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STEPHEN BARRIE FLYNN

THE SOLUS AGREEMENT CASES:

THEIR EFFECT ON CONCEPTIONS AS TO THE RUNNING OF THE BURDEN IN RESTRICTIVE COVENANTS.

SUBMITTED FOR THE LL.B (HONOURS) DEGREE AT THE VICTORIA UNIVERSITY OF WELLINGTON.

1 SEPTEMBER 1981.

THE SOLUS AGREEMENT CASES: THEIR EFFECT ON CONCEPTIONS AS TO THE RUNNING OF THE BURDEN IN RESTRICTIVE COVENANTS.

It has recently been suggested [1] that a series of modern cases, primarily concerned with the enforceability of trade supply agreements, cast some element of doubt upon a seemingly unconnected area of the law which has largely been considered settled for the past sixty years. The suggestion made is that a recent string of cases on what are known as 'solus agreements' - agreements, usually in respect of petrol, that supplies required by retailers shall be obtained exclusively from one supplier - have provided possible evidence of a judicial change-of-heart as regards the purportedly settled principle of land law that for the burden of a restrictive convenant to run, in Equity, to the covenantor's successor, with notice, there must subsist a dominant and servient tenement relationship.

It is the object of this paper to analyse and discuss further this intriguing possibility and to attempt to ascertain how, if at all, the solus agreement cases abrogate or modify the rule necessitating a dominant tenement for the running of the burden of a restrictive covenant.

HISTORICAL BACKGROUND

In order to appreciate and evaluate the suggested recent developments it is necessary first to examine in some depth the history and development of the restrictive covenant, from its inception through to the present day, paying particular attention to the varying fortunes of the rule necessitating a dominant tenement.

The restrictive covenant is essentially a contract which seeks to regulate the use of land. It would be clear even at this stage in the analysis that such a creation, being the progeny of two such imposing compartments of the law as contract and land law, would provide considerable potential for jurisprudential confusion as the contractual and property aspects of its heritage affected it character. In its infancy the restrictive covenant was treated by the Common Law as a mere contract which only incidentally had land as its subject matter. As such it was subject to the Common Law doctrine of Privity of Contract, which

meant that the restrictive covenant was effective only between the contracting parties; no one who was not a party to the contract could enforce it or be bound by it.

This rigid position maintained by the Common Law was softened somewhat by the subsequent allowing of the running of the benefit of a restrictive covenant to the covenantee's successors, provided certain conditions were met. By so allowing the benefit of the covenant to run, the Common Law was not making as generous a concession as may at first appear, as it was necessary to show that the covenant was intended to so run,[2] and also that the covenantor would not be placed under any new restrictions not originally covenanted for. So the detriment to the covenantor by allowing the benefit to run at law would rarely outweigh the commonsense and commercial advantages of allowing the benefit of such covenants to run.

But although it was now possible for the benefit of the restrictive covenant to run in certain circumstances, it became clear at an early stage that the burden of a restrictive covenant would not be permitted to run at law to fetter the covenantor's successors in title.[3] The Common Law would sanction a person gaining from a contract to which he was not a party, but it would not countenance a third party suffering any detriment due to such contract.

The Courts of Equity altered the position substantially in 1848 in the landmark decision of Tulk v. Moxhay,[4] in which it was conclusively held that the burden of a negative covenant affecting land could thenceforth be enforceable against successors in title of the covenantor, despite the lack of Privity of Contract or Privity of Estate. The case involved property in Leicester Square including a fenced garden which was laid out in the middle of the Square for the benefit of the surrounding residents. The owner sold a portion of the Square, including the garden which was sold subject to a restrictive covenant that it should always remain a garden and should not be built upon. Subsequently the covenantee sought to enforce the covenant against an assignee of the original covenantor who had threatened to build upon the site of the garden. Lord Cottenham expounded the basis of Equity's enforcement of the covenant:[5]

> that the question does not depend upon whether the covenant runs with the land

> is evident from this, that if there was a mere agreement and no covenant, the Court would enforce it against a party purchasing with notice of it, for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased.

The injunction sought was granted. The decisive factor in the view of the Court was knowledge by the defendant of the existance of the covenant, and a Court of Equity, being a court of conscience would not permit him to disregard a contractual obligation affecting the land of which he had notice at the time of his purchase. Reinforcing the notice basis for Equity's jurisdiction in this case, Lord Cottenham also considered that the reality of a reduced price for the encumbered land was a crucial factor:[6]

> Of course the price would be affected by the covenant and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken.

The same sentiment is expressed in somewhat different language in the Hall and Twells report:[7]

> Of course the party purchasing the property which is under such restriction gives less for it than he would have if he had bought it unincumbered. Can there, then, be anything more inequitable or contrary to good conscience, than that a party, who takes property at a less price because it is subject to a restriction, should receive the full value from a third party, and that such third party should then hold it unfettered by the restriction under which it was granted?

A dominant and servient tenement relationship existed in Tulk v. Moxhay, as the plaintiff retained a number of houses surrounding the garden, but the question must be asked whether the existence of this relationship was crucial to the decision or whether it was merely incidental.[8] Nowhere in the five known reports of the case[9] can there be found an unequivocal statement that the decision was conditional upon the existance of such a relationship. The only real such hint as to this is to be found in the Phillips report:[10]

> it is now contended not that the vendee could violate that contract, but that he might sell the piece of land and that the purchaser from him may violate it without this court having any power to interfere. If that were so it would be impossible for an owner of land to sell part of it without incurring the risk of rendering what he retains worthless.

This statement does not appear in the same terms in any of the other reports, although the Hall and Twells report refers twice to 'neighbour', as at page 111 of that report where there is the statement: "where the owner of a piece of land enters into a contract with his neighbour" (emphasis added). These phrases, which have subsequently been relied upon to justify the modern necessity for a retained dominant tenement, can hardly be considered definitive. It is quite tenable to interpret these statements as being made in reference to the case where the covenantee does in fact retain some proximate land, rather than seeing them as demanding that he do so. It could be contended, with little fear of conclusive rebuttal, that Lord Cottenham took for granted the existence of a dominant tenement in this case, but it seems rather surprising that His Lordship should neglect to at least comment upon such a potentially important aspect of the doctrine, especially considering the fact that he was undoubtedly breaking new ground in this decision, and there was therefore little in the way of established doctrine[11] which could be relied upon to fill in the unspoken necessity for a dominant tenement.

The broad equitable principle behind Tulk v. Moxhay was discussed in the charterparty case of De Mattos v. Gibson in

which Knight Bruce L.J. stated:[12]

> Reason and justice seem to prescribe that, at least as a general rule, where a man by gift or purchase acquires property from another, with knowledge of a previous contract ... made by him with a third person to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistantly with it, use and employ the property in a manner not allowable to the giver or seller. This rule, applicable alike, in general as I conceive, to moveable and immoveable property.

So on the basis principally of the equitable doctrine of notice and through the decision in Tulk v. Moxhay, despite an adament rejection of the suggestion early on,[13] it was now clear that a restrictive covenant meeting the appropriate requirements was an interest in property, as it was enforceable against persons with whom there was neither Privity of Contract nor Privity of Estate.[14]

The restrictive covenant was converted from a personal interest, solely derived from contract, into a property interest by the Courts of Equity on the basis of an equitable doctrine - therefore a restrictive covenant is an equitable interest in land. But Equity was not to have things all its own way; the Common Law considered the categories of incorporeal hereditament closed and therefore this new creation could only be accomodated if it could be seen as an extension in Equity of some existing category of land interest.[15] This is evidenced by the oft-quoted statement of Jessel M.R. in Gomm v. London & S.W. Rly[16] which was to govern the play from then on:

> the doctrine of Tulk v. Moxhay is either an extension in Equity of the doctrine of Spencer's case or else an extension in equity of the doctrine of negative easements.

The consequence of this obiter dictum has effectively been to deny the restrictive covenant recognition in its own right; at

every turn the restrictive covenant has been haunted by this uncharacteristically improvident aside.

Supplementing Jessel M.R.'s two candidates for the uncomfortable adoptive parentage of the restrictive covenant is the statement of Farwell J. in Re Nisbett and Potts' Contract:[17]

> this equity although created by covenant or contract as such, but stands on the same footing with, and is completely analogous to an equitable charge on real estate created by some predecessor in title of the present owner of the land charged.

This statement, had it been followed by the courts, could have led to a different conclusion in relation to the need for a dominant tenement because it is quite possible to have equitable charges existing in gross. But the suggestions of equitable charge and equitable extension of Spencer's case[18] were never overtly latched onto by the courts, rather it was the analogy to the negative easement which was favoured by the courts in explaining the jurisprudential nature of the restrictive covenant.[19] Strict adherence to this analogy worked to decharacterise the restrictive covenant and make it look like merely a special kind of negative easement, but what has often been overlooked is that we are only dealing with an analogy, the comparison with the negative easement is not, and was never meant to be, definitive. As McMorland says of the restrictive covenant: "But as a concept it is sui generis and should be treated as such".[20] In recent times this analogy has faltered due to the restraint of trade aspect of the solus agreement. Whereas an easement can either be created as a condition under which a new proprietor takes the land or as a grant from an incumbent proprietor, it is apparent from recent solus agreement cases[21] that the power of an incumbent to grant restrictive covenants, of the solus agreement type, may be fettered by the doctrine of restraint of trade. Someone coming to land for the first time loses nothing by taking land subject to a restraint, but it appears that an incumbent proprietor cannot covenant away certain freedoms without offending against the doctrine of restraint of trade.

The purported requirement for a retained dominant tenement would appear to have been imported to the restrictive covenant in pursuance of this analogy to negative easements, and this contention is borne out by the fact that while the restrictive

covenant was still under the full control of Equity there were two leading cases decided which denied the necessity for a dominant tenement to be retained, or even to have ever existed, in order for the covenantor's successors in title to be bound.

The first of these cases, Catt v. Tourle,[22] involved the plaintiff, a brewer, selling land to a freehold land society who covenanted with him that he would have the exclusive right of supplying beer to any public house erected on the site. The defendant, a member of the society, acquired a portion of the land, with notice of the covenant, and built a public house upon it and supplied it with his own beer. The Court of Appeal confirmed the plaintiff's rightto enforce the covenant against the defendant without apparently even considering the possibility that the plaintiff might be barred from doing so because he retained no land in the vicinity of the restricted land. Somewhat prophetically the defendant challenged the covenant as being an unreasonable restraint of trade, but the court held that such a covenant, although unlimited in time, was sufficiently limited in space, and good according to the nature of the trade and the prevailing conceptions as to restraint of trade.[23]

The second case, that of Luker v. Dennis,[24] represents the greatest extreme to which the restrictive covenant based purely on the equitable concept of notice was carried. The case involved the lease of a public house by a brewer to a publican, with a covenant by the latter to purchase all beer, wine and spirits from the brewer not only for the public house included in the lease but also for another public house held by the publican under another landlord. Fry J. after considering Knight Bruce L.J.'s statement in De Mattos v. Gibson, and the decision in Catt v. Tourle, held that a covenant was binding in Equity upon an assignee of the second public house who had notice of the covenant, saying at page 236:

> I think therefore I am bound to give effect to the equitable doctrine of notice.

These two decisions have been roundly criticised - Cheshire referring to Luker v. Dennis as[25]

> an indefensible extension of a contractual liability to a non-contracting party.

And Megarry and Wade:[26]

> It is axiomatic that the justification for converting a personal covenant into an equitable encumbrance is to enable the covenantee to preserve the value of other land of his in the neighbourhood.

The implications arising from these two tied-house cases require further consideration in order to evaluate the validity of these criticisms. The effect of the cases is claimed to be to make the covenant personal to the covenantee rather than related to his land or tenure. The question must be asked: what interest is the non-landholding covenantee seeking to protect by attempting to enforce the covenant against the covenantor's successor? It is not a whimsical personal vendetta or an officious intrusion that he is seeking to further, yet neither is it actual land that he is aiming to protect for he now no longer has, or never did have, any land in the vicinity which may be adversely affected by the breach. The true object of his concern is some business interest. The concept of the protection of a business interest by use of a restrictive covenant may be significantly buttressed by the decision in Newton Abbot Coop v. Williamson & Treadgold[27] where, despite the previous description of such interests as merely collateral, the enforceability of a covenant placing a restriction on the form of business permitted to be undertaken on the covenantor's land was accepted in relation to an assignee of the covenantor. Upjohn J. saying that a covenant prohibiting sorts of inoffensive business was enforceable against the covenantor's assigns notwithstanding that it was clearly taken for the prevention of competition. The decision was founded upon the equitable doctrine of notice and the fact of enhanced resale value for unencumbered land - the very reasons held decisive by Lord Cottenham in Tulk v. Moxhay!

But the possibility of a business interest being a dominant tenement is denied by Preston and Newsom:[28]

> A business cannot be the dominant tenement, the decision upholding a brewer's tie as against an assign of the covenantor having been expressly disapproved in L.C.C. v. Allen.

L.C.C. v. ALLEN: An Unimpeachable Authority?

The decision of the English Court of Appeal in London County Council v. Allen[29] purportedly removes any doubt relating

to the necessity for a dominant and servient tenement relationship in order to bind in Equity the covenantor's successors. In that case the owner of a plot of land covenanted with the Council that he would not erect any buildings on the plot without the Council's consent. It was admitted that the Council did not possess, nor were they interested in any neighbouring land for the benefit of which the covenant was imposed. The owner subsequently sold the plot to the defendant who had notice of the restrictive covenant. The defendant then proceeded to build houses on the section without having obtained the requisite consent. The Court of Appeal unanimously rejected the plaintiff's action, holding that the plaintiff could not rely on the covenant as against a successor in title of the covenantor because the covenant, not being for the benefit of any dominant tenement, could only be seen as personal. Buckley L.J. was emphatic as to the absolute fatality of the non-existance of a dominant tenement to the running of the burden, and condemned Catt v. Tourle and Luker v. Dennis as no longer being good law on this point.

It is somewhat surprising that while L.C.C. v. Allen is universally and religiously cited for the principle necessitating a dominant tenement it is far from being a harmonious decision within itself. Despite the vigour and conviction of Lord Justice Buckley's judgment the other two judges are much more reserved, almost doubtful, and both resignedly find themselves bound by previous decisions[30] to find as they do. After finding himself bound Kennedy L.J. was moved to say:[31]

> whatever might be my own opinion if I was not controlled by such recent decisions, but free ... to treat a restrictive covenant ... as enforceable in equity at the suit of the covenantee, although be may retain no other land which can be affected by the covenant, against an assign of the covenantor who has acquired the land with notice of the restriction.

Scrutton J. is even less convinced, noting:[32]

> Though the covenantee in that case [Tulk v. Moxhay] did hold adjacent land, there is no trace in the judgment of

> Lord Cottenham of the requirement that the covenantee should have and continue to hold land for the benefit of the covenant. I read Lord Cottenham's judgment as proceeding entirely on the question of notice of the covenant.

After conducting a thorough survey of the cases states:[33]

> Up to 1881 ... I cannot trace, nor could counsel before us discover, that Tulk v. Moxhay had been based on anything but notice of the covenant by the assignee.

And further:[34]

> The first departure from this position occurs in the judgment of Jessel M.R. in Gomm v. London & S.W. Rly.

And at page 668 quotes and comments upon a passage from Rigby J.'s judgment in Rogers v. Hosegood[35]:

> "I do not think any covenant runs with the land in equity. The equitable doctrine is that a person who takes with notice of a covenant is bound by it"; a remark again which seems to me to harmonise with the earlier authorities.

Scrutton J. goes on to employ the ultimate statement of judicial dissatisfaction:[36]

> It may be if the matter is considered by a higher tribunal, that tribunal may see its way to revert to what I think was the earlier doctrine of notice.

The learned judge reluctantly finds himself bound by the earlier cases and concludes:[37]

> I regard it as very regrettable that a public body should be prevented from enforcing a restriction on the use of property, imposed for the public benefit, against persons who bought the property knowing of the restriction, by the apparently immaterial circumstance that the public body does not own any land

in the immediate neighbourhood.

So the position of L.C.C. v. Allen may not be as strongly founded and unshakeable as is generally considered and it may be the case that the unquestioning faith in the conclusiveness of the decision, or more correctly, of Buckley L.J.'s leading judgment, is the very reason that the case has never since been challenged head-on.

Murmurs of doubt and discontent, adding to those of Kennedy L.J. and Scrutton J. within L.C.C. v. Allen itself, can be detected from time to time. Most noticeable recently are the occasional comments of Lord Wilberforce, as in Sefton v. Tophams:[38]

> we do not know, for the parties have not told us, whether the covenantee owned any land for the benefit of which these covenants subsist. And under what I am content for present purposes to take as accepted doctrine (see L.C.C. v. Allen), in the absence of any such land the burden of the covenants would not run with the covenantor's land.

And in National Providence Bank v. Hastings Car Mart[39] where His Lordship commented:

> Fifty years ago it was decided that an obligation ... relating to the use of land, of a personal nature, was not binding on a purchaser, and Buckley L.J. in his judgment in the Court of Appeal refuted precisely the argument which was advanced here .... There may, I recognise, be something to be said for the view that the Courts have, in this field, taken too strict a line ...

When comments such as these from a judge of Lord Wilberforce's pre-eminence are considered alongside the doubts expressed by Kennedy L.J. and Scrutton J., and the approved decision of Upjohn J. (as he then was) in the Newton Abbott Coop. case, the pedestal upon which L.C.C. v. Allen has been set must be seen to be wavering.

A further interesting and unsettling case in this respect is that of the Lord Strathcona Steamship v. Dominion Coal,[40] a decision of the Privy Council on appeal from Nova Scotia concerning

a charterparty. Their Lordships, through Lord Shaw, discussed[41] the general equitable principal expounded by Knight Bruce L.J. in De Mattos v. Gibson, and applied to land in Tulk v. Moxhay, but then Their Lordships qualified the Tulk v. Moxhay rule by approving the L.C.C. v. Allen principle.[42] But despite this express approval of L.C.C. v. Allen it has been strongly contended that Their Lordships' deference was insincere. In Cheshire and Fifoot's Law of Contract[43] the learned author says of the Strathcona case:

> The Privy Council recognised the necessity for its [i.e. proprietary interest retained by the covenantee] existence, but they can scarcely be said to have found it in the facts before them ... The Privy Council in fact paid lip service to the modern doctrine of Tulk v. Moxhay but applied it as it existed in an earlier environment.

This detected dissatisfaction with the hard legal aspects imported to the Tulk v. Moxhay principle by L.C.C. v. Allen may be evidence of a move to return to the purer equitable principle based on notice. The courts appear to be taking cognizance of the shortcomings of the L.C.C. v. Allen unsparing requirement of a retained physical dominant tenement, especially in that it provides no answer to the injustice foreseen by Lord Cottenham whereby the covenantor, presumably paying a lower price for the land subject to the restriction, can, where the covenantee falls foul of the L.C.C. v. Allen stringency, immediately convey the affected land to a knowingful purchaser and receive a much enhanced price for the now unencumbered land - a land speculator's dream!

Additional Aspects of the Dominant Tenement Rule

Before moving on to examine the suggested possibility that the group of solus agreement cases may contribute to the perception of judicial unease as regards the scope of the L.C.C. v. Allen principle it is necessary in order to complete the picture, to firstly, detail a couple of supplementary aspects of the dominant tenement rule which must be borne in mind when looking at the solus agreement cases; and secondly, to point out the special

situation in which New Zealand finds itself in relation to this whole topic.

It is now clear that for a dominant/servient tenement relationship to exist what is needed is some degree of physical proximity[44] although the dominant tenement need not actually be contiguous to the servient land. This can be seen primarily through the analogy with easements, as in Todrick v. Western National Omnibus Coy.[45] where it was held that a right of way can validly be made appurtenant to land with which the way has no physical contiguity. That the proximity, rather than contiguity, standard applied also to restrictive covenants can be seen from the Newton Abbott case where the relevant plots of land were on opposite sides of the street.

It is also clear that apart from having a dominant/servient tenement relationship in space, that is, by physical proximity of two pieces of land, it is also possible to have a dominant/servient tenement relationship in time. A landlord's reversionary interest is sufficient to constitute a 'dominant tenement' and enable him to sue a sub-lessee in Equity on a restrictive covenant contained in the lease. There is no need for any other land which could be seen as a dominant tenement.[46] Preston and Newsom state:[47]

> In cases between landlord and tenant this difficulty does not arise since performance is on the devised land and that land is obviously touched and concerned by what is done there.

And in Teape v. Douse Swinfen Eady J. states:[48]

> It is clear if a person acquires an underlease, though not being bound in law by the restrictive covenants of the lease, if he purchased with notice of the covenants he will not be allowed to use the land in contravention of the covenants.

A similar modification of the rule applies to mortgages so that a mortgagee's interest in the mortgaged land likewise suffices as a dominant tenement. This can be seen from another tied-house case, John Bros. Abergarw Brewery v. Holmes[49] where covenants, restrictive of the purchase of beer, contained in the second mortgage of a leasehold public house were held to bind in Equity

anyone deriving title under the original mortgagor, including an underlessee, with notice, until the redemption of the mortgage.

A recent case involving a solus agreement approves these old decisions on landlords' and mortgagees' interests. In Regent Oil v. Gregory Harman L.J. said:[50]

> As between landlord and tenant the covenant will run while the lease persists. Now a mortgagee has of necessity an interest in the land, the subject matter of the charge, which I think he is entitled to protect by covenants relating to the user of it.

New Zealand may be in something of a privileged position should the L.C.C. v. Allen principle be moving out of favour or its scope being modified. Unlike the United Kingdom and Australia[51] the requirement in New Zealand for a dominant tenement is not so clear, in light of the Court of Appeal decision in Staples v. Corby.[52] There the covenantee sold the freehold of a public house to the covenantor who covenanted to take only the covenantee's beer. The defendant bought the public house with notice of the covenant and entered into possession and supplied it with other beer. Upon the covenantee seeking to enforce the covenant the Court of Appeal reluctantly followed the then current Catt v. Tourle line of authority based on notice, and allowed enforcement of the covenant. But the reluctance expressed by the court was more as to the undesirability on these facts of allowing any possible assignee of the covenantee to enforce such a covenant, rather than to allowing the covenantee himself enforcing it against the covenantor's assigns.

There has been no subsequent New Zealand case which has purported to overrule Staples v. Corby.

Professor Campbell in his 1944 article[53] points out that "the equitable interest of the covenantee has come to be regarded as in the nature of an equitable easement" and that the analogy has been taken too far in saying that as in an easement a restrictive covenant also requires a dominant tenement. He points to section 122 of the Property Law Act 1952 which permits easements in gross, and contends that by this the analogy, in requiring a dominant tenement in restrictive covenants, can no longer be sustained.

He suggests that[54]

> The fact that in New Zealand the Legislature has permitted the creation of legal easements in gross further supports the view that the restrictions should be unaffected by the requirement for a dominant estate.

But if we are looking for indications from the Legislature we must also note that, as Brookfield explains[55], whereas section 126 of the Property Law Act 1952 allows notation on the register of restrictive covenants benefitting other land, it provides no direct means of noting restrictive covenants existing in gross should they be accepted.

The Solus Agreement Cases

The scene has now been set sufficiently to allow a discussion of the suggestion[56] that the solus agreement cases may be evincing a return to a purer equitable form of restrictive covenant, enforceable on Lord Cottenham's criteria of notice and better price, and founded on the broad Equitable doctrine of unconscionability, rather than being dependant upon hard legal criteria imposed through rigid pursuance of an analogy with negative easements.

Solus agreements are essentially supply contracts made between a bulk supplier and a retailer whereby the retailer agrees to take his supplies exclusively from the one supplier for a certain period, provided that the supplier can maintain supplies. In return the supplier gives the retailer a standing discount on his purchases and often provides various fringe-benefits in the way of advertising, promotion and equipment. The old tied-house covenants were basically solus agreements, but recently it has been in the area of petrol and oil supplies that solus agreements have moved into the limelight.

It appears that solus agreements in respect of petrol became widespread in the United Kingdom in the early 1960's and that initially they worked well for both parties - the retailer getting a guaranteed supply of petrol at a reduced price, along with associated benefits through being part of a nationwide network of branded outlets, and quite often being supplied with pumps and equipment bearing the supplier's name and symbols; and the supplier gaining guaranteed sales giving a degree of certainty of

of demand and the ability to benefit from distribution planning and organised advertising. But in the middle of that decade the petroleum industry experienced a price war of unprecedented magnitude and ferocity. Retailers were being tempted away from the companies to which they were tied by rival oil companies bearing offers of discounts and benefits far exceeding those available under the existing solus agreement. Retailers began challenging and breaking their pre-price war solus agreements on the alleged grounds that they constituted unreasonable restraints of trade - thus leading to the spate of cases upon solus agreements in the latter half of the decade.

It is beyond the objects of this paper to deal in any depth with the restraint of trade aspects of the solus agreement beyond noting that it was the doctrine of restraint of trade which rendered the solus agreement litigious and caused it to become juridically known. Neither is it within the scope of this paper to examine the various complicated arrangements which were concocted for reasons of tax avoidance[57] and in an attempt to keep one step ahead of the developing restraint of trade doctrine, whereby there came an increasing sophistication in the form of solus agreements. This resulted in a movement away from simple 'naked' agreements between a supplier and an established retailer to complicated sale and lease-back or mortgage arrangements. Although it must be noted in relation to this that the steadily changing form would often incidentally remedy possible inadequacies as to the running of restrictive covenant burdens, should these prove to be relevant, as the covenantee began to gain various interests in the burdened land.

It is appropriate to point out at this stage that the dearth of New Zealand cases on petrol solus agreements could be due to the fact that such agreements would appear contrary to the Motor Spirits Distribution Act 1953, unless approved by the Licensing Authority. And that similarly, the question of tied-houses in relation to the supply of beer will not arise in New Zealand as section 296 of the Sale of Liquor Act 1962 renders such tying covenants void.

Solus Agreements - Evidencing the Demise of the Dominant Tenement?

What this paper is primarily concerned with is the suggestion that these solus agreement cases are covertly saying something about the nature of the rules relating to restrictive covenants.

Solus agreements are being consistantly referred to by judges as 'restrictive covenants', examples abound;

- Lord Denning M.R. in Cleveland v. Dartstone:[58]

> when a person takes possession of premises under a lease, not having been in possession previously, and in taking possession, enters into a restrictive covenant trying him to take all his supplies from the lessor

and later:[59]

> They knew that there was this restrictive covenant upon the land and nevertheless entered into this assignment binding themselves to it.

- Salmon L.J. in the same case:[60]

> its right to trade on the premises derives only from the lease which contains the restrictive covenant

- Lords Reid and Pearce in Esso Petroleum v. Harpers Garage[61]
- and His Honour Sir Alfred North, President of the Court of Appeal, in Robinson v. Golden Chips:[62]

> Clause 4 is undoubtedly a restrictive covenant in that it requires the appellants not to purchase any of the stipulated goods from any other source.

The question must be asked as to what these eminent judges are saying. Are they using the specialised term 'restrictive covenant' in a loose sense to mean merely a covenant which is restrictive in its terms, or are they using it in its legal sense to mean the equitable creation founded on the case of Tulk v. Moxhay. It is unlikely that the former is the case as the term is being used by a number of judges, and by judges who would not use a recognised specialised term in such haphazard a manner. It must be that these solus agreements are being classified as 'restrictive covenants' in the legal sense of the term. This contention is borne out by the express application to solus agreements of the law applicable to 'restrictive covenants' in cases such as Regent Oil v. Gregory[63] and Petrofina v. Martin[64] which both discuss aspects of Tulk v. Moxhay and L.C.C. v. Allen in relation to solus agreements. And the statement by Jacobs J. in Quadramain v. Sevastapol[65] that

> the law on restraint of trade and the law on restrictive covenants have been greatly and concurrently developed over the last hundred years or so.

also serves to tie together the two doctrines and to suggest that the restraint of trade solus agreement is also a property law restrictive covenant.

A third possibility explaining the use of the term 'restrictive covenant' in the solus agreement cases must be noted. The term 'restrictive covenant' is in accepted legal usage to describe[66]

> clauses in contracts of partnership and employment which limit a contracting party after termination of the contract in performing similar work for a period of time and within a certain geographical area.

And as such was used by Younger L.J. in Dewes v. Fitch.[67] Although there are obvious attractions in saying that all that is being done in the solus agreement cases is to adopt a term recognised in one area of restraint of trade into usage in another area of restraint of trade, this does not square with the treatment of 'restrictive covenant' in the cases discussed. The fact that the solus agreement is being considered in the area of property law would suggest that 'restrictive covenant' is being used in the recognised property law sense of the term. The hazards attendant upon using a specialised term to mean one thing, in an area of law where it means another, would be obvious and conclusive against such an occurrence.

So it appears that the courts may see solus agreements as being actual property law restrictive covenants, but if so, where are all the hallmarks of the classical restrictive covenant? Primarily restrictive covenants, in order to attract that mantle, required a dominant/servient tenement relationship to subsist and also needed as a subject a covenant which was not merely personal to the parties themselves but one which could be said to 'touch and concern' the land.

There are a number of reasons for doubting that the solus agreement cases are purporting to do away with the L.C.C. v. Allen necessity for a dominant tenement. In a number of the cases the L.C.C. v. Allen principle, despite its demonstrably insecure base,

has been expressly approved. Lord Denning stated in Petrofina v. Martin:[68]

> if once the new company acquired the legal title to the garage Petrofina would have no claim against the new company because Petrofina own no land in the vicinity.

And Lord Justice Harman in Regent Oil v. Gregory:[69]

> Ungoed- Thomas J. found great difficulty here because the covenantee had no other land to protect and a covenant dependant on Tulk v. Moxhay would be good only while that state of things continued: see L.C.C. v. Allen cited by the judge. I do not think that this reasoning has any application to a case between lessor and lessee.

Thus Harman L.J. is accepting the L.C.C. v. Allen line but is employing a valid exception to it. And in Regent Oil v. Leavesley Stamp J. commented:[70]

> It is convenient to mention that in this case the plaintiff had no interest as owner, mortgagee, or lessor of the land on which the garage and petrol station stands.

So it can be seen from these examples that any judicial discussion of solus agreements in relation to the need for a dominant tenement is being bracketed with an affirmation of the basic L.C.C. v. Allen principle

Contributing to the doubts which must be entertained in relation to the suggestion that the solus agreement cases are pointing to an erosion of the necessity to have some kind of dominant tenement is the continuing development of the analogy between restrictive covenants and easements. This analogy, which, as discussed earlier, apparently led to the necessity for a dominant tenement for the running of restrictive covenants has recently been strengthened by the case of Re Tiltwood[71] whereby restrictive covenants have been brought into line with the situation pertaining to easements as regards extinguishment through unity of seisin. It would be inconsistant to see the analogy with easements being strengthened in relation to this

aspect yet being weakened as regards the need for a dominant tenement.

Another factor dissuading from such a view is the lack of a single solus agreement case in which the judge admits the possibility of, or the decision on the facts renders implicit, the binding of a successor in title of the covenantor to a covenantee who has no dominant tenement. In actual fact the opposite may have occurred - where the relevant facts have arisen and the court has not even adverted to the possibility of binding the covenantor's successor. In Esso Petroleum v. Kingswood Motors[72] the defendant, a retail petrol company, entered into a solus agreement with the plaintiff oil company which included the usual 'continuity clause' requiring the defendant company to notify Esso of any proposal to transfer the garage and to procure the purchaser to enter a similar solus agreement with Esso. A mortgage was associated with the solus agreement, with Esso as mortgagees. A company named Impact Holdings procured Kingswood's shares and through Kingswood repaid the mortgage and then, unknown to Esso, got the garage transferred to Impact Holdings' subsidiary Impact Motors. The latter company shared the same two directors as its parent company. Impact Motors then broke the solus agreement. Here was an open invitation to the court to enforce a solus agreement against an assignee of the covenantor to whom, by the merest piercing of the corporate veil, could be ascribed knowledge of the covenant in an atmosphere scented with fraud and where the plaintiff no longer held an interest in that land or any other land. But the court did not advert to this possibility, rather Bridge J. held that since Impact had procured Kingswood's breach of its obligations the court could order undone what was done and order the reconveyance of the land to Kingswood. No mention was made of the suggested possible alternative of enforcing the solus agreement against the new proprietors. But this decision cannot be seen as conclusive against the suggested solus agreement contention as it is apparent from the latter part of Bridge J.'s judgment[73] that counsel for the defendants argued that by the court allowing such injunctions against them then

> that doctrine [conspiracy to induce breach of contract] will come into head-on collision with the other doctrine [Tulk v. Moxhay as modified by L.C.C. v. Allen] restricting the

> court's power, once the land has changed hands, to enforce against the new owner any obligation deriving from contractual covenants entered into by the former owner.

Bridge J.'s reply to this rather forlorn contention that the court's powers to so act against such tortfeasors were fettered by the conspirators' succeeding in obtaining a transfer of the land makes it clear that the two are separate doctrines and thus it can be seen that His Honour's dealing of the case on the grounds of conspiracy to induce breach of contract may not exclude the suggested solus agreement-based alternative.

Other aspects of the solus agreement cases which are being employed to support the suggestion that the need for a dominant tenement may be on the way out are inconclusive. It is true that there has been a revival in the citing of Catt v. Tourle, despite the condemnation of it in L.C.C. v. Allen as no longer being good law, but it is being cited not for its implications as to the need for a dominant tenement, but rather for its illustration of the old rules of restraint of trade[74].

And as to the resurgence of judicial statements echoing the words of Lord Cottenham in Tulk v. Moxhay, for example North P. in Robinson v. Golden Chips:[75]

> I think it would be wrong for this court to give voice to an opinion that in these days persons who freely and voluntarily purchase another's land and business and subject themselves to a tie can repudiate the tie while retaining the benefit.

and Lord Pearce in Esso Petroleum v. Harpers Garage:[76]

> It would be intolerable if, when a man chooses of his own free will to buy, or take a tenacy of land which is made subject to a tie (doing so on terms more favourable to himself owing to the existance of the tie) he can then repudiate the tie while retaining the benefit.

such statements are as equally applicable to the policy considerations involved in restraint of trade as they are to the desirability of enforcing a covenant against an assignee of the covenantor.

But such statements as those quoted, being made in relation to business covenants, may provide policy considerations reinforcing the forthcoming suggestion that a business may and should, be seen as a legitimate and sufficient dominant tenement.

A Widening of the Conception of 'Dominant Tenement'?

It is submitted that although the proposition that[77]

> in the context of solus agreement [sic], the Courts of England, Australia and New Zealand have ignored L.C.C. v. Allen and restored Catt v. Tourle to hold that the burden of such an agreement will bind purchasers from the covenantor who come to land already burdened, and with notice of the burden even though there be no dominant tenement held by the covenantee

cannot be supported as such nevertheless it still serves to point, for what this writer believes to be the first time, to the observation that something is happening, as evidenced by the solus agreement cases, in relation to conceptions as to dominant tenements held by the covenantee.

It is submitted that rather than saying such covenants will be enforced against third parties despite the lack of a dominant tenement the solus agreement cases are really showing the changing nature of the necessary dominant tenement. A dominant tenement must still be retained by the covenantee in order to enforce the obligation against an assignee of the covenantor, but the necessary characteristics of that dominant tenement must be seen to have changed.

Solus agreements are collateral agreements - they affect, at most, the use to which the land is put and what is done upon the land rather than affecting the land itself. Such collateral covenants were regarded as personal and as not 'touching and concerning' the land and would therefore not be capable of running with the land under the doctrine of Tulk v. Moxhay. Yet in the solus agreement cases and in a number of other restrictive covenant cases, particularly the Newton Abbott Coop

case and the decision of the High Court of Australia in Quadramain v. Sevastapol[78], these collateral covenants have been accorded full restrictive covenant status and in a number of instances have attracted the use of L.C.C. v. Allen in order to deal with them, rather than being labelled mere collateral covenants and being denied the ability to run with the land on that basis.

The one common factor coming through in these cases is that the covenantee is seeking to protect via the covenant not land itself nor, antithetically, some private personal whimsy but rather some actual and valuable business interest.

It is submitted that the possibility must be recognised that a business itself, as distinct from any land it is situated upon, is now considered more than something merely personal to the covenantee and is being seen as sufficient to be an interest capable of constituting a 'dominant tenement', the benefit for which a restrictive covenant of the solus agreement type can be enforced against an assignee of the covenantor. This proposition is a necessary implication from the Newton Abbott Coop case wherein it was held a covenant was enforceable despite clearly being taken for the prevention of competition. The inference to be taken from this is that the land in these cases is incidental and the actual interest which is being allowed to be protected is the business itself. If then the land is incidental there should be no valid reason for not allowing enforcement of a covenant protecting a business interest independant of any proximate land.

By going back to the fundamental principles underlying the restrictive covenant doctrine and considering them in light of present day values and realities there emerges a strong conceptual reationalisation for seeing a business interest as sufficient to constitute a new class of 'dominant tenement'.

We must begin by asking what it is which renders the doctrine of Tulk v. Moxhay so special and so rule-bound and rigidly controlled and regulated. The answer is surely that the doctrine is an exception to the indomitable doctrine of Privity of Contract and as such would have been generally abhorred, and consequently strictly circumscribed, by the Common Law. Therefore to warrant such an exception to Privity of Contract what is needed is some very special interest to be

protected, with attributes such as permanence and value justifying protection beyond the strict rule of Privity of Contract. Surely it is this interest, warranting such protection, which is what is meant by the term-of-art 'dominant tenement' - a dominant tenement is the interest or class of interests which justify departure from the doctrine of Privity of Contract in order to protect them by providing the power to bind a non-party. Land is only an example of an interest amounting to a 'dominant tenement' - albeit until recently the only example.

In the late nineteenth century when the requisite elements for the running of a restrictive covenant were being considered the only sufficiently valuable, permanent, and important interest warranting such special treatment was land - a man's land was his all. As land was for so long the only such interest sufficient to constitute a 'dominant tenement' the courts began to see land as the rule for a dominant tenement not merely as an example of a dominant tenement, thus we get the dogmatic statements by judges, most influentially those of Buckley L.J. in L.C.C. v. Allen that land and only land could suffice as a dominant tenement for the purposes of this doctrine.

So we have the situation where land is seen universally as a dominant tenement for the protection of which an exception to Privity of Contract can be invoked.

What then is the limitation on the effective protection of a piece of land? Land is all the same in terms of being spatially fixed, essentially two-dimensional, and having a limited sphere of influence. So the appropriate regime for protecting a land-type dominant tenement need only extend to other pieces of land in the immediate vicinity as a piece of land can only directly affect another when the two are physically close together. Thus the old rule necessitating some proximate land for the benefit of which the covenant was created makes good sense as there is no justification for allowing the Tulk v. Moxhay exception to Privity of Contract to be used when the two pieces are separated to the extent that they could not affect, or be affected by, each other. And in keeping with the very restricted sphere of influence which land itself possesses the law declared the acceptable level of such separation to be minimal.

But in today's more sophisticated and commercially orientated world there is an interest which has come to possess the same attributes necessary to merit the title 'dominant

tenement' and to deserve the invocation of the Tulk v. Moxhay exception to Privity of Contract that land has enjoyed exclusively for the past one hundred and thirty years. The incorporated business interest, the spectacular growth of which has been an economic and legal feature of the last fifty years, is in many relevant respects analogous to land for the purposes of this doctrine - it is valuable and through incorporation acquires an existance which is both independant of any individual and is potentially perpetual. It is land's equivalent in all relevant respects in warranting such protection.

Business interests must be seen to have joined land as being sufficient to warrant the application of the Tulk v. Moxhay principle and thereby earning the title 'dominant tenement'. In the business covenant cases it is for the value of the business that the covenant has been taken, and it is important not to confuse the business with its mere physical location on some land. Here the land is incidental to the business interest so questions must be asked as to the validity of subjecting the business interest to rules applicable only to land. The business interest is a different creature and deserves and requires rules of its own.

If, then, a business interest can be seen as a dominant tenement for the purposes of the modern Tulk v. Moxhay doctrine the next stage is to consider how this business interest is suitably protected. It has been seen that the law has rightly considered that to protect land-type dominant tenements the restriction must relate to some other immediately proximate land, or to land's equivalent such as the interests of a mortgagee and lessor, as the sphere of influence of land is relatively limited. But in contrast the sphere of influence of a business is potentially much greater. The business exists 'up above' any land upon which it is situated and its protective umbrella can justifiably extend much further afield than can that of two-dimensional, spatially fixed, immutable land.

Business interest dominant tenements, not being as intrinsically similar as land interests, can not have one fixed standard delimiting their zones of effect, as the blanket proximate-estate necessity does for land-type dominant tenements. Business interests are manifested in a myriad of variations and the acceptable limits of the zone of influence for each must be determined on policy and practical considerations. The extent

to which a businessman can create a competition-free zone within which he can validly encumber land by a restriction as to business activities detrimental to his existing business must ultimately depend on the type of business being protected and, relatedly, its ascertainable zone of useful influence.

Again, in this respect, the law of restrictive covenants and the doctrine of restraint of trade can be seen to be coming together as the geographical limits within which a business may be protected via the mechanism of a restrictive covenant are set by the same types of considerations of situation, character, and policy as are the limits within which a business may be protected without falling foul of the doctrine of restraint of trade in relation to restraints imposed upon employees.

Returning to the question of scope of protection and the geographical area over which a businessman can see his business as providing a dominant tenement for the protection of which can enforce covenants he has created, or come to, as against a third party, we may consider antithetic examples of the range of geographical protection that businesses may attract. If it could be established that the effective and acceptable market range of a horse-whip manufacturing business was in the order of fifty miles then why should not such a horse-whip manufacturer be able to restrict any property in which he has an interest, and which comes to be sold, within so relatively large a radius as fifty miles of the site of his business so as to prevent competitive production on the demised site. Due to its nature his business emanates an ethereal cloud of influence constantly hovering over the appropriate area and providing sufficient an interest over that area to enforce any such business-protective covenant against third parties with notice. Conversely, it may well be that a chemist business situated on Lambton Quay could only expect to acceptably so restrict a site within a radius of perhaps fifty yards - its effective zone of influence, as determined largely by its nature and situation, being quite limited.

Conclusion

The Tulk v. Moxhay doctrine allowing the burden of a restrictive covenant to run in Equity to bind third parties with notice is notable in that it exists as an exception to the formidable doctrine of Privity of Contract. Such exception must

itself exist to protect something - there can be no validity in the suggestion that a dominant tenement should not be needed in order to allow a restrictive covenant to run with the land as there must always by some interest retained by the covenantee for the significant benefit of which the covenant can be enforced. It would indeed be "an indefensible extension of a contractual liability to a non-contracting party"[79] to allow a covenantee to enforce a covenant against a non-party unless the covenantee had a valuable and acceptable interest to protect by doing so.

It is submitted not that the need for such an interest, that is, a dominant tenement, is being questioned or eroded but rather that the question as to what constitutes such an interest must be reconsidered.

For an interest to warrant the Tulk v. Moxhay exception to be invoked for its protection it must have special attributes of value, permanence, and be more than a merely personal interest. This interest, deserving of such protection, is surely what is meant by the stylistic term ' dominant tenement', so that the categorical statements by earlier courts that some land was necessary as a dominant tenement are overstating the situation. Land is an example of a 'dominant tenement', that is, it possesses the attributes warranting application of the Tulk v. Moxhay doctrine, but to define 'dominant tenement' as being land and no other type of interest is both myopic and wanting for a conceptual justification.

It has been contended, at some length, that a business is now able to be seen as amounting to a dominant tenement for the purposes of the doctrine; it has the necessary attributes making it worthy of such protection, and in reality it is usually for a business interest that restrictive covenants of the type discussed are created - any land is merely incidental.

There can be no objection to a business being seen as a dominant tenement on the grounds of its essentially intangible nature as it has long been settled law that abstract manifestations of the land-type dominant tenement, namely landlords' reversions and mortgagees' interests, are acceptable dominant tenement interests.

The accepted proximate-estate rule for a land-type dominant tenement is perfectly in keeping with the protection that land itself needed, but such a limited zone of protection cannot validly be imposed upon a business-type dominant tenement which has

a potentially much wider sphere of interest than land. And neither is one fixed standard applicable to business-type dominant tenements which, in contrast to land's inherent homogeneity, are of multitudinous variety.

It is submitted in conclusion that the solus agreement cases, in conjunction with other recent restrictive covenant cases dealing with covenants for the protection of business, require a reappraisal of the purportedly accepted view of the nature and meaning of a 'dominant tenement' for the purposes of the doctrine of Tulk v. Moxhay.

By seeing a business interest as the second acceptable example of a dominant tenement we can not only begin to rationalise some of the doubts expressed from time to time as to the strict traditional view taken of the dominant tenement requirement, but also legitimise some of the inconsistancies which have arisen from persistant adherence to an anachronistic conception of the nature of a dominant tenement.

Also by seeing a business interest in this light we can provide a firm foundation for the development of a more realistic and commercially expedient body of doctrine relating to the running of the burden of restrictive covenants.

FOOTNOTES

1. See Davis, Introduction to Real Property (Butterworths, Wellington, 1979) para. 13.11, p.225. Quoted in part, infra, see n. 77.
2. Rogers v. Hosegood [1900] 2 Ch. 388.
3. Austerberry v. Oldham Corpn. (1885) 29 Ch.D. 750.
4. (1848) 1 Ph. 774, 41 E.R. 1143; 1 H. & Tw. 105, 47 E.R. 1345.
5. 2 Ph. 774 at 778, 41 E.R. 1143 at 1144.
6. Idem.
7. 1 H & Tw. 105 at 114, 47 E.R. 1345 at 1348.
8. The same question has very recently also been posed by C.D. Bell, "Tulk v. Moxhay Revisited" [1981] Conv. 55.
9. 2 Ph. 774; 1 H. & Tw. 105; (1848) L.J. Ch. 83; 13 L.T. (O.S.) 21; 13 Jur. (U.S.) 89.
10. 2 Ph. 774 at 777, 41 E.R. 1143 at 1144, (emphasis added).
11. Really only the hesitant steps in the general direction contained in Whatman v. Gibson (1838) 9 Sim. 196, 59 E.R. 333, and Mann v. Stephens (1846) 15 Sim. 377, 60 E.R. 665.
12. (1858) 4 DeG. & J. 276 at 282, 45 E.R. 108 at 110.
13. Keppell v. Bailey (1834) 2 My. & K. 517, 39 E.R. 1042.
14. See Hayton, (1971) 87 L.Q.R. 539 at 540.
15. See Hill v. Tupper (1836) 2 H. & C. 121 at 127, 159 E.R. 51 at 53 per Pollock C.B., and Ackroyd v. Smith (1850) 10 C.B. 164 at 188, 138 E.R. 68 at 77-78 per Cresswell J.
16. (1882) 20 Ch.D. 562 at 583.
17. [1905] 1 Ch. 391 at 396.
18. (1583) 5 Co. Rep 16; 77 E.R. 72.
19. As in re Nisbett and Potts [1906] 1 Ch. 386 C.A.; Reid v. Bickerstaff [1909] 2 Ch. 305 at 320; L.C.C. v. Allen [1914] 3 K.B. 642 per Buckley L.J.; Kelly v. Barrett [1924] 2 Ch. 379 at 405; Newton Coop v. Williamson & Treadgold [1952] Ch. 286 at 293; amongst others. But note Bailey in 6 C.L.J. 339, 341 at note 14 where he suggests Jessel M.R. in Gomm only meant by the analogy that the burden of the covenant runs with the restricted land.
20. Hinde, McMorland and Sim, Introduction to Land Law (Butterworths, Wellington, 1979) vol. 2, para 11.012.
21. See Esso Petroleum v. Harpers Garage [1968] A.C. 269.
22. (1869) L.R. 4 Ch. App. 654.
23. Ibid. at 659 per Selwyn L.J.

FOOTNOTES CONT.

24. (1877) Ch.D. 227.
25. Cheshire, Modern Law of Real Property (11ed., Butterworths, London, 1972) at 584.
26. Megarry and Wade, Law of Real Property (4ed., Stevens, London, 1975) at 755.
27. [1952] Ch. 286. Approved in re Royal Victoria Park Pavilion [1961] Ch. 581 at 590.
28. Preston and Newsom, Restrictive Covenants Affecting Freehold Land (6ed., Sweet & Maxwell, London 1976) at 74.
29. [1914] 3 K.B. 642.
30. Essentially the previous Court of Appeal decisions in Formby v. Baker [1903] 2 Ch. 539 and Milbourn v. Lyons [1914] 2 Ch. 231.
31. [1914] 3 K.B. 642 at 662.
32. Ibid. at 664.
33. Ibid. at 665.
34. Ibid. at 666.
35. [1900] 2 Ch. 388.
36. [1914] 3 K.B. 642 at 672.
37. Ibid. at 673.
38. [1967] 1 A.C. 50 at 80-81 (emphasis added).
39. [1965] A.C. 1175 at 1253-1254.
40. [1926] A.C. 108.
41. Ibid. at 117-120.
42. Ibid. at 121.
43. J.F. Northey (ed.), Cheshire and Fifoots Law of Contract (5 ed. N.Z., Butterworths, Wellington, 1979) at 386.
44. See Kelly v. Barrett [1924] 2 Ch.379 at 403.
45. [1934] Ch. 561 C.A.
46. Hall v. Erwin (1887) 37 Ch.D. 74.
47. Op. cit. at 74.
48. (1905) 92 L.T. 319 at 320.
49. [1899] 1 Ch. 88.
50. [1966] 1 Ch. 402 at 432-433.
51. See Commissioner for Main Roads v. B.P. Australia (1964) 82 W.N. (Pt. 2) N.S.W. 27; and Tooth & Co. v. Barker [1960] N.S.W.R. 51.
52. (1899) 17 N.Z.L.R. 734.
53. "Restrictive Covenants Affecting Land: Is a Dominant Tenement Necessary in New Zealand?" (1944) 20 N.Z.L.J. 68.
54. Ibid. at 69.

FOOTNOTES CONT.

55. "Restrictive Covenants in Gross." [1970] N.Z.L.J. 67.
56. See Davis. op. cit., para. 13.11, p. 225. Quoted in part, infra, see note 77.
57. See for example Strick v. Regent Oil [1966] A.C. 295.
58. [1969] 1 W.L.R. 116 at 119 (emphasis added).
59. Idem (emphasis added).
60. Idem (emphasis added).
61. [1968] A.C. 269 at 298 and 325 respectively.
62. [1971] N.Z.L.R. 257 at 266 (emphasis added).
63. [1968] 1Ch. 402 at 432-433.
64. [1966] 1 All E.R. 126 at 130.
65. (1976) 8 A.L.R. 555 at 568.
66. Blacks Law Dictionary (5 ed., West Publishing, St. Paul Minn., 1979) at 1182.
67. [1920] 2 Ch. 159 at 185.
68. [1966] 1 All E.R. 126 at 130.
69. [1968] 1 Ch. 402 at 432-433.
70 [1966] 2 All E.R. 454 at 455-456.
71. [1978] 2 All E.R. 1091.
72. [1973] 3 W.L.R. 780.
73. Ibid. at 793-794.
74. See for example Lord Denning in Petrofina v. Martin [1966] 1 All E.R. 126 at 132-133.
75. [1971] N.Z.L.R. 257 at 267 (emphasis added).
76. [1968] A.C. 269 at 325.
77. Davis, op. cit., para. 13.11, p. 225 (footnotes omitted and emphasis added).
78. (1976) 8 A.L.R. 555, especially the judgment of Jacobs J. commencing at 567.
79. Cheshire, Modern Law of Real Property , op. cit. at 584.

1 Folder F1	FLYNN, S.B. The solus agreement cases. 416,592
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