Development Disputes

Current issues for property litigators

Development contracts and the privity trap

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The importance of contractual relationships

Contractual relationships dominate the law relating to the acquisition and disposal of development land. A developer may have one, several or many landowners from whom it must acquire an interest in the site. It will bring them into the project by way of rights of pre-emption, options, conditional or unconditional contracts. In time the developer will also bind itself in contract to those who wish to buy the developed units and perhaps also an estate management company and others.

One characteristic of these contractual relationships is their longevity. Many years may pass from the developer's acquisition of contractual rights over the first tranche of land, through the process of acquiring the whole site, the completion of the development works, to the eventual sale of the completed houses, offices or shops. Long after the acquisitions have been completed, the vendor and developer may continue to be bound by contractual rights and obligations relating, for example, to overage. Even the relationship between developer and purchaser may endure for some years, if the units have been acquired 'off-plan'.

The long-term nature of contracts relating to development land means that there is a good chance that the people who end up with the financial interest in completion of the contract are not those who originally entered into it. The economics of the deal may change; the developer or vendor may sell on. A business relationship nurtured over years may be overtaken by the insolvency of one or other party or the intervention of a lender. An off-plan purchaser may find him- or herself unable to raise the finance needed to complete and decide to assign the contract instead. If there is a single lesson which we have learned from the 2008 credit crunch and its aftermath, it must be to expect the unexpected: things often do not work out the way in which the contracting parties assume they will at the outset.

This article explores some of the legal issues which arise when the person who wishes to enforce a contract relating to development land, or the person who is said to be bound by that contract, is not an original contracting party. What I shall call 'the privity trap' occurs when a person who has an interest in enforcing a contract cannot do so effectively. In its most acute form it can mean that a person is bound by a contract of which he or she cannot require performance. Such issues have been a fruitful source of dispute in recent years.

The privity trap

The starting point for any discussion is the principle of privity of contract: that a person cannot acquire rights or be subjected to liabilities arising under a contract to which he or she is not a party. To this principle there are many exceptions, some at common law, some in equity and some by virtue of statute. An obvious statutory inroad into the principle has been made by the Contracts (Rights of Third Parties) Act 1999, but as the application of the Act is almost invariably excluded by express contractual provision, it has very little part to play in relation to contracts concerning development land.

Let us start by considering a very simple arrangement between vendor and developer. The vendor grants the developer an unconditional option to purchase a freehold development site. The option may be exercised within a particular period – say 21 years – and if exercised will give rise to a binding contract for sale. In such a straightforward case there is very little difficulty about third party rights. The developer can, in the absence of any contractual provision to the contrary, assign the benefit of the option to a third party. As long as the assignment complies with s.136 of the Law of Property Act 1925, once notice has been given of it, the assignee will be able to exercise the option and enforce the resulting contract of sale in its own name against the vendor.

Furthermore the developer will register a notice of the option as an estate contract[1] against the vendor's registered title. This means that if the vendor sells on the land, the new owner will take subject to the option. If the new owner were to refuse to complete after the assignee had exercised the option, the assignee could sue the new owner for specific performance and obtain completion of the contract in its favour. By these two routes, assignment of the benefit and registration of the burden, the option becomes binding as between developer's assignee and new owner, neither of whom are the original parties to the agreement.

Things become more complicated, however, if instead of a simple option, we think about a bilateral contract for the sale and purchase of freehold land, whether conditional or unconditional. In the context of development land, it is highly likely that such an agreement will impose on both developer and vendor a number of obligations going beyond the obligation on the vendor to sell and on the developer to buy. For example, the developer may contract to use its reasonable endeavours to obtain planning permission; to build out the development to certain standards and within a particular timescale; to pay overage. The vendor may be under a positive duty to assist with the planning process, for example by agreeing plans and entering into planning agreements; he or she may promise not to apply for a competing planning permission or not to make changes to the condition or occupation of the land.

As in the case of the simple option, unless there is anything in the contract to prevent it, both vendor and developer may each assign the benefit of their contract to a third party. But it is a cardinal principle that without the consent of the other contracting party only the benefit, and not the burden, of contractual obligations may be assigned.[2] This important point is sometimes obscured by the fact that we often talk about "assignment of a contract", when what we really mean is "assignment of the benefit of a contract".[3]

Some benefits so assigned may, on their proper construction, be conditional or qualified, so that the assignee cannot claim to have acquired an unqualified right without having shouldered a burden to which that right is inherently subject. This is the doctrine of 'reciprocal benefits and burdens' considered in *Halsall v Brizell*.[4] But it does not follow that the assignee must accept the burden of all the obligations undertaken by its assignor, just because they happen to form part of the same contract.[5]

Consequently, if both vendor and developer execute an assignment of their rights under the development contract, the result is a four-way split of rights and obligations. The vendor's assignee obtains the benefit of the developer's promises to apply for planning permission, to complete the purchase and to carry out the development. But the burden of those obligations remains with the original developer and does not pass to the developer's assignee. Equally the developer's assignee obtains the benefit of the vendor's obligations to agree plans, not to apply for a competing planning permission, not to change the change the condition of the site and to complete the sale. But the

1 The interest created by an option is an interest in land, even before the option is exercised: *London & South Western Railway Co v Gomm* (1882) 20 Ch D 562; *McCarthy & Stone Ltd v Julian S. Hodge & Co Ltd* [1971] 1 WLR 1547. Rights of pre-emption created before 13 October 2003 in relation to registered land, or at any time in relation to unregistered land, are registrable as an estate contract but do not create proprietary interests on creation, though they may do so later: *Pritchard v Briggs* [1980] 1 Ch 338. Rights of pre-emption granted on or after 13 October 2003 in relation to registered land are deemed to create a proprietary interest upon creation by s.115 Land Registration Act 2002.

2 *Tolhurst v Associated Portland Cement Manufacturers Ltd* [1902] 2 KB 660, 668

3 *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 103E

4 [1957] 1 Ch 169

5 *Rhone v Stephens* [1994] 2 AC 310 at 322E-323A

burden of those obligations remains with the original vendor and does not pass to the vendor's assignee. There will be some benefits which are conditional, so for example the developer's assignee cannot claim to be entitled to acquire the land free of the obligation to pay the new owner the price for that land. And there is likely to be the potential for dispute about the extent to which other rights and obligations under the contract are so closely linked that the assignees cannot claim the benefit without also shouldering the burdens.

The contractual scheme breaks down if one party in the web of contractual relations disappears, or becomes insolvent. Let us say, in this example, the original developer has gone bust. Those with the economic interest in the contract are the vendor's assignee and the developer's assignee. The developer's assignee is not in too bad a position. It can, if it needs to, sue the original vendor. The original vendor will probably have assigned to its assignee on terms which allow it to pass its obligations down the line: so if sued by the developer's assignee it can in turn sue its own assignee and, by this roundabout route, the developer's assignee gets what it wants. But the vendor's assignee is in a difficult position. It has the benefit of the obligations entered into by the original developer, now insolvent or possibly even dissolved. It cannot force the developer's assignee to apply for planning permission, buy the land or carry out the development directly, and does not in practice have the indirect method of enforcement open to it either. It finds itself in the privity trap.

Registration of the contract

So far we have been talking about an assignment of the benefit of the contract, and the inability of that assignment to carry with it the burdens of the contract. Now let us talk about assignment or transfer of the land which is the subject of the contract. It is sometimes assumed that the privity trap springs open if the contract is registered against the vendor's title, in which case a new owner of the land is said to be "bound" by the contract and, it is assumed, automatically subjected to the obligations which would not pass by mere assignment of the contract. Such an assumption is, however, based on a misunderstanding of the nature of the interest which is registered and the effect of registration.

A contract for the sale of land creates an interest in land which is capable of binding third parties, if appropriately registered, and renders the vendor a sort of trustee for the purchaser.[6] The rationale for this is said to be that a contract for the sale of land is specifically performable and "equity looks on as done that which ought to be done". The rule is far too well-established to be the subject of dispute, but the reasoning for it does not withstand prolonged scrutiny. The purchaser will not become an owner of the land at law until the completion date has arrived and the purchaser has paid the price. But equity accelerates the purchaser's interest, giving him or her a form of beneficial ownership from the moment the contract is made.[7] This is the case even if the contract is subject to a condition precedent which has not been fulfilled, at which point in time no order for specific performance would be made.[8] Equity is clearly doing something more here than simply "looking on as done something which ought [at law] to be done".

Much debated in the authorities is the question whether the vendor who has contracted to sell land can properly be called "a trustee" for the purchaser.[9] This is not important for present purposes.

6 The authorities are helpfully gathered and discussed in *Englewood Properties Ltd v Patel* [2005] 1 WLR 1961.

7 The equitable interest can be viewed as "passing to the buyer in stages, as title is made and accepted and as the purchase price is paid in full": *Jerome v Kelly (Inspector of Taxes)* [2004] UKHL 25, [2004] 1 WLR 1409 at [32]. See also Gray & Gray, Elements of Land Law, 5th edn, paras 8.1.57-8.1.67 for discussion of the "phased transfer of equitable property to the contractual purchaser" and the "gradual intensification of the trust relationship".

8 *Chattey v Farndale Holdings Inc* (1996) 75 P & CR 298

9 See *Englewood Properties v Patel*, above, at [42]-[43]

What is important is to note that the obligations which are imposed by equity upon the vendor are fiduciary obligations, not contractual ones. Fiduciary obligations are obligations of loyalty: breach of fiduciary obligation connotes infidelity.[10] What equity is doing is requiring the vendor to recognise that ownership of the land has, at least to some extent, passed to the purchaser and that the vendor cannot act as if he continued to be an absolute owner. Pending completion of the purchase, he must act, not only in his own interest, but so as to protect the interest which the purchaser has acquired. So for example, the vendor owes the purchaser a duty to keep the property in a reasonable state of preservation and, so far as may be, in the same condition as it was when the contract was made.[11] He owes the purchaser a duty to consult him before re-letting the land.[12] If the property is leasehold, he must continue to observe the covenants in the lease to avoid the risk that the lease will be forfeited.[13]

What is protected by notice on the register[14] is not the contract itself, but the equitable interest in the land created by virtue of the contract.[15] A transferee of the freehold interest takes subject to this equitable interest: this means that the fiduciary duties owed by the original vendor are now imposed on the transferee, who is also liable to the equitable remedy of specific performance. Registration of a notice does not, however, transfer to the new owner the contractual duties of the vendor. The new owner becomes liable to complete the contract, not because he is contractually bound to do so, but because upon payment of the full purchase price the purchaser becomes absolutely entitled to the land in equity[16] and may therefore demand the conveyance to him of the legal title.

Thus registration of notice of a development agreement does not transfer to the new owner of the freehold the contractual obligations of the original vendor other than the obligation to complete the sale, any more than does an assignment of the benefit of the contract.[17] These burdens remain with the original vendor, despite the fact that the developer's assignee must now look to the new owner for completion of the contract by transfer.

Privity of contract is not only a problem as between vendor and developer. It may give rise to problems as between the developer and purchaser of a unit. Let us say that a developer contracts to sell a freehold house on the development 'off plan' to a purchaser. If the purchaser assigns his or her interest in the contract to a third party and then disappears, or becomes bankrupt, there is an imbalance in the position of the parties. The third party can call on the developer (or, subject to registration of a notice against the developer's title protecting the contract, its transferee) to complete the contract. But if the agreed price is now wholly out of line with market values, the third party may not wish to complete. The developer is left with a worthless claim in breach of contract against the original purchaser: it cannot compel the third party assignee to complete.

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10 *Bristol & West Building Society v Mothew* [1998] Ch 1 at 18A-F

11 *Clarke v Ramuz* [1891] 2 QB 456

12 *Earl of Egmont v Smith* (1877) 6 Ch D 469

13 *Dowson v Solomon* (1859) 1 Dr & Sm 1

14 Or by actual occupation under Schedule 3, paragraph 2 of the Land Registration Act 2002, or by registration of a class C(iv) land charge if the land is unregistered.

15 In the case of a right of pre-emption granted before 13 October 2003, this sentence is not strictly true, because of the (controversial, and probably wrong) decision in *Pritchard v Briggs*, above.

16 *Lloyds Bank plc v Carrick* [1996] 4 All ER 630

17 In *Englewood Properties Ltd v Patel*, above, E held various freehold and leasehold interests in a parade of shops. By virtue of one of the leases it was under a contractual duty, if selling any of the other shops, to impose a covenant preventing the purchaser from using or letting the shop as a fixed price store. P contracted to buy the shop subject to the lease, but refused to complete on the grounds that E was under a duty, which it had not fulfilled, to impose appropriate covenants on purchasers of the other shops. It was held that E's duty as trustee for P did not extend to a duty to impose covenants on the other purchasers.

Mortgagee sales

Where a party's interest is sold by a mortgagee, this can introduce a further layer of complexity. If the original vendor's interest in the development site is sold by a mortgagee, there may be doubt as to whether or not the benefit of the development contract has passed to the new owner. Equally, where a developer has acquired a site but then fallen into financial difficulties, and its interest in the site has been sold by its mortgagee, there may be doubt as to whether or not the benefit of its contracts with purchasers of units have passed to the new developer. These issues raise two questions: first, whether the lender initially acquired sufficient rights over the contract; and secondly, whether those rights have been effectively passed on to the person who has acquired the development site.

Choses in action, such as contracts and options, are mortgaged by assigning the chose to the mortgagee, subject to a right to have the chose reassigned back upon repayment of the loan.[18] Commercial mortgages are usually drafted in such wide terms that there is no doubt that they purport to catch the benefit of a development contract held by the mortgagor, whether that contract is made before or after the mortgage deed.[19] But however widely drafted the mortgage deed may be, it cannot effect an assignment of a contract or option which provides that it is personal to the grantor or not assignable: in such a case the assignment is invalid.[20]

Contracts and options may also expressly or by implication restrict the category of people to whom they may be assigned. So, for example, an option to purchase land granted to the freehold owner of neighbouring land and his 'successors in title' has been held not to be capable of assignment to his lessee, since the reference to 'successors in title' limited the class of people to whom an assignment could be made, and a lessee was not a 'successor in title' to the freehold estate held by the grantee.[21] If the contract or option is by its terms not capable of being assigned to a mortgagee, then the mortgagee cannot obtain rights over it and has no power to sell the benefit of the contract or option.[22]

Even once it is established that the benefit of a development contract or option has been validly assigned to a mortgagee by the mortgagor, there may be doubts as to whether the mortgagee has passed on that benefit to a new owner to whom it has sold the development site. Although a power to sell the chose in action is implied as a legal incident of the security and need not be expressed in the mortgage deed,[23] having a power to sell is not the same as actually selling. A transfer which simply refers to the land and makes no reference to the contract may not suffice to assign the benefit of the contract to the purchaser.[24]
A new owner of land who has purchased from a mortgagee may therefore find itself bound

18 If the assignment is by way of security, such a right of reassignment will be implied, if not expressed: *Durham Bros v Robertson* [1898] 1 QB 765.

19 An assignment of a chose in action not yet in existence operates as a contract to assign the chose upon its creation, and therefore as an equitable assignment.

20 *Linden Gardens v Lenesta Sludge*, above; see also *Briargate Developments Ltd v Newprop Co Ltd* [1990] 1 EGLR 283 at 286M

21 *Snape v Snape* (1959) 173 EG 697

22 In *Souglides v Tweedie* [2012] EWHC 561; [2012] 3 All ER 189 Newey J held that a mortgagee was a 'successor in title' for the purposes of an option granted to a lessee to acquire a further lease. Cf. Barnsley's Land Options, 5th edn, para. 9-009, which suggests that a covenant to renew a lease will not normally be capable of exercise by a mortgagee, who is not a 'successor in title' within the meaning of the standard definition clauses often inserted in leases.

23 Fisher and Lightwood's Law of Mortgage, 13th edn, para. 30.3.

24 But it may be apparent from the surrounding circumstances, as was held to be the case in *Souglides v Tweedie*, above, that it was the intention of the mortgagee also to assign the benefit of the contract or option. In *Griffith v Pelton* [1958] 1 Ch 205 the benefit of an option to purchase the freehold, contained in a lease, was held to have passed to an assignee of the term of the lease without express mention, but the reasoning in this case is dubious and it is unlikely to be extended to contractual rights embodied in an entirely separate document.

to complete a contract which has been duly protected by notice in the register at the time of its purchase, but unable to enforce the same contract, or to rely on, for example, contractual termination rights, the benefit of which have not been passed to it.

Ingenious – but unsuccessful – attempts to escape the privity trap

Some ingenious arguments have been advanced by those caught in the privity trap, in an attempt to demonstrate that the benefit of the relevant contract has passed to them automatically, despite the absence of any express assignment.

One such argument relies on the common law principles about freehold covenants. At common law[25] the benefit of a covenant, including a positive covenant, which "touches and concerns" land of the covenantee, is annexed to and runs with that land so as to be capable of enforcement by successors in title with a legal estate in the land. There is no need for the covenant to relate to land of the covenantor or for the covenantor to have any land at all.[26] This ancient common law rule is now reflected in, and expanded by, s.78(1) of the Law of Property Act 1925. The argument goes that a prospective purchaser's promise to buy land, under a contract for sale, is a covenant which runs with the land to be bought. Thus if a developer enters into a contract to sell a house on its estate to an individual, and the developer or its mortgagee then sells the freehold estate, the new owner of the estate can automatically enforce the contract against the individual.

I would suggest that the argument cannot work. For a start, this common law exception to the rules about privity only applies to covenants properly so-called: that is to say, to promises made in deeds under seal.[27] Section 78(1) of the Law of Property Act 1925 speaks of 'covenants', not 'contracts', and when looked at in its statutory context, is clearly intended to refer to a promise given in a deed.[28] Most contracts for sale are not made by deed. Moreover, a contract to purchase land does not 'touch and concern' that land.[29]

25 These principles are to be distinguished from the equitable rules about restrictive covenants. In relation to the benefit of covenants, equity built upon the common law, but in relation to the burden, it departed from it, allowing the burden of restrictive covenants to run with land. At common law the burden of a covenant cannot run.

26 *Smith v River Douglas Catchment Board* [1949] 2 KB 500

27 A promise in a deed does not require consideration for its enforcement; a person can only enforce a contract which is not under seal if consideration has been given by him to the promisor or to some other person at the promisor's request: *Dunlop Pneumatic Tyre Company v Selfridge & Co Ltd* [1915] AC 847 at 858. The common law cannot allow the benefit of a simple contract to run with land to a successor in title without infringing this principle, for the successor has given no consideration for the promise he seeks to enforce.

28 The draftsmen of the 1925 legislation were steeped in property law and the drafting of the LPA 1925 carefully distinguishes covenants from simple contractual promises. It is true that in *Weg Motors Ltd v Hales* [1962] 1 Ch 49 it was held that references to "covenants and provisions" in leases in ss.141 and 142 include promises not under seal. This is correct as a matter of statutory construction, because the definition of "lease" in s.154 LPA 1925 includes short leases, which may be made by parol, and equitable leases made by a specifically performable agreement for lease. It is suggested that this authority does not detract from the point being made about freehold covenants.

29 The concept of 'touching and concerning' has been much criticised, but seeks to capture the idea of a promise which is of enduring value to owners of the land of the covenantee: see *Kumar v Dunning* [1989] QB 193 at 200E; *P&A Swift Investments v Combined English Stores Group Plc* [1989] 1 AC 632; "*Touching and Concerning: From Spencer's Case to Swift*" (1989) 8947 EG 24, 77 (1989) 8948 EG 22. It is conceptually difficult to conceive of a sale constituting an enduring benefit to owners of land when it involves the transfer of that land away from the owner; in any event whether or not the sale is beneficial must depend on the price to be paid, and a covenant cannot be considered sufficiently beneficial to the owner of land to justify treating it as a property right enduring in perpetuity if it is only of value to the owner in certain market conditions. In Australia it has been held that neither a conditional agreement for lease *(Showa Shoji Australia Pty Ltd v Oceanic Life Ltd* (1994) NSWLR 548) nor a landlord's put option *(Denham Bros Ltd v W Freestone Leasing Pty Ltd* [2004] 1 Qd R 500 at [23], [63]) 'touch and concern' the land which is subject to the agreement so as to enable the benefit automatically to run with that land to a transferee.

Another argument relies on s.63(1) of the Law of Property Act 1925. This provides:

> *"Every conveyance is effectual to pass all the estate, right, title, interest, claim and demand which the conveying parties respectively have in, to or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same."*

The section is an 'all estate clause', the object of which is to:

> *"avoid the litany of express mentions of ancillaries and sweepings up which, in order to ensure that everything passed that could pass with the conveyance, had become the standard language of conveyancers."*[30]

The argument here goes that a contract, option or right of pre-emption is something which the vendor 'has power to convey' and is therefore automatically passed to the vendor's assignee.[31] The problem with this argument is that the section is only effectual to pass rights "*in, to or on the property conveyed*". Whilst these words may be wide enough to capture some rights which are not proprietary in nature, it has been held that the section is limited to passing a right which is an appurtenance of, annexed to or is such as to touch and concern the land conveyed.[32] A contract or option of the nature of those we have been discussing does not have this character. It is a purely personal right.[33]

Agreements for lease

The Landlord and Tenant (Covenants) Act 1995 has had a major effect on the privity trap where the relevant contract is not for the sale of a freehold but for the grant of a lease.[34]

Say, for example, a developer, owning the freehold and having built out the development, contracts to sell a number of leasehold flats to individual purchasers. The developer (or its mortgagee) transfers the freehold to a transferee. If a notice has been entered on the register of the contract, there is no doubt that the new owner can be compelled to grant the leases. But what if, the market having moved downwards, the purchasers' assignees no longer wish to complete? Can the new owner compel them to do so, in the absence of any express assignment of the benefit of the purchase contracts? And what happens if the purchasers also assign the benefit of their contracts?

Before the 1995 Act, these questions would have been answered in the same way as if the sales were of freehold land. The new owner of the freehold could not claim that the benefit of the purchase contracts had passed to it without an express assignment under s.141 of the Law of Property Act

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30 *Harbour Estates Ltd v HSBC Bank Plc* [2005] Ch 194

31 A similar argument was made in *Souglides v Tweedie*, above, in relation to an option granted to a lessee to have a further lease granted to him. The lease was sold by the lessee's mortgagee and the freeholder claimed (amongst other things) that the sale by the mortgagee to the purchaser did not include the option. The assignee of the lease relied upon s.63 in the event that there was held not to be an effective assignment of the option from the mortgagee to the assignee, but the Court did not need to rule on this argument, as it held that there had been an effective assignment.

32 *Harbour Estates Ltd v HSBC*, above

33 And therefore analogous to a personal contract concerning payment of a premium for a lease, which was held not to pass under s.63 in *Hill v Booth* [1930] 1 KB 381.

34 Whether for a premium or at a rack-rent: the principles are the same.

1925.[35] And if the individual purchasers had assigned the benefit of their purchase contracts, the assignees' entitlement to complete the purchase would not have carried with it the obligation to do so, there being no privity of estate between the assignees and the owners of the freehold.[36]

The 1995 Act has changed all this, by including an "agreement for a tenancy" within the definition of "tenancy". By s.3(1) of the 1995 Act, the benefit and burden of all "landlord covenants" and "tenant covenants" of "a tenancy":-

> *"(a) shall be annexed and incident to the whole, and to each and every part, of the premises demised by the tenancy and of the reversion in them, and*
>
> *(b) shall in accordance with this section pass on an assignment of the whole or any part of the premises or of the reversion in them."*

This section, and the definitions of terms used in it, have to be read in light of the fact that the Act includes agreements for lease within its definition of "tenancy". So, by s.28(1):

> *" 'landlord' and 'tenant', in relation to a tenancy, mean the person for the time being entitled to the reversion expectant on the term of the tenancy and the person so entitled to that term respectively."*

In the case of an agreement for lease there is no actual "reversion" and no actual "term". But to make sense of the definition in the context of agreements for lease it is necessary to include the persons who, under the agreement, will be the landlord and tenant once the lease is granted. A "landlord covenant" means:

> *"in relation to a tenancy, a covenant falling to be complied with by the landlord of premises demised by the tenancy"*

and a "tenant covenant" means:

> *"in relation to a tenancy, means a covenant falling to be complied with by the tenant of premises demised by the tenancy".*

Again, once it is accepted that "landlord" includes a would-be landlord under an agreement for lease and that "tenant" includes a would-be tenant under such an agreement, it must follow that a promise to grant a lease is a "landlord covenant" and a promise to take a lease is a "tenant covenant" under the Act. In this context, the "premises demised by the tenancy" means the interest in land created by the tenancy and in the case of an agreement for lease must mean the interest created by the agreement. "Covenant" includes "term, condition and obligation" and is clearly not confined to covenants under seal.

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35 Unlike the point made in the next footnote, this is not because of the absence of a deed. "Lease" in ss.141 and 142 LPA 1925 includes "an underlease or other tenancy" and both sections are capable of applying, not only to leases in due form, but to specifically enforceable agreements for lease. The references to "covenants" in these sections includes promises not made under seal. But an agreement for lease does not "have reference to the subject-matter of", i.e. 'touch and concern', the lease: see *Showa Shoji v Oceanic Life*, above, which considered the Australian equivalent of s.141 LPA 1925.

36 Privity of estate cannot exist without a legal lease in due form: an agreement for lease, which does not create a legal estate, would not suffice: *Camden v Batterbury* (1860) 7 CB (NS) 864; *Purchase v Lichfield Brewery Co* [1915] 1 KB 184. But see *Boyer v Warbey* [1953] 1 QB 234 and criticism of it in Megarry & Wade's Law of Real Property, 8th edn, para. 20-044.

The consequence of these provisions is that the benefit of a contractual promise to take a lease will automatically run to a person to whom the land over which the lease is to be granted is transferred. Equally an assignment by the prospective tenant of the benefit of the agreement to lease will automatically carry with it the burden of that agreement, and automatically release the original contracting party from liability.[37] The anti-avoidance provisions in section 28 will operate to limit the ability of the parties to contract out of this consequence and whilst it is possible to avoid it by making the agreement to lease personal or non-assignable, that has potentially significant consequences for the value of the contract.

Furthermore, the impact of the Act on agreements for lease may not be confined to the promises by each party to grant or accept the lease. It may also extend to other promises in the agreement, or contained in separate documents altogether. Thus where a developer in an agreement for lease agrees to apply for planning permission or to build a development, those obligations may be carried over to an assignee of the developer, and the benefit of them carried over to an assignee of the original vendor, as "tenant covenants" under the Act.[38]

Whilst it is undoubtedly the case that the Act was designed to sweep away old distinctions between legal and equitable leases for the purposes of enforcing covenants in those leases and to simplify a very complex area of law, it is interesting to note that this radical impact on the law of privity was not discussed at all in the Law Commission's Report which preceded the Act.[39]

Whether intended or not, the result is that we have two very different sets of rules, depending on whether the contract under consideration is one for the sale of a freehold interest, or for the grant of a lease. Given that a developer may well enter into both agreements for sale of freeholds (e.g. in the case of houses) and of leaseholds (e.g. in the case of flats) on the same site, there is substantial potential for confusion.

Conclusion

In the good times, the split of contractual burden and contractual benefit is often irrelevant. There is money to be made and everyone has a commercial interest in getting the deal done. Vendor's and developer's assignees work to get the project up and running and to complete the acquisition, regardless of the legal niceties, because it is in the developer's interest to build out and sell the development and the new owner's interest to get the land price and any overage. The original vendor and developer are often still in existence, solvent and capable of being called upon by their assignees, if necessary, to fulfil the obligations by which they continue to be bound as original parties to the contract. But when the property market falls, owner and developer may both be looking more closely at their contractual rights and obligations. It is at times like this that the privity trap comes into its own, and the hunt begins for ways around it.

37 s.5 of the 1995 Act. In the case of an assignment by the would-be landlord, the release is not automatic but may be achieved by application under ss.6 and 8.

38 In *George Wimpey Manchester Ltd v Valley and Vale Properties Ltd* (in administration) [2012] EWCA Civ 233 at [5], it is recorded as being common ground between the parties that, notwithstanding the grant of a lease, the covenants in an agreement for lease (relating to road building, etc) continued to bind the parties and that the agreement for lease was a "collateral agreement" within the meaning of s.28(1) of the 1995 Act, with the consequence that the benefit and burden of the covenants in the agreement for lease were annexed to the land. If this is correct it would seem to follow that all covenants in an agreement for lease, including those which have nothing to do with the grant or acceptance of the lease, are tenant covenants and therefore pass on an assignment of the agreement or the land subject to it.

39 "Landlord and Tenant Law: Privity of Contract and Estate", Law Com 174