Neutral citation number: [2018] EWHC 4018 (Ch)

Case No: E30MA126

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
MANCHESTER DISTRICT REGISTRY

Manchester Civil Justice Centre,
1 Bridge Street West,
Manchester. M60 9DJ.

Date: Tuesday 6th March 2018
Start Time: **11.09 a.m.** Finish Time: **12.08 p.m.**

Page Count: 19
Word Count: 5744
Number of Folios: 80

Before:

HIS HONOUR JUDGE HODGE QC
Sitting as a Judge of the High Court

- -

IN THE MATTER OF:

JOHN STANSFIELD AND RUTH STANSFIELD

- -
- -

ANDREW CLARK for the **Applicant** instructed by **Chadwicks Solicitors**, Leyland

- -

APPROVED JUDGMENT

(Approved on 1 August 2019 without reference to any papers)

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

Digital Transcription by Marten Walsh Cherer Ltd.,

1st Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. Fax No: 020 7831 6864 DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

HIS HONOUR JUDGE HODGE QC:

1. This is my extemporary judgment on a Part 8 claim brought by Mr. John Stansfield and his wife, Mrs. Ruth Ann Stansfield, in relation to freehold land known as Grosvenor Garage, Chorley Road, Walton-le-Dale, Preston and registered under title number LA680773. The claim has been assigned claim number E30MA126 and there is no named Defendant to the claim.

2. Mr. and Mrs. Stansfield seek declaratory relief under section 84(2) of the Law of Property Act 1925. That section provides, so far as material, that the court shall have the power on the application of any person interested (a) to declare whether or not in any particular case any freehold land is or would in any given event be affected by a restriction imposed by the instrument; or (b) to declare what, upon the true construction of any instrument purporting to impose a restriction, is the nature and extent of the restriction thereby imposed and whether the same is or would in any given event be enforceable and if so by whom.

3. The evidence in support of the application is contained in a witness statement of Mr. John Stansfield, verified by a statement of truth on 7th February 2018, together with Exhibits JS/1 through to JS/16.

4. The Claimants are represented by Mr. Andrew Clark (of counsel) who has produced a detailed written skeleton argument dated 5th March 2018. The claim was listed for hearing today on 6th March 2018 by a Notice of Hearing dated 27th February 2018.

5. Mr. and Mrs. Stansfield are the registered proprietors of the freehold estate in Grosvenor Garage. Their application concerns a restrictive covenant which

was imposed by a conveyance made on 4th October 1929 between Mr. Matthew Worthington and Mrs. Nancy Worthington (as the vendors), the Burnley Building Society (as legal mortgagee) and Mr. John Crook (as the purchaser). The conveyance began with a number of recitals. The first recital referred to a conveyance dated 21st August 1928 by which Thomas Eccles Sons & Company conveyed certain land, including the land the subject-matter of the 1929 conveyance, to Mr. and Mrs. Worthington. Recital (2) recorded that on 22nd August 1928 Mr. and Mrs. Worthington had charged that property by way of legal mortgage to the Burnley Building Society. Recital (3) recorded that an unspecified principal sum remained owing to the Burnley Building Society on the security of the legal charge, together with interest. Recital (4) recorded that the vendors had agreed with the purchaser for the sale and transfer to him of the property thereby conveyed, subject to such reservations and restrictions as were thereinafter contained but otherwise free from encumbrances, for the sum of £70. Recital (5) recorded that it had been agreed that £50 should be paid to the Burnley Building Society in part satisfaction and discharge of the mortgage debt owing to it and that the Burnley Building Society should join in the deed.

6. There then followed the operative part of the conveyance. Clause 1 provided that, in consideration of the sum of £70, which was paid by the purchaser, as to £50 to the Society and as to the £20 balance to the vendors, the vendors, as beneficial owners, granted and the Society, as mortgagee by the vendor's direction, granted and released to Mr. Crook "**all that** plot of land containing 367 square yards or thereabouts situate on the north-westerly side of Chorley Road in Bamber Bridge aforesaid and delineated and more particularly

described in the plan hereupon endorsed and therein edged red, which plot of land forms part of Holland Slack Farm, Bamber Bridge aforesaid, excepting and reserving as in the recited conveyances excepted and reserved and excepting and reserving unto the vendors in fee simple certain rights of drainage and entry **to hold** unto the purchaser in fee simple freed and discharged from all principal monies and interest secured by and from all claims and demands under the legal charge."

7. Clause 2 contained a number of covenants. The purchaser for himself and his successors in title covenanted with the vendors and each of them, and as a separate covenant with the Society, in manner following: sub-clause 2(a) was a positive covenant to erect and complete a motor garage in accordance with plans and elevations to be approved by the vendors and under their inspection and satisfaction, and at all times thereafter to maintain and keep the same in good repair and condition.

8. Clause 2(b) was a negative covenant not to use or permit to be used any building erected upon the plot of land otherwise than as a motor garage with usual out offices and conveniences thereto.

9. Clause 2(c) was a positive covenant: at all times thereafter to maintain and keep the roadway shown on the plan and thereon coloured brown in good repair and condition to the satisfaction of the vendors and their successors in title and to keep such roadway or cause the same to be kept open and free from obstruction and so that the whole of such roadway might be freely used for all purposes by the vendors and their successors in title and all other persons having the right or privilege of using the same.

10. Clause 3 contained an agreement and declaration as to rights and access of light.

11. Clause 4 contained the usual acknowledgments for the safe custody and production of relevant documents of title.

12. Clause 5 was the usual certificate of value.

13. It is with the negative covenant in Clause 2(b) of the conveyance that this court is now concerned. The Claimants are the successors in title to Mr. Crook. They are the registered proprietors of the land conveyed to Mr. Crook by the October 1929 conveyance. It is clear that their title also includes land to the south-east that would appear to have been conveyed to Mr. Crook by Mr. and Mrs. Worthington by a later conveyance dated 6th August 1930. At Exhibit JS/5 to Mr. Stansfield's witness statement there is an abstract of the title of Mr. and Mrs. Worthington and their mortgagee to the land that was conveyed to Mr. Crook in 1929. That abstract of title includes a plan which shows the full extent of the land that was conveyed to Mr. and Mrs. Worthington by the conveyance dated 21st August 1928 recited at recital (1) of the conveyance of 4th October 1929 to Mr. Crook.

14. Mr. and Mrs. Stansfield propose to sell their property to a developer with a view to demolishing the motor garage erected upon it and the construction of a convenience store. Unfortunately, the issue of the restrictive covenant contained in Clause 2(b) of the 1929 conveyance is causing difficulties. In particular, it has not been possible to obtain indemnity insurance cover acceptable to the proposed operator of the convenience store in respect of any

potential breach of Clause 2(b) of the 1929 conveyance. It is this that has led to the present claim being brought.

15. Mr. and Mrs. Stansfield are the ultimate successors in title to Mr. Crook to the property, together with the other land conveyed in 1930, having purchased it on 31st October for a little under £250,000. There is evidence that, as one would expect, Mr. and Mrs. Worthington are now both deceased, having died on 7th March 1959 and 3rd August 1955 respectively. Mr. Clark accepts that the benefit of the covenant in Clause 2(b) of the 1929 conveyance, if it had remained vested in Mr. and Mrs. Worthington at the time of their respective deaths, would have vested in their personal representatives by operation of law, and without regard to any questions of annexation.

16. It would appear from certain of the title documents in evidence that Holland Slack Cottage, which (according to her burial certificate) was the residence of Mrs. Worthington at the time of her death, was conveyed away on 5th January 1960, shortly after the death (on 7th March 1959) of the survivor of Mr. and Mrs. Worthington (Mr. Worthington), by a Mr. John Worthington and a Mr. Arthur Carter. I am invited to, and I do, infer that they were the personal representatives of Mr. and Mrs. Worthington. I also am invited to, and do, infer that those personal representatives are no longer the owners of any land that might be benefited by the covenant. That is evidenced by the registration of Persimmon Homes Ltd as the proprietor of the majority of the adjoining land formerly owned by Mr. and Mrs. Worthington, and the evidence of ownership of other parts of such land, comprising some 26 residential properties, by New Progress Housing Association Limited. I therefore accept

that the personal representatives of Mr. and Mrs. Worthington, the original covenantees, can no longer enforce the covenant in equity under the doctrine of *Tulk v Moxhay* (1848) 2 Ph 774 against successors of Mr. Crook.

17. As I have already indicated, at the time of the 1929 conveyance, Burnley Building Society had a charge over Mr. and Mrs. Worthington's retained land. That charge would appear to have remained extant as late as 9th April 1937, but even if it remained in existence at the time of the deaths of Mr. and Mrs. Worthington, some 20 years later, it would have been discharged upon repayment of that debt by their personal representatives. I am invited to presume, and I do presume, that the personal representatives of Mr. and Mrs. Worthington complied with their duties to discharge the debt to the Burnley Building Society, insofar as it was then still subsisting, following their deaths. I therefore accept that the Burnley Building Society no longer retains any charge over the retained land even if, as chargee by way of legal mortgage, that Society could be regarded in equity as having a sufficient interest in the land intended to be protected by the covenant as to be able to rely on the doctrine of *Tulk v Moxhay* against successors in title to Mr. Crook as the original covenantor. I therefore accept Mr. Clark's submission that the covenant may be enforced, if at all, only by a successor in title of Mr. and Mrs. Worthington against the successors in title of Mr. Crook.

18. I accept the summary of the law given by Neuberger J (as he then was) in the case of *Whitgift Homes Limited v Stocks* (2001) which was approved on appeal by the Court of Appeal in the same case under the name *Stocks v Whitgift Homes Limited* [2001] EWCA Civ 1732. First, for a subsequent purchaser of

land subject to a restrictive covenant to be bound by the covenant, there are three requirements: (a) that the covenant must be negative in nature; (b) that the covenant must be either (i) for the protection of land retained by the covenantee, or (ii) part of a scheme; and (c) that the subsequent purchaser must have notice of the covenant. Secondly, for a subsequent purchaser of other land to be able to enforce the covenant there are also three requirements: (a) that the covenant must, to use the old expression, "touch and concern his land"; (b) that the benefit of the covenant must have passed to him by (i) annexation, (ii) assignment, or (iii) pursuant to a scheme; and (c) that there must be no good ground for depriving him of the right to enforce the covenant.

19. Here there is no question but that the covenant is negative in nature, since it is a restriction which forbids the use of any building erected on the property otherwise than as a motor garage. As to the question of notice, the covenant is presently noted as entry number 2 on the charges register to the registered title to the property and was noted thereon at the time of first registration, which took place on 20th August 1991. There is also evidence that the covenant was recorded as a land charge of Class D(ii) against the name of Mr. Crook on 18th October 1929. On the footing that there was no conveyance of the property between 4th and 18th October 1929, which is overwhelmingly likely, in view of the fact that Mr. Crook later acquired further adjoining land the following year from Mr. and Mrs. Worthington, that D(ii) entry is conclusive as to the issue of notice.

20. That leaves the question of whether the covenant is for the protection of land retained by the covenantee since there is no question of any building scheme

in the present case. That requirement was established by the decision of the Court of Appeal in the case of *London County Council v Allen* [1914] 3 KB 642. There it was said that the doctrine in *Tulk v Moxhay* did not extend to the case where the covenantee had no land capable of enjoying, as against the land of the covenantor, the benefit of the restrictive covenant. When the covenantee had no land, the derivative owner claiming under the covenantor was bound neither in contract nor by the equitable doctrine which attached in cases where there was land capable of enjoying the restrictive covenant.

21. Mr. Clark points out that the question of whether a Claimant owns land capable of being benefited is a question of fact which is distinct from the question whether a successor in title has the benefit of a covenant, either by annexation or by assignment. Mr. Clark acknowledges that, as previously stated, an abstract of title of Mr. and Mrs. Worthington and their mortgagees to the freehold land at Bamber Bridge dated 1929 is exhibited to Mr. Stansfield's witness statement at Exhibit JS/5. That abstract includes the provisions of the conveyance of 21st August 1928 by which Mr. and Mrs. Worthington acquired the land, which land is described in the parcels clause as "**all that** messuage or farmhouse with the outbuildings thereto and the several closes or pieces of land together known as Holland Slack Farm, Walton-le-Dale aforesaid and containing in the whole 19 acres, two roods and 36 perches or thereabouts and for the purpose of identification only and not of limitation delineated and more particularly described in the plan thereupon endorsed and therein edged red." The abstract of title also includes that plan. Mr. Clark accepts that, subject to the question of whether any land was disposed of between August 1928 and October 1929, the land owned by Mr. and Mrs.

Worthington at the time of the 1929 conveyance is capable of identification. Mr. Clark points out that some, but not all, of the land retained by Mr. and Mrs. Worthington is now owned by Persimmon Homes Limited, as confirmed by the official copy of the register of title to Title No. LA723990 and the title plan thereto. Indeed, Persimmon owns some 15 of the 19 acres originally conveyed to Mr. and Mrs. Worthington. As to the balance, it is apparent that some parts of the original registered title have been sold off by Persimmon as individual plots.

22. It is also apparent that land labelled A on the plan attached to the abstract of title is not owned by Persimmon and has been developed by another residential developer and now comprises various individual homes. Thus, it would seem that there are a large number of individuals who might potentially have land capable of being benefited by the restrictive covenant. Mr. Clark therefore accepts that the burden of the covenant binds Mr. and Mrs. Stansfield in equity and is capable of being enforced by any of the successors in title of Mr. and Mrs. Worthington, provided that the three requirements previously identified in respect of the transfer of the benefit of a restrictive covenant are fulfilled. Accordingly, the crucial question on the application is whether the benefit of the covenant passed to a person capable of enforcing the same, either by annexation or by assignment or pursuant to a scheme.

23. I accept on the evidence that there is no question of any scheme of development. The 1929 conveyance was not one of a number of sales of plots to various parties, and the covenant in Clause 2(b) of the 1929 conveyance was particular to that individual sale rather than one intended to be part of a

scheme of similar covenants for the mutual protection of a number of properties.

24. In the course of his oral submissions, Mr. Clark indicated that he did not press the point which he had originally made at paragraph 17 of his skeleton argument; but he did emphasise that it was a requirement for an express assignee of land entitled to the benefit of a restrictive covenant, in order to be able to enforce that covenant, to show that the covenant was one taken for the benefit of ascertainable land. In support of that proposition, Mr. Clark relied upon the decision of the Court of Appeal in *Miles v Easter* [1933] 1 Ch 611. There it was held that, where on a sale otherwise than under a building scheme, a restrictive covenant was taken, the benefit of which was not on the sale annexed to the land retained by the covenantee so as to run with it, an assignee of the covenantee's retained land could not enforce the covenant against an assignee of the covenantor taking with notice of the covenant unless he could show, amongst other things, that the covenant was taken for the benefit of ascertainable land of the covenantee capable of being benefited by the covenant. Thus, it would be necessary, in order for the covenant to be enforceable, for the court to be satisfied that the covenant was taken for the benefit of ascertainable land of Mr. and Mrs. Worthington which was capable of being benefited by the covenant.

25. Moving on to the question of annexation, Mr. Clark points out that the 1929 conveyance does not state that the covenant is made for the benefit of any retained land or made with Mr. and Mrs. Worthington in their capacity as the owners thereof. In particular, it does not include any reference to Mr. and

Mrs. Worthington's successors in title. In that regard, the covenant is to be contrasted with that in Clause 2(c) of the 1929 conveyance, where express reference is made to the vendors and their successors in title, and later to all other persons having the right or privilege of using the roadway. Mr. Clark submits that there is nothing to indicate an intention to annex the covenant in Clause 2(b) to land manifested by the conveyance. He submits that there was no express or implied annexation from the terms of the deed. I would accept that submission, subject to the possibility that the benefit of the covenant may have passed by statutory annexation under section 78 of the Law of Property Act 1925. Section 78 provides, so far as material, that "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 effect as if such successors and other persons were expressed."

26. In the case of *Federated Homes Ltd v Mill Lodge Properties* [1980] 1 WLR 594 it was said that if the condition precedent of section 78 was satisfied, that is to say that 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. The effect of that decision was considered by the Court of Appeal in the later case of *Crest Nicholson Residential (South) Ltd v McAllister* [2004] EWCA Civ 410, [2004] 1 WLR 2409. Giving the leading judgment, Chadwick LJ indicated that it was a requirement for the annexation of a covenant to land that the land to be benefited should be defined so as to be easily ascertainable. He explained that: "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 ascertain 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 described 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 the 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."

27. Mr. Clark therefore submits that annexation cannot be achieved by extrinsic evidence only; rather it must be possible from a proper construction of the relevant deed to find the nexus or connection by which the covenant can be construed as relating to particular land of the covenantee. Thus, in the case of a certain conveyance in the *Crest* case, Mrs. McAllister failed to establish annexation. Mr. Clark accepts that it does not follow that the benefited land must be fully defined in the deed; but he says that there must be a sufficient description of it that it is capable of being rendered certain by extrinsic evidence. Mr. Clark submits that in the present case there is nothing in the 1929 conveyance to define the property for the benefit of which the covenant was taken. Accordingly, he says that the relevant land is not easily ascertainable; rather, the instant case is said to give rise to the very problems

identified by Chadwick LJ in his judgment in the *Crest Nicholson* case. Mr. Clark therefore submits that the benefit of the covenant is not annexed to the land acquired by Persimmon, or by individual owners from the other developer, and therefore it cannot be enforced by any of them.

28. Mr. Clark submits that the court should conclude that the original covenantees and their privies are not entitled to enforce the covenant against Mr. and Mrs. Stansfield, as the successors of the original covenantor (Mr. Crook), and that the benefit of the covenant was not annexed to any particular land and was not otherwise transmitted by assignment or because of any scheme of development. The court is therefore asked to declare, pursuant to section 84(2), that the property is not affected by the covenant. Mr. Clark appreciates that because this application is unopposed, the court must be clear that the property is not burdened by the covenant before any declaration to that effect can be made; but he submits that the test nevertheless remains the civil standard of the balance of probabilities; and he submits that such standard is achieved in the present case.

29. Mr. Clark points out that the particular benefit to Mr. and Mrs. Stansfield of an application under section 84(2) of the 1925 Act is that the consequent declaration is effective against anyone who might claim the benefit of the covenant. He refers in that regard to section 84(5) which provides that "any order made under section 84 shall be binding on all persons, whether ascertained or of full age or capacity or not, then entitled, or thereafter capable of becoming entitled to the benefit of any restriction, and whether such persons are parties to the proceedings or have been served with notice or not".

30. Mr. Clark acknowledges that, owing to this binding effect of the declaration under section 84(2), the court is necessarily concerned to protect the right of anyone who might be affected by the declaration to be heard, and therefore such persons should be offered the opportunity to be made respondents and to be joined as such if they wish to oppose the application. Mr. Clark accepts that it was therefore desirable to give prior notice of this application to all the current individual landowners and occupiers of the land belonging to Mr. and Mrs. Worthington at the time of the 1929 conveyance insofar as they could be located. That was to ensure that every person having a probable interest had the opportunity to object. The effect of such a process is usually to whittle down the potential objectors either to none at all, in which case the application can proceed without notice, or to identify a limited number of respondents who wish to maintain objections to the proposed development.

31. The evidence shows that Mr. and Mrs. Stansfield have ensured that anyone who might be affected has received notice and has had an opportunity to object. On the basis of those efforts, the decision has been made that no-one should be joined as a respondent to this claim. Express consents have been received from both Persimmon and also the Housing Association. Only one couple, Mr. and Mrs. Akers of 5 Waltnutwood Avenue, have stated in response to the form of objection supplied to them that they did not agree to the garage being converted into a convenience store. However, they failed to respond to a follow-up letter from Mr. and Mrs. Stansfield's solicitors which inquired as to the basis for their objection. In the circumstances, Mr. Clark submits that it was not appropriate to join Mr. and Mrs. Akers as respondents.

32. I accept on the evidence that everything has been done to ensure that anyone who wished to object to the present application could be joined to the present claim and that no one has manifested a wish so to be joined. Nevertheless, as Mr. Clark acknowledges, I have to be satisfied that it is appropriate to make a declaration in accordance with, and pursuant to, section 84(2) of the Law of Property Act. I have to be satisfied before doing so that the property owned by Mr. and Mrs. Stansfield and shown coloured blue on the plan of their title at the Land Registry is not affected by the restrictive covenant in Clause 2(b) of the 1929 conveyance.

33. I am satisfied that the original covenantee and his estate are no longer entitled to enforce the benefit of the restrictive covenant. I am satisfied that there is no relevant building scheme and no express assignment of the benefit of the restrictive covenant such that it is enforceable by any third party against the land in question. However, I am not satisfied that there was no valid statutory annexation of the covenant to Mr. and Mrs. Worthington's retained land pursuant to and in accordance with section 78 of the Law of Property Act 1925. I reject Mr. Clark's submissions to the contrary. Mr. Clark submitted that there was no extrinsic evidence that would enable any land intended to be benefited by the covenant to be ascertained. He submits that there is no evidence from the 1929 conveyance that the original covenantees ever intended the whole or any part of the land that they had acquired in 1928 to benefit from the restrictive covenant and that the land to be benefited cannot be ascertained. Mr. Clark accepted that the land acquired by Mr. and Mrs. Worthington in 1928 could be ascertained from the abstract of title; but he submitted that the 1929 conveyance did not indicate any intention that all or

any ascertainable part of the land conveyed to Mr. and Mrs. Worthington in 1928 was intended to benefit from the restrictive covenant. He submitted that there was no indication in Clause 2 of the 1929 conveyance as to what land was intended to be benefited by the Clause 2(b) covenant. There was nothing said about whether either the farmhouse itself, or the whole of the farmland, should benefit from the covenant in Clause 2(b) of the 1929 conveyance. Mr. Clark submitted that the reference to the land conveyed to the vendors in 1928 was not sufficient to identify the land intended to be benefited by the covenant in Clause 2(b). I do not accept those submissions.

34. Recital (1) to the 1929 conveyance refers in terms to the conveyance of 21st August 1928 as being of property, including the land to be conveyed by the 1929 conveyance. Recital (2) to the 1929 conveyance makes it clear that that land had been charged to the Burnley Building Society as legal mortgagee. Clause 1 of the operative part of the conveyance refers to the land thereby conveyed to Mr. Crook as "forming part of Holland Slack Farm, Bamber Bridge aforesaid". The covenants in Clause 2 are given not simply to Mr. and Mrs. Worthington as the vendors but as a separate covenant with the Building Society, which was the legal chargee of the land conveyed to Mr. and Mrs. Worthington in 1928. It seems to me to be sufficiently clear from Clause 2 of the 1929 conveyance, and notwithstanding the absence of any reference to either successors in title to Mr. and Mrs. Worthington as the vendors, or to the covenant being for the benefit of the vendors' retained land, that the covenant is nevertheless one which touches and concerns Mr. and Mrs. Worthington's retained land. Clearly the covenant was intended to enure for the benefit of the mortgagee as well as Mr. and Mrs. Worthington personally.

35. I am satisfied that the owner for the time being of the land shown coloured blue on the title plan to the Claimant's registered title is able to ascertain the land for which the benefit of the covenant was taken, and thus to identify who can enforce the covenant, by looking at the land that had been conveyed to Mr. and Mrs. Worthington in 1928. In my judgment, the land for which the benefit of the covenant was taken is sufficiently ascertainable. As Mr. Clark accepted, one can ascertain the land in question by reference to the plan which forms part of the abstract of title. In my judgment, as a result of the doctrine of statutory annexation under section 78, the covenant is annexed to the whole, and to each and every part, of the land conveyed to Mr. and Mrs. Worthington in 1928 and it would not be appropriate for me to make any declaration as to the enforceability of the restriction under section 84(2).

36. I acknowledge, however, that that is not necessarily the end of the matter. Section 84(1) of the 1925 Act gives the Upper Tribunal power to discharge or modify a restrictive covenant. In the present case, there may well be a powerful case for saying that, by reason of changes in the character of the property or the neighbourhood or other circumstances of the case, the restrictive covenant may now be deemed obsolete, or that its proposed discharge or modification will not injure the persons entitled to the benefit of the restriction. As a result of the responses that have been received from many of the surrounding landowners, it may be possible to contend, under section 84(1)(b), that many of the persons entitled to the benefit of the restriction have agreed, either expressly or by implication, to the same being discharged or modified. But that is not a matter for this court, it is a matter for the Upper Tribunal. I do sit as a judge of the Upper Tribunal Lands Chamber, but I am

not presently so sitting and there is no present application before me under section 84(1) of the 1925 Act. I am prepared to say that, if such an application were to be made, it would be appropriate to ask for it to be dealt with in Manchester and, if thought appropriate, to be dealt with by myself as a Judge of the Lands Chamber of the Upper Tribunal; but I do not feel able, on the evidence before me, to make any order under section 84(2). I appreciate that that will be a disappointment to Mr. and Mrs. Stansfield, but there may be other relief available to them, as I have indicated.

37. For those reasons I would propose to dismiss the claim. Since there is no defendant it is unnecessary to say anything about costs.
