The Granting of Freehold Title to Apartment Owners – Pros, Cons and Why Not?

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Abstract: Traditionally, long leasehold titles have been used for apartments to bind successors in title to the performance of both negative and positive covenants. Problems with the rules relating to the enforceability of freehold covenants meant that, in practical terms, it was generally not possible to use freehold titles for apartments. This difficulty was, however, removed by the Land and Conveyancing Law Reform Act 2009 which allows for the enforceability of freehold covenants. Despite this development, conveyancers have continued to use long leases for apartments. This article explores the historical difficulties and the current implications of granting freehold title to apartment owners.

Keywords: Freehold covenants, apartments, enforceability, freehold title, long leases, Tulk v Moxhay.

Introduction

Traditionally, long leasehold titles have been used for apartments primarily for one reason. That is to bind successors in title to the performance of both negative and positive covenants. Historically, 'the burden of restrictive covenants only runs in equity, and in the case of positive covenants, not at all.'[1]

Apartment schemes require mutually enforceable covenants. Problems with the rules relating to the enforceability of freehold covenants meant that, in practical terms, it was not possible to grant freehold title in relation to multi-occupational developments such as blocks of flats and apartment complexes.

However, the Land and Conveyancing Law Reform Act 2009 ('the 2009 Act') removed this difficulty by allowing for the enforceability of freehold covenants. Despite this, conveyancers have continued to use long leases for apartments.

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[1] Andrew Lyall, 'Freehold Covenants and What To Do With Them' (1991) 9 ILT 157.

Such leases need to be carefully drafted so that the tenants do not have the right to buy out the freehold. The effect of this would be to remove some covenants and potentially defeat the communal nature of the scheme. But, given the provisions of the 2009 Act incorporating the enforceability of freehold covenants, why are freehold titles not being granted to apartment owners? What would be the benefit of this, if it became common practice? What difficulties (if any) might arise?

The benefit and burden

A covenant is taken to be 'a promise or undertaking contained in a deed.'[2] Previously it would have been under seal, but section 64(1) of the 2009 Act abolished '[a]ny rule of law which requires … a seal for the valid execution of a deed by an individual'. Section 3 of the 2009 Act defines a covenant as including 'an agreement, a condition, reservation and stipulation'.

In practical terms, it is a promise to do something or to refrain from doing some act in relation to land. Usually, a covenant is contained in a deed executed by the covenantee (the party given the promise who can sue if the covenant is not complied with (i.e., the person with the benefit) and the covenantor (the party who takes on the promise and is liable to be sued if he breaches the promise (i.e., the person with the burden). Traditionally, the enforcement of covenants was governed by the rules of contract law, however, the law of property has intervened to enforce covenants outside of the strict rules of contract law. A positive covenant is a promise to do something (i.e., to carry out a positive act), while a negative covenant is a promise not to do something (i.e., to refrain from a particular act). An example of a positive covenant would be a covenant to repair, while an example of a negative or restrictive covenant would be a covenant to refrain from demolishing or altering a property, or a covenant to restrict its use.

A lease will always contain leasehold covenants (e.g., to pay the rent, to build a house on the land, to maintain and repair, to use the land in a particular way etc.). There are also freehold covenants which arise most frequently when a parcel of land is being divided. The seller is selling part of the land and retaining another part which they wish to protect and hence they make the sale subject to

[2] Paul Coughlan, *Property Law* (2nd edn, Gill & Macmillan 1998) 261.

compliance with covenants which will protect the retained land after the sale is completed. Alternatively, the covenant may impose an obligation on the purchaser in relation to the sold land. Such covenants may restrict the purchaser's right to use the land purchased.

Covenants will always bind the covenantee and covenantor as these parties will be bound by the agreement they entered into under the principles of contract law. However, the question arises as to whether such covenants bind successors in title of the covenantee and covenantor. Do the benefit and burden of such covenants 'run with the land' so as to bind subsequent owners?

While leasehold covenants have long been enforceable against successors in title,[3] the law in relation to freehold covenants 'never developed properly and is subject to serious flaws.'[4] Freehold covenants were enforceable against successors in title only to a limited degree. This has been referred to as '[o]ne of the most striking anomalies' in the Irish land law and conveyancing system.[5] According to Lyall: 'The burden of positive covenants cannot run at law or in equity between independent freehold owners. The burden of restrictive covenants only runs in equity under *Tulk v Moxhay*.'[6]

According to McGrath in *Lyall on Land Law*:

> The old rules, particularly the common law rules, began by treating covenants as purely personal obligations, affecting only those parties who originally entered into them. Sometimes the common law, and more

[3] The Law Reform Commission noted that the law relating to leasehold covenants is relatively straightforward and effective; see Law Reform Commission, *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* (LRC CP 34—2004) 92. The only reform recommended by the Commission is the replacement of the overlapping and slightly contradictory provisions contained in section 12 and section 13 of the Landlord and Tenant Law Amendment Act, Ireland 1860 (otherwise known as, and hereafter referred to as, Deasy's Act) and section 10 and section 11 of the Conveyancing Act 1881; see Law Reform Commission, *Consultation Paper on General Law of Landlord and Tenant* (LRC CP 28—2003) 53-57. The suggested new provision is section 16 of the draft Landlord and Tenant Bill at Appendix B of the Law Reform Commission, *The Law of Landlord and Tenant* (LRC 85—2007). This recommendation remains to be implemented.

[4] Law Reform Commission, *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* (LRC CP 34—2004) 92.

[5] Law Reform Commission, *Report on Land Law and Conveyancing Law: (7) Positive Covenants Over Freehold Land and Other Proposals* (LRC 70—2003) 3.

[6] Lyall (n 1).

> frequently equity, went beyond this and began to recognise covenants as property rights. As such they could bind successors to the original parties between whom there was no privity of contract.[7]

Complicated rules relating to the enforceability of covenants (and, in particular, positive freehold covenants) were developed by the common law and modified by equity. Numerous academics have articulated these rules, emphasising different nuances in their analysis. Some key elements of the historical position are summarised below.

The position at common law and in equity

Historically, only leasehold covenants (positive and negative) ran with the land and bound successors in title.[8] This was the reason why many leases were created particularly in relation to apartment schemes where all owners were required to comply with the same rules to ensure the efficient operation of the scheme (e.g., that no owner would put down wooden floors, that everyone would be required to pay the service charge or that no one could hang washing on their balcony).

The position in relation to freehold covenants was more complicated and common law rules laid down requirements to be met if the benefit or burden was to run with the land. The rules applied equally to both positive and negative freehold covenants.

Running of the benefit at common law

If a successor in title of the covenantee wanted to enforce a freehold covenant against the original covenantor, he could only do so if he complied with a number of common law rules:

a) The covenant touched and concerned the land of the covenantee i.e. it must not be personal;

b) The successor in title must have a proprietary interest in the land;

[7] Noel McGrath, *Lyall on Land Law* (5th edn, Round Hall 2023) 612.

[8] Sections 12 and 13 of Deasy's Act provide for the enforceability of leasehold covenants between successors in title to the landlord and tenant. See also ss 10 and 11 of the Conveyancing Act 1881.

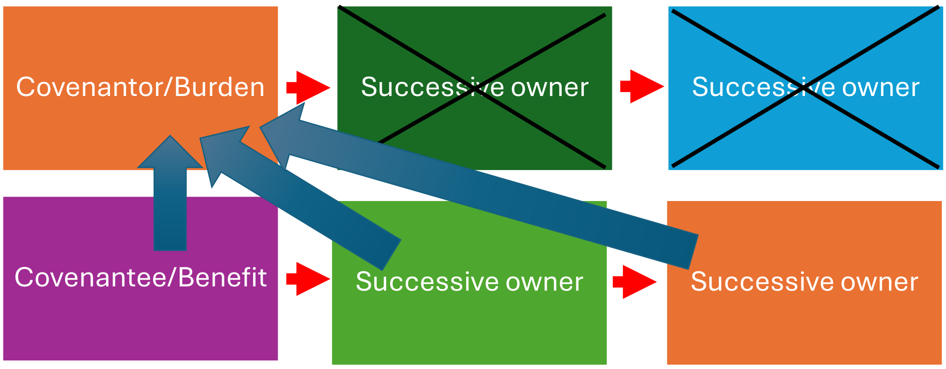
c) The successor in title must own the same type of estate as the original covenantee; and

d) The covenant must be intended to benefit successors in title.

In this way, the benefit of a freehold covenant could pass to successors in title of the covenantee.

Running of the burden at common law

Matters were more complicated in relation to binding successors in title of the covenantor. The common law position was that the burden of a freehold covenant cannot bind successors in title of the covenantor and does not run with the land.



However, as illustrated above, equity intervened to modify the common law position. Under the rule in *Tulk v Moxhay*,[9] the burden of a freehold covenant may run with the land in equity so that successors in title of the covenantor's land are bound by it. However, as noted by Mee and Murphy, 'the equitable rules surrounding the passing of the benefit and the burden of restrictive covenants are complicated and somewhat uncertain.'[10]

The rule in *Tulk v Moxhay*

In this 'iconic'[11] case, the plaintiff Mr. Tulk sold a garden and required the purchaser to enter into a covenant to the effect that the land would be kept as a garden and would not be built on. The garden was sold on a number of times until it was purchased by the defendant, Mr. Moxhay, who purchased it with

[9] (1848) 2 Ph 774.
[10] John Mee and Alan Murphy, 'Reform of the Law of Covenants' (2007) 12(4) CPLJ 100.
[11] David Cowan, Lorna Fox O'Mahony and Neil Cobb, *Great Debates in Land Law* (3rd edn, Hart 2023) 159.

notice of the covenant. Although he was aware of the covenant, Mr. Moxhay attempted to build on the land and Mr. Tulk brought an action to stop him on the basis that he was acting in breach of the covenant. Mr. Moxhay argued that he was not bound by the covenant and that under the common law rules, the burden of a freehold covenant does not pass to successors in title of the covenantor.

The court held that an injunction could be granted in equity preventing Mr. Moxhay from breaching the restrictive covenant and that the burden of such a covenant runs with the land in equity. It should be noted that Mr. Tulk retained land nearby and this land was benefited by the covenant.

Running of the burden in equity

Under the rules applied in this case equity will bind successors in title of the covenantor if the following conditions are satisfied:

a) The covenant must be negative or restrictive (and not positive). In *Tulk v Moxhay*[12] although the covenant was expressed in positive language as a duty to maintain the square as a garden, the court looked behind the wording to the substance of the obligation involved. This examination revealed that the covenant was actually a restrictive covenant prohibiting building on the land.

b) The land to which the benefit of the covenant is attached must be in the vicinity of the burdened land and must be benefited by the covenant.

c) The right to sue a successor in title of the covenantor is an equitable proprietary interest.

d) The rule in *Tulk v Moxhay*[13] may only be invoked by the original covenantee if he retains land for the benefit of which the covenant was entered into.

[12] *Tulk* (n 9).
[13] ibid.

e) The rule in *Tulk v Moxhay*[14] may only be invoked by successors in title of the original covenantee if they can show that the benefit of the covenant passed to them in equity.

In *Rhone v Stephens,*[15] the owner of a house had a covenant with his neighbour to keep the roof common to both properties tiled and watertight. The covenantor sold his property and the House of Lords refused to enforce the covenant against the new owner (the covenantor's successor in title) because it was a positive covenant and thus the rule in *Tulk v Moxhay*[16] did not apply.

The Irish courts recognised and applied the rule in *Tulk v Moxhay*[17] in cases such as *Craig v Greer*,[18] *Williams & Co Ltd v LSD Ltd,*[19]*Power Supermarkets Ltd v Crumlin Investments Ltd*[20] and *Whelan v Cork Corporation.*[21]

As the right to sue a successor in title of the covenantor is an equitable proprietary interest, the courts must decide if the new owner should be bound by applying the general rules in relation to binding transferees of land to third party interests. As the burden in *Tulk v Moxhay*[22] is equitable, the rule will be applied differently depending on whether title to the land is registered or unregistered.

If the burden exists over unregistered land, it can be extinguished by a sale of the legal estate to a *bona fide* purchaser for value who has no actual or constructive notice of the covenant. If the burdened land is registered, then a purchaser will not be bound unless the covenant is noted on the title register. However, a volunteer who takes the land as a gift will not be protected and will be bound by the covenant.

[14] ibid.
[15] [1994] 2 All ER 65. See also its application in the Irish case of *Cardiff Meats Ltd v McGrath and Ors* [2007] IEHC 219.
[16] *Tulk* (n 9).
[17] ibid.
[18] [1899] 1 IR 258 (CoA).
[19] (HC, 19 June 1970).
[20] (HC, 22 June 1981).
[21] [1991] ILRM 19 (HC); [1994] 3 IR 367 (SC). For a detailed analysis of this case, see Lyall (n 1).
[22] *Tulk* (n 9).

Running of the benefit in equity

To show that the benefit of the covenant had passed in equity, a number of additional conditions had to be satisfied:

a) The covenant must touch and concern the land of the covenantee;

b) The land owned by the covenantee is owned by the person enforcing the covenant; and

c) One of the following conditions is to be met:

i. The benefit of the covenant was annexed to the land; or

ii. The benefit of the covenant was assigned with the land; or

iii. The land benefited and the land burdened were part of a scheme of development.

For the benefit of the covenant to be annexed to the land, both the covenantee and covenantor must have intended the benefit to run with the land so as to bind successors in title of the covenantor and thus be enforced by successors in title of the covenantee. This intention is clear where it is stated that the covenant is intended to benefit the land. In *Rogers v Hosegood,*[23] a restrictive covenant was held to be annexed to the land of the covenantee as it was stated to be in favour of the vendors of certain land, their assigns and others claiming under them for the benefit of adjoining land.

Lack of clarity may mean that the claim of annexation will fail. In *Renals v Cowlishaw,*[24] a claim that the benefit of the covenant was annexed to the land failed because the extent of the property to which the covenant was to be annexed was not clearly defined. In *Re Ballard's Conveyance,*[25] the benefit of the covenant was annexed to a large estate. Only a small part of the land was capable of being benefited by the covenant, so it was held that the covenant was not enforceable by the purchasers of the estate. In this particular case the covenant

[23] [1900] 2 Ch 388.
[24] (1878) 9 Ch D 125 (HC); (1879) 11 Ch D 866 (CoA).
[25] [1937] 1 Ch 473.

was said to be for the benefit of 'the land' as opposed to a covenant for 'the whole, part or any parts of the land'.

Section 58 of the Conveyancing Act 1881 provided that a freehold covenant shall be deemed to be made with the covenantee, his heirs and assigns. Hence, it is questionable as to whether this provided a method of statutory annexation of all covenants of freehold land so that their benefit would automatically run with the land in equity.

The alternative to automatic annexation (based on the intention of the original covenantee and covenantor) is that the benefit passes with the land if stated expressly in every deed selling the land. The benefit must be passed expressly and contemporaneous with the sale and cannot be done subsequently.[26]

If the land is part of a scheme of development, then equity will determine that each owner will be bound by the covenants put in place for the mutual benefit and burden of each owner within the scheme even where different houses are sold at different times. The rationale is that each house in the scheme is subject to similar restrictive covenants and that the mutual right to enforce these covenants, but also to be bound by them, ensures the proper maintenance of the scheme. Thus, equity will recognise that all owners are bound without looking for annexation or assignment of the benefit of the covenants.

A purchaser of each house only needs to covenant with the seller and does not need to enter into a deed of mutual covenant with all of the owners of the other houses. All the house owners will be able to enforce covenants against the other owners in the scheme. The case of *Elliston v Reacher*[27] set down the criteria relating to such schemes of development.

There are a number of conditions to be met:

a) The same vendor must have owned all the land in the scheme originally.

[26] See *Re Union of London and Smith's Bank Ltd's Conveyance* [1933] 1 Ch 611.
[27] [1908] 2 Ch 374.

b) Before selling, the vendor must have divided the land into lots subject to common restrictions (although this requirement is not applied strictly).[28]

c) The restrictions must benefit all the lots.

d) The nature and terms of the scheme must be disclosed to the individual purchasers, as they must be aware of the nature of the rights and obligations and they must also be aware that the rights and obligations are reciprocal.

e) The area of the scheme must be definite and known to the individual purchasers so that the scope of the rights and obligations are determined.

Thus, to comply with *Tulk v Moxhay*,[29] allowing a successor in title of a covenantee to sue a successor in title of a covenantor, the first conditions must be satisfied, and the successor must also show that the benefit has passed to him in equity, either by annexation, assignment, or under a scheme of development.

Practical problems

The Law Reform Commission has pointed out:

> These defects and limitations in the law governing enforceability of freehold covenants are sufficiently serious in themselves to justify legislative reform, but the practical problems to which they give rise in conveyancing transactions make the case for reform overwhelming … the most serious problem lies in the fact that the obligations contained in a positive covenant, such as a covenant to pay money or to carry out works or to do repairs, generally cannot be made to pass to a successor in title.[30]

As a result of the difficulty with the enforceability of freehold covenants, and by contrast the lack of difficulty in enforcing leasehold covenants, legal advisers and

[28] See *Baxter v Four Oaks Properties Ltd* [1965] Ch 816 *and Re Dolphin's Conveyance* [1970] Ch 654.
[29] *Tulk* (n 9).
[30] Law Reform Commission (n 5) 8.

their clients sought comfort by creating the relationship of landlord and tenant even where it was not strictly necessary. According to Mee and Murphy:

> Prior to the prohibition (subject to exceptions) of the creation of new long leases by the Landlord and Tenant (Ground Rents) (No.2) Act 1978, it was common in Ireland for vendors to grant long leases of land subject to nominal rents, instead of conveying the freehold. Amongst other things, this gave the landowner more flexibility in the imposition of covenants on the purchaser because such covenants, even if positive, would continue to be enforceable against future assignees of the leasehold interest.[31]

A landowner who wished to part with some land and to create rights in favour of the land retained was often advised not to convey the freehold, but instead to create a lease to protect their and their successors' right to enforce covenants which benefited the retained land. Even if the landowner did not want to retain a reversion and instead might have preferred to part with the freehold and their entire interest in the property, they may have been advised not to do so. This led to the creation of additional interests in land and increasing pyramids of title.

Another option was the creation of a fee farm grant[32] described as achieving 'the best of both worlds'.[33] This passed the freehold but created the relationship of landlord and tenant to avail of the law on the enforceability of leasehold covenants. This became more common for a period.[34] However, it was a retrograde step to move from unencumbered freehold titles to creating freehold interests subject to a rent (that is not sought for itself and is merely a legal technicality) to get around a difficulty in the law. In more modern fee farm grants created for this purpose the fee farm rent was never sought or paid. While these fee farm grants subsist, the creation of a fee farm grant at law or in equity is now

[31] Mee and Murphy (n 10).

[32] Section 3 of Deasy's Act provides that a reversion shall not be necessary to the relation of landlord and tenant thus allowing for the creation of fee farm grants.

[33] John CW. Wylie, *Irish Conveyancing Law* (2nd edn, Bloomsbury Professional 1996) 701.

[34] Lyall (n 1) examines the use of this and other legislation as devices to enforce and discharge freehold covenants.

prohibited by section 12(1) of the 2009 Act.[35] For pre-existing fee farm grants the obligation to pay such rent can be bought out under the ground rents legislation.[36] There would then be no rent payable and the relationship of landlord and tenant would come to an end with the estate of the grantee becoming an unencumbered fee simple. It is worth noting that certain covenants would no longer be enforceable due to the impact of section 28 of the Landlord and Tenant (Ground Rents) (No. 2) Act, 1978, as amended ('the No. 2 Act of 1978') (this is explained later).

Where the freehold interest (not being the creation of a fee farm grant) was passed, legal advisers drafted additional documentation, such as a lease of easements or a deed of covenant[37] and used this as a means of binding the purchaser and their successors in title to the enforcement of covenants, particularly positive covenants.

Thus, the limitations of the law governing the enforceability of freehold covenants had a considerable impact on conveyancing transactions and the legal formalities for vendors and purchasers. This has become acute in more recent years with the proliferation of mixed developments: not just mixed residential and commercial developments but also mixed residential developments containing apartments and houses and perhaps also townhouses or duplexes.

In relation to apartments, the difficulty was compounded after the enactment of the ground rents legislation. To preserve the reciprocal nature of neighbourliness and equality in burden sharing in apartment schemes, it is important that no one apartment owner, as tenant, can buy out the freehold. This would have the potential to unravel the scheme as it would impact the enforceability of covenants. Not all covenants would remain in force after acquisition of the freehold. It was also important that, if apartment owners were being granted

[35] Members of the public do not expect a freehold owner to have to pay rent and the confusion of the position of a freehold owner and a leasehold tenant is 'out of keeping with the drive to get rid of ground rents' Law Reform Commission (n 4) 44.
[36] The definition of lease in s 3 of the Landlord and Tenant (Ground Rents) (No 2) Act, 1978 includes a fee farm grant.
[37] For a more detailed explanation see Gabriel Brennan and Nuala Casey, '*Complex Conveyancing*' (Tottel 2007) 209 – 212. A typical Lease of Easements is included at Appendix 17.2.

leases, that such leases were not void under the Landlord and Tenant (Ground Rents) Act, 1978 ('the No. 1 Act of 1978').

Restriction on creation of leases

The No. 1 Act of 1978 is titled '*An Act to prevent the creation of new leases reserving ground rents on dwellings and to provide for related matters*'. This Act came into force on 16 May 1978. Section 2 of the No. 1 Act of 1978 provides that a lease of land made after 16 May 1978 shall be void if the lessee would, apart from this section, have the right to enlarge their interest into a fee simple and the permanent buildings are constructed for use wholly or principally as a dwelling.[38]

Section 2(4) of the No. 1 Act of 1978 provides that a person who has given consideration for a lease that is void has the right to acquire the fee simple in the land and any intermediate interests at the expense, as to both purchase money and costs, of the person who purported to grant the lease. The freehold owners or the owners of an intermediate interest who inadvertently grant such a lease are required to buy out the freehold for the lessee at their own expense. Thus, section 2(4) protects the position of a purchaser of a leasehold interest deemed void under the No. 1 Act of 1978.

A 'dwelling' under section 2 does 'not include a separate and self-contained flat in premises divided into two or more such flats'.[39] 'Flat' is not defined. Hence, multi-unit developments such as apartment complexes were excluded from the prohibition and continued to be 'developed on a leasehold basis.'[40]

In practical terms, the restriction applies to dwellinghouses. Any party selling a dwelling must pass their own interest in the property. Thus, a vendor who owns the freehold in a dwellinghouse must sell the freehold. A vendor who owns a leasehold interest must assign that interest to the purchaser. The vendor cannot create a new interest, e.g. a lease or sub-lease that would entitle the purchaser to buy out the freehold. If they did so, then the lease would be void and the vendor

[38] Landlord and Tenant (Ground Rents) Act 1978 s 2(1).
[39] ibid s 1.
[40] John C. W. Wylie, *Wylie on Irish Land Law* (6th edn, Bloomsbury Professional 2020) 1020.

would have to acquire the freehold and any intermediate interests for the purchaser.

In the case of dwellinghouses in mixed schemes, the difficulty with the enforceability of covenants pre the 2009 Act was overcome by granting freehold title to the houses and by creating a lease of easements. That lease of easements allowed for use of the common areas, right of access, support and so on with the required mutually enforceable covenants. Post the 2009 Act those covenants can now be included in a conveyance[41] or transfer[42] of freehold title.

Right to buy out the freehold

While the No. 1 Act of 1978 did not directly impact the granting of leases of apartments (flats in the legislation) the same cannot be said of the No. 2 Act of 1978. This legislation introduced the current test to be met by a tenant wishing to buy out the freehold and all intermediate interests.[43] It also provided for various restrictions on the right to buy out the freehold as listed in section 16. If any of these restrictions apply, then the lease will not be void under the No. 1 Act of 1978 as the lessee is not entitled to buy out the freehold.

Section 16(2) provides:

> A person shall not be entitled to acquire the fee simple … if the lease on which such right is based is—
>
> (a) a lease of land which is used for the purposes of business or includes a building divided into not less than four separate and self-contained flats being a lease which contains provisions enabling the amount of the rent reserved by the lease to be altered within twenty-six years from the commencement of the lease (not being provisions enabling such rent to be altered once only and within five years from such commencement or upon the erection after such commencement of any buildings upon the land or upon the breach of a covenant in the lease), or

[41] For unregistered land.
[42] For registered land.
[43] Landlord and Tenant (Ground Rents) (No. 2) Act 1978 ss 9, 10 and 15 for yearly tenants.

(b) a lease granted before the commencement of the Act of 1967 of land which is used for the purposes of business, being a lease which contains provisions requiring the lessee to carry on business on the land which is restricted in whole or in part to dealing in commodities produced or supplied by the lessor, or

(c) a lease of land containing a covenant by the lessee to erect a building or buildings or carry out development on the land if and so long as the covenant has not been substantially complied with, or

(d) a lease made by the Commissioners of Irish Lights, or

(e) a lease made by a harbour authority, within the meaning of the Harbours Act, 1946, whether before or after the passing of that Act.

A new subsection (f) was added by the section 76 of the Registration of Deeds and Title Act 2006 ('the 2006 Act') as follows:

> or
>
> (f) subject to subsection (3), a sublease of land granted by a lessee who is not a person to whom this Part applies-
>
> (i) on or after 27 February 2006, or
>
> (ii) before that date, unless before that date-
>
> (I) a notice of intention to acquire the fee simple in the land was served by the sublessee in accordance with section 4 of the Act of 1967, or
>
> (II) an application was made by the sublessee to the Registrar of Titles under Part III of this Act.

In addition to introducing section 16(2)(f) above, the 2006 Act also introduced a new section 16(3).[44] This provides that section 16(2)(f) will not apply if, at the date of the sublease, the sole reason why the lessee is not entitled to buy out is because the covenant to erect permanent buildings on the land has not been substantially complied with and, after that date, the covenant is substantially

[44] Registration of Deeds and Title Act 2006 s 76.

complied with by the sublessee. Thus, a sublessee who complies with this covenant is protected and can subsequently buy out the freehold. This is different to the remainder of section 16(2) which provides that a lessee (as opposed to a sublessee) can buy out the freehold if he is in contravention of a covenant in the lease, except where he is in breach of a covenant to build.[45]

In all other cases, a sublessee, unless an application had already been made or notice served before 27 February 2006, cannot buy out the freehold if the sublease was granted by a lessee who was not themselves entitled to buy out the freehold.

Thus, a sublessee cannot buy out the freehold unless:

(a) an application had already been made or notice served before 27 February 2006; or

(b) the lessee was entitled to buy out the freehold; or

(c) the covenant to erect permanent buildings on the land was not substantially complied with at the date of the sublease and after that date the covenant is substantially complied with by the sublessee.

This prevents 'unqualifying' lessees from creating a sublease which would qualify and thus allow the sublessee to have an advantage which the lessee itself did not have under the legislation. Prior to this change '[o]ne mechanism used to get around section 16(2)(a) was for the lessee to grant a sublease to themselves in which no rent-review clause was contained.'[46]

Section 4 of the No. 2 Act of 1978 provides that the Act does not bind a Minister of the Government, the Commissioners of Public Works in Ireland, or the Irish Land Commission. Section 4 has been amended by the Landlord and Tenant (Ground Rents) Act 2005,[47] which removed the reference to the Irish Land Commission, which no longer exists. It added three other agencies to the list of bodies not bound by the No 2. Act of 1978 Act. These are the Industrial

[45] See the No. 2 Act of 1978 s 16(2)(c) above.
[46] Ruth Cannon, 'Buying out the Fee Simple under the Landlord and Tenant (Ground Rents) Acts in Commercial Property —Some Issues' (2019) 4 Conveyancing and Property Law Journal 58, 65.
[47] Landlord and Tenant (Ground Rents) Act 2005 s 2.

Development Agency (Ireland), Shannon Free Airport Development Company and Udarás na Gaeltachta. The Central Bank of Ireland was added by section 85 of the Central Bank (Supervision and Enforcement) Act 2013. Harbour authorities were added by section 55 of the Maritime Safety Act 2005. Under the British-Irish Agreement (Amendment) Act 2005 certain other bodies can restrict acquisition of the fee simple by certifying that such acquisition would not be in the public interest.[48] These are North-South bodies.

Section 4 was examined in *Digital Hub Development Agency v Keane & Ors*.[49] The initial lease was found to be a building lease under the Landlord and Tenant Act 1931, and a subsequent lease was found to be a reversionary lease. That being so, section 10 of the No. 2 Act of 1978 was satisfied, and the lessee was entitled to acquire the freehold.

Since 1980, the right to acquire the freehold from state authorities such as a Minister of the Government, and other state authorities listed above, including the Commissioners of Irish Lights and the harbour authorities, is no longer automatically excluded due to section 70 of the Landlord and Tenant (Amendment) Act 1980 ('the 1980 Act'). Section 70 provides, in relation to dwelling-houses, that a lessee is entitled to acquire the fee simple save where the appropriate state authority or the Minister for Transport[50] is satisfied that such acquisition would not be in the public interest and certifies this.

In *Metropolitan Properties Ltd v John O'Brien and the Commissioners of Public Works in Ireland*,[51] it was held by the Supreme Court that as the lessee was not entitled to buy out the freehold held by the Commissioners, the lessee had no right to acquire the intermediate interests even though the lessee satisfied section 9 of the No. 2 Act of 1978. O'Flaherty J stated 'the existence of such interest in the Commissioners precludes not merely the acquisition of the fee simple but also of any intermediate interests in the property.' Thus, the right to purchase the intermediate interests exists only for the purpose of enlarging the interest held

[48] British-Irish Agreement (Amendment) Act 2005 s 2.
[49] [2008] IEHC 22.
[50] In the case of the Commissioners of Irish Lights and harbour authorities.
[51] [1995] 1 IR 467.

by the lessee into a fee simple interest. It is a case of all or nothing; either the applicant is entitled to buy out all interests or none.

To summarise, pursuant to section 16(2) of the No. 2 Act of 1978, the lessee cannot buy out the freehold where there is a lease of land used for business or a building divided into not less than four separate and self-contained flats which contains provisions enabling the amount of the rent reserved by the lease to be altered within 26 years from the commencement of the lease (not being provisions enabling such rent to be altered only once and within five years from such commencement or upon the erection after such commencement of any buildings upon the land or upon the breach of a covenant in the lease).[52]

Thus, a lease of an apartment block containing four or more flats or a business premises where there are rent reviews in the first 26 years may be granted provided:

(a) there is more than one rent review within the first five years;

(b) the rent review is not due on the erection of a building; and

(c) the rent review is not due to a breach of a covenant in the lease.

Hence, it is common to come across long leases of apartments with a rent review every year for several years. The rent may be nominal, for example €1 for the first year, €2 for the second year and €3 thereafter. This rent may never be demanded or paid. However, its purpose is to ensure that the lease comes within the restriction in section 16 of the No. 2 Act of 1978. Hence the lessee is not entitled to purchase the freehold and there is no possibility of the lease being void under the No. 1 Act of 1978. This requires careful drafting.

Those drafting such leases are naturally anxious to ensure that there is no possibility of the lease being void under the No. 1 Act of 1978 and that such leases fall within the restrictions in section 16 of the No. 2 Act of 1978 thus avoiding the possibility of enlargement rights arising. As is apparent from the discussion of the No. 1 Act of 1978, there is an element of overcaution in this practice as a 'dwelling'

[52] McCann notes that this was inserted to help the IDA grant business leases which would prevent the lessees from purchasing the freehold although they had paid for the building of the factory. And that it helped 'to provide communal covenants to protect the communal apartment dwellers.' See Angela McCann 'Landlord and Tenant Acts 1967 to 1987' (Dublin Solicitors Bar Association Seminar 1 June 2022).

in section 2 of the No. 1 Act of 1978 does not include 'a separate and self-contained flat in premises divided into *two* or more such flats [emphasis added]'. Interestingly, section 16 of the No. 2 Act of 1978 has a higher threshold; it is 'a building divided into not less than *four* separate and self-contained flats'.[53] The fact that 'flat' is not defined in either act may have engendered an overly cautious approach being taken in leases of apartments and this may be compounded by a lack of coherence and complexity in the legislative provisions.

Impact on covenants

One of the primary reasons legal advisers are keen to ensure that a lessee in an apartment cannot buy out the freehold is that it would adversely impact the mutuality of covenants. Such covenants include the requirement to pay the service charge and the nominal rent (which, as noted, may never be demanded or paid) and other covenants which ensure the smooth running of the scheme. Mutual enforceability of such covenants is key for the successful operation of apartment schemes. These may include negative covenants prohibiting the keeping of pets, putting down wooden floors or causing a disturbance to neighbours, and positive covenants such as ensuring windows are cleaned and rubbish is put in appropriate receptacles.

Not all covenants cease after acquisition of the freehold under the legislative provisions. Section 28(2) of the No. 2 Act of 1978 provides for certain covenants to continue in full force and effect after acquisition. A covenant—

(a) which protects or enhances the amenity of any land occupied by the immediate lessor of the grantee, or

(b) which relates to the performance of a duty imposed by statute on any such person, or

(c) which relates to a right of way over the acquired land or a right of drainage or other right necessary to secure or assist the development of other land,

[53] Section 3 of the No. 2 Act of 1978 provides that dwelling 'does not include a separate and self-contained flat in premises divided into two or more such flats'. However, section 16(2)(a) relates to 'a building divided into not less than four separate and self-contained flats'. (emphasis added).

continues in full force and effect. They are also burdens which affect the lands without registration under section 72 of the Registration of Title Act 1964 ('the 1964 Act').[54]

Section 28(2)(a) refers to covenants for the benefit of the lessor and section 28(2)(b) refers to the performance of a duty imposed by statute. Only section 28(2)(c) preserves covenants in favour of third parties. These are restricted to those which relate to 'a right of way over the acquired land or a right of drainage or other right necessary to secure or assist the development of other land' as per section 28(2)(c). In an analysis of *Whelan v Cork Corporation*[55] Lyall states:

> [i]t would seem that the only effect of *subsection 2* is to preserve those covenants the burden of which ran with the land before the enlargement and this can only refer, as far as third parties are concerned, to restrictive, i.e., negative, covenants. The burden of positive covenants cannot run either at law or in equity, outside privity of estate.[56]

Initially, all other covenants ceased to have effect, and no new covenants could be created in conveying the fee simple. This position was changed by section 77 of the Registration of Deeds and Title Act 2006, which substituted a new section 28(1) into the No. 2 Act of 1978. This provides that where a lessee buys out the freehold under the legislative provisions only covenants affecting the land in the lease under which the person held the land cease to have effect, and no new covenants can be created except with the person's agreement. Thus, only the covenants in the lease cease to have effect[57] and new covenants can be created with the lessee's consent.[58] The new subsection applies where the fee simple is acquired on or after 27 February 2006 unless the application was made or notice served before that date. After that date only covenants in the lease cease to have effect but the amenity and other covenants referred to above will survive.

[54] See Registration of Title Act 1964, s 28(4).
[55] *Whelan* (n 21).
[56] Lyall (n 1).
[57] Cannon notes that after this change 'it was no longer possible to extinguish freehold covenants by creating a lease in favour of a third party nominee and transferring the fee simple to that third party nominee' or that third party then buying out the fee simple. See Ruth Cannon, 'Leasehold and Freehold Covenants affecting building' (2009) 14(3) CPLJ 66, 71.
[58] McGrath explores the difficulties that could arise with using this provision to attach covenants to the freehold. McGrath (n 7) 617.

Examples include a covenant restricting development, a covenant requiring land to be dedicated to common use and those which relate to a right of way or a right of drainage.

This is a change from the previous position. The previous version of section 28(1) did not refer to persons acquiring the fee simple under the legislative provisions and thus it could be argued that it applied to all cases where the lessee acquired the fee simple regardless of the method of acquisition. It potentially covered a situation where the lessor and lessee agreed terms among themselves and executed a deed of conveyance. However, it could also be argued that where acquisition of the freehold occurs outside the ground rents legislation no covenants survive the merger of the interests.

2009 Act reform

The 2009 Act radically altered the law in this area and replaced the old rules of common law and equity with a new statutory regime that makes no distinction between positive and negative covenants. The changes were introduced to address the two most serious flaws the Law Reform Commission had identified with positive covenants over freehold land. [59] First, that the burden of a positive covenant did not bind a successor in title to the original covenantor and secondly, that the burden of negative covenants ran in equity only under the rule in *Tulk v Moxhay*. [60]

The 2009 Act introduced new provisions in relation to 'freehold covenants' which are defined in section 48 as 'a covenant attaching to dominant land and servient land[61] which has been entered into after the commencement of this Chapter'.[62] The new provisions only apply to freehold covenants as 'servient land' is defined

[59] Law Reform Commission (n 4) 92. See also Law Reform Commission (n 5) for a more detailed examination. It was acknowledged by many commentators that this was an area of the law that was in need of much reform. See also Andrew Lyall, *Land Law in Ireland* (2nd edn, Round Hall 2000) 707 and John CW Wylie, *Irish Land Law* (3rd edn, Tottel 2005) 1013.
[60] *Tulk* (n 9).
[61] As noted by Wylie this language is similar to the language of the law of easements. See Wylie (n 33) 1038.
[62] McGrath articulates potential difficulties with the new statutory regime for the enforcement of covenants among successors including that any covenants entered into prior to the 1st of December 2009 are still subject to the pre-existing rules of law and equity. McGrath (n 7) 632-634.

in section 48 as 'freehold land which is subject to a covenant benefiting other freehold land'. No distinction is made between positive or negative covenants. The main effect of the 2009 Act is to provide for the enforceability of freehold covenants, thus transforming them into legal interests in land on a par with other legal interests such as easements and *profits*.[63]

Section 49 of the 2009 Act changed the position in relation to freehold covenants and provided that the benefit of such a covenant, whether positive or negative, will run with the land intended to be benefited and the burden will run with the land subject to the covenant. A prior owner may enforce breaches of covenant which occurred before he ceased to be owner, and a prior owner is also liable for breaches which occurred during their period of ownership.

However, section 49(6)(b) provides that section 49 takes effect subject to the terms of the covenant or the instrument containing it. Thus, it is possible to contract out of these provisions by providing that the particular covenant is personal to the parties and does not bind their successors in title. Section 49 does not affect the enforceability of a covenant under the doctrine of privity of contract or a section 80 covenant for title.[64]

The new statutory regime includes provision for the enforceability of covenants in the context of a scheme of development. Where such a scheme exists, section 49(3) ensures the enforceability of covenants which are capable of reciprocally benefiting and burdening the land within the scheme. Covenants are enforceable by and against owners and former owners for breaches occurring during their period of ownership. No privity of contract is required.

A 'scheme of development' is defined in section 48 by reference to an intention to create reciprocity of covenants as they relate to the parts and the proximity of the relationship between their owners as expressed in each conveyance to the

[63] John C. W. Wylie, *The Land and Conveyancing Law Reform Acts Annotations and Commentary* (3rd edn, Bloomsbury Professional 2023) 149. A freehold covenant is included in the list of legal interests in land in section 11(4) of the 2009 Act. Section 129 of the 2009 Act amends section 69 of the 1964 Act relating to burdens which may be registered as affecting registered land to include a freehold covenant. Mee and Murphy make some interesting points about priority and registration of title in respect of the draft Bill. See Mee and Murphy (n 10).

[64] Land and Conveyancing Law Reform Act 2009, s 49(6).

owners or implied from the covenants in question. This would usually be evident from the title documents or implied from the covenants as they relate to the parts and relationship between the owners.

In practical effect, this preserves and extends[65] the rule known as the rule in *Elliston v Reacher* [66] which provides that the covenants entered into by one resident on the estate with their vendor are enforceable by any other resident on the same estate. This applies even if the parties are not strictly successors in title. Section 49(4) provides that where the servient land has been subdivided any obligations are apportioned to the appropriate parts and enforceable by or against the persons in whom the parts are vested. Thus, subsequent transfers of title do not need to specifically identify how the obligations are to be apportioned. However, if such obligations are not specifically identified and apportioned it may become difficult to determine who has the benefit or burden of the covenants particularly in the future when schemes of development may be broken up for sale and redevelopment. Any dispute about apportionment can be referred to the court for determination.[67]

Subject to the terms of the contract between the parties, freehold covenants created after 1 December 2009 are now governed by the 2009 Act and the pre 2009 Act rules of common law and equity no longer apply. This is put beyond doubt by section 49 which confirms that the rules of common law and equity (including the rule known as the rule in *Tulk v Moxhay*[68]) are abolished to the extent that they relate to the enforceability of a freehold covenant.

McGrath notes that these provisions of the 2009 Act:

> [H]eralded a significant transformation in the established principles for the enforcement of covenants between successors to the original covenanting parties. The effect of the relevant provisions of the LCLRA 2009 goes a long way towards removing the traditionally recognised distinction between easements, as incorporeal interests affecting land, and covenants, which

[65] Wylie (n 63) 150.
[66] *Elliston* (n 27).
[67] Land and Conveyancing Law Reform Act 2009, s 49(5).
[68] *Tulk (*n 9).

> have tended to be regarded as a vestige of contract law to which the intervention of equity has ascribed certain proprietorial characteristics.[69]

Discharge and modification

Prior to the 2009 Act covenants could be modified or discharged but only in limited circumstances. Covenants could be discharged or there was the possibility of 'suspending the operation of the burden of them as to certain parties'[70] through enlargement.

Under section 69(3) of the 1964 Act the court has the power to modify or discharge any section 69 covenant or condition where the covenant or condition does not run with the land or is not capable of being enforced against the owner of the land, or where the modification or discharge will be beneficial to the persons principally interested in the enforcement thereof. The Registrar[71] may also discharge or modify with the consent of all persons interested in the enforcement thereof without a court order.

No similar provision exists for unregistered land and this was a considerable restriction,[72] particularly as problems often arise in relation to urban land which is more likely to be unregistered.[73] Even with a corresponding provision for unregistered land, the benefit of such a provision is limited in that it does not give the Registrar power to discharge or modify where the dominant owner refuses to co-operate. In that instance the only way to discharge or modify was to apply to court if the requirements of the section were met or to buy out or buy off the recalcitrant neighbour.

Section 50 of the 2009 Act has changed the position in that a person subject to a freehold covenant can apply to court for an order discharging it in whole or in part or modifying it on the grounds that continued compliance would constitute

[69] McGrath (n 7) 608.
[70] Lyall (n 1).
[71] Now Tailte Éireann.
[72] Wylie (n 59) 1015.
[73] Coughlan notes that as most urban land is unregistered section 69(3) of the 1964 Act is generally of no application in the areas where restrictive covenants cause the most difficulty. Coughlan (n 2) 290.

an unreasonable interference with the use and enjoyment of the land that is subject to the covenant i.e. the servient land. This section applies to new covenants and covenants that were put in place prior to the coming into force of the 2009 Act. In making its determination 'the court shall have regard as appropriate to the following matters—

a) the circumstances in which, and the purposes for which, the covenant was originally entered into and the time which has elapsed since then,

b) any change in the character of the dominant land and servient land or their neighbourhood,

c) the development plan for the area under the Act of 2000,

d) planning permissions granted under that Act in respect of land in the vicinity of the dominant land and servient land or refusals to grant such permissions,

e) whether the covenant secures any practical benefit to the dominant owner and, if so, the nature and extent of that benefit,

f) where the covenant creates an obligation on the servient owner to execute any works or to do any thing, or to pay or contribute towards the cost of executing any works or doing any thing, whether compliance with that obligation has become unduly onerous compared with the benefit derived from such compliance,

g) whether the dominant owner has agreed, expressly or impliedly, to the covenant being discharged or varied,

h) any representations made by any person interested in the performance of the covenant,

i) any other matter which the court considers relevant.

As noted by Wylie, '[a] "modification" should be distinguished from a "discharge' and means an amendment or change which falls short of a discharge. Thus, it might involve relaxing a restrictive covenant to allow some uses it prohibits but retaining others. The covenant will continue to operate, but as amended or changed.'[74]

The court can order that compensation be paid to cover any quantifiable loss resulting from the order to discharge or modify the covenant. It should be noted that section 50[75] does not extend to leasehold covenants. With a leasehold title, buying out the freehold may remove the covenant. However, if it is a covenant that remains in force after enlargement the only option is to seek the agreement of the lessor to vary the terms of the lease.

Section 50 provides a mechanism for freehold covenants that are obsolete or an unreasonable interference with the use and enjoyment of land to be removed from the title. In the past these have been an impediment to the development of land. They could only be discharged or modified by agreement between the parties and this often proved difficult and expensive to negotiate, particularly where several people enjoyed the benefit of the covenant. According to Cannon, section 50 is

> one of the most useful provisions in the Act and opens a light at the end of the tunnel for freeholders whose property is burdened by onerous freehold covenants … [However] [s]ection 50 of the 2009 Act does not provide for any right as such to have such covenants discharged, merely a right to apply to have them discharged if the court at its discretion so decides.[76]

McGrath notes that section 50

> introduces a welcome new facility for the removal of an otiose or over-burdensome covenant, without giving a right to demand extortionate payment for its discharge to a party entitled to enforce the covenant, which is a clear latent weakness in s.69(3) of the Registration of Title Act, 1964. Allowing the court to attach payment of compensation as a condition of the granting of an order of discharge or modification provides appropriate

[74] Wylie (n 63) 171.
[75] Cannon explores the parallels between section 50 and the comparable Northern Ireland, Welsh and English legislation. See Cannon (n 57) 71.
[76] ibid 74.

> protection to a party who would otherwise be at risk of gratuitous denial of his or her property rights. On the other hand, the necessity of making an application to court may provide a disincentive to the use of the section.[77]

This can be evidenced by the fact there has only been one written judgment on the use of this facility. *Jackson Way Properties Ltd v Smith & Ors*[78] concerned a freehold covenant not to erect any buildings on lands. The Court in examining the covenant found that there were no persons entitled to the benefit of the covenant and the benefit was not annexed to any land, either expressly or by implication. The High Court found in favour of Jackson Way Properties Ltd holding that the restrictive covenant was not valid and enforceable. However, the Court of Appeal set aside the order of the High Court and allowed the appeal.[79] It is disappointing that the section was not extended to include leasehold covenants.[80] Why should leaseholders equally not be able to apply to the courts to be released from burdensome covenants that are obsolete or an unreasonable interference with the use and enjoyment of land?

Lessees who do seek to discharge or modify leasehold covenants can avail of other statutory provisions, but these are limited in various respects. Section 29 of the Landlord and Tenant (Ground Rents) Act 1967 provides that a covenant, condition or agreement in a lease prohibiting alteration of user or the making of

[77] McGrath (n 7) 635.
[78] [2018] IEHC 115.
[79] [2023] IECA 185.
[80] Mee and Murphy argue, in examining the draft legislation, that a major defect of the legislation is 'that it does not apply to covenants which affect leasehold land but which are not governed by the landlord and tenant rules because they are not made between landlord and tenant (e.g. covenants imposed at the time of the subdivision of a property held on a long leasehold title subject to a ground rent).' They note the consequence 'that the enforceability of a positive covenant created on the sale of a subdivided piece of land will depend on whether the land is freehold or leasehold. If it is the former, it will be enforceable against all successors in title of the original covenantor. If it is the latter, it will not.' They explain that this is 'because the common law and statutory rules allowing the benefit and burden of covenants in a lease to run only apply to covenants entered in to between the landlord and the tenant. They do not apply to covenants entered into later between a tenant and her assignee, or between an assignee and subsequent assignees, as there will be no privity of estate between them.' They question if the equitable rules under *Tulk v Moxhay* would still apply. See Mee and Murphy (n 10). Note that this analysis related to the draft bill and not the legislation as subsequently enacted, but some interesting points arise in this article.

an improvement shall not apply provided planning permission has been obtained, or other conditions are met.[81] Effectively, the tenant is deemed not to have breached the terms of the lease by changing the user or making the improvement. However, the scope of this section is 'extremely limited'[82] and does not extend to covenants which would survive the acquisition of the fee simple.

Sections 66[83], 67[84] and 68[85] of the 1980 Act can be availed of where the landlord seeks to strictly enforce covenants in relation to alienation, user and improvements. The landlord can also grant a waiver of the covenant.[86] Other means of discharging leasehold covenants only arise where the lessee is entitled to buy out the freehold.[87] McGrath notes 'there is no effective method of removing a moribund or excessively burdensome leasehold covenant short of seeking to utilise (with their marked inherent limitations) the enfranchisement statutes'.[88] It is also possible to seek the consent of the landlord.

Arguments on granting freehold title

If apartment owners are granted freehold title, then they, and their successors in title, can avail of the enforceability of positive and negative covenants. The benefit and burden will run with the land. Freehold covenants created after 1 December

[81] The change of user or making of the improvement must have planning permission, be an exempted development or a planning consultation must have taken place. This provision is further restricted in that it only applies to lessees holding under a building lease or proprietary lease. These have the meanings assigned to them by section 4 and section 7 respectively of the Landlord and Tenant (Reversionary Leases) Act 1958. The provision is also limited in other respects. See Cannon (n 57).
[82] Cannon (n 57) 69.
[83] A covenant in a lease of a tenement absolutely prohibiting or restricting the alienation of the tenement shall have effect as if it were a covenant prohibiting or restricting such alienation without the licence or consent of the lessor.
[84] A covenant in a lease of a tenement absolutely prohibiting the alteration of the user of the tenement shall have effect as if it were a covenant prohibiting such alteration without the licence or consent of the lessor.
[85] A covenant in a lease of a tenement absolutely prohibiting the making of any improvement within the meaning of section 67(3) on the tenement shall have effect as if it were a covenant prohibiting the making of the improvement without the licence or consent of the lessor.
[86] This is required to be in writing by virtue of section 43 of Deasy's Act 1860.
[87] Landlord and Tenant (Ground Rents) (No. 2) Act 1978, s 28 as amended by section 77 of the Registration of Deeds and Title Act 2006. Under this provision certain covenants continue in full force and effect and thus it does not have the wide application of section 50 of the 2009 Act.
[88] McGrath (n 7) 636.

2009 are now legal interests that bind the whole world. Wylie points out that they are not like equitable interests, vulnerable to losing priority to a bona fide purchaser of a legal interest.[89] Similar to easements and *profits* created by express grant, if affecting registered land, they may be registered as burdens on the folio relating to the servient land[90] in order to preserve their enforceability against that land and the benefit can also be noted on the folio relating to the dominant land.[91]

Freehold title avoids the limited nature of a leasehold title which at some point in the future will expire and there is no risk of a lessee not having good marketable title[92] and being restricted to selling to a cash purchaser, if at all, when the lease has less than 70 years to run. Anecdotal evidence suggests that there are already some apartment owners who have this difficulty with management companies having to go to the effort and expense of granting reversionary leases.

In this situation, difficulties may arise if the management company does not hold the freehold. Legal title may remain with the developer, or the beneficial interest may not have been transferred, or the management company may have been struck off. [93] The owners may have to apply to court to remedy the position.[94]

Leases expire by effluxion of time. Will new ground rents legislation be required covering apartments when all these leases start to expire? How will the title be remediated? If a new lease is not granted but rent is paid and accepted, then they

[89] Wylie (n 63) 149.
[90] Under section 69(1)(kk) of the 1964 Act as inserted by section 129 of the 2009 Act.
[91] Registration of Title Act 1964, s 82.
[92] As agreed between the Law Society and lending institutions under the Certificate of Title system for residential mortgage lending. The title must be freehold, or leasehold with an unexpired term of at least 70 years, unless the solicitor is satisfied that the lessee has a statutory right to purchase the fee simple under the ground rents legislation. If Land Registry title, it must be either absolute or good leasehold.
[93] Under section 28 of the State Property Act 1954, where a body corporate is dissolved all land which was held (other than land held by such body corporate upon trust for another person) shall, immediately upon such dissolution, become and be the property of the State. Hence consent to any action would be required from the Minister of Finance or a waiver of the State’s right to such property would need to be obtained.
[94] *Re Heidelstone Co Ltd* [2007] 4 IR 175 the original development company had been dissolved before transferring the common areas. Laffoy J found that the company constituted a ‘trustee “who cannot be found”’ and that the unit owners holding under long leases were the beneficiaries of the trust. The court made an order vesting the common areas in the new owner management company under section 26 of the Trustee Act 1893.

will become periodic tenancies which can be terminated by notice to quit. These issues will be avoided for apartments owners holding freehold title.

If disputes break out over, for example, unpaid service charges and the management company is not functioning effectively, is there a danger that some apartment owners will hinder the granting of reversionary leases to other apartment owners? Given the general length of such leases, apartment owners would not be entitled to the protection of the Residential Tenancies Act 2004, as amended.[95] Furthermore, they may not be entitled to rights of renewal under the 1980 Act. They would not have the required business user for a business equity.[96] Similarly, they would not have carried out improvements sufficient to gain an improvement equity.[97] While there remains the possibility of a long possession equity,[98] it is unclear how the courts would respond to such an application. Moreover, if successful, the tenant would only gain a 35-year lease.[99]

If granted a freehold title apartment, owners could avail of section 50 of the 2009 Act. However, this could equally be seen as a reason not to grant such title (particularly from the perspective of the management company). Nevertheless, in the case of an apartment block it is likely that an individual application by one apartment owner may have a low chance of success as it would impact all apartment owners.

The question arises as to whether a leasehold title provides more security and stronger remedies for the management company. A lease will have provisions in relation to breach and termination. Theoretically, a management company could forfeit the lease in the event of a breach. The courts are disinclined to forfeit commercial leases, with landlords often having to apply to court several times

[95] The Act does not apply to tenancies of more than 35 years. See the Housing (Miscellaneous Provisions) Act 2009, s 100.
[96] Landlord and Tenant (Amendment) Act 1980, ss 3 and 13(1)(a).
[97] ibid ss 13(1)(c) and 45.
[98] The long possession or long occupation equity under section 13(1)(b) is no longer available to dwellings to which the Residential Tenancies Act 2004, as amended applies. However, these tenancies tend to be considerably longer e.g. 500 years, 999 years. See section 192(2) of the Residential Tenancies Act 2004 which also captures the improvements equity. Hence, the possibility of an application under section 13(1)(b) remains.
[99] See Landlord and Tenant (Amendment) Act 1980, s 23.

before being successful. Hence, it is difficult to see how a court would grant an order to forfeit a lease of an apartment which is a residential property.

Conclusion

Apartment schemes first appeared in Ireland in the 1970s and became more prevalent from the 1990s. They are now a fixed part of our built environment. Initially there was no set structure for such schemes and conveyancers developed their own methods of addressing the complexity of communal living and ensuring this was reflected in the legal paperwork. Over time, difficulties emerged *inter alia* with the transfer of common areas to the management company, developers retaining control and a lack of transparency in the running and financing of apartment developments. Many of these practical difficulties were, to a greater or lesser degree, addressed by the Multi-Unit Developments Act 2011. However, this legislation did not address the difficulties arising when apartment leases expire.

The ground rents legislation and the 2009 Act have, in different ways, restricted the further creation and expansion of complex pyramid titles.[100] The 2009 Act also removed the difficulties with the enforcement of freehold covenants so that leases are no longer required to be created, and apartment owners have the possibility of a freehold title. All covenants can be included in a conveyance or transfer of the freehold. The concept of flying freeholds has been recognised in law for centuries. It is submitted that the time has come for practitioners to embrace the freehold apartment scheme.

[100] In relation to dwelling houses and the creation of fee farm grants.