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RESTRICTIVE COVENANTS: Tips and Traps

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RESTRICTIVE COVENANTS

Restrictive covenants are of dubious value for various reasons. Long term, in particular, they may be discharged under **S.84 Law of Property Act 1925**, for instance if obsolete or if they prevent reasonable use and enjoyment of land. In event of discharge by the Lands Chamber damages may be awarded but may be limited. Moreover, in any court proceedings an injunction will not necessarily be awarded to prevent breach and again damages will be limited to the loss of value to neighbouring land. If there is little or no loss in value there will be no enforceability.

Alexander Devine Children's Cancer Trust v (1) Millgate Development Ltd and (2) Housing Solutions Ltd [2018] EWCA Civ 2679 here, thirteen units of social housing were built upon land which was subject to covenants not to use other than for car parking. The Court of Appeal reversed the Upper Tribunal decision and held that public interest in additional housing did not prevail over contractual provisions and the Court refused to discharge the covenant. This has now been confirmed by the Supreme Court ***in Alexander Devine Children's Cancer Trust v Housing Solutions Limited [2020] UKSC 45***. A cynical disregard of restrictive covenants would not be permitted, nor would a clear and unambiguous breach of a restrictive covenant. The Supreme Court, but on different grounds, stated that there were two stages. Firstly, whether the covenant prevented a reasonable use of the land. The covenant was unambiguous and in any case the developer chose to build the social housing on the land subject to the covenant when planning permission allowed them to build elsewhere. Secondly, whether it was reasonable to discharge the covenant. As there had been a cynical breach of covenant it would not be reasonable. Subsequently, Alexander Devine agreed to discharge the covenants in return for a monetary payment and Housing Solutions applied to discharge the covenants. In the case of ***Housing Solutions v Bartholomew Smith [2023] UKUT 25*** the original land owner objected to the discharge but were found to be preventing reasonable use of the land and the covenants were discharged.

Contrast this with ***George Wimpey (Bristol) Ltd v Gloucester Housing Association [2011] UKUT 91 (LC)*** the developer blatantly disregarded restrictive covenants in the expectation that they would be discharged under **S.84**. This, together with the fact that loss of views could not be compensated, was held to be sufficient not to discharge the covenants. In ***Fosse Urban Projects v Whyte [2023] UKUT 286*** the Tribunal refused to discharge covenants against building even though the house had already been built. A factor included the blatant disregard of the covenants by the builder.

See ***Wrotham Park Estates v Parkside Homes [1973] 1WLR798.*** Here 5% of enhanced value was awarded in damages, i.e. how much was reasonably expected to be paid for relaxing the covenants.

See also ***Stockport Borough Council v Alwiyah [1983] 52 P & CR 278***. Lost value was calculated in relation to the fact that neighbouring houses on the benefited land would lose their view of open farm land. This was further reduced as the local authority's tenants had the Right to Buy. Damages for a breach of covenant and the building of 42 houses were limited to £2,250.

Re Holden [2018] UKUT 21 here there was a covenant not to carry out a trade or business. The applicant wanted to convert their garage to a dog grooming parlour. It was held that the covenants were not obsolete as this required material change in character of the locality. The covenant did prevent reasonable use of the land, but as it had been deliberately flouted it would only be modified to allow current and not general business use.

In ***Hogdson v Cook [2023] UKUT 41*** the tribunal refused to modify a covenant preventing the running of a trade or business. The applicant wanted to run a beauty salon from a cabin in their garden. The disruption through clients and parking was a reasonable ground for neighbours to complain.

Overriding Restrictive Covenants

Local authorities, central government bodies, The Crown and the Welsh government can also use **S.203 of the Housing and Planning Act 2016** to discharge restrictive user covenants. For this to apply there must be:

a) planning consent for building or maintenance work;
b) the land has become vested or acquired by a specific authority or appropriated for planning purposes;
c) the authority could have compulsorily acquired the land;
d) the building or maintenance work is for a purpose related to the appropriation or acquisition of the land.

The provision came into force on July 13th 2016 and replaced **S.237 Town and Country Planning Act 1990** which only applies to local authorities. It allows the above bodies to override easements such as rights to light and other interests and breach restrictions as to user arising by virtue of a contract or an obligation under a conservation covenant. The land must be vented in a specified authority or a specified company acting on behalf of a specified authority. **S.204** allows compensation as under the Compulsory Purchase Act 1965. Another person is liable and has not paid the local authority will be liable.
Under **S.237**, in the case of ***R V Leeds City Council Ex Parte, Leeds industrial Co-operative Society Limited (1997) P&CR70*** it was stated that this power was equivalent to compulsory purchase and the same degree of requirement or necessity such that the acquisition cannot be reasonably avoided was needed. Also, there is a potential breach of Article 1 of Protocol 1 of the European Convention of Human Rights and the right to possessions. Use of S.203 must be proportionate and in the public benefit.

The provision cannot be used against protected rights of telecommunications operators and statutory undertakers. Nor can it be used against the National Trust.

Enforceability After a Breach has Occurred

In the case of ***Hepworth v Pickles [1900] 1 Ch.108*** the Court recognised that where a breach had been allowed to occur without taking steps to enforce for 24 years, the covenant was not enforceable. Based on this the Lenders' Handboook states that if a breach has not been enforced for 20 years, the solicitor may take a view or take out insurance. On a reading of the Limitation Act 1980, enforcement is probably not possible after 12 years.

Long Leasehold Covenants

Shaviram Normandy v Basingstoke and Deane Borough Council [2019] UKUT 256. Here a long lease stated that the premises could only be used for commercial purposes. Conversion into residential flats was possible through permitted development however, the landlord refused to surrender the covenants. A tenant can apply to the Lands Chamber to discharge covenants under **S.84 (12) Law of Property Act 1925** is the Lease is for a term of more than 40 years and at least 25 years has expired, residential use and the covenants did not secure any practicable benefits and were contrary to public policy as there was a need for housing. A requirement the landlord give their licence for underletting was not discharged as the head rent was dependent on the underletting rents and the landlord had an interest in who the underlessees were. Here the Upper Tribunal held that rentals would not be affected by a change from commercial to residential.

Blackhorse Investments (Borough) LTD. v London Borough of Southwark [2024] UKUT 33. In

relation to a long lease of a public house there was no ability to discharge covenants preventing alteration and alienation without consent. Only covenants in relation to user or building can be discharged. A keep open clause was a positive and not a restrictive covenant and could not be discharged.

Great Jackson Street Estates v Manchester City Council [2025] EWCA652 two warehouses were held under 99 year leases with 61 years remaining. The leaseholder wished to demolish them and replace them with two 56 storey residential blocks. There were various covenants not to develop without the landlord's consent. Some were absolute and some were qualified. The Council refused consent and offered the leaseholder a new 250 year lease instead. The Court Appeal decided that the covenants did prevent reasonable use of the land that secure a practical benefit. Such a benefit cannot merely be the opportunity to extract money but must flow from compliance with the covenant and not its discharge. The local authority had a legitimate interest in continuing to influence use of the land and secure its orderly and appropriate development. A near ability to see the covenant is observed and control of the land is not enough but an ability to prevent development unless appropriate safeguards are in place to mitigate the possibility that the developer might not proceed in a timely fashion was a tactical benefit. The covenants were not discharged. The leaseholder has sought the leave to appeal.

ENFORCEABILITY OF RESTRICTIVE COVENANTS

Although the burden of a covenant cannot run at law, it may run in equity providing certain requirements are met. The binding effect of a restrictive covenant was first recognised by Lord Cottenham LC in the seminal case of ***Tulk v Moxhay [1848].***

The Benefit Running
Equity provides three ways in which the benefit may pass – annexation, assignment and under a building scheme.

Whether or not the benefit of a restrictive covenant has been annexed is a question of construction. However, purely personal covenants cannot run; therefore, the restrictive covenant must be made with the dominant owner as the owner of the dominant land, not just as an individual.

Thus, in ***Renals v Cowlishaw [1878] 9 Ch D125***, where a purchaser covenanted with the vendors and "their heirs, executors, administrators and assigns" not to build on the land conveyed, it was held that the word "assigns" meant merely assignees of the covenant as a separate entity from the land. Therefore, upon a later conveyance of the land without mention of the covenant, it did not pass.

However, in ***Rogers v Hosegood [1900] 2 Ch.388*** where a covenant was expressed to be for the benefit of the dominant owners, "their heirs and assigns and others claiming under them to all or any lands adjoining", it was held to run with the land, the benefit of the covenant passing with the subsequent conveyance of the land.

As to how much of the conveyed land the covenant must benefit, the approach of the courts has been relaxed over recent years. In ***Re Ballard's Conveyance [1937] Ch.473*** a covenant was said to be for the benefit of an estate of 1,700 acres. In fact, the covenant could only benefit a small portion of the estate, and the court, refusing to sever the covenant from the whole estate and attach it instead to only a part of it, held that the covenant could not run on the sale of the estate because it did not benefit the whole of the 1,700 acres.

This attitude was modified in ***Wrotham Park Estate Co Ltd v Parkside Homes [1974]***. It was held there that where the covenant benefits a substantial part of the dominant tenement, that will enable it to run. There is a presumption that the covenant does benefit the land, unless it is very clear that it is not capable of doing so.
The latest case on this point is ***Federated Homes Ltd v Mill Lodge Properties Ltd [1980] 1 WLR 594*** where Brightman L J stated that:
"…..if the benefit of the covenant is on a proper construction of a document, annexed to the land, prima facie it is annexed to every part thereof, unless the contrary clearly appears".

Thus, once a covenant is annexed, it benefits each and every part of the dominant land.

See also ***Bath Rugby Ltd v Greenwood [2020] EWHC 2662***. This is another case involving local residents trying to stop the development of the Recreation Ground in Bath. The land was subject to 1922 restrictive covenants preventing a nuisance or annoyance on the land. The covenants were stated to be for the benefit of the covenantee, their successors in title and assignees. Although the covenant predated the **Law of Property Act 1925** and was not automatically annexed to the land through statute (see below), use of the word 'title' gave rise to an express annexation. The other issue was trying to identify the benefited land. The Court decided that on its facts the benefited land would be the neighbouring Bathwick estate and the covenants were enforceable. The Court of Appeal passed judgment on the case in December 2021***. [2021] EWCA 1927***, they held that there was no clear annexation of the covenant to the land. The beneficiaries were stated to be the inhabitants of the Bathwick estate. The High Court stated that it must be inferred that the

beneficiaries would be adjoining owners of land within the Bathwick estate. The Court of Appeal held that this could not be inferred and the benefitted land was not clearly identified. The covenants were not therefore binding.

Statutory

S.78 LPA 1925 automatically annexes the benefit of a covenant to successors in title - this will only apply to covenants created from 1 January 1926 onwards.

It appears from ***Federated Homes v Mill Lodge [1980] 1 WLR 594*** that the effect of this is to automatically pass the benefit of a restrictive covenant. The case has been accepted without argument in ***Robins v Berkeley Homes (Kent) [1996] 2EGLR 75***; however, in the absence of a House of Lords decision, practitioners would be wise to include an express annexation and not merely rely on ***S.78*** and statutory annexation.

However, in ***Roake v Chadha [1984] 1WLR40***, Judge Paul Baker QC held that **S.78** could not be applied where the original covenanting parties had expressly stipulated that their covenant should "not enure for the benefit of any subsequent purchaser of any part of the … estate unless benefit…shall be expressly assigned". Baker J felt that such an unambiguous term could not be construed in such a way as to render the covenant attached to the land, but only to the original parties.

More Problems in Interpreting Restrictive Covenants

City Inn (Jersey) Ltd v 10 Trinity Square Ltd [2008] EWCA Civ 156

The Court of Appeal confirmed the High Court decision in this important case on the interpretation of restrictive covenants.

The case involved a dispute between two hotels and a restrictive covenant, requiring the consent of the 'Transferor' of land to alterations. It has now been confirmed that the 'Transferor' meant the original transferor and not any successor in title. If successors were intended to obtain the benefit of restrictive covenants then this should have been made clear in drafting.

Presumably, the same would apply to restrictive covenants and their enforceability by subsequent purchasers of the dominant land generally, in which case the decision has major significance in relation to such matters as consents to plans by the Transferor.

At first glance, the case seems to fly in the face of previous case law in relation to the interpretation of ***Section 78 of the Law of Property Act 1925*** whereby the benefit of restrictive covenants is "deemed to be made with the covenantor, successors in title and persons deriving the title under him or them."

This was interpreted by the Court of Appeal in the case of ***Federated Homes v Mill Lodge Ltd [1980]*** and in ***Robins v Berkeley Homes (Kent) Ltd [1999]*** as automatically annexing the benefit of a restrictive covenant to the land and, in ***Roake v Chadha [1985]*** the High Court held that the only way in which the benefit of a restrictive covenant would not be annexed to the land was if the document creating the covenant either expressly or by implication made the covenant personal.

It must be assumed, therefore, that the ***City Inn*** case is, to some extent, dependant on its facts and may be of little use outside the area of consents to alterations, and, presumably, consents to plans

by a named individual. Nevertheless, it is a highly significant case.

In ***Margerison v Bates [2008] EWHC 1211 (Ch)*** the Court held that a consent to plans covenant which referred to a named individual only was extinguished on the death of the individual.

Whitgift Homes Limited v Stocks [2001] EWCA1732

Unless there is a building scheme (see later), when the first plots on a development is sold the benefit of covenants is not automatically annexed to the sold land. When the second plot is sold the purchaser of this plot will have the benefit against the first plot and so on. The last plot will have the benefit over the whole estate.

Mackenzie v Cheung [2024] EWCA13. Here the Court of Appeal accepted that the original covenantee could include a clause in the covenant whereby the covenant could be unilaterally varied by them, removing a covenant requiring the land not to be used other than as a single detached
private dwelling.

Some Cases on Interpretation

In ***Tod-Heatley v Benham [1888] Ch. D 81*** The Court accepted that a nuisance or annoyance covenant could be used to prevent building work. Moreover, an annoyance was broader than a nuisance and a breach did not have to constitute common in law nuisance. In ***Davies v Dennis (2009) EWCA 1081*** there was held to be a breach of covenant against committing a nuisance when an extension was built near to a neighbouring boundary. The three storey extensions with planning permission obscured the neighbour's view of the River Thames. The Court of Appeal confirmed this decision. See also ***Bath Rugby v Greenwood*** above. Damages and/or an injunction may be available in relation to breach of a nuisance and annoyance covenant.

See also ***Di Silvio v Sharp [2022] EWHC 909*** where leave to appeal was refused in relation to a declaration that a nuisance and annoyance covenant would not be breached by the building of an extension. The test is an objective one, would a reasonable person find the work an annoyance and in this case they would not.

Contrast ***William Aldreds Case (1610):*** views cannot be protected by means of an easement. According to the present case, however, loss of views may be in breach of an annoyance covenant.

Caradon District Council v Paton [2000] 33 HLR 34 a private dwelling covenant in a former council house bought under Right to Buy was breached by granting a series of short-term lettings. See also ***Triplerose v Beattie [2020] UKUT 180*** Airbnb also amounted to a breach of a private dwelling covenant as well as a breach of a non-business user covenant.

Re Hutchinson [2009] UKUT 182 - A transfer created restrictive covenants which were expressed to be for the benefit of the retained land. The only other reference to such land was in part of a deed of gift some 15 years previously which had been lost. As the beneficiary could not show the retained land, the covenants were unenforceable. In ***Coventry School Foundation v Whitehouse [2012] EWHC 235*** the High Court was allowed extrinsic evidence outside the contract to identify the benefitted land. The case was decided on different grounds by the Court of Appeal ***[2013] EWCA 885***. The Court held that a nuisance and annoyance covenant was not breached by the building of a school on playing fields. The increased traffic at certain times of the day was a part of every day life and there must be a degree of give and take.

Note: HMLR will not state where the benefitted land is and if original documentation is lost many such covenants must be unenforceable.

Martin v David Wilson Homes [2004] EWCA1027 Reference to a private dwelling does not necessarily mean a single private dwelling.

89 Holland Park (Management) Ltd v Hicks [2020] EWCA 758 – HPML was the freeholder of a large Victorian building which was divided into five flats all of which were held under long leases. A neighbouring piece of land was subject to the freeholder giving consent to development which was not to be unreasonably withheld.

The Court of Appeal held that the freeholder was entitled to take into account the interest of the leaseholders as well as its own interests. The freeholder could also raise valid objections on aesthetic grounds even though this would not affect the value of the reversion.

Assignment - of a chose in action

A Building Scheme or Scheme of Development

A building scheme, or scheme of development, arises where a property developer who intends building an estate of houses, wishes to impose restrictions on the purchasers of each of the plots of land in order to retain the overall characteristics of the estate and to maintain the values of the properties thereon, for the mutual benefit of all purchasers. In such situations, equity will enable the restrictive covenants which relate to each and every plot on the estate to be enforced by all who currently own any land within the scheme. The principle applies not only to the usual housing development, but also to units in a shopping precinct according to the Canadian case ***of Re Spike and Rocca Group Ltd [1980].*** In ***Williams v Kiley [2002] EWCA 1645*** a building scheme was inferred and was used in a shopping arcade as a means of mutually enforcing user covenants.

Note: In ***Sugarman v Porter [2006] EWHC 331*** it was held that for a scheme to apply there must be an expectation, and not merely a suspicion, of its existence.

Note: Building schemes may affect the value of land and should be reported to a mortgage company valuer.

The essential elements of a building scheme were laid down in ***Elliston v Reacher [1908] 2 Ch.374*** by Parker J. The requirements were strict:

a) both the claimant and defendant must derive title from a common owner;
b) such common vendor must have laid out a definite scheme of development prior to the sales of the plots now owned by the claimant and defendant;
c) there was an intention to impose a scheme of mutually enforceable restrictions upon all purchasers of land within the development and their successors in title;
d) every purchaser bought his land knowing of the scheme and intending to be bound by the mutually enforceable restrictions.

To these four requirements, a fifth – that the area affected by the scheme must be clearly defined – was added in ***Reid v Bickerstaff [1900] 2 Ch.305***.

In ***Birdlip Ltd v Hunter & Anor [2016] EWCA Civ 603*** the Court of Appeal limited the existence of building schemes. The land which is subject to mutual obligation must be clearly defined and it must be made clear that the parties have a mutual benefit and suffer a mutual burden. Preferably this

should be referred to in the deeds.

In ***Khoury & Anor v Kensell [2018] EWHC 217 (Ch)*** there was found to be no evidence that three dwellings were the subject matter of a building scheme.

In ***Dobbin v Redpath [2007] EWCA 570*** the Court of Appeal decided that the normal principles applicable to the discharge of restrictive covenants as being obsolete do not apply to building schemes which are comparatively much more difficult to discharge.

Following on from this, in the case of ***Turner v Pryce [2008] EWHC B1*** the High Court held that a restrictive covenant against using land other than as a single private dwelling, enforced by means of a building scheme which applied generally to the locality, would not be discharged by the Lands Tribunal as being obsolete even though many other such covenants within the area had already been breached with impunity and the character of the neighbourhood had changed. This may be contrasted with ***Lawntown Ltd v Camenzuli [2007]*** whereby a single private dwelling covenant was discharged as preventing reasonable use of land. Of particular bearing in the case was the fact that much of the housing in the area had already been converted into flats, and locality had, consequently changed since the covenants were imposed.

Note: Estate management schemes - In ***Zenios v Hampstead Garden Suburb Trust Ltd [2011] EWCA Civ 1645*** it was held that an estate management scheme was binding and would not be discharged as preventing reasonable use of the land. Moreover, compensation would not be sufficient to allow discharge of the covenant.

Passing in Equity: Burden

Note: Local Authorities can use either **S.609 of the Housing Act 1985** or **Section 33 of the Local Government (Miscellaneous Provisions) Act 1982**, to enforce covenants even if they do not own any neighbouring land which is benefitted. Since Central Government bodies and bodies such as the National Trust and Church of England have similar powers.

In order for the burden to run in equity four requirements must be satisfied:

1. The covenant must be negative in nature, such as a covenant not to build on land, or not to use the land for business purposes. See ***Austerberry v Oldham Corporation [1885] 29 Ch D750 and Rhone v Stephens [1994] 2AC 310***. A covenant may be worded in a negative way, yet be positive in fact. Positive covenants run neither at law nor in equity.

2. There must be a dominant and servient tenement. Both the covenantee and the covenantor must own an estate in their respective tenements. The Court of Appeal, in ***London County Council v Allen [1914]*** held that the claimant was unable to enforce a restrictive covenant against the covenantor's successor in title, as he (the claimant) did not have any estate in the dominant land. The dominant land must be reasonably close to the servient tenement: See also ***Kelly v Barrett [1924] 2 CH 379*** where only the subsoil of the highway was retained, the surface belonging to the Highways Authority, this was not enough to give rise to a benefited covenant. See also ***North Foreland Limited v Ward***, unreported, where it was accepted that retention of private roads would not be enough to support a covenant.

3. The covenant must touch and concern the dominant land that is it must benefit the land. It was stated in ***Re Gadd's Land Transfer [1966]*** that a "benefit" must be "something affecting either the value of the land or the method of its occupation or enjoyment". We have already seen the extent to which the dominant land must be benefited.

In registered land the covenant must always be registered.
HMLR on first registration will systematically note all restrictive covenants even if not registered as D (ii) land charges. Ensure that a request is made to take these off the Register. On subsequent transfers

4. The covenant must have been intended to run with the covenantor's land. Therefore, a covenant which is phrased in such a way as to bind the covenantor only will not run with the land. In the absence of such a limitation, however, it will be assumed that the burden of the restrictive covenant was intended to run with the covenantor's land.

For restrictive covenants created after 1 January 1926, S.79(1) LPA 1925 provides that, unless a contrary intention is shown, a covenant relating to any land of a covenantor or capable of being bound by him, shall be deemed to be made by the covenantor on behalf of himself, his successors in title and the persons deriving title under him or them, and shall have effect as if such successors and other persons were expressed.

In ***Morrell's of Oxford v Oxford United Football Club [1998] Ch.459***, some covenants were expressed to pass with the land. The current covenants, in relation to sale of alcohol, did not state this and it was held, therefore, not to pass with the land.

In addition, and most importantly, a purchaser of land which is subject to a restrictive covenant may take free of it if, as with any equitable right, he is not sufficiently bound by it. In **unregistered land** the covenant, if created on or after 1st January 1926, must be registered as a **D(ii)** land charge if it is to bind a purchaser. Registration is deemed to constitute actual notice of the covenant: **S.198 LPA 1925**. If not registered, a purchaser for money or money's worth will be free of the charge regardless of his actual state of mind: **S.198 LPA 1925**. If the covenant was entered into prior to 1926, then whether it binds will depend on whether or not the purchaser had actual, constructive or imputed notice of it.

ENFORCEABILITY OF POSITIVE COVENANTS

As above, positive covenants in freehold land are not property rights and do not automatically bind third parties. Other methods of enforcement will be needed.

Positive Covenants and Restrictions

The problem here is that in freehold land a positive covenant will not burden third party purchasers. See ***Austerberry v Oldham Corporation [1885]*** - this was confirmed by the House Lords in ***Rhone v Stephens [1994] 2 All ER 65*** where maintenance of a flying freehold roof could not be required against third party purchasers. It is suggested that the best manner of enforcement would be to include direct covenants and restrictions on the register. There are many ways of circumventing this, e.g. estate rentcharges and the doctrine of mutual benefit and burden, i.e. if a right is claimed, a corresponding obligation must be taken on. The classic example of this is in relation to maintenance of private roads and drains in small estates. This is not suitable however in relation to overage.

1. **Direct covenants and restrictions**

Here each new purchaser enters into a direct covenant with the original seller or their successor. They are therefore contractually bound. A restriction should be placed on the register (in registered land) to the extent that no disposition is to be registered unless the transferee produces to the Land Registry a deed of covenant in that form.

2. **Section 33 Local Government (Miscellaneous Provisions Act) 1982**

As above, Local Authorities may enforce positive covenants if they invoke their powers under the Act and the transfer refers to the 1982 Act, or its predecessor, the Housing Act 1974.

3. **Mutual Benefits and Burden: The rule in *Halsall v Brizell (1957)***

If a landowner wants to obtain a benefit, then it must submit to any corresponding burden. This may be by way of enforcing obligations in relation to private roads in smaller developments. However, the ***Thamesmead Town v Allotey (1999)***, payments for maintenance of private roads and drains was able to be collected, but not for gardening and landscaping if the owner does not wish to avail themselves of such rights.

Wilkinson v Kerdene Ltd [2013] EWCA 44. Here, the doctrine of mutual benefit and burden was held to apply to the whole of a holiday village in Cornwall. This included maintenance of roads, car parks, footpaths and other recreational facilities and also maintenance to the outside of bungalows and the foul sewer system.

4. **Long Leases**

If the lease was created pre-1 January 1996, both positive and negative covenants will pass with the land if they touch and concern the land, i.e. they are leasehold covenants.

Note: ***Woodall v Clifton (1909)*** Options to purchase, as opposed to options to renew the lease, will not pass with the land. If the lease was created from 1 January 1996 onwards, then all covenants

will pass unless expressed to be personal under Sections 2 and 3 of the Landlord and Tenant (Covenants) Act 1995. On enlargement of a long lease without a rent and without forfeiture provisions, positive covenants will pass onto the freeholds under Section 153 of the Law of Property Act 1925.

Estate Rentcharges

S.1 of the Rentcharges Act 1977 defines a rentcharge as follows:

Meaning of "rentcharge".

For the purposes of this Act "rentcharge" means any annual or other periodic sum charged on or issuing out of land, except—

a) rent reserved by a lease or tenancy, or

b) any sum payable by way of interest.

In some parts of the country freehold properties are subject to fixed sum rentcharges, a sum of money is paid per annum to the rent owner. In such rentcharges cannot be created since July 22nd 1977 when the Rentcharges Act of that year came into force. Existing fixed sum rentcharges will come to an end on July 22nd 2037 or within 60 years of first becoming payable whichever is the latter. However, estate rentcharges which may include a fixed nominal amount which otherwise are variable and reasonably reflect maintenance, repairs or insurance costs can be created.

Note the **Leasehold and Freehold Reform Act 2024** intends to make residential rentcharges and estate charges subject to a reasonableness test and application to the tribunal.

The Problem

S.2 Rentcharges Act 1997 provides the situations where the rentcharges may still be creates. This includes estate rentcharges which are defined as such:

4. For the purposes of this section "estate rentcharge" means (subject to subsection (5) below) a rentcharge created for the purpose—
    a. of making covenants to be performed by the owner of the land affected by the rentcharge enforceable by the rent owner against the owner for the time being of the land; or
    b. of meeting, or contributing towards, the cost of the performance by the rent owner of covenants for the provision of services, the carrying out of maintenance or repairs, the effecting of insurance or the making of any payment by him for the benefit of the land affected by the rentcharge or for the benefit of that and other land.
5. A rentcharge of more than a nominal amount shall not be treated as an estate rentcharge for the purposes of this section unless it represents a payment for the performance by the rent owner of any such covenant as is mentioned in subsection (4)(b) above which is reasonable in relation to that covenant.

The **Leasehold and Freehold Reform Act** intends to add to **S.2(4)(a)** to include improvements as well as repairs maintenance and insurance.

Roberts v Lawton [2016] UKUT 396 (TCC) S.121 (4) of the Law of Property Act 1925 allows the holder of a rentcharge to appoint trustees who will be tenants under a 99 year lease if a rentcharge is not paid within 40 days of being due. This will be the case whether the charge is formally demanded or not. Here the arrears amounted to between £6 and £15. This was held to be a lease which can be registered at HMLR. The lease will continue even if the arrears are paid. In the present case, the holder of the rentcharge used this fact to hold home owners to a ransom in order for them to pay administration charges. S.121 (4) will apply equally to estate rentcharges. The provision can be excluded but only in the document that creates the rentcharge.

Note also **S.121 (3)** allows possession of the land by the rent owner under similar circumstances.

Note there is provision in the **Leasehold and Freehold Reform Act 2024** whereby S.121 will not apply to fixed sum rentcharges but will still apply to estate rentcharges.

As above in the future the tribunal will be able to question the reasonableness of work carried on under an estate rentcharge. In relation to S.121 then the legislation defines a regulated rentcharge as being one which cannot be created under **S.2 Rentcharges Act 1977**. This relates to fixed sum rentcharges (historic) only. No claim may be made by the rent owner unless they have first made a demand in prescribed form and then waited 30 days. The form will have to have:

- the name of the rent owner and an address in the UK
- The amount of arrears
- How it has been calculated
- How to pay
- A copy of the instrument creating the rentcharge
- Proof of title of the rent owner. This will be deemed to be so if their title is registered at HMLR.

The changes to enforcement of rentcharges came into force on July 24th 2024. They were backdated to November 27th 2023.
The Government announced a consultation to repeal S.121.

COMMONHOLD

Commonhold was introduced by the **Commonhold and Leasehold Reform Act 2002** and came into force on September 27th 2004. Currently there are less than 200 commonhold units in England and Wales.

Commonhold has been much in the news of late as it has been proposed as a way of solving problems with leaseholds. It is fundamentally a freehold title where there will be a Commonhold Association and the various freeholders will become members and agree to be bound by positive and restrictive covenants. This is fundamentally a residents management company and a management structure will always be required.

There is nothing in the Act which amends Commonhold. In particular residential leases of seven or less years cannot currently be created under commonhold. It does seem however that the commonhold unit holder will have the benefit of the changes to service charges and administration charges. There is currently no right to forfeit under commonhold which gives rise to concerns that the commonhold association may become insolvent if debts are not paid.

In the King's Speech it was announced that the draft Leasehold and Commonhold Reform Bill will amend commonhold. Before the General Election Labour announced that they would abolish Leasehold dwellings within 100 days of being elected. They now say that the bill will be make Commonhold the default option for new dwellings but this is unlikely to happen for some time.

On March 3rd 2025 a white paper on the Proposed New Commonhold Model for Home Ownership in England and Wales was produced. The government intends to produce a draft Bill in the latter half of 2025 and are adamant that commonhold will be used for all new leasehold flats within this parliament. It proposes changes to the current legislation based on Law Commission Paper in 2020. Major changes will be:

- Separate the ability to have separate management of different areas;
- Separate costs and decision making for people who have use of separate areas;
- Currently their cannot be a residential lease granted for more than 7 years in a commonhold development. This will be changed to allow shared ownership leases and home finance plans such as equity release;
- Mandatory insurance;
- Mandatory reserve funds;
- Allowing a commonhold association to take out a loan secured by a fixed or floating charge;
- The commonhold association can apply to court for an expedited order to sell a unit if someone does not pay the assessment; and
- Currently a freeholder can apply to have an existing block converted to commonhold but must obtain 100% agreement of the unit holders and any mortgage companies. The proposal is that this should be amended to 50%. People who do not wish to take part will have a leaseback for 999 years.
- The Government promised a draft Leasehold and Commonhold Reform Bill by the end of 2025 but this did not materialise.

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