One consequence of the apparent upturn in the property market is a notable increase in the number of queries and disputes concerning restrictive covenants passing across property litigators' desks. As ever, it is the would-be developer who wishes to understand the limits of any restriction on his right to develop and to push these limits as far as possible. This is met by an equal and opposite concern by the person who alleges the benefit of the restrictive covenant, if only to protect a ransom value.

The typical scenario is where the owner of land (O) wishes to enforce a restrictive covenant against a neighbouring owner, in this case the developer (D); both will be successors in title of the original vendor and purchaser who signed up to the restrictive covenant. This article considers the themes which have recently emerged in attempts to enforce or avoid restrictive covenants.

Intention to benefit

The first thing which O must demonstrate is that he has the benefit of the restrictive covenant. It will not simply be good enough to show that O is the successor in title of the original vendor of D's land, who extracted the restrictive covenant. O must show that the parties originally intended the benefit of the covenant to go with O's land. This involving showing both that the covenant (a) was intended to benefit O's land and (b) that the covenant does in fact benefit O's land.

In a straightforward case the covenant will expressly state that is for the benefit of O's land. That is known as 'express annexation'. However in many cases this is not clearly stated. In that case O will need to rely upon section 78 of the Law of Property Act 1925 which provides that:

> "*a covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in title …*".

Crest Nicholson

The courts have imposed a threshold test for the application of this section. In *Crest Nicholson v McAllister* [2004] 1 WLR 2409 the Court of Appeal held that, for this section to apply, "land intended to be benefited must be so defined that it is easily identifiable". Importantly, there must be sufficient definition within the conveyance itself. The difficulty with this formula is that it does not identify what must be shown so that the land to be benefited is sufficiently defined. Plainly the conveyance does not need to say that the covenant is for the benefit of O's land or is to be enforceable by the successors in title of the original vendor, because that is express annexation in which case there would be no need for section 78.

However it seems that it is insufficient for the conveyance simply to name the land without other indications that it refers to the covenant. This is exactly what occurred in *Crest Nicholson* itself where the land to be sold was described as "*No.5 on the Fee Farm Estate*". One could be forgiven for thinking that the reference to the Fee Farm Estate was sufficient to indicate that the covenants must be taken for the benefit of the vendor who retained ownership of the Fee Farm Estate. However the Court of Appeal said that this was not a sufficient indication.

By contrast in *Mohammad Zadeh v Joseph* [2008] 1 P&CR 6, when the original vendors sold part of their back garden at 68 Barnett Gate Lane and

took restrictive covenants from the purchaser without stating for whose land they were supposed to benefit, the Court held that it was "obvious" that the covenant was to benefit the retained part of No.68. Having regard to the stated address of the vendor (No.68) and the fact that part of No.68 was being sold, as was clear from the plan, it was clear that the covenant was supposed to benefit No.68. The court specifically rejected any notion that "the conveyance must also, expressly or by necessary implication, display an intention that such land benefit from the covenant …".

So it can be seen from the different results of these two cases that where the parties to a conveyance do not expressly annex the benefit of restrictive covenant to the vendor's retained land, it is necessary to look very carefully at all elements of the transaction to see whether the land intended to be benefited is sufficiently identified. It will be relevant to have regard to the stated address of the vendor, any description of the vendor's property and any plan attached to the conveyance. Only if the conveyance is truly silent as to the identity of the vendor's retained land, so that one must ascertain this from evidence wholly outside the conveyance itself, can one be sure that O cannot enofrce. Short of this the right answer will often be a matter of judgement.

Covenant must "relate" to the land

Section 78 requires that the covenant must "relate" to the land in question. In short, is the covenant capable of benefiting O's land?

In many cases it is obvious that the covenant is capable of benefiting O's land. Thus covenants to restrict noise, height of buildings, density of buildings will very often clearly be for the benefit of O's land. Where there is

doubt the courts would often give O the benefit of the doubt. After all, if the original parties to the restrictive covenant had seen fit to include it for the benefit of the land and its successive owners then that would suggest that it probably was to its benefit. However this presumption has been put under serious fire in a couple of recent cases.

Cosmichome

In *Cosmichome v Southampton City Council* [2013] 2 P&CR 13 the Council had sold land to the BBC. The BBC entered into a restrictive covenant to the effect that the property was to be solely occupied by the BBC or to someone to whom the BBC's franchise was devolved by Act of Parliament. There was a proviso that the covenant could be removed in which case, if planning permission were granted for any use other than a television or radio studio, 50% of the uplift in value would be payable to the Council.

The test for whether a covenant actually benefits retained land is whether it affects the nature, quality, amenity or value of that land. When the Council sold the site to the BBC they retained the neighbouring Civic Centre, the Mayflower Theatre and the Grantry Art Centre. One could be forgiven for thinking that a BBC-user clause was plainly for the benefit of such neighbouring civic land. However the judge held against O, saying that he was "quite unable to see in any real sense that that [BBC] presence impacts upon either the nature of the Council-owned land in the immediate vicinity, or its quality, amenity or value".

On the face of it, that is a surprising finding. Often practitioners would not query a restrictive covenant which restricted land to a specific use. However the decision was much influenced by what the court saw as an absence of

evidence which proved that the presence of the BBC benefited the retained land.

Having regard to his finding, the judge did not need to go on and consider the precise effect (if any) of the 50% uplift in value. A restrictive covenant will often say that D cannot do a certain thing *unless* money is paid. So, for example, O may have the right to control development on D's land unless D submits plans for approval and pays O the cost of hiring professionals to scrutinise those plans. There is nothing objectionable about this.

The covenant in *Cosmichome* is a hybrid. There is a clear restriction on use to a BBC-type use. But there is also a provision for release on payment of money. A requirement to pay for the cost of releasing the covenant if the restriction would otherwise have value is not obviously objectionable.

89 Holland Park

In *Re: 89 Holland Park* [2013] EWHC 391 (Ch), the owners of 89 Holland Park claimed a series of covenants over the immediately adjacent building plot. One of the covenants they sought to enforce was a covenant not to apply for planning permission for redevelopment of the plot without their consent. D argued that this covenant was not a restrictive covenant at all because, among other things, it did not benefit O's land. Anybody could apply for planning permission over the plot, not just O. Further, the application for planning permission itself would not affect O, in contrast with the implementation of permission, once granted. However the judge disagreed, holding that the covenant allowed O "to have a degree of control over the nature of any development on or over the property and its likely effect on the value of No.89".

What both *Cosmichome* and *89 Holland Park* demonstrate is that developers are attacking the very fundaments of a given restrictive covenant, namely whether it is capable of benefitting O's land at all. Owners of land claiming the benefit of covenant will need to be prepared to put forward cogent evidence demonstrating the covenants really do benefit their land.

Restrictive covenants and overage

A covenant to pay overage is a positive covenant and so, unlike a restrictive (negative) covenant, it is not automatically binding on the successors of the purchaser's land. Accordingly one almost always sees a mechanism for the entry of a restriction on D's land so that it cannot be sold without D's purchaser signing up to a new overage agreement with O. However this mechanism sometimes breaks down in practice. Thus, where the vendor intends to retain land it would be wise to insert a covenant in the conveyance providing that the purchaser shall not do a certain thing (whether it is to develop or sell on) without paying the required overage to the vendor or his successors (O).

Of course such an attempt to create a restrictive covenant may not ultimately succeed. In the *89 Holland Park* case, O conceded that to qualify as a restrictive covenant, the covenant in question must be restrictive of the user of land. On this basis a covenant whose essential purpose is to enforce the payment of overage may fail. Secondly and following the approach in *Cosmichome*, the covenant may be said not benefit O's land but instead simply provide a mechanism for paying O overage. However for the time being the role of restrictive covenants in protecting overage has not been conclusively determined.