

## NON-DEROGATION FROM GRANT

by

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*Midtown v City of London Real Property Co* [2005] 1 EGLR 65 (rights to light).

*Esquire v HSBC* [2006] HKCA 313 (breach of fiduciary duty and economic duress by bank regarding mortgage of Hong Kong office block);

*Clear Channel UK Ltd v. Manchester City Council* [2006] 04 EG 168 (whether advertising hoarding licences are business tenancies);

*Coors Holdings v Dow Properties* [2007] NPC 37 (construction of rent review clause)

*Coleman v. Ibstock Brick Ltd* [2008] EWCA Civ 73 (mineral rights).

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There is said to be a principle or maxim<sup>1</sup> that one must not derogate from one's grant. A person must not give something with one hand and take away the means of enjoying it with the other.<sup>2</sup> The idea is said to be imposed in the interests of fair dealing<sup>3</sup> or common honesty.<sup>4</sup>

Perhaps because the idea that one should not derogate from one's grant seems axiomatic, its origins are obscure. It was certainly fully formed and flourishing by 1663<sup>5</sup> and has been said to be older than the Year Books.<sup>6</sup>

Its earliest applications seem to have concerned rights to light. If James owns a house and some adjoining land and sells the house to Alexandra but keeps the land, Alexandra can prevent him building on the adjoining land so as to obstruct the light passing over it to the house on the basis that, if he did so, he would be derogating from his grant. It was established that the principle applied not just to the original vendor and purchaser but also to their successors and applied as much to leases as to freehold conveyances.<sup>7</sup>

With the advent of the industrial revolution the principle was applied in a new direction. Land was conveyed for particular purposes such as for the construction of a railway or for an iron foundry. The question which arose was whether the former owner of the land could work the minerals in the adjoining land where this might endanger the undertaking being carried out on the land conveyed. In holding that he was not entitled to do so the court again relied on the principle of non-derogation from grant.<sup>8</sup>

The rights to light cases led directly to the doctrine of *Wheeldon v. Burrows*.<sup>9</sup> The case laid down two rules: first that a grant passes with it continuous and apparent easements, that is those necessary for the reasonable enjoyment of the land granted; and secondly that subject to exceptions, such as ways of necessity, if the grantor intended to reserve rights he should do so expressly. Both rules were expressed to be founded on the principle of non-derogation from grant.

The doctrine of *Wheeldon v. Burrows* is now recognised as a free standing doctrine governing the circumstances in which easements can be implied into conveyances. The existence of that separate doctrine and also the application of

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<sup>1</sup> *Browne v Flower* [1911] 1 Ch 219

<sup>2</sup> *Birmingham Dudley & District Banking Co v. Ross* (1888) 38 Ch D 295 per Bowen LJ

<sup>3</sup> *Johnston & Sons v. Holland*[1988] 1 EGLR 264 at 268

<sup>4</sup> *Harmer v. Jumbil (Nigeria) Tin Areas Ltd* [1921] 1 Ch 200

<sup>5</sup> *Palmer v. Fletcher* (1663) 1 Lev 122

<sup>6</sup> *Birmingham Dudley & District Banking Co v. Ross* (1888) 38 Ch D 295 per Bowen LJ

<sup>7</sup> see eg. *Palmer v. Fletcher* (1883) 1 Lev 122, *Compton v. Richards* (1841) 1 Price 27, *Coutts v. Gorham* (1829) Moo & M 396

<sup>8</sup> see eg. *Siddons v. Short* (1877) 2 CPD 572 and *Rigby v. Bennett* (1882) 21 Ch D 559. Cf. *North Eastern Ry v. Elliott* (1860) 1 J & H 145

<sup>9</sup> (1878) 12 Ch D 31

section 62 of the Law of Property Act 1925 (which has similar effect) means that it is rarely necessary to resort to the principle of non-derogation from grant in the case of rights to light or other easements. Given the dearth of modern cases on mineral rights, one might be forgiven for thinking that the doctrine of non-derogation from grant can thus safely be consigned to history.

However the principle has found new life in two other directions. Firstly it has been applied to landlords of shopping centres to impose responsibility on them in the manner in which they manage the centre and let other units within it. The application of the doctrine in this area seemed unpromising at first since it was held in 1938 that it was not a derogation from grant for a landlord to let an adjoining shop for a competing trade.<sup>10</sup> However more recently it has been held that a landlord derogated from its grant by failing to control a nuisance caused by the presence of a pawnbroker's shop in an adjoining unit in a shopping mall;<sup>11</sup> and under the same principle a landlord was prevented from adversely affecting a tenant's trade by allowing kiosks to be set up selling competing products;<sup>12</sup> and London Underground was prevented from closing an exit to the tube so as adversely to affect the business of a kiosk positioned strategically near that exit.<sup>13</sup> In another case a claim that the creation of a Virgin Megastore within a shopping mall was a derogation from grant failed but the court held that the principle nevertheless probably required the landlord not to alter the common parts of the centre so as to cause it to lose its character as a retail shopping mall.<sup>14</sup>

The second way in which the principle has found new life is in areas which do not involve transfers or leases of real property at all. As long ago as 1896 the House of Lords held that a vendor of a business could not canvass his former customers since in doing so he would be derogating from his grant.<sup>15</sup> More recently it was held that a car manufacturer would be derogating from its grant if it sought to rely on its copyright in car parts so as to prevent car owners from buying replacement parts from anyone other than the manufacturer.<sup>16</sup>

These new applications have led to uncertainty as to the scope and application of the principle. It is unclear what legal test is to be applied in any given case to determine whether or not the doctrine applies. In *Platt v. London Underground Ltd*<sup>17</sup> Neuberger J (as he then was) considered the application of the principle to leases. His judgment contains in a list of numbered points a valuable distillation of the relevant case law. However, as he recognised, that case law does not provide a clear test to be applied in order to determine whether or not the landlord has derogated from his grant. This is illustrated by points 7 and 8 in his list which are as follows:

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<sup>10</sup> *Port v. Griffith* [1938] 1 All E R 295. See also *Romulus Trading Co Ltd v. Comet Properties Ltd* [1996] 2 EGLR 70

<sup>11</sup> *Chartered Trust plc v. Davies* [1997] 2 EGLR 83

<sup>12</sup> *Oceanic Village v. Shirayama Shokusan Co Ltd* [2001] L & T R 478

<sup>13</sup> *Platt v. London Underground Ltd* [2001] 2 EGLR 121

<sup>14</sup> *Petra Investments v. Jeffrey Rogers plc* [2000] 3 EGLR 120.

<sup>15</sup> *Trego v. Hunt* [1896] AC 7

<sup>16</sup> *British Leyland Motor Corporation Ltd v. Armstrong Patents Ltd* [1986] AC 577

<sup>17</sup> [2001] 1 EGLR 121

*“7. One test that is often helpful to apply where the act complained of is the landlord’s act or omission on adjoining land is whether the act or omission has caused the demised premises to become unfit or substantially less fit than the purpose for which they were let...”*

*8. However, even that formulation, although helpful, may in many cases be too generous to the tenant. Thus permitting a competing business to be run from a next-door property was held not to be derogation from grant: see Port v, Griffith [1938] 4 All E R 295, but compare Oceanic Village Ltd v. Shirayama Shokusan Co Ltd ...”*

This uncertainty is compounded by the lack of clarity in the relationship between the principle of non-derogation from grant and the covenant for quiet enjoyment. In *Southwark London Borough Council v. Mills*<sup>18</sup> Lord Millett said that there seems to be “little if any difference” between the two principles and in *Platt v. London Underground Ltd*<sup>19</sup> Neuberger J said that there was “a close connection, indeed a very substantial degree of overlap” between the doctrine of non-derogation from grant, the covenant for quiet enjoyment and implied terms of a contract.

What is needed is a clear conceptual foundation for the principle. *Megarry & Wade*<sup>20</sup> states that the principle:

*“is sometimes said to rest upon an implied promise; but it is in truth an independent rule of law, and has nothing to do with restrictive covenants or the equitable doctrine of notice.”*

This passage has received the approval of both Lord Denning<sup>21</sup> and of Nicholls LJ (as he then was).<sup>22</sup> However, if true, this is both unhelpful and troubling. It is unhelpful since it does not assist the elucidation of the conceptual basis of the principle simply to say that it is not like other established principles; and it is troubling since it suggests that the principle might rest on some as yet undiscovered conceptual foundation with as yet unknown characteristics.

Apart from seeking to identify the question of what test is to be applied to decide whether a person is in derogation of grant, the search for the conceptual basis of the principle ought also to cast light on the question of the extent to which the principle of non-derogation from grant is or can create a right in property which binds successors of the grantor and benefits successors of the grantee. It is clear that insofar as the principle of non-derogation from grant encompasses what is now called the *Wheeldon v. Burrows* doctrine then it gives rise to easements and thus property rights. Other cases might be explained on the basis that they give rise to restrictive covenants but the passage in *Megarry & Wade* cited above says that it has nothing to do with restrictive covenants at all.

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<sup>18</sup> [2001] 1 AC 1 at 23F

<sup>19</sup> supra

<sup>20</sup> Law of Real Property 6<sup>th</sup> ed. paragraph 18-077

<sup>21</sup> in *Molton Builders Ltd v. City of Westminster LBC* [1976] 1 EGLR 150

<sup>22</sup> in *Johnston & Sons v. Holland* [1988] 1 EGLR 264

A recent case has brought to the fore the question of the extent to which the principle creates property rights which bind third parties. In *Johnston & Sons v. Holland*<sup>23</sup> a lessor granted a lease of a building reserving to herself the right to erect advertisements on the flank wall of the building. The lessee as in effect grantor of the right reserved to the lessor was under an obligation not to derogate from his grant. The lease was assigned to a company which subsequently acquired a tenancy of adjoining land on which it erected a structure which obscured the lessor's advertising hoarding. The Court of Appeal overruled earlier authority<sup>24</sup> to the effect that the principle applied only to land owned by the grantor at the time of the grant and held that it prevented the company doing anything on its after acquired land designed to obscure the hoarding.

The important question which the court left open was what would happen if the company surrendered its tenancy of the adjoining land. To answer that question we need to understand the nature of the proprietary interest, if any, created by the principle of non-derogation from grant. *Megarry & Wade* takes the view that it is not correct to say that insofar as the principle creates proprietary interests it creates easements or restrictive covenants. An important academic contribution to the debate by Professor Elliot in 1964 reached the same conclusion.<sup>25</sup> He regarded rights arising from the principle as creating a novel and anomalous type of property right halfway between easements and covenants.

In my view the resolution of the debate about the conceptual basis of the doctrine of non-derogation from grant requires at the outset a distinction to be made between two quite different questions that is:

1. Whether, as between the immediate parties, the doctrine applies; and
2. What effect, if any, the doctrine has as between successors.

Not only must the first question be decided first, but the answer to it is unaffected by any conclusion which might be reached on the second question.

I contend that the answer to the first question depends simply on the true construction of the instrument in question in light of all the admissible factual background and taking into account its express and implied terms. This contention is supported by the numerous references in the cases both to the implication of obligations and to the construction of the grant in the light of the surrounding circumstances.<sup>26</sup> But more importantly it provides a coherent and illuminating explanation for the decisions reached in those cases.

It explains for example why the principle did not apply in *North Eastern Ry v. Elliot*.<sup>27</sup> In that case the grantor's adjoining land contained an abandoned mineshaft which was full of water. The grantor wanted to drain the mineshaft and work the mine again but the water in the mineshaft gave support to the grantee's land. The principle

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<sup>23</sup> [1988] 1 EGLR 264

<sup>24</sup> eg. *Booth v. Alcock* (1873) 8 Ch App 663; *Beddington v. Atlee* (1887) 35 Ch D 317

<sup>25</sup> (1964) 80 LQR 244. But see (1965) 81 LQR 28 (Peel).

<sup>26</sup> see eg. *Birmingham Dudley & District Banking Co v. Ross* (1888) 38 Ch D 295

<sup>27</sup> (1860) 1 J & H 145 at 153

of non-derogation from grant did not apply since the parties were well aware that flooded mines are sometimes reopened and there was no stipulation in the contract to the effect that the mine could not be reopened. In other words, construing the grant in the light of the surrounding circumstances there was no room for the implication of an obligation on the part of the grantor not to drain the mine.

It also explains why the principle did not apply in *Lyttleton Times Co Ltd v. Warners Ltd*<sup>28</sup> where a residential tenant on the upper floors of a building was disturbed by the printing presses operated by the landlord on the ground floor. No term was to be implied preventing the landlord from operating its printing presses on the ground floor since both parties contemplated at the time of the residential lease that it would use the ground floor for that purpose.

Perhaps of greater practical relevance, an analysis based on the construction of the contract in the light of its express and implied terms provides a powerful explanation of the superficially conflicting cases on the leases of shops within shopping centres and the like. The general principle as illustrated by *Port v. Griffith*<sup>29</sup> and *Romulus Trading Co Ltd v. Comet Properties Ltd*<sup>30</sup> is that it is not within the reasonable contemplation of parties to a lease that the landlord was thereby accepting any restriction on the purposes for which it could let other units in the centre and so no term will be implied to that effect and the principle of non-derogation from grant will not apply.

The position was different in *Chartered Trust plc v. Davies*<sup>31</sup> where a landlord was held liable to a tenant for having derogated from its grant by failing to control a nuisance caused by a pawnbrokers' business in an adjoining unit in the shopping mall. The difference in this case was that the landlord retained rule making powers in relation to the development and the tenants were required to pay a service charge for management of the centre. It was contemplated by the parties that the landlord would exercise its power of control over the common parts and accordingly it had an implied obligation to do so. It was in breach of that obligation when it failed to take any steps to stop the pawnbroker's clientele obstructing access to the adjoining shop.

*Oceanic Village v. Shirayama Shokusan Co Ltd*<sup>32</sup> on the face of it represents an even more direct challenge to the principle that a landlord owes no obligation as to the purposes for which it let adjoining units since the court found that it owed an obligation to the lessee of an aquarium gift shop not to permit the sale of aquarium related products from other kiosks in the area. What marked the case out as different from *Port v. Griffith* was that it was not simply the case that the unit was let as an aquarium gift shop it was to be *the* gift shop for the aquarium and so, for example, it had direct access from the access from the aquarium, and the lessee was required to ensure that a certain proportion of its sales represented aquarium-related products, and its staff were required to wear London Aquarium uniforms. In those circumstances the court

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<sup>28</sup> [1907] AC 476

<sup>29</sup> [1938] 1 All E R 295

<sup>30</sup> [1996] 2 EGLR 70

<sup>31</sup> [1997] 2 EGLR 83

<sup>32</sup> [2001] L & T R 478

held that it was contemplated by both parties that it would be the only shop which the landlord permitted to sell such products.

The final case, *Petra Investments v. Jeffrey Rogers plc*<sup>33</sup> is the most difficult. The question was whether a landlord of a shopping centre in the Kings Road in London apparently originally intended for “locally resident middle-aged women” was in derogation from its grant in reorganising the centre and opening a Virgin Megastore there. Unsurprisingly the judge held that this was not a derogation from grant. However he expressed the view *obiter* that the landlord was under an obligation not to alter the centre so that it lost its character as a retail shopping mall and that, although the landlord was not under an obligation to retain the existing mix of user, it was required to take into account the expectations of the existing lessees when exercising its powers of letting vacant units.

Whether or not the judge was correct in the *obiter* views he expressed seems to me to be open to doubt. However what is more important is to recognise the basis of these remarks. They are based on the implication of terms into the leases of the units in the mall having regard to the true construction of the leases and taking into account the circumstances in which they are entered. Since this is dependent on the particular facts of the individual case they do not set any precedent for the obligations that may be owed by landlords of other shopping centres. In each case it is necessary to examine carefully the factual background against which the leases were executed and ask oneself whether or not in those circumstances and in the light of what would have been in the reasonable contemplation of the parties at the time of the grant a term should be implied into the leases imposing some particular obligation on the lessor.

In my view it is only having construed the contract and implied whatever terms are required in the circumstances that it is then appropriate to move on to the second question to consider what sort of property interest if any is created by the term which has been implied into the contract. Since, as mentioned above, the doctrine is not limited to grants of property interests there may be no question at all of it creating any proprietary right being created. In other cases, as we have seen, the right in question clearly creates an easement such as a right to light. Where the right in question is in the nature of a covenant there is no reason why if it occurs in the context of a transfer of freehold land it should not amount to a restrictive covenant or if it occurs in the context of a lease it should not amount to a leasehold covenant so that the benefit and burden of the covenant pass to successors in title of the covenantor and covenantee in accordance with the provisions for the transmissibility of such covenants.

One fundamental distinction between contract law and property law is that, although there is no limit on the sort of contractual rights that can be created, only such property rights as are recognised by the law can exist. This so called *numerus clausus* rule is fundamental to English property law.<sup>34</sup> It means for example that although the list of easements is not closed, a right to a view cannot amount to an easement.<sup>35</sup>

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<sup>33</sup> [2000] 3 EGLR 120

<sup>34</sup> see generally B Rudden, ‘Economic Theory v. Property Law: The *Numerus Clausus* Problem’ in Eekelaar & Bell (eds.) *Oxford Essays in Jurisprudence*, 3<sup>rd</sup> series (Oxford OUP 1987) 244.

<sup>35</sup> *William Aldred’s Case*(1610) 9 Co. Rep. 57b

If the principle of non-derogation from grant were capable of creating interests in land which were neither easements nor covenants and did not amount to any other recognised interest simply on the basis that a term should be implied into a grant this would be surprising indeed. One would be entitled to ask why it was that if a term were implied into a grant by virtue of the principle of non-derogation from grant it should be capable of giving rise to a novel interest in land and yet if the term appeared expressly in the grant so that there was no need to rely on the principle it would not amount to such an interest. Yet this is the apparent effect of the passage of *Megarry & Wade* mentioned above that was cited with approval in *Molton Builders Ltd v. Westminster LBC*<sup>36</sup> and in *Johnston & Sons v. Holland*.<sup>37</sup>

The passage in *Megarry & Wade* rests for its authority on the first instance judgment of Neville J in *Cable v. Bryant*.<sup>38</sup> A company conveyed a stable to the claimant which was ventilated by apertures on the boundary of open land which was owned by the company but let to a third party. The company conveyed the adjoining land to the defendant and the third party lessee joined in the conveyance so that the term of the lease came to an end. An injunction was granted to restrain the defendant from erecting anything on the yard to as to obstruct the apertures in the stable on the basis that if it did so it would be in breach of the principle against derogation from grant. The defendant argued that the right was not capable of amounting to an easement *inter alia* because in light of the fact that the adjoining land was let at the time of the conveyance it would have been a grant in reversion and easements could not be granted in reversion. He argued that if, alternatively, it amounted to a restrictive covenant it would not bind him because he was a bona fide purchaser of the adjoining land without notice of the covenant.

The judge accepted that the right was not an easement but held that that it was binding on him on the basis that the principle of non-derogation from grant was a principle of law not equity and did not depend on the implication of a covenant. As has been noted by one commentator,<sup>39</sup> the case is highly unsatisfactory since at the date of the conveyance to the claimant, the lease of the adjoining land had 28 years left to run and, it being reasonable to assume that the claimant knew about this lease, there was no reason for him to think that the grantor was undertaking any obligation to maintain the ventilation of the stable during the course of the lease. The lessee was not bound by any obligation not to obstruct the ventilation to the stables and accordingly it is difficult to see why it makes any difference that, in addition to taking an assignment of the lessee's interest, the defendant also acquired the freehold reversion.

The only other case in which the question of the precise basis of the principle appears to have been material to the decision was *Woodhouse & Co Ltd v. Kirkland (Derby) Ltd*.<sup>40</sup> The claimant had an existing right of way over the defendant's land acquired by prescription. The question which arose was whether the conveyance of a small piece of land by the defendant to the claimant near its entrance to the claimant's

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<sup>36</sup> [1976] 1 EGLR 150

<sup>37</sup> [1988] 1 EGLR 264

<sup>38</sup> [1908] 1 Ch 259

<sup>39</sup> Peel (1965) 81 LQR 28

<sup>40</sup> [1970] 1 WLR 1185

land gave the claimant a right of way of a greater width on the basis of non-derogation from grant.

During the course of the hearing the question of the basis of the principle of non-derogation from grant became material since the offending posts were erected after the date of issue of the writ. If the principle of non-derogation from grant depended on the implied grant of an easement then there was no difficulty in obtaining the declaratory relief sought as to the width of the right of way. However if it did not depend on implied grant (and it was not argued that it depended on an implied covenant in that case) no cause of action arose until after the issue of the writ and so the claimant's action was premature. The judge held that it did not depend on implied grant and accordingly the action could not be maintained.

Again the authority ought not to cause us to hesitate long in rejecting the view that the principle of non-derogation from grant creates a new hitherto unknown property right for two reasons. Firstly the question of the precise nature of the property right in question did not arise directly in the case at all. It concerned the original grantor and grantee and no question of the right passing to or binding successors in title arose. Secondly the procedural point upon which the action failed would undoubtedly be decided differently today. Not only would it ordinarily<sup>41</sup> be no bar that the cause of action had arisen after the issue of the claim form, the court would be able to grant a declaration that a particular action on the part of the defendant would amount to a derogation from grant even if that action had not yet been taken so long as the question was not wholly hypothetical.

So far as authority is concerned the only case so far as I am aware where the principle of non-derogation from grant has been applied to successors in title and which cannot be explained on the basis that the principle creates a covenant or an easement is *Cable v. Bryant*. In my view that unsatisfactory authority is too slender a basis to hold that a new species of property right has been born.

This analysis of the principle of non-derogation from grant as depending firstly, so far as the extent of the obligation is concerned, on the implication of terms into the grant and, so far as its proprietary effect is concerned, on the question of whether that term so implied amounts to a recognised property interest, casts light on the interrelationship between the doctrine of non-derogation from grant and the implied covenant for quiet enjoyment. There are cases in which a claim based on the covenant for quiet enjoyment has failed on the facts and yet a claim based on non-derogation from grant has succeeded.<sup>42</sup> But it is difficult to draw reliable conclusions from such cases for two reasons. Firstly there are also dicta of similar antiquity to the effect that they are identical in scope.<sup>43</sup> Secondly and more importantly, quiet enjoyment originally had a technical meaning<sup>44</sup> and was limited to direct physical interference with the tenant's use and enjoyment of land. In *Southwark LBC v. Mills*<sup>45</sup> the House of Lords

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<sup>41</sup> save perhaps if a question of limitation arose

<sup>42</sup> see eg. *Grosvenor Hotel Co v. Hamilton* [1894] 2 QB 836

<sup>43</sup> eg. *Robinson v. Kilvert* (1889) 41 Ch D 88 at 95

<sup>44</sup> *Southwark LBC v. Mills* [2001] 1 AC 1 at 10 per Lord Hoffmann, at 22 per Lord Millett

<sup>45</sup> [2001] 1 AC 1

held that the covenant for quiet enjoyment was not subject to these limitations. Interestingly it also held that whether or not a particular matter falls within the scope of the covenant depends on the proper construction of the covenant in light of the surrounding circumstances known to the parties at the time the lease was granted.<sup>46</sup> This inquiry corresponds precisely with the inquiry as to the scope and application of the principle of non-derogation from grant.

The difference between the covenant for quiet enjoyment and the principle of non-derogation from grant relates only to the nature of the proprietary interest, if any, created. The covenant for quiet enjoyment imposes a covenant on the landlord in his capacity as landlord and so it is only implied obligations which amount to landlord covenants which are within the scope of the covenant quiet enjoyment. Where the principle of non-derogation from grant would lead to the implication of a covenant on the landlord as such then there is no difference between the scope of the two principles at all. However the principle of non-derogation from grant is potentially wider in a number of respects. Firstly it is of course not limited to obligations in leases. Secondly, even as regards leases it is not limited to obligations owed by the lessor since it may also impose obligations on the lessee.<sup>47</sup> Thirdly it is not limited to covenants owed by a landlord as such. It may also give rise to restrictive covenants binding adjoining land of the landlord for example or easements.

The existence of the principle of non-derogation from grant appears to make the covenant for quiet enjoyment redundant since all cases of breach of the covenant for quiet enjoyment will fall within the scope of the principle of non-derogation from grant. That would certainly appear to be the case where an implied covenant for quiet enjoyment is relied on. Where there is an express covenant for quiet enjoyment this will exclude the implied covenant<sup>48</sup> and accordingly a limitation on the express covenant might prevent the tenant complaining about a breach of the covenant for quiet enjoyment in a particular case. However a limitation on the express covenant will not necessarily prevent the principle of non-derogation from grant having a wider scope.<sup>49</sup> Thus an action might be based on the principle of non-derogation from grant which cannot be based on a breach of the covenant for quiet enjoyment. Again there is unlikely to be any advantage in relying on a breach of the covenant for quiet enjoyment where such an action is available apart from the obvious one that existing case law may make it easier to point to authority that the covenant, rather than the principle of non-derogation from grant, is broken in any particular case.

Finally it is useful to return to *Johnston & Sons v. Holland*<sup>50</sup> to apply the method of approach set out above which considers first the construction of the grant and its express and implied terms in the light of the admissible factual matrix at the time of the grant and secondly whether and if so what recognised proprietary interest is thereby created. It will be recalled that in that case it was held that the lease reserved a right to the lessor to erect advertisements on the flank wall of the building and that the company

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<sup>46</sup> *ibid.* at 12 per Lord Hoffmann, at 23-25 per Lord Millett

<sup>47</sup> see eg. *Johnston & Sons v. Holland* [1988] 1 EGLR 264

<sup>48</sup> *Line v. Stephenson* (1838) 4 Bing NC 678

<sup>49</sup> *Oceanic Village v. Shirayama Shokusan Co Ltd* [2001] L & T R 478

<sup>50</sup> [1988] 1 EGLR 264

which took an assignment of the lease acted in derogation from grant when it acquired a lease of adjoining land and erected a structure on that adjoining land in order to obscure the hoarding.

So far as the question of whether the obligation in question extended to after acquired adjoining land is concerned, Nicholls LJ reasoned as follows. Firstly he considered a case where a lessor let the flank wall of a building to a lessee for an advertising site. It is, he said, necessarily implicit that the lessor could not erect anything on adjoining land which he then owned so as to obscure the advertising hoarding. Secondly he considered the case where the land is subsequently acquired by the lessor and asked rhetorically whether the position should be any different. Finally he held that this second example was materially the same as the present case where it was the lessor who reserved the right to erect advertising hoardings.

It is interesting to note how he dealt with the relevance of the factor that at the date of the lease the grantor did not yet own the adjoining land in question. He said this:

*“Of course in considering what is necessarily implicit in a transaction in a case where the grantor owns no other land, very great weight indeed must be given to that factor. It will be a very exceptional case for it to be necessarily implicit in a lease that the activities of a lessor who owns no adjoining land, and has no plans to buy any adjoining land, are to be restricted on the adjoining land should he ever become owner or tenant of that land. Whether it is so implicit or not will depend on all the circumstances, including the purpose of the grant and the nature of the activities sought to be restrained. But if the facts in a given case point clearly to such a restriction being implicit, I can see no reason in principle why the law should treat that case differently from one where the lessor already owns the adjoining land at the time of the lease. Why, I ask myself, should the law, as much in such a case as any other, not give effect to what, echoing the words of Bowen LJ in Myers v. Catterton (1889) 43 Ch D 470 at p481 “was the obvious intention of the parties, so as to give the transaction between them that minimum of efficacy and value, which upon any view of the case, it must have been their common intention that it should have?”*

There could be no clearer illustration in my view of the fact that the scope of the principle of non-derogation from grant in any case depends simply on the implication of terms into a grant applying ordinary contractual principles.

As to the nature of the proprietary interest, if any, created by the obligation, there were three possibilities: an easement, a restrictive covenant and a tenant covenant. The nature of the obligation meant that there was no question of it giving rise to an easement and Nicholls LJ rightly discounted restrictive covenants on the basis that the original lessee had no interest in the adjoining land at the date of the lease.

This left a tenant covenant, that is a covenant given by the tenant not to erect a structure on any adjoining land which it should subsequently acquire so as deliberately to obscure the advertising hoarding. If it amounted to a tenant covenant there was no difficulty in holding that a successor in title of the lessee became bound by it. This also helps to provide an answer to the question of whether the obligation would bind the freehold owner of the adjoining land if the company's lease of that land came to an end. If the lease came to an end by effluxion of time or was forfeited and the freehold owner then obscured the hoarding there seems no reason to hold it liable.

The position if the lease is deliberately surrendered in order to avoid the obligation is more difficult to resolve. The freehold owner would no doubt argue that it was relying on its reversionary interest and not on the lease. There are at least two possible arguments that might be put forward in answer. One argument might be to say that a surrender of a lease takes effect as an assignment of the lease followed by merger and accordingly that the freehold owner would in fact have derived title from the lessee and should remain bound insofar as the lessee was bound. However this argument should fail since the covenant is not a restrictive covenant but a tenant covenant and so does not run with the lease of the adjoining land at all. .

A second and simpler solution is to hold that the freehold owner is not liable at all (save possibly for the tort of conspiracy to cause loss by unlawful means) but that the lessee is liable under the principle of non-derogation from grant for deliberately creating a position designed to prolong into the future the obstruction of the hoarding. It does not lie in the mouth of the lessee to say in that event that the obstruction on the adjoining land is being carried out by the freehold owner and not by him where he deliberately surrenders his lease to the freehold owner knowing and intending that the freehold owner will continue the obstruction.