided always that if the vendor should sell all or any part of its land immediately adjoining or adjacent to the land hereby conveyed either free from any restriction as to user or on terms permitting the same to be used for any purpose other than agricultural purposes or if the vendor should agree with the town or country planning authorities that all or any part of the land immediately adjoining the land hereby conveyed may be used for purposes other than agricultural purposes the purchaser shall be at liberty to use or sell all or any part of the land hereby conveyed either free form any restriction as to user or subject to the same conditions as to user as those imposed by the vendor on such sale or agreed with the town or country planner as the case may be….'

59. In 1947, the British Air Ministry permitted the defendant company to occupy the aerodrome at *Crook Farm* with rights in the nature of a tenancy, on payment of a substantial rent. The company, which was formed to develop methods of refuelling aircraft in flight, carried out industrial activities there, including some work for the Air Ministry, which was not otherwise using the aerodrome. Mrs Marten, who as an infant had been the equitable owner of the *Crichtel* estate with an interest in the tail male, attained her majority in 1950, whereupon she disentailed the *Crichtel* estate and became its absolute owner. Mrs Marten and the trustees together sued the defendant company and the Air Ministry to enforce the restrictive covenant against industrial activity on the *Crook Farm* lands, while making no objection to the use of those lands for military purposes associated with the defence of the realm.

60. The relevant contentions of the defendants, identified by Wilberforce J (at 130), were, first, that an intention to benefit some land must appear on the face of the deed and, second, that the precise land to be benefited must also be stated in the deed or at least must be capable of ascertainment from the terms of the deed in accordance with the normal rules of interpretation of documents. In reliance upon the decisions in *Miles v Easter and Newtown Abbot Cooperative Society Ltd v Williamson & Treadgold Ltd*, already cited, Wilberforce J held (at 131) that the existence and situation of the land to be benefited need not be indicated in the conveyance, if it can be otherwise shown with reasonable certainty from evidence *dehors* (meaning 'outside') the deed and, secondly, that a broad and reasonable view may be taken as to the proof of the identity of the lands.

61. On that basis, and by reference to the fact that the *Crichtel* estate had, for many years, been not merely a conglomeration of separate lands and cottages but a recognisable and recognised agricultural unit, Wilberforce J concluded that the covenant was taken for the benefit of the land of the vendors, that land being the *Crichtel* estate.

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 and which was found to be ineffective in Renals v Cowlishaw. Hence, there is no suggestion in *Marten* that Renals v Cowlishaw is, or has become, bad law. Second, it would have been difficult on the facts of *Marten* to construe the trustees of the *Crichtel* estate as having covenanted for personal benefit, rather than for the benefit of the *Crichtel* 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 *Crichtel* estate left no doubt in *Marten* about the identity of the lands that were to benefit under the covenant.

*viii. extrinsic evidence of the identity of the lands that are to benefit*

63. The last observation brings me to the next issue, which is 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 reasonable certainty by extrinsic evidence.

64. The circumstances surrounding the creation of the 1947 deed are not in issue and have already been described. Mr Murphy had acquired the Priorsland property in 1942 and the quite separate, though immediately adjacent, Hinchogue Estate (Folio DN1849) lands in 1944. Under the 1947 deed, Mr Murphy transferred 108 acres out of the Folio DN1849 lands to Mr Wilson, which lands were then registered as Folio DN4940, while retaining approximately 18 acres of land in Folio DN1849. The question, therefore, is whether, in the acknowledged absence of express words, there is any properly admissible extrinsic evidence capable of establishing whether the lands to benefit were the remaining Folio DN1849 lands or both those lands and Priorsland?

65. One might, indeed, ask the antecedent question, was it ever intended to annex the benefit of the covenant to any land, rather than to have it benefit Mr Murphy personally by enabling him more advantageously to deal with his property? After all, the decisions in *Rennals v Cowlishaw* and *Rogers v Hosegood* were already many decades old when the 1947 deed was drafted and executed in the specific terms already described.

66. Leaving that aside for the present and addressing the implied annexation question on its merits, it is plainly not enough that both the Priorsland property and the remaining Folio DN1849 lands were capable of benefiting from the covenant at the time of the 1947 deed. That is so because, while I do not believe it is disputed that - in that sense, at least - the restriction on building under the covenant 'touches and concerns' those lands, Cozens-Hardy MR made clear in *Reid v Bickerstaff* [1902] 2 Ch. 305, a case in which the plaintiff failed to establish that a covenant of 1840 with the vendors 'their heirs and assigns' was annexed to the land, 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 land more valuable (at 320-321).

67. The Smiths submit that Mr Murphy's 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 benefitwhat land is benefited under the covenant, and that the extrinsic evidence of that purpose appears, albeit *ex post facto*, in the following averment in the affidavit that Mr Murphy swore on 6 March 1962 in support of Mr Wilson's application for registration of the modification of the covenant under the 1962 deed:

> '3) 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.'

68. There are three principal difficulties with that submission. 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.

69. The second is 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. While it is true that, as an exception to the general rule, extrinsic evidence is admissible to explain the meaning of words used where a latent ambiguity exists, I do not think that that is the position here, where the problem is the absence of any relevant words rather than any ambiguity in the words used.

70. In *Renals v Cowlishaw* (1879) 11 Ch. D. 866, affirming on appeal the decision of Hall VC in that case, already cited and discussed, James LJ said 'there must be something in the deed to define the property for the benefit of which the [restrictive covenants] were entered into.' The In *Marquess of Zetland v Driver* [1939] Ch. 1, the English Court of Appeal (Greene MR, Luxmoore and Farwell JJ) in *Zetland v Driver* [1939] Ch. 1 identified as one of the conditions of annexation that 'the land which is intended to benefit must be so defined as to be easily ascertainable' (at 8).

71. Thus, while extrinsic evidence may be adduced to establish the existence and situation of the lands intended to benefit under a covenant, where the words used in the covenant make referencerefer only to 'the lands retained by the vendor'; 'the vendor's adjoining [or nearby] lands'; 'the X estate'; or some equivalent general expression thereby capable of latent ambiguity, it is not permissible to adduce extrinsic evidence to establish both the existence and situation of the land intended to benefit and that it was intended to benefit some land, rather than the covenantee personally. Differently put, while extrinsic evidence can be used to interpret ambiguous words in a deed, it cannot be used to add new wordsterms to one.

72. As *Preston and Newsom* explains (at para. 2-34):

> '"Ascertainable" does not mean that the land must be fully defined in the covenant deed. It is enough, as Farwell J. said in *Rogers v Hosegood*, that there is sufficient description of it that it is capable of being rendered certain by extrinsic evidence. This is an application of the maxim "that is certain that can be rendered certain" without the future agreement of the parties. In cases of unclear drafting, it follows that, as extrinsic evidence is lost over time, annexation is liable to become more difficult or impossible to prove.'

73. The third difficulty is that, even if the relevant averment in Mr Murphy's 1962 affidavit were admissible evidence on the issue of annexation (and, in my judgment, it is not), 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 benefited was the Priorsland property, the retained land in Folio DN1849, or any part thereof, or both the Priorsland property and the retained lands in Folio DN1849, or any part thereof. Mr Murphy's statement that the 'purpose' of the covenant was to protect the amenities of his residence at Priorsland and the privacy of himself and his family, 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 the Priorsland property; or through his ownership of both of those properties.

74. In this context, it is necessary to bear in mind that the 1962 deed of modification again fails to identify any lands to which the benefit of the covenant is annexed. That deed was made between the Bedford Company, Mr Murphy and Mr Wilson and recites that Mr Wilson had requested both Mr Murphy and the Bedford Company to modify the original covenant to permit him to erect a dwelling house on the burdened lands, in circumstances where Mr Murphy had conveyed the fee simple interest in both the Priorsland property and the remaining Folio DN1849 lands to the Bedford company in 1956.

75. The Smiths submit that the involvement of the Bedford Company in the execution of that instrument, as successors in title to Mr Murphy in respect of 'all his lands at Carrickmines', implies an agreement or acknowledgment that the benefit of the covenant was annexed to both the Priorsland property and the remaining Folio DN1849 lands, 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 evidences an agreement or acknowledgment that the benefit of the covenant was personal to him.

76. The conclusion I draw is 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. Nor did the releases from the burden of the covenant that Jackson Way obtained in more recent years from the owners of various other parts of the remaining Folio DN1849 lands. 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.

77. In *Crest Nicholson Residential (South) Ltd v McAllister* [2004] 1 W.L.R. 2409, the English Court of Appeal (per Chadwick LJ; Auld and Arden JJ concurring), having endorsed the requirement identified in *Marquess of Zetland* that the land to be benefited must be so defined as to be readily ascertainable, went on to explain the good reasons for that requirement (at 2422-3para. 34):

> 'It is obviously desirable that a purchaser of land burdened with a restrictive covenant should be able not only to ascertain, by inspection of the entries on the relevant register, that the land is so burdened, but also to identify the land for which the benefit of the covenant was taken – so that he can identify who can enforce the covenant. That latter object is achieved if the land which is intended to be benefited is defined in the instrument, so as to be easily ascertainable. To require a purchaser of land burdened with a restrictive covenant, but where the land for the benefit of which the covenant was taken is not identified in the instrument, to make enquiries as to what (if any) land the original covenantee retained at the time of the conveyance and what (if any) of that retained land this covenant did, or might have "touched and concerned" would be oppressive. It must be kept in mind that (as in the present case) the time at which the enforceability of the covenant becomes an issue may be long after the date of the instrument by which it was imposed.'

78. In this case, the relevant register is the register of freeholders, originally established and operative at the material time under the Local Registration of Title (Ir) Act 1881, as amended. That Act has since been replaced by the Registration of Title Act 1964, as substantially amended by the Registration of Deeds and Title Act 2006, and further amended by the Land and Conveyancing Law Reform Act 2009. Under s. 45(1)(k) of the Act of 1881 a covenant could be registered as a burden affecting registered land. In this case, Part III of Folio DN4940 includes the following entries:

> '3. 5th June 1947, No. 275-6-47} The covenant contained in Instrument No. 275-67-47 by John Hugh Wilson with Thomas Vincent Murphy…his heirs, executors, administrators and assigns that the said John Hugh Wilson his heirs, executors, administrators and assigns will not at any time erect any building on the property herein.
>
> 4. 29th March, 1962. No. 45/4/62) The covenant at Entry No. 3 has been modified to the extent specified in Inst. 45/4/62.'

79. As might be expected, Instrument No. 275-67-47 is the 1947 deed of conveyance and Instrument No. 45/4/62 is the 1962 deed of modification. Even if one accepts that the 1962 affidavit of Mr Murphy forms part of the latter instrument by being placed with it on the Land Registry file, for all of the reasons I have already set out I am satisfied that inspection of those entries on the relevant register does those documents considered together do not permit the ascertainment , by inspection of the entries on the relevant register, 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 are 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 a source of a very real practical problem.s, such as the one presented here.

80. I conclude that it is 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.

*ix. is annexation implied by statute?*

81. The Smiths submit that the benefit of the covenant in the 1947 deed has been annexed to their lands by operation of law under s. 6 or s. 58 of the Conveyancing Act 1881. They urge me to adopt the view expressed by Professor Wade ([1972B] C.L.J. 157 at 173-5) on the effect of those sections, properly construed, as a matter of English law.

82. Section 58(1) of the Act of 1881, which now stands repealed in Ireland under s. 8(3) of the Act of 2009, 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. Professor Wade speculated that, in enacting s. 58, the British Parliament intended to remedy the 'mistake' made in *Renals v Cowlishaw* and that its effect was to annex the benefit of any such covenant to the land of the covenantee. That view was an unorthodox one when expressed by Professor Wade and it has never found acceptance in the jurisprudence.

83. Indeed, *Preston and Newsom* takes the opposite view (at para. 2-12):

> 'As the words "heirs and assigns" had already been held not to annex the benefit of covenants, s. 58 made no alteration in this respect. It continued to be necessary to establish an intention to make the benefit run.'

84. After identifying a number of cases involving covenants relating to land made after 1881 (but before 1926) in which no finding of implied annexation was made – such as Ives *v Brown* [1919] 2 Ch. 314; *Miles v Easter* [1933] Ch. 611; and *J Sainsbury plc v Enfield LBC* [1989] 1 W.L.R. 590 –the authors of that text conclude the section from which have I just quoted at paragraph by stating:

> '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.'

85. The position in England and Wales altered upon the enactment of the Law of Property Act 1925. Section 78 of that Act, which replaced s. 58 of the Act of 1881, states:

> '(1) A covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in title and the persons deriving title under him or them, and shall have effect as if such successors and other persons are expressed. For the purposes of this subsection in connexion with covenants restrictive of the user of land "successors in title" shall be deemed to include the owners and occupiers for the time being of the land of the covenantee intended to be benefited.
>
> (2) This section applies to covenants made after the commencement of this Act, but the repeal of section fifty-eight of the Conveyancing Act, 1881, does not affect the operation of covenants to which that section applied.'

86. In the English Court of Appeal decision in *Federated Homes Ltd v Mill Lodge Properties Ltd* [1980] 1 All ER 371, Brightman LJ said (at 379):

> 'If the condition precedent of Section 78 is satisfied – that is to say, there exists a covenant which touches and concerns the land of the covenantee – that covenant runs with the land for the benefit of his successors in title, persons deriving title under him and other owners and occupiers.'

87. Before reaching that conclusion, however, Brightman LJ had observed (at 379):

> 'The first point to note about s 78(1) is that the wording is significantly different from the wording of its predecessor, s 58(1) of the Conveyancing and Law of Property Act 1881. The distinction is underlined by sub-s (2) of s 78, which applies sub-s (1) only to covenants made after the commencement of the Act. Section 58(1) of the earlier Act did not include the covenantee's successors in title or persons deriving title under him or them, nor the owners or occupiers for the time being of the land of the covenantee intended to be benefited. 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 s 78.'

88. And after reaching that conclusion, Brightman LJ added (at 379):

> 'This approach to s 78 has been advocated by distinguished textbook writers: see Dr Radcliffe in the Law Quarterly Review [1941] 57 LQR 203, Professor Wade in the Cambridge Law Journal [1972] CLJ 157 under the apt cross-heading 'What is wrong with section 78?' and Megarry and Wade on the Law of Real Property, 4th edn. (1975), page 764'
>
> (citations inserted)

89. It is noteworthy that, in endorsing Professor Wade's view concerning the interpretation and effect of s. 78 of the Act of 1925, Brightman LJ offered no such endorsement in respect of Professor Wade's views on s. 58 of the Act of 1881, which were expressed under the same cross-heading in the same journal article. That is unsurprising in viewlight of the direct equivalence of effect attributed to those two provisions byclose analogy that Professor Wade drew between those two provisions, in contrast to the careful distinction that Brightman LJ made between them. It is also perhaps worth noting - as Professor Wade didhad done for the purpose of expressing respectful disagreement - that Dr Radcliffe's view in the article referenced by Brightman LJ was that s. 58 of the Act of 1881 was ambiguous in that "assigns" might mean either assigns of the land or assigns of the benefit of the covenant as an independent chose in action. The current authors of *Megarry and Wade* reciprocate the approving words of Brightman LJ in observing (at para 32-063, fn 287): 'The judgment of Brightman LJ, unlike so many in this area, is clear and straightforward, and firmly based on realities.'

90. The most directly apposite and, hence, to my mind the most persuasive authority on the point is the decision of Morritt J in the English High Court in *J Sainsbury plc v Enfield LBC,* already cited. That was a case involving certain estate lands that had been sold in 1894, subject to the purchaser's entry into a restrictive covenant on their user of the conveyed land, and the retention of adjoining land. In 1985, the plaintiff entered into a contract to purchase those landse land that had been conveyed in 1894 from the second plaintiff who then owned the freehold, subject to the latter first obtaining a declaration that they were land was no longer subject to the restrictive covenant.

91. Having determined that the 1984 conveyance did not, on its true construction, annex the benefit of the purchaser's covenant to the retained land, Morritt J was then required to consider whether the benefit was annexed by virtue of section 58 of the Conveyancing Act 1881, having regard to the passage from the judgment of Brightman LJ in the *Federated Homes* case already quoted. Morritt J began his analysis with the following observation (at 599):

> 'In *Renals v. Cowlishaw*, 9 Ch.D. 125 and *Reid v. Bickerstaff* [1909] 2 Ch. 305, the covenants to which I have referred were entered into before section 58 of the Conveyancing and Law of Property Act 1881 came into force on 31 December 1881. Thus, the point was not of relevance in those cases. But 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.'

92. Morritt J went on to consider the subsequent jurisprudence on the section, and the relevant provisions of the Law of Property Act 1922 and the Law of Property (Amendment) Act 1924, which were eachboth superseded by the Law of Property Act 1925, before concluding (at 601):

> 'Thus, section 78 of the Law of Property Act 1925, which only applies to covenants entered into after 1 January 1926, was in radically different terms from section 58 of the Act of 1881, as Brightman L.J. pointed out in *Federated Homes Ltd. V. Mill Lodge Properties Ltd*. [1980] 1 W.L.R. 594. 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.'

93. This decision, which I accept as a correct statement of the law, is now cited as the principle authority for the following proposition in *Megarry and Wade* (at para. 32-064) (albeit that readers are still invited to compare Wade [1972B] C.L.J. 157 at 173):

> '[S]tatutory annexation applies only to covenants made since 1925. It has been held that the predecessor of s. 78, the differently worded s. 58 of the Conveyancing Act 1881, did not annex the benefit of a covenant without proof of intention that the covenant should run.'
>
> (footnotes omitted)

94. I conclude that that the benefit of the covenant in the 1947 deed has not been annexed to the Smiths' lands by operation of law under s. 58 of the Conveyancing Act 1881.

95. In their defence and counterclaim, the Smiths advance the alternative plea that the benefit of the covenant in the 1947 deed has been annexed to their lands by operation of s. 6 of the Conveyancing Act 1881, although the point was not addressed at any length in argument.

96. Section 6(2) of the Conveyancing Act 1881 provides:

> 'A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages, whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, 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, houses, or other buildings, conveyed, or any of them, or any part thereof.'
>
> with one exception. The Smiths rely on the equitable doctrine of laches to
>
> concerning: whether the benefit of the covenant could be annexed to part of retained lands; whether the portion of the retained lands were too small to benefit from the covenant; whether the validity of the covenant could be affected by any material change in the character of the area and, if so, whether there has been such a change rendering the covenant invalid;

97. In his article already cited, Professor Wade expressed surprise that section 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. However, even in advancing the heterodox view that it should be construed as having that effect, Professor Wade acknowledged that 'the court might interpret that section restrictively in a number of ways.'

98. In *Roake v Chadha* [1983] 3 All ER 503, in the Chancery Division of the English High Court, Judge Paul Baker QC was presented with precisely that argument in respect of s. 62 of the Act of 1925. Finding it unnecessary to decide the issue in the particular circumstances of that case, Judge Baker QC did point out that the point was not a new one , before continuing (at 509):

> 'In *Rogers v Hosegood* [1900] 2 Ch 388, [1900-3] All ER Rep 915 it was similarly put forward as an alternative argument to an argument based on annexation. In that case however it was decided that the benefit of the covenant was annexed so that the point on the Conveyancing Act 1881, s 6, the forerunner of s 62 of the 1925 Act, did not have to be decided. Nevetheless, Farwell J, sitting in the Chancery Division, said ([1900] 2 Ch 388 at 398):
>
> > "It is not necessary for me to determine whether the benefit of the covenants would pass under the general words to which I have referred above, if such covenants did not run with the land. If they are not in fact annexed to the land, it may well be that the right to sue thereon, cannot be said to belong, or be reputed to belong, thereto; but I express no final opinion on the point."
>
> …
>
> On whether the benefit of a covenant not annexed can ever pass under s 62, I share the doubts of Farwell J.'

99. As the point was not seriously pressed in argument at trial, I do not propose to go further in disposing of it than to add my own expression of doubt to those of Judge Baker QC and Farwell J in relation to the effect of s. 6 of the Act of 1881.

**Conclusion**

95.100. In my judgment there are now no persons entitled to the benefit of the covenant against building contained in the 1947 deed and the benefit of that covenant is not annexed to any land, either expressly or by implication. In view of that conclusion, it is unnecessary to consider either the various contingentalternative issuesarguments already described raisedor the quite extensive evidence called on each side to address certain of them, such as whether there has been a material change in the character of the land in the neighbourhood, or whether there has been some action or election on the part of the Smiths that would otherwise affect the validity of the covenant.

101. For completeness, I should say that I have come to the conclusion that this is not an appropriate case in which to apply the maxim that delay defeats equity, whether by laches or acquiescence. While there has undoubtedly been some delay in the institution and prosecution of these proceedings, the issue of the enforceability (or, as I have found, non-enforceability) of the covenant in the 1947 deed is self-evidently far from stale. As Laffoy J observed in *Dunne v ESB* [1999] IEHC 199, when rejecting a similar argument in the context of a right asserted by a plaintiff against a defendant that had been the subject of controversy between those parties since the early 1960s, this was 'a controversy that was never resolved and which, inevitably, was going to have to be resolved at

some stage.' A refusal on equitable grounds to make a declaration that the Smiths' lands are not entitled to the benefit of a particular restrictive covenant could not operate to confer that benefit upon those lands. It would simply leave the position up in the air.

102. Jackson Way is not pursuing a claim for damages. Nor has it advanced any claim for an injunction. Thus, no purpose would be served if the court were to exercise its discretion to refuse the purely declaratory relief that it does now seek, solely on grounds of delay. On the evidence before me, I do not think any issue of acquiescence on the part of Jackson Way arises.

103. I will hear the submissions of Counsel on the form of declaration appropriate to reflect the terms of the judgment I have given.