POSITIVE COVENANTS RUNNING WITH LAND: A CASTAWAY ON OCEAN ISLAND?

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This article looks at the law relating to positive covenants in light of recent case law which rejects the prospect of positive covenants running with land. The author looks at the policy behind the respective positions in an attempt to reconcile the competing cases.

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I. INTRODUCTION

This article invites a reconsideration of the general law governing the running of positive covenants with land, a topic which, despite its lack of lustre, continues to generate interest. In 1984, the English Law Commission proposed reforms that would allow positive covenants to bind successors in title of burdened land.[1] In a contribution to the Oxford Essays in Jurisprudence, Professor Bernard Rudden chose to illustrate the clash of economic theory and *numerus clausus* in land by focussing primarily on the enforceability of positive covenants.[2] Others have written about various means of enabling obligations to run with chattels.[3] The remarkable feature of these commentaries is that they downplay, or ignore altogether, that ominous-looking giant which has loomed over this area for more than ten years. I refer, of course, to *Tito* v. *Waddell*,[4] also known as the *Ocean Island* case, in which Megarry V.C. applied what he termed the pure principle of benefit and burden. He who takes the benefit of a covenant, says *Tito*, may have to submit to related burdens, whether positive or negative in nature, even if these were originally cast as independent obligations.

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1. Law Commission, *Transfer of Land: The Law of Positive and Restrictive Covenants* (Law Com. 127, 1984); *see also Report of the Committee on Positive Covenants Affecting Land* [the Wilberforce Report] (Cmnd. 2719, 1965); Law Commission, *Working Paper on Appurtenant Rights* (No. 36, 1971).
2. B. Rudden, "Economic Theory v. Property Law: The *Numerus Clausus* Problem" in J.M. Eekelaar & J. Bell, eds., *Oxford Essays in Jurisprudence* 239 (3rd series, 1987).
3. S. Gardiner, "The Proprietary Effect of Contractual Obligations Under *Tulk* v. *Moxhay* and *DeMattos* v. *Gibson*" (1982) 98 *L.Q.R.* 279; A.M. Tettenborn, "Covenants, Privity of Contract, and the Purchaser of Personal Property" [1982] *C.L.J.* 58.
4. [1977] Ch. 106. A thoughtful, if sparing, treatment is found in G.H. Treitel, *The Law of Contract* (7th ed. 1987), at 525-6. *See also* E.P. Aughterson, "The Enforcement of Positive Burdens — A New Viability" [1985] *Conv.* 12; R.E. Megarry and H.W.R. Wade, *The Law of Real Property* (5th ed. 1984), at 769-70.

Almost everything about *Tito* v. *Waddell* is of monumental, larger-than-life dimensions. The controversy involved the fate of virtually an entire south Pacific island community and its indigenous population, the Banabans. The hearings, which involved two complex actions, lasted for months; there were scores of witnesses and exhibits; the report of the decision occupies more than 250 pages in the law reports; over four days were spent (wasted?) reading the judgment in court. From a jurisprudential standpoint, the decision loses none of this grandeur for the pure principle of benefit and burden (only one of the several matters dealt with in the case) appears to have profound implications for both the law of contracts and property. In light of all this, the Vice Chancellor's prefatory observation that the case involved "litigation on a grand scale",[5] can almost count as an understatement.

Even with this imposing presence, the judicial and academic response to *Tito* has been muted. This may be so for several reasons. As a decision of first instance, it is less than authoritative, and no conveyancing solicitor with an eye on errors and omissions liability would likely use the pure principle as the sole means of establishing a scheme of reciprocal obligations. This, in turn, limits opportunities to generate new caselaw. Secondly, the existence of alternative means of imposing continuing positive obligations reduces the need to employ new means of circumventing the general restriction on the running of positive covenants.[6] Thirdly, despite appearances, *Tito* may not have the capacious sweep which some have attributed to it.[7] Finally, it may well be that *Tito* v. *Waddell* is very, very wrong, and while the pure principle may have saved the Banaba islanders in their moment of need, it is otherwise best left alone.

The decade of judicial silence has now been thunderously broken in *Government Insurance Office* v. *K.A. Reed Services Pty. Ltd. et al.*[8], where the Full Court of the Supreme Court of Victoria plumped for the last view: that is, that *Ocean Island* was not good law, and should not be followed. The Victorian case is thoughtful and compelling, if perhaps a little over-zealous in its crusade against the pure principle. The purpose of this article is to contrapose the arguments raised in these two judgments, and to reflect on the policies relevant to the running of positive burdens with land.

II. THE ESSENTIAL ELEMENTS OF *TITO* v. *WADDELL*

A slightly jaded reading between the lines of *Tito* reveals a measure of corporate and imperial avarice. The starting point in the narrative must be the discovery of extraordinarily large deposits of high-grade phosphate on the British South Pacific colony of Ocean Island (or Banaba). An exclusive mining licence was granted to a British company which then set about to acquire rights from the respective property

5. *Supra* n.4, at 123. F.R. Crane, Note, (1977) 41 *Conv. (N.S.)* 432, described the case as "famous and record-breaking".

6. Such as estate rentcharges: *see* S. Bright, "Estate Rentcharges and the Enforcement of Positive Covenants" [1988] *Conv.* 99. The author suggests (at p. 101) that in England "[w]hat is often not appreciated is that by using certain rentcharges it is possible to make positive covenants in effect bind land for all time." *See also* Law Commission, No. 127, *supra* n.1, at para. 3.42. As to other devices, *see id.* at paras. 3.31 to 3.32.

7. *See* text accompanying note 52; *cf.* text accompanying notes 16 to 18, *infra*.

8. [1988] V.R. 829 (S.C. Full Court).

owners to remove phosphate and trees, arrangements which were incorporated into so-called P and T deeds. By 1909, this approach was being viewed with disfavour (on various grounds) by the colonial office. Following protracted discussions and negotiation with the government, a new means of acquiring mining rights was established in 1913. Under this new approach, the company entered into an agreement with 258 landowners which included a condition that on the completion of the mining operations, the company would return all worked out lands and would replant those lands, whenever possible, with coconut and other food-bearing trees. The agreement also called for the execution of documents of transfer embracing both the mining rights and the replanting obligations. Accordingly, so-called A and C deeds were granted in relation to most of the relevant lands, but some of the properties remained subject only to the old P and T deeds.[9] In 1920, the company was bought by the governments of the United Kingdom, Australia and New Zealand, and rights over the mining operations were vested in three Phosphate Commissioners (one from each country), who operated as an unincorporated association. In 1971, in the midst of a wide-ranging dispute, a number of Banabans, including one Rotan Tito, filed suit against the current Commissioners, seeking performance of those replanting obligations which had then become due.

The liability of the defendant-Commissioners could not be founded on contract *simpliciter*; they were not parties to the original contracts or deeds, and neither could any of their dealings be treated on the facts as creating a contract by novation. Moreover, under orthodox views the benefit but not the burden of a contractual promise may be assigned, and equally, the burden of positive covenants cannot run with land at law or in equity. Therefore, the liability of the defendant-Commissioners had to rest on some other footing: enter the pure principle of benefit and burden.

The central rationale of the pure principle can be found in several venerable playground adages: 'you can't have it both ways'; 'you can't have your cake and eat it too'; and 'you can't blow hot and cold'.[10] Generally speaking, these notions have received recognition interstitially throughout the law, but the significant contribution of the *Ocean Island* case is that it draws together and builds on this earlier authority. A brief discussion of this doctrinal edifice is essential; further details are developed through the critique in *Reed Services*.

The principle of benefit and burden applies where, as a matter of construction, the benefits and burdens are created as independent obligations, for a central feature of the doctrine is to tether previously separate promises. Where, by contrast, conditional benefits are involved, the matter is more easily resolved. In that instance, the benefit and the burden are so intimately intertwined that a taking or approbation of the benefit ineluctably means that the burden has also been assumed.[11] In *Tito*, the mining rights and replanting obligations were construed as

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9. 'A' deeds were used when 'P and T' deeds were being replaced; 'C' deeds were applicable when new properties were being acquired. Both of these deeds provided that: "Whenever the said land shall before or after the end of the . . . term, cease to be used by the company for the exercise of the rights hereby granted, the company shall replant the said land as nearly as possible to the extent to which it was planted at the date of the company's operations . . . with such indigenous trees and shrubs or either of them as shall be prescribed by the resident commissioner for the time being in Ocean Island."

10. *Supra* n.4, at 289. *See further* P.S. Atiyah, *Essays on Contract* (1986), 341-2.

11. *Id.* at 290 and 302.

being originally independent, thus making the application of the pure principle central to the case.[12]

The degree of approbation of the benefit required to trigger the operation of the pure principle cannot be described with precision. *Ocean Island* suggests that the principle is not to be regarded as technical or minimal and accordingly it may be said the benefit enjoyed must be real and substantial,[13] arguably beyond the *de minimis* range at least. This standard was met with regard to the benefits enuring to the Commissioners under the A and C deeds, for it was through these that the mining rights were obtained and ultimately exploited. Even if the current Commissioners had not actually exercised the mining rights, they nevertheless remained poised to do so, and this sufficed to bring the machinery of the pure principle into operation. However, there had never been a sufficient taking of any benefit under the 1913 agreement. That document called only for the acquisition of rights through the execution of deeds, and at best this gave the company an implied right of access over the relevant lands. On the facts, the Court was not satisfied that any right enjoyed by the current Commissioners was referable to the agreement.

As to whom may be saddled with a burden, the judgment suggests that a person whose connection with the transaction is sufficient to show that he has some claim to the benefit will be caught. Not only does this include successors in title to the original covenantor, but also someone who has appropriated the benefit without valid title. The Court seemed inclined to the view that there was no sound reason why such a person should be able to take title without also assuming a related burden and thereby be in a superior position when compared to a contractual assignee. It was added, however, that "'mere strangers'"[14], whoever may be contemplated by that phrase, were to be excluded from the operation of the pure principle.

In a passage which appears in the judgment after much of the pure principle has been adumbrated, Megarry V.C. suggested that the principle may be either founded on acceptance, meaning that on adoption of the benefit one is taken to have opted to accept the burden, or alternatively, the doctrine may be regarded as a rule of law, so that one who accepts the benefit is held bound by the burden. Under this latter conceptualization the burden may be the price the law compels as payment for the benefit.[15] Although Megarry V.C. purported not to resolve this issue of juridical characterization, much of his analysis seems to be based on the acceptance approach. Hence, the taking of the benefit is not enough to ensure that the burden will also pass. A pivotal concern appears to be whether this result was intended as part of the assignment package in which the benefit was transferred. The circumstances under which the assignee comes into the transaction are crucial in this

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12. This reading of the A and C deeds (*see* note 9, *supra*) seems sound, though the comparable provision in the 1913 deeds is more equivocal. There, the replanting obligation, together with several other terms, was prefaced by the phrase: "the company shall comply with the following conditions". Of course, use of the magic word 'condition' is not necessarily enough to create a conditional benefit, but it does give leverage to that construction. In the event, there is no consideration of this point in the judgment. The agreement was held to have merged in the A and C deeds, and in those instances where the plaintiffs based their claims solely on the agreement, these failed on a different ground (*see* the text accompanying note 13, *infra*), so that detailed consideration of the contractual terms was unnecessary.

13. *Supra* n.4, at 305-6.

14. *Id.* at 303. The court expressly declined to determine where to plot the dividing line.

15. *Id.* at 309.

determination and, naturally, the documents of assignment are of prime importance, but would not necessarily be controlling: the surrounding circumstances as a whole would have to be taken into account.[16] So, for example, the acquisition of benefits, coupled with an express promise by the assignee to discharge all burdens (and a promise to indemnify the assignor for losses arising from a failure to do so), seems to raise a compelling inference that the burden and benefit were meant to pass together. However, if the original contracting party undertakes to continue to discharge the burden, *Tito* tells us that it would be "remarkable"[17] if the assignee could not take the benefit free from these burdens. Treitel has suggested that one ought to presume that an assignee has *not* agreed to assume a burden, and if this view is correct, the ambit of the pure principle would be quite narrow in fact.[18] In any event, it is hard to treat the pure principle as a rule of law when the parties can contract out its operation with such facility. Perhaps, however, there is room for the operation of the pure principle as a rule of law where the benefit is assumed by someone without valid title. To say in this realm that liability for the burden is the price the law exacts for the acquisition of the benefit has a ring of authenticity and common sense.

The application of this component in *Ocean Island* is not problematic, that is, as long as one is prepared to ignore some weak links in the chain of assignments from commissioner to commissioner over a span of some fifty years. When the initial assignment was made from the company to the first Phosphate Commissioners, the documents of transfer made it patent that both rights and liabilities were being obtained. This matter was not expressly dealt with in subsequent transfers, as retiring commissioners were replaced, a process which was informal almost to the point of being cavalier. Still, Megarry V.C. held that the burdens were to be regarded as assumed, just as in the original assignment, for "the thought that a new commissioner was to take over the assets, but not the liabilities, which the outgoing commissioner, stripped of the assets, was to bear for the rest of his life, and his estate after his death, seem(ed) . . . absurd".[19] Indeed, all concerned appeared to act on the assumption that the new Commissioners succeeded automatically to all the contractual rights and liabilities of their predecessors.[20]

By assigning the burden, the original promissor cannot shuck off continuing liability to perform.[21] As in the case of restrictive covenants, the burden is bifurcated, and the original promissor can temper his liability if he so wishes by obtaining an indemnity from his assignee. Additionally, one would assume that the burden (and benefit) can only be assigned where the initial transaction contemplated this possibility, at least implicitly. This would accord entirely with the law governing the transfer of benefits and burdens of restrictive covenants. However, where a restrictive covenant is placed on land, transfer of that land carries with it liability

16. *Id.* at 303.

17. *Id.* at 302.

18. Treitel, *supra* n.4, at 526. Precisely, Professor Treitel states: "An intention to subject an assignee of contractual rights to liabilities under the contract will not generally be inferred (57); so that the scope of the principle of pure benefit and burden is likely to be a narrow one." Footnote 57 reads: "[*Tito* v. *Waddell*] p. 291; *cf.* p. 299". I am unable to find at these references any discussion pertaining to Professor Treitel's proposition.

19. *Id.* at 304.

20. *Id.* at 155.

21. Treitel, *supra* n.4, at 526; *see also* Greig & Davis, *The Law of Contract* (1987), at 1025.

for the burden, and the assignor and assignee cannot decide *inter se* that this shall not happen. In contrast, under the pure principle, the parties to an assignment can control whether the burden is to pass with the benefit, and this has important implications for the continuing transmission of the burden after the first assignment. In *Ocean Island*, it was suggested that it might be sensible to regard the first assignment as annexing the burden to the benefit for all subsequent transactions. Yet Megarry V.C. stopped short of endorsing this view, stating elliptically that this posed difficulties.[22]

The principle of benefit and burden applies, in theory, to both unitary and continuing burdens.[23] A continuing burden is one which is connected to an intermittent, but ongoing or periodical benefit. The obligation to pay for repair and upkeep of a right-of-way for so long as it is being used by the obligated party provides a simple illustration. Where the burden is continuing, repudiation of the benefit may give rise to the suspension of the burden.[24] A unitary burden, as the name implies, is a one-shot affair. *Tito* provides the best example, for there was a single obligation, *i.e.* to replant the trees after the mining operations were complete. Of course, here one cannot simply give up the benefit at some convenient time and so terminate all liability for the burden; much of the benefit may have been consumed without one iota of the burden having been met. In *Tito*, the Commissioners were held liable for the entire replanting obligation, even though they held the benefit only for a relatively short period of time. To allow for the fair apportionment of liability as between past and present Commissioners, it was intimated in *obiter* that a right of indemnity ought perhaps to be recognized.[25]

Although Megarry V.C. vacillated somewhat on the question of whether liability is legal or equitable, it seems clear enough at the end of the day that it could be either (or both) depending on the circumstances. Where liability is initially purely equitable, only equitable remedies would apply; where the initial liability was recognized at law, legal remedies (*i.e.* damages) should also be available. In *Ocean Island*, the defendant-Commissioners were held liable at law and in equity, however, the Court brushed past the question of whether damages at law would provide an adequate remedy and considered the position in equity. Ultimately, an award of damages in lieu of specific performance was made under Lord Cairn's Act.[26]

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22. *Supra* n.4, at 303.

23. *Id.* at 291. The Court also described 'active' and 'passive' forms of the pure principle: *id.* The active form is forward-looking and applies in instances where there can be a future exploitation of the benefit. Here, if the benefit is taken, the burden must be assumed. The passive form is relevant to past conduct. A party who has already taken a benefit may claim an entitlement so to do as an assignee of the original grantee, or that person may claim that his actions were unauthorized, and face liability on that basis. This election may affect the quantum of damages, but apart from this, Megarry V.C. did not view the forms as greatly different, and he did not address the dubious logic of (apparently) permitting the liable party to select the basis of liability.

24. *See* the *obiter* comments in *Parkinson* v. *Reid* (1966) 56 D.L.R. (2d) 315 (S.C.C.), cited in *Tito*, *supra* n.4, at 295-6. *See further id.* at 291, where the Court refrained from resolving whether there would be a right to resume using a benefit following a discontinuance.

25. *Id.* at 308.

26. Chancery Amendment Act, 1858, 21 & 22 Vict., c.27.

III. *GOVERNMENT INSURANCE OFFICE* v. *REED SERVICES*

The fact pattern of *Reed Services*[27] provides an almost perfect scenario for the application of the *Ocean Island* principle and illustrates how that principle might be applied in a different context. A property owner, *A*, proposed to construct a multi-story office tower in Melbourne in a manner which would have infringed local building regulations. Specifically, the building was to include windows on the north wall, close to neighbouring property (owned by *B*), and this would be in breach of Code restrictions designed to provide fire protection from adjacent properties. An exemption from these regulations was obtained by *A* on application to a local government regulatory agency, but the exemption was made subject to various conditions which were incorporated into the order. Among these was the requirement that an undertaking be given by *A* to *B* that if the height of the building on *B*'s land were ever extended, *A* would seal up the windows at its own expense. *A* was also required to enter into an agreement incorporating that promise. This was done: the terms of the agreement permitted *A* to instal the windows and to enter *B*'s air space periodically to carry repairs or cleaning; these rights were conferred without prejudice to *B*'s right to extend the buildings on its property. Should that occur, *A* would then be required to seal up the windows at its own expense in compliance with the building code. The agreement was stated to be binding on the parties and their respective successors and assigns.

In 1985, *A* sold its property to *C* who, it was conceded, had no notice of the contract. One year later, *B* sold the adjoining land to *D*, and purported to assign the agreement, warranting that it remained in full force. *D* later took steps to develop its property, which, if completed, would prompt the obligation to seal up the windows on the neighbouring property. In the law suit which followed, *C* claimed that as a *bona fide* purchaser for value without notice of the property subject to the local government order or the agreement, it was bound by neither. The trial judge rejected these defences, holding that the order operated *in rem* and was binding on future owners of the building, even absent registration, and the agreement was held to be binding under the benefit and burden principle. On appeal, the Full Court confirmed the ruling as to the order, but the trial judge's conclusion that the agreement was binding was unequivocally rejected. It is this aspect of the appeal judgment which may ultimately reverberate throughout the common law world.

The Full Court might have handled and dismissed the pure principle on its own terms easily enough. Given that *C* had no notice of the contract, it would be an egregious fiction to impute that it had somehow agreed to assume the burden. Without knowledge of the agreement, it made little sense to say that *C* had taken the benefit of it. Certainly, no attempt was made to exercise directly any of the contractual benefits, except of course, that had there been no contract, the building *C* had acquired could not (lawfully) have had windows on the north wall. Alternatively, since land is involved, it could have been decided that the protections afforded under the Torrens registration system prevented the obligations from running into the hands of *C*, who took the land without notice. Or, the Court could well have decided the case exclusively by reference to the local government order, treating the contract argument as moot. As it stands, it was the order which dictated the actual

27. *Supra* n.8.

outcome of the case; since the resolution of the contract point led to the opposite conclusion (*i.e.* no liability) that part of the judgment is *obiter dicta*.

But, instead of retreating through any of these escape routes, the judgment of Mr. Justice Brooking (with which the other members of the panel agreed)[28] contains a ferocious assault, along several flanks, on the principle of benefit and burden. It was said that if that principle is to be regarded as a legal or equitable rule, and not merely as a maxim capable of giving rise to more specific rules, then it is too general and uncertain to be accepted. As a mere maxim "masquerading"[29] as a rule, it suffers the same weaknesses of other maxims: when taken literally, it is unhelpful, false and misleading. The pure principle is built upon an illusory foundation of caselaw, and is at odds with established principles. In this caustic attack, few punches are pulled. The Court "in the interests of certainty and sound doctrine",[30] overtly declared its intention to repel the incipient invasion of the pure principle into Victorian law, an invasion which has already established a beachhead in New South Wales in several unreported trial decisions.[31]

A. UNCERTAIN ASPECTS OF THE PURE PRINCIPLE

The benefit and burden principle hardly looks like a finely polished concept and Megarry V.C. acknowledged that issues relating to the ambit of the pure principle would have to be resolved in due course; this was regarded as inescapable in a developing branch of the law. Brooking J. seized on these uncertain areas and posed five hypothetical questions in response. Although these are not analyzed at all by the Court, it is implicit that the answers cannot be easily discovered from *Ocean Island*, or that the likely solutions would be disquieting, unjust, or anomalous. In each of the hypotheticals the issue is roughly the same: under what circumstances is someone who acquires a contractual benefit bound to perform a positive obligation (*e.g.* the making of a payment) which was originally created as an independent contractual promise? In paraphrased form, the hypotheticals are as follows:

(a) *A* buys a car from *B* on credit, but title passes without security being taken. *A* makes a gift of the car to *C*; subsequently *A* defaults on his payments.

(b) *A* hires a taxi operated by *B* to pick up his wife *C*; *A* agrees to pay for the fare. After *B* completes the ride, *A* refuses to pay.

(c) *A* purchases a watch on credit from *B*, in the presence of *C*. *A* then makes a gift of the watch to *C* and makes no payments under the terms of credit.

(d) *A* hires *B* to paint *C*'s house, making it clear that *A*, not *C*, will pay for this work. The job is performed, but *C* is not paid.

(e) *A* fails to pay a local authority *B* in respect of school fees owing for *A*'s child, *C*.[32]

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28. The other members of the panel were Nicholson J. and O'Bryan J. The decision as to the effect of the local government order was written by Nicholson J.; there was also full concurrence on this issue.

29. *Supra* note 8, at 841.

30. *Id. Compare* I.J. Dawson & R.A. Pearce, *Licences Relating to the Occupation or Use of Land* (1979) at 37, where the authors predict that the pure principle will receive judicial acceptance.

31. *Licata* v. *Maddedu*, 9 August, 1985; *Beaton* v. *McDivitt*, 16 September, 1985; *Carlton & United Breweries Ltd.* v. *Tooth & Co. Ltd.*, 13 August, 1986; *Stuart* v. *Reapers* 5 March, 1987, cited in *Reed Services*, *supra* note 8, at 840.

32. *Supra* n.8 at 831-2.

These are followed by four general questions, some of which cover much of the same ground:

(a) Does the pure principle relate only to transactions concerning land, or personalty, or are other types of contracts included?
(b) Does the requirement that the burden be borne result in a personal or proprietary right, or both, depending on the circumstances?
(c) Who may take advantage of the burden?
(d) Is liability legal or equitable?[33]

In distilled form, *Reed Services* spots at least four major problem areas in the operation of the pure principle, though not in every instance are these expressly identified and in fewer still is the critique complete. Some defy categorical treatment, and this may be all that the Court in *Reed Services* was attempting to demonstrate.

First, there is the question of whether the doctrine is applicable only to land transactions (as in *Tito*), to personalty (*e.g.* jewelry), or, going still further, to contracts for services (*e.g.* a taxi ride). This is not answered directly in *Tito*, but the judgment does talk of land or other property,[34] suggesting that limitation. Despite this, the rationale of the principle, rooted as it is in basic concepts of fairness, would appear to apply to all manner of contracts. However, even accepting this as the base point, one sees in *Tito* strictures which drastically limit the breadth of its operation. Its operation will depend on whether the burdens were initially intended to be assignable and whether a subsequent assignment, when looking at the circumstances as a whole, included both the benefit and the burden.

A second issue concerns the role of 'notice' in the operation of the doctrine, a question raised *via* the hypotheticals, albeit only implicitly. Little direct attention is paid to this point in *Tito*; to be more exact, the judgment does not expressly speak of notice at all. However, it does focus on when the assignee of the covenantor should be taken to have assumed the burden. This is a rather central element and notice may play a part in specific instances in which assumption of the burden is at issue. It will be recalled that whether an assignee of the original covenantor is bound by the burden depends upon the circumstances in which that person came into the transaction. In the case of assignment by contract one looks, it would seem, to the actual or imputed intentions of the assignor and assignee of the benefit. Notice to the assignee would then be a surrounding circumstance which would often be vital in ascertaining this intention. Issues pertaining to notice may also help in nderstanding the likely position where a benefit is given by gift, a matter alluded to in the hypotheticals. Only where the circumstances show an intention to pass the burden would transmission occur. Common sense leans against a presumption in favour of assumption of a contractual burden by a donee, but notice might be a relevant consideration in fixing liability. Where there is neither a contract nor a gift, such as where the benefit is assumed by someone without valid title, Megarry V.C. suggested that the pure principle could nevertheless be invoked. Imputing an intention here is highly artificial and it was suggested above that this may provide an instance where the doctrine may be said to apply by operation of law. In this context, notice seems less important.

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33. *Id.*
34. *Supra* n.4 at 303.

The issue of notice is of particular significance in relation to land, however, especially for jurisdictions which have adopted the Torrens model of land registration. Under that system, the abstract is supposed to contain a compendium of all (or virtually all) interests on title, and a subsequent purchaser of property is not bound by a prior interest, unless he receives notice of it in the form of proper registration on title. While Meagher *et al.* have proclaimed that the pure principle cannot apply to land governed by Torrens title,[35] this may be too assertive. The first question, admittedly a difficult one, is whether the pure principle is capable of creating an interest in land which can be attached to burdened property. If it does, then registration may be possible (by way of caveat presumably), and the objectives of the Torrens system would not be offended. However, the conclusion that the pure principle creates an interest in land is a troubled one, and can only be advanced with diffidence. In *Tito*, the Vice Chancellor was careful to describe the principle as being distinct from covenants running with land, and the suggestion that the first assignment perfected an annexation to the property thereafter was resisted.[36] At the same time, it is equally clear that the ultimate basis of liability in *Tito* was not contractual. Regarding the Commissioners as liable to the Banabans under some facet of contract law would be to torture contract principles out of all recognizable shape.[37] If the enigmatic pure principle is a *sui generis* concept, which on reflection it appears to be, the manner in which it is to dovetail with land registration is entirely unclear.

Thirdly, in *Reed Services*, it is asked: who can "take advantage" of the burden? and whether the assumption of the burden results in a "personal or proprietary" right, or both?[38] The import and focus of these questions are difficult to discern since it is hard to conceive of the assumption of a contractual burden as some type of right. Presumably what is being referred to is the right to enforce the assumed burden, an issue which *Tito* deals with only briefly. There, those seeking to enforce the replanting covenant were successors in title to the subject lands; with little ado the benefit was found to pass (at law and in equity) under land law principles governing the transmission of benefits under a covenant. Specifically, it was held that the obligations touched and concerned the benefited land and that it must have been intended that these benefits would run in favour of future owners of the property. *Tito* does not attempt to alter basic principles here; no alteration seems required.

Finally, *Reed Services* probes difficulties in the treatment of the pure principle as a doctrine of equity, principally in relation to the available remedies for the enforcement of positive obligations. Where the burden was a continuing one, a prohibitory injunction could be granted, so that equity would enjoin the assignee from exercising the benefit unless the burden was assumed as well. Where this was not possible because, for instance, the benefit had been almost fully exploited, Megarry V.C. thought that declaratory relief might be obtained, although this seems a rather hollow measure. As an alternative, it was suggested that the maxim that 'equity

35. Meagher, Gummow & Lehane, *Equity: Doctrines and Remedies* (2nd ed.), at 1078.

36. *Supra* n.4 at 302 and 303.

37. *But cf.* H.W.R. Wade, Note [1957] *C.L.J.* 35, at 37, where it is said that the approach in *Halsall* looks more akin to some rule of contract law by which a person who seeks to make use of property belonging to another impliedly accepts the intended terms.

38. *Supra* n.8 at 832.

treats as done that which ought to be done' could be invoked. Brooking J. found the notion of relying on this maxim altogether perplexing:[39]

> If . . . the benefit and burden principle is one that equity has devised, then [the] conclusion — that the Commissioners were liable at law on the replanting obligations — would . . . have to be arrived at by saying that equity treated the Commissioners as having done what they ought to have done, that is assumed the burden at law. But this is a difficult step. For the benefit and burden principle required the Commissioners to "bear the burden" and this I should take to mean discharge the planting obligations, not to enter into fresh deeds binding themselves to discharge those obligations. Application of the maxim that equity treats as done that which ought to be done would require the Commissioners to be treated, not as having assumed the obligations at law, but as having discharged them. In any event, I am not aware of any application of the doctrine in analogous situations.

The logic of this analysis is elusive. Treating the replanting obligation as being discharged by virtue of the operation of the maxim would be non-sensical. Its only possible use would be to provide a justification (within the internal logic of equity) for deeming the burden to have been assumed so that an equitable remedy for a failure to discharge the obligation could be awarded.

But putting this matter aside, the more critical concern must be whether the treatment of the remedies issue in *Ocean Island* was correct. The primary remedy sought by the plaintiffs was specific performance of the replanting obligations. Megarry V.C. declined to grant such an order on the facts before him, though it appears from the judgment that had certain logistical, horticultural, and other factual matters been different, such an order might well have issued. As it was, on the facts, specific performance would have been futile and an utter waste of time.[40] That being so, damages in lieu of specific performance were ordered. An order of damages in equity is not possible unless a court has jurisdiction to award specific performance (or an injunction), but declines to do so as a matter of discretion.[41] There is little consideration in *Ocean Island* as to whether an order of specific performance was properly available at all. That remedy is designed for the enforcement of contractual promises as against contracting parties and ordering performance against an assign of the original covenantor appears to be novel. Though the implications of extending the remedy in this direction are not addressed in the decision, it does seem a natural and correct extension, for if one accepts the logic of allowing positive obligations to run, specific performance, or its first cousin, the mandatory injunction, seems an appropriate means of enforcement, with Lord Cairn's Act serving as a safety valve.

B. THE PURE PRINCIPLE AND EARLIER AUTHORITY

For Brooking J., the clash of the pure principle with precedent is manifested in two complementary ways. It was asserted that there was not an acceptable base of prior authority to support the pure principle and that if the principle were accepted, it would cut across the grain of established doctrine in three discrete areas of property law.

The jurisprudential genesis of the pure principle may be traced to an ancient rule relating to the construction of deeds which provides, in essence, that where a party

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39. *Id.* at 833-4.

40. *Supra* n.4 at 327.

41. *See generally* T. Ingram & J. Wakefield, "Equitable Damages Under Lord Cairns Act" [1981] *Conv.* 286.

to a deed does not execute it, he will nevertheless be treated as bound if he knowingly takes a benefit under it. This rule applies only to those persons designated in the deed (specifically, or as an ascertainable remainderman), and operates as a proxy for the execution of the document. To apply this rule to any person who takes a benefit under a deed would be a clear extension of the doctrine: this is precisely what occurred in *Halsall* v. *Brizell*,[42] a decision which was relied on by Megarry V.C. as a prior application of the pure principle. There, it was held that a party who acquires a pre-existing right to use a road adjoining land is bound to contribute to the cost of upkeep of that appurtenant right where this was agreed by the initial contracting parties. However, as a precedent *Halsall* is obviously limited. The judgment was *obiter* on this point, and more significantly, the benefit/burden issue was not argued fully, but was conceded by counsel, so that it appears that the ancient rule relating to liability of parties to a deed may have been unwittingly extended. These deficiencies (and more) were acknowledged in *Tito*,[43] but it was the fairness of the result which impressed the Vice Chancellor.

A second case relied upon, one of more recent vintage, was *E.R. Ives Investment Ltd.* v. *High*.[44] There, a building on *A*'s land was found to be encroaching (slightly) on neighbouring property owned by *B*. The parties agreed orally that the encroachment would remain and that *B* would be allowed a right-of-way over *A*'s land. Based on this understanding, *B* built a garage that could only be used in conjunction with the right-of-way. The English Court of Appeal held that this agreement was binding on subsequent owners. All three members of the Court rested their decision on estoppel by acquiescence. Lord Denning M.R. went further, explicitly referring to the benefit and burden principle.[45] Additionally, the opinion of Danckwerts L.J. seems to conflate that principle with the idea of estoppel.[46] Winn L.J., while adverting to the benefit and burden concept, nevertheless did not rely on it as a separate reason for judgment.[47] However, even if one may conclude from this that a majority of the Court of Appeal endorsed and applied the pure principle (but, of course, not under that name), it still remains true that the entire construct totters on the uncertain plynth of *Halsall* v. *Brizell*.[48] Moreover, neither that case nor *Ives* indulged in the type of detailed construction of the pure principle which is fashioned in *Tito* v. *Waddell*. In sum, Megarry V.C.'s conclusion that there is ample authority for the pure principle of benefit and burden is doubtful.

In *Reed Services*, it was suggested that if *Tito* v. *Waddell*, is correct, there is a good deal of well-established jurisprudence which would be outflanked. Hence,

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42. [1957] Ch. 169. In a commentary on *Halsall* which is in many ways a harbinger of things to come, Megarry (years before his appointment to the bench and the decision in *Tito* v. *Waddell*), observed that "*Halsall* v. *Brizell* is plainly an important decision of which more will be heard": *see* R.E. Megarry, Note (1957), 73 *L.Q.R.* 154 at 156.

43. *Supra* n.4 at 293-5. It was further acknowledged that the decision in *Halsall* was not reserved, and that the court had placed reliance on certain comments of Cozens-Hardy M.R. in *Elliston* v. *Reacher* [1908] 2 Ch. 665, which were interlocutory observations only and formed no part of that judgment.

44. [1967] 2 Q.B. 379 (C.A.).

45. *Id.* at 394.

46. *Id.* at 399-400.

47. *But see id.* at 405.

48. *See also* H.W.R. Wade, "Covenants — 'A Broad and Reasonable View' " [1972B] *C.L.J.* 157 at 158.

under the rule in *Cox* v. *Bishop*,[49] a tenant who receives an equitable assignment of a legal lease is not bound to perform the covenants of that lease (absent estoppel). The same rule obtains in the case of an assignee of an equitable lease. However, if *Tito* applied, it was said that the result would be different: an equitable assignee could not assume the lease without submitting to the relevant burdens. The pure principle could have an even more dramatic effect on the law of personal property. *Tito* aside, there is considerable uncertainty as to whether covenants can and should be able to run with personalty.[50] The pure principle, if applicable to chattels, would bracket much of this debate, and would have a profound impact on personal property security. With regard to land, Brooking J. maintained that the pure principle would by-pass the entrenched rule that positive burdens cannot run with land, the so-called negativity rule which for a century has been grafted onto the doctrine of *Tulk* v. *Moxhay*.[51] On a more extreme note, some have suggested that in its widest possible interpretation, *Tito* would render the entire law of restrictive covenants irrelevant.[52] Moreover, if new forms of servitude interests can be created in this way, one should perhaps re-evaluate whether the law of easements can continue to perform a limiting function.

Some of these prospects are not particularly terrifying. With regard to the equitable assignment of leases, the state of the jurisprudence has suffered criticism.[53] In the context of land law, Megarry and Wade have (predictably) heralded the pure principle as a welcome development:[54]

> The legal pedigree of the "pure principle" is questionable in that it hardly seems to be supported by the old rule as to deeds, which is narrow and technical . . . [That rule] has been pressed into service . . . in order to mitigate injustices caused by the rigidity of the basic rule that the burden of a positive covenant cannot run with freehold land, a rule which is acknowledged to be in need of reform. In its broad formulation, the "pure principle" goes far to undermine the basic rule. It could do so entirely if it were held that the successors of a purchaser who covenanted, for example, to keep a boundary wall in repair, were liable on the covenant merely because they derived title under the same deed and so took the benefit of it. The novel feature of the *Ocean Island* case is that it appears to go to that length, since the only benefit enjoyed by the company and its successors was their proprietary interest under the deeds of grant. In earlier cases the covenants were related to the enjoyment of some extraterritorial benefit such as the right to use roads or to encroach on land belonging to the other party. Basic principles are now in conflict, but the prospects for justice are better.

Despite the concerns in *Reed Services* and the claims of Megarry and Wade, it does not appear that the pure principle as formulated in *Ocean Island* has quite these broad dimensions. Recall that the principle only applies where this is clear from the nature of the assignment of the benefit that the burden was also meant to pass,

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49. (1857) 8 De G.M. & G. 815, 44 E.R. 604. The relevance of *Tito* v. *Waddell* in this context was recognized in R.J. Smith, "The Running of Covenants in Equitable Leases and Equitable Assignments of Legal Leases" [1978] *C.L.J.* 98 at 110, 118-9, 121. *Quaere* the effect of the pure principle on *Spencer*'s case (1583) Co. Rep. 16a, 77 E.R. 72 and its statutory equivalents. Under *Spencer*'s case, on a legal assignment of a lease, only the real covenants are enforceable by the landlord against that assign. Arguably, the pure principle could embrace more than real covenants, thereby extending the assignee's liability. *But see* the comments accompanying notes 16 to 18, *supra*.

50. *See* Tettenborn, *supra* n.3; Gardiner, *supra* n.3.

51. (1834) 2 My. & K. 517, 39 E.R. 1042.

52. Meagher *et al.*, *supra* n.35 at 837.

53. *See e.g.* R.J. Smith, *supra* n.49; *see also Boyer* v. *Warbey* [1953] 1 Q.B. 234 (C.A.) (*per* Denning L.J.).

54. Megarry & Wade, *supra* n.4 at 770.

and that the assignor and the assignee can agree that the burden will not be assumed. In view of this feature, the law of covenants over land, for example, is not completely overwhelmed by the pure principle.

However, if one is endeavouring to create a positive burden that will run with land, thereby avoiding the straight-jacket of conventional covenants law, *Ocean Island* actually suggests that a more effective means may be through the deployment of a conditional benefit. Bear in mind that a burden which has been made a condition of a benefit simply passes with it, meaning that the benefit of a property can only be taken as it stands.[55] Not only is the original grantee bound by the conditions, but also all successors in title are precluded from taking the benefit without also assuming the burden. Thus, it is not necessary to work through the more complex route of invoking the pure principle, in which the circumstances surrounding the first assignment, as well as all subsequent ones, are so instrumental. Additionally, some of the strictures of covenant law, such as the need for the covenant to touch and concern the land, or the requirement of a dominant tenement, are not germane. Imagine the grant of a fee simple made conditional on the performance of some positive obligation. Classically, of course, a fee simple subject to a condition subsequent gives rise to a right of re-entry for condition broken. However, there seems to be no reason why this must necessarily form part of the transaction and indeed, the existence of that right may not be desirable as a practical matter. To the covenantor, it may appear to be too drastic a remedy; and from the covenantee's perspective, the efficacy of the right of entry may be limited in time by the rule against perpetuities. Since a conditional benefit was not created in *Tito*, the conveyancing potential of this mechanism was not extensively treated and the cases involving conditional benefits discussed by Megarry V.C. did not deal directly with the type of grant in fee simple mentioned here.[56] Likewise, the viability of conditional grants was not considered in *Reed Services*.

IV. THE RUNNING OF POSITIVE COVENANTS

A critical question in the debate over the pure principle is left on the periphery in the two judgments under analysis. The central concern should not be whether *Tito* v. *Waddell* is faithful to prior authority, or whether one technique or another is better suited to circumvent the orthodox rule prohibiting the running of positive covenants. But rather, the question should be whether there remains a sound justification for that prohibition. The resistance of the English courts to the idea of enforcing positive obligations often appears as little more than a phobic response to entering new terrain. This is sometimes manifested by claims that the court is incompetent to extend the law, or that the unknown implications of change argue against reform. This attitude is most notable in the nineteenth century English reaction against the applicability of *Tulk* v. *Moxhay*[57] to positive covenants. So, in

55. *Tito* v. *Waddell*, *supra* n.4 at 290.

56. The principle cases relied upon were: *Aspden* v. *Seddon* (1875) 10 Ch. App. 394; *Aspden Seddon (No. 2)* (1876) 1 Ex. D. 496; *Westhoughton Urban District Council* v. *Wiggan Coal & Iron Co. Ltd.* [1919] 1 Ch. 159; *Chamber Colliery Co. Ltd.* v. *Twyerould* [1915] 1 Ch. 268n (decided in 1893); *Radstock Co-operative and Industrial Society* v. *Norton-Radstock Urban District Council* [1968] Ch. 605. A further example may be found in *Re Ellenbourough Park* [1956] Ch. 131 at 167. *See also Rufta Pty. Ltd.* v. *Cross*, [1981] Qd. 365 (Full Ct.).

57. *Supra* n.51.

Haywood v. *Brunswick Benefit Building Society*, for example, it was said that to enforce positive covenants "would be making an equity, which we cannot do".[58] In a later case it was added that enforcement would be dangerous,[59] though the dangers were not described. Although the courts in *Tito* v. *Waddell* and *Reed Services* recognize and refer to the prohibition on the running of positive covenants, neither of these judgments addresses its underlying rationale. Apposite is Browder's despairing observation, that "a search for the reasons for such a law . . . only leads one into the typical inscrutability of the English judges".[60] This may be so, but if one shakes the bushes a little, a few more specific reasons emerge, even if many of these may appear "unimpressive" or "rather naive".[61] In general terms, the advanced explanations relate to a plethora of concerns ranging from promotion of the alienability of land to problems with remedies and beyond.

Much of real property has been forged, defended, or reformed in the cause of furthering alienability. The several factors which conjoin to support the promotion of alienation share a common predicate — the assumption that allowing property to circulate within the community produces desirable economic results. In Blackstone's words, "experience ha[s] shown, that property best answers the purpose of civil life, especially in commercial countries, when its circulation and transfer are totally free and unrestrained."[62] The law and economics school advances an accordant view in the context of the modern mixed economy. Restraints on alienation allow the dead hand control of prior owners, not ever-changing market conditions, to dictate land use. Fetters on land use mean that an investor is restricted in his ability to alter the composition of his wealth in order to exploit changes in opportunities resulting from economic changes.[63] Restrictions on transfer lower the profitability of investments in property, potentially sterilizing land commercially and creating disincentives to invest in improvements. Some restraints can also reduce the availability of land as loan-security.

With these concerns in mind, it is sometimes offered that positive covenants may constitute indirect restraints on alienation, particularly where the accumulation of numerous positive obligations on a single servient tenement may dissuade potential purchasers from that property. This is compounded by the added transaction costs which may be associated with examining the title, and assessing the nature of the obligations. Positive covenants, easily identifiable entities, are singled out

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58. (1881) 8 Q.B.D. 403, at 408 (*per* Brett L.J.). It has been suggested that *Haywood* may "best be explained if one remembers the contemporary setting. The principle laid down in . . . *Tulk* v. *Moxhay* was still in a formative stage, there was little upon which to assert that the burden of a positive covenant could run with freehold land in equity and the court may have refrained from endorsing the latter principle because of an inability to comprehend the consequences which would flow from so doing. The case may be legitimately considered as an example of the natural conservatism of the judiciary." *See* C.D. Bell, "*Tulk* v. *Moxhay* Revisited" [1981] *Conv.* 55 at 59-60. *See also* Wade, *supra* n.48 at 160-1.

59. *L.S.W.R.* v. *Gomm* (1882) 20 Ch. D. 562 at 587 (*per* Lindley L.J.); *see also* the decision of Sir James Hannen, at 586-7.

60. O.L. Browder, "Running Covenants and Public Policy" (1978) 77 *Mich. L. Rev.* 12 at 18-9. To be fair, a similar comment has been made of American courts (on the same issue): *see* W.H. Lloyd, "Enforcement of Affirmative Agreements Respecting the Use of Land" (1928) 14 *Va. L. Rev.* 418 at 428-9.

61. Gardiner, *supra* n.3 at 295.

62. W. Blackstone, 2 *Commentaries on the Laws of England* (1788) at 288.

63. O.E.G. Johnson, "Economic Analysis, The Legal Framework and Land Tenure Systems" (1972) 15 *J. of L. & Econ.* 259 at 267.

for exclusion as a means of minimizing the potential for restraints. Browder, admittedly puzzled by the origins of the restriction on positive covenants, has suggested that this may lie at its root: "do English judges" he asks rhetorically "assume that the greater the burden the greater the restraint on alienation, and that somewhere a line must be drawn?"[64]

If anything, this explanation serves only to underscore the overbreadth and arbitrariness of the limitation. Restrictive covenants may constitute restraints on alienation and that issue, when it arises, is assessed on a case-specific basis. Similarly, it is obvious that not all positive covenants will inhibit alienation; some may have quite the opposite effect.[65] Moreover, the requirement that the burden touch and concern the land would have a moderating effect on attempts to impose some types of unreasonable burdens on servient land.[66] There is also the more general response that market forces will take account of, and respond to, the effect of positive covenants on alienation: if a covenant renders a property less desirable, its price will fall until it again becomes attractive to purchasers.[67]

There is a superficial difference between positive and negative covenants which may appear to support divergent treatment in the law governing restraints. In the case of negative covenants, a prospective purchaser appears to be able to know, from the outset, the full extent of the obligation he is assuming. If he agrees to a restriction on building on the land, this will involve no direct expenses: in the classic language of the negativity rule, the servient owner here is not required to put his hand into his pocket. However, a landowner who covenants to maintain a wall or, as in *Reed Services*, undertakes to carry out construction at some future date is assuming an obligation of uncertain financial dimensions. No one can forecast future labour and material costs and this places a cloud over the property which may put off the risk-averse investor.

This argument is premised on a view of costs which is rather narrow, focussing as it does on actual outlays.[68] To the economist, the basic concept of costs is sometimes thought of differently: the economic cost of property (or any commodity) is equal to its value in the next best alternative.[69] This is its opportunity cost. With this in mind, it becomes plain that the costs hidden behind a given restrictive covenant can easily surpass actual outlays required by a given positive obligation. Indeed, the foregone investment opportunities incurred by being unable to convert property (because of a restrictive covenant) can be significant, and this inability to respond to emerging opportunities is something which the rules governing restraints on alienation are supposed to avoid.

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64. *Supra* n.60 at 19.

65. Note "Affirmative Duties Running With Land" 35 *N.Y.U.L. Rev.* 1344 at 1361 (1960). Consider the case of a positive covenant to maintain and repair both sides of a duplex.

66. *See* S.F. French, "Toward a Modern Law of Servitudes: Reweaving Ancient Strands", 55 *S.Cal. L. Rev.* 1261 at 1308 (1982); *see also* S.F. French, "Servitude Reforms and the New Restatement: Creation Doctrines and Structural Simplification", 73 *Cornell L. Rev.* 928 (1988).

67. *See* R.A. Epstein, "Notice and Freedom of Contract in the law of Servitudes" (1985) 55 *S.Cal. L. Rev.* 1353, at 1360; Rudden, *supra* n.2 at 252-3; Gardiner, *supra* n.3 at 295-6.

68. G.J. Stigler, "The Theory of Price" in *Readings in the Economics of Law and Regulation* A.I. Ogus & C.G. Veljanovski, eds., 1984 at 25.

69. C.G. Veljanovski, "The New Law-and-Economics: A Research Review" in Ogus *et al.*, *supra* n.68 at 17.

For Gardiner, the restriction on the running of positive covenants is best understood and supported, in retrospect, as a problem of remedies. He explains:[70]

> Specific performance of the contract will not lie against the purchaser from the covenantor, who is not in privity with the plaintiff. The mandatory injunction, and a 'prohibitory' injunction restraining one from failing to comply with the obligation, are also almost certainly unavailable. This leaves the injunction restraining one from doing what he has undertaken not to do, and from doing anything obstructive of a positive obligation under *Lumley* v. *Wagner*. Positive remedies thus being unavailable against him, the purchaser from the covenantor cannot himself be effectively subject to a positive obligation.

Gardiner's analysis does not stop there. He recognized that sometimes it would make sense to restrain the purchaser from the covenantor — sometimes. A court might do so to insure that the purchaser did not impede the covenantor himself from performing his contractual obligation. Of course, where the covenantor is unavailable, an injunction against the purchaser would be in vain and would therefore be denied. In brief, Gardiner argues that the refusal to enforce positive obligations against a purchaser is based on the presumption that such injunctions are often likely to be in vain. This blanket refusal to grant relief is rough justice, but it serves to reduce the costs (in terms of judicial and other resources) of allowing a plaintiff to attempt to prove that an injunction would be worthwhile in a specific case.[71]

The matter of remedies has already been discussed and the earlier comments do not confront Gardiner's main arguments, but strike instead at his doctrinal premises. He starts by accepting that neither specific performance nor mandatory injunctions are available as a means of enforcing positive obligations, but he does not address the policy forces that would justify *those* limitations. Employing specific performance or the mandatory injunction, with all the caution which attends the use of these remedies in other contexts, provides a ready means of enforcing positive obligations of the type contemplated here. True, there are a number of reasons why these remedies would not be appropriate in a given case: for example, problems of supervision might commonly arise. However, this will not always be so; and *Tito* reminds us that the remedy of damages can serve as a fallback.[72]

A fairly daunting dilemma in the enforcement of positive covenants concerns the fair apportionment of liability between the original covenantor and all future owners. This issue has already been touched upon with regard to subsequent purchasers of the fee simple,[73] but it is just as important to consider the position of someone who acquires more limited interest in the burdened property, such as a lessee, sub-lessee, or life tenant. In the case of a restrictive covenant, future owners of limited interests would be bound by the covenant and no particular problems, theoretical or practical, arise, since all may be forced to comply without incurring disproportionate expenses. Even the opportunity costs would, by and large, be tied to the quantum of the interest held. Requiring a limited owner to comply with a positive obligation attached to a continuing benefit, as long as that owner took the benefit, also seems fair. But it may be excessive to require him to pay the full costs of a unitary burden. The solution hinted at in *Tito*, the right of indemnity, seems

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70. Gardiner, *supra* n.3 at 296.

71. Gardiner notes (*id.* at 296-7) that the *Lumley* v. *Wagner* injunction used to enforce a *negative* burden will never be in vain, even if the original covenantor cannot be located. If anything, the absence of the covenantor ensures that he will not violate the restriction.

72. *Cf.* Law Com. No. 127, *supra* n.1, at para. 4.17.

73. *See* text accompanying note 25, *supra*.

sensible. Certainly, this would be no worse than the so-called chain of indemnity approach which may be used as a means of indirectly enforcing positive obligations.[74] Alternatively, the rule might be refined to provide that a positive obligation will only run against an assign who acquires the same interest as the original covenantor or that freehold covenants cannot be binding against leaseholders.[75] The Law Commission saw this type of approach as acceptable. Under their proposals, positive obligations would generally be binding on leaseholders (under a lease for 21 years or more) or freeholders, provided that in both instances there was a right of possession. The covenants would also run against an individual who acquires any estate (such as a short-term lease) which has been made subject to a burden.[76]

It has been said that the potentially infinite duration of positive covenants militates against their acceptance.[77] It is true that such an obligation may endure indefinitely (if so framed), perhaps long after its original objective has been emptied of importance. As a general matter, the rule against perpetuities has no application in limiting the duration of the benefit or burden of a covenant, and removal of outmoded covenants by means of negotiations may be hampered by problems of holdouts in cases where a number of property owners may be involved in the negotiations. Again, these problems are not unique to positive covenants, and indeed here the parallel with restrictive covenants is particularly strong. Certainly, the problem of holdouts applies with equal force. Moreover, where a restrictive covenant has out-lived its usefulness, the courts have refused enforcement and this same tack can be taken in relation to positive covenants. Perhaps the most that can be said here is that statutory powers which allow for the removal of certain restrictive covenants may not be cast in a way that would allow these to be applied to positive covenants.

Some of the possible reasons for refusing to allow the burden of positive covenants to run are straw horses and so can be easily dismantled. It is unconvincing to say that absence of demand for such rights supports a prohibition;[78] the use of such covenants in the cases considered above, and their deployment in the context

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74. *See further* Law Com. No. 127, *supra* n.1, at para. 3.32: "Positive covenants can of course be framed so as to be enforceable only while the covenantor himself retains the land; but in the normal case this will be totally unsatisfactory to the covenantee . . . [T]herefore, the covenantee will insist upon the covenantor making his covenant on behalf of the successive owners of his land. This, however, will put the covenantor in a difficulty because when he parts with his land he will remain liable for breaches of the covenant but will lose all power to prevent them. To protect himself, therefore, he will insist that any purchaser of the land covenants with him to perform the covenant and to keep him fully indemnified against any liability which he may incur through its non-performance . . . The owner of the benefitted land cannot go against the purchaser of the burdened land, but he can go against the original covenantor who can himself go against the purchaser. If all goes well, compliance with the covenant can be indirectly ensured". Where, however, following continuing sales of the burdened land, one of the prior owners cannot be located, the chain of indemnity snaps. The original covenantor may still be sued, but liability cannot be transferred by a series of claims of indemnity back to the present owner of the land, who is likely to have been the person who perpetrated the breach. At least with the indemnity contemplated under *Tito* v. *Waddell*, there is no need to trace the complete line of prior owners. The right of indemnity would be linked to the exploitation of a given owner of the benefit. This may raise problems of proof, however.

75. This approximates the position taken by the Wilberforce Committee, *supra* n.1 at para. 20.

76. Law Com. No. 127, *supra* n.1 at p. 169, para. 28.

77. *See* Lloyd, *supra* n.60 at 431; *see also* Rudden, *supra* n.2 at 259.

78. Rudden, *supra* n.2 at 259. Professor Rudden also dismisses these concerns.

of condominium and strata title statutory regimes, demonstrates their perceived utility. Neither is it compelling to suggest that the conventional law governing positive obligations is consistent with the law's general reluctance to foist affirmative duties on individuals.[79] This posture is readily discarded where the freehold is acquired subject to agreements for purchase, or rentcharges etc.; neither does it prevent positive burdens from running in a leasehold setting. As in those instances, the purchaser of land subject to a positive covenant assumes these obligations with his eyes open, and as long as there is notice, holding the purchaser bound seems correct.[80]

V. CONCLUSION

In 1832, the Real Property Commissioners recommended that legislation be introduced to make it clear that affirmative and restrictive covenants could be effectively annexed to land.[81] Parliament did not act but the mantle of reform was taken up in 1848 in the landmark case of *Tulk* v. *Moxhay*.[82] In the years which followed, the scope of the new doctrine was refashioned and constricted. In a curious way, history may be repeating itself. Calls for reform of the law pertaining to the running of positive burdens have so far fallen on deaf ears, but there has been movement in this area nonetheless, through *Tito* v. *Waddell*. Even if that judgment is deficient — and *Reed Services* points to some of its vagaries and flaws — *Tito*, as with *Tulk*, may yet prove to be a valuable first step in the reform process.

Few would quarrel with the value of wholesale rationalization of the law of servitudes.[83] Until that happens, incremental adjustments through the caselaw should not be regarded with surprise or dismay. There are no compelling reasons why the schemes sought in *Reed Services* and *Tito* should not be regarded as permissible as an ordinary incident of private property ownership. In both cases, allowing affirmative burdens to run with land would have enabled the parties to meet their intended objectives in a straightforward and inexpensive fashion. If the *Ocean Island* case ultimately paves the way for a direct repudiation of the negativity rule, the law will be improved modestly, and there will be something in the brash assertion of Megarry and Wade that, in the wake of *Ocean Island*, the prospects of justice are better.

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79. For a clever, complex and careful attempt to present this argument, *see* Rudden, *id.* at 249-52.

80. This is the central thesis of Epstein, *supra* n.57. *See also* Note, "Enforcement of Affirmative Covenants Running With Land" (1938) 47 *Yale L.J.* 821 at 826-7. *Cf* S.E. Sterk, "Freedom From Freedom to Contract" (1985) 70 *Iowa L. Rev 615*; S.E. Sterk, "Foresight and the Law of Servitudes" (1988) 73 *Cornell L. Rev.* 956.

81. Third Report of the Real Property Commissioners, *Parliamentary Papers*, 1831-2, xxiii (484), 321 at 372.

82. *Supra* n.51.

83. G.S. Alexander, "Freedom, Coercion and the Law of Servitudes" (1988) 73 *Cornell L. Rev.* 883.