
A Gross Oversight?

An analysis of the statutory introduction of covenants in gross and their potential threat to the boundaries of property law

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Introduction

The law on property interests operates at the intersection between two distinct areas of law, the law of property and the law of contract. At times the distinction between these areas has shifted in response to societal change. But for the most part, the boundary between property and contract historically has remained jealously guarded.¹ The practical expression of this boundary comes from the conventional principle of *numerus clausus* which ensures only those rights that satisfy firmly established criteria are admitted to the closed categories of property rights which sit apart from contractual obligations.²

In 2010, the New Zealand Law Commission published a report which recommended the reform of New Zealand property law in an attempt to facilitate the creation of a modern land transfer system.³ As part of the report, the statutory introduction of covenants in gross was recommended to address some of the issues surrounding freehold covenants.⁴ This recommendation resulted in a legislative amendment to the Property Law Act 2007 which as enacted, poses a potential threat to the boundaries of property law.

The provisions allow for the creation of a covenant in gross, which burdens the land of the covenantor but will not benefit land held by a covenantee.⁵ By notifying those covenants on the register, this right can bind successors in title.⁶ The creation of covenants in gross arguably does not pose a problem in itself, rather the potential issues arise from the ambiguous nature of the provisions. In particular, as the provision only requires a covenantor to do, or refrain from doing an action in relation to the land,⁷ the extent to which a proposed covenant in gross must link to the land is unclear, and gives rise to two possible interpretations.

¹ Michael Weir, “Pushing the Envelope of Proprietary Interests: The Nadir of the *Numerus Clausus* Principle?” (2015) 39 MULR 651 at 652.

² See discussion in Brendan Edgeworth, “The *Numerus Clausus* Principle in Contemporary Australian Property Law” (2006) 32 Mon LR 387.

³ New Zealand Law Commission, *A New Land Transfer Act* (NZLC R116, 2010) at iv.

⁴ A freehold covenant is a promise or agreement made by the owner of the servient land (the covenantor) with the owner of the dominant land (the covenantee) that the covenantor will do or refrain from doing some act in relation to the servient land which he or she could otherwise do; DW McMorland and others *Hinde McMorland & Sim Land Law in New Zealand* (online loose-leaf ed, LexisNexis) at [17.011].

⁵ Amendments to the Property Law Act 2007 contained within the Land Transfer Act 2017, ss 242 – 246; and Ben France-Hudson, “The Recognition of Covenants in Gross in New Zealand: A Dangerous Advancement?” in Sinéad Agnew and Ben McFarlane (eds) *Modern Studies in Property Law* (Hart Publishing, 2018) vol 10 at 1 (forthcoming).

⁶ Property Law Act 2007, s 307A to be inserted through Land Transfer Act, s 242.

⁷ Property Law Act 2007, s 307A to be inserted through Land Transfer Act, s 242.

On one interpretation, the ambiguous wording likely allows for the imposition of a wide spectrum of obligations with varying levels of connectedness to the burdened land itself. This variability may allow for certain obligations to become property rights which have never been previously contemplated under any system of property law in New Zealand or otherwise.⁸ Interpreting these rights presents a need for judges to decide between two conflicting interpretations which find their basis in the diverging views over the value that the boundary between property and contract continues to have in the contemporary context.

One interpretation has the potential to radically reconceptualise the way property law has conventionally been conceived by redefining the property law-contract law boundary. The other approach conservatively maintains this boundary through recognising a continued value in the conventional principles of property law such as the *numerus clausus* to keep contractual obligations distinct from property.

In this dissertation, I will illustrate the potential threat that covenants in gross pose to the property law-contract law boundary. In resolving the potential threat, I will argue that the conventional approach retains a valuable place in interpreting property interests, and that judges ought to act conservatively and be guided by this conventional approach when interpreting covenants in gross. Doing so will arguably minimise the range of negative consequences that could arise in relation to these provisions, and maintain the distinction between the judiciary and the legislature.

To achieve this argument, this dissertation will comprise four chapters. Chapter One provides the historical background to freehold covenants, and introduce the competing schools of thought on approaches to property law in the contemporary context. Chapter Two will examine the driving forces behind the creation of these provisions and the potential problems with the wording of the finalised legislation. Chapter Three will then analyse the two possible interpretations that can be taken by judges to conclude that a conservative approach using conventional concepts creates the most beneficial consequences for society. Chapter Four will practically discuss the way this approach can be implemented to the legislation through pre-emptively constraining the definition of covenants in gross.

⁸ France-Hudson, above n 5, at 2.

I Approaches to freehold covenants

“The status quo, you know, is Latin for ‘the mess we’re in’”

Ronald Regan (1982)⁹

Understanding the contentious nature of the provisions enacting covenants in gross requires some background knowledge of the way freehold covenants have developed and been interpreted prior to the Land Transfer Act 2017.

A Freehold covenants

A freehold covenant is a promise or agreement made between a covenantor (owner of the servient land), and a covenantee (owner of the dominant land) to do, or refrain from doing a certain action in regard to their land.¹⁰ Since 1 January 1987¹¹ New Zealand has permitted both positive freehold covenants (involving an obligation to carry out a specific activity on the land) and negative freehold covenants (involving an obligation not to carry out a specific activity on the land). These covenants attach to the land, and are able to bind subsequent owners of the land and thus ‘run with the land’ in equity.¹² However this privilege is subject to the requirement that the covenant burdens the covenantor’s land, is intended to benefit the covenantee’s land, and there is no privity of estate.¹³ These types of covenants have always been required to confer a ‘benefit’ upon a dominant piece of land (often assessed by asking whether the covenant ‘touches and concerns’ the dominant land),¹⁴ and preclude any person from obtaining a personal benefit. This particular feature will become fundamentally important to the discussion on the introduction of covenants in gross.

In contrast to positive and restrictive freehold covenants, a freehold covenant in gross involves an obligation which burdens a piece of servient land but benefits a person as opposed to a dominant tenement. Historically covenants in gross have never been able to bind successors in title in common law or equity. After some debate in the case law, *ANZCO Foods Waitara Ltd*

⁹ Ronald Regan (Address Before a Joint Session of the Tennessee State Legislature, Nashville, 15 March 1982)

¹⁰ McMorland, above n 4, at [17.011].

¹¹ See the Property Law Amendment Act 1986, s 64A.

¹² Property Law Act 2007, s 303(2).

¹³ Property Law Act 2007, s 303(1)(a)-(b).

¹⁴ The ‘touch and concern’ test operates to ensure that “the covenant must either affect the land as regards mode of occupation, or it must be such as per se, and not merely from collateral circumstances, affects the value of the land” see *Rogers v Hosegood* [1900] 2 Ch 388 (CA) at 395 per Farwell J; and France-Hudson, above n 5 at 3, n 10.

v AFFCO New Zealand Ltd affirmed the position that covenants in gross were unable to run with the servient land so as to bind successors in title.¹⁵ *Omaha Beach Residents Society Inc v Townsend Brooker*¹⁶ later affirmed this position. The need for a freehold covenant to benefit a dominant tenement was developed in a line of nineteenth century English cases and finally clarified in *London City Council v Allen* which stated:¹⁷

Where the covenantee has no land, the derivative owner claiming under the covenantor is bound neither in contract nor by the equitable doctrine which attaches in the case where there is land capable of enjoying the restrictive covenant.

France-Hudson has suggested that the justification for such dicta has troubled scholars for generations and is a primary reason why the debate over the value of *numerus clausus* often surrounds the use of freehold covenants.¹⁸

1 The creation of freehold covenants

The recognition of freehold covenants as property interests arose in the case of *Tulk v Moxhay*¹⁹ in response to a pressing social need during the nineteenth century to regulate of the explosion of urban developments and industrial progression.²⁰ Significant social benefit resulted from the creation of this new species of property right. At that time, freehold covenants acted as a valuable regulatory mechanism to control environmental degradation, preserve heritage buildings, and the identity and character of suburban neighbourhoods. The social cost of the restrictions they required was therefore outweighed by the derived social benefit.²¹

The facts of *Tulk v Moxhay* concerned a negative obligation to maintain a piece of adjoining property as a garden. The successor in title to the burdened land had refused to adhere to the covenant despite purchasing the land at a reduced price and with full and prior notice of the restriction.²² The Lord Chancellor determined that in light of the prior knowledge held by the

¹⁵ *ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd* [2006] 3 NZLR 351 (CA).

¹⁶ *Omaha Beach Residents Society Incorporated and GNS Trust Limited v Townsend Brooker Limited et al* [2010] NZRMA 53.

¹⁷ *London City Council v Allen* [1914] 3 KB 642 (CA) 660 (citations omitted); cited in France-Hudson, above n 5, at 3-4.

¹⁸ France-Hudson, above n 5, at 4.

¹⁹ *Tulk v Moxhay* (1848) 2 Ph 774, 41 ER 1143 (Ch).

²⁰ Edgeworth, above n 2, at 399.

²¹ At 398.

²² *Tulk*, above n 19.

incoming purchaser, it would be inequitable to permit him to use the land in manner inconsistent to the contract they entered with notice of the covenant.²³ The restrictive covenant therefore attached to the land title and was binding in equity on the incoming purchaser.

The importance of this decision for the purpose of this dissertation is that the creation of freehold covenants in *Tulk v Moxhay* was entirely the work of the judiciary. This is noteworthy as it explicitly went against the grain of a ‘well-settled’²⁴ previously unarticulated idea that classes of property rights had historically remained closed.²⁵ The decision in *Tulk v Moxhay* resulted in significant confusion over the correct approach to interpreting property rights, and many judges in subsequent decisions attempted to put the classes of property rights back in their defined boxes. This concept is known as the principle of *numerus clausus*.²⁶

Tulk v Moxhay supports a different approach to property interests than the *numerus clausus* based on binding successors in title through prior notice of the covenant in question.²⁷ A line of precedent followed *Tulk v Moxhay* which gave proprietary status to both restrictive and positive covenants,²⁸ and also covenants which lacked a dominant tenement (essentially covenants in gross).²⁹ The value of the restrictions provided by this unarticulated idea that classes of property rights should remain closed was left to be questioned. In the contemporary context, these different schools of thought have not fallen away. The justifications for the closed classes of property interests continue to be an unresolved debate, and the differences of opinion that were prevalent in nineteenth century common law³⁰ continue to be expressed by many judges and property law commentators.

²³ Anne Wallace, Michael Weir and Les McCrimmon, *Real Property Law in Queensland* (Lawbook, 4th ed, 2015) at 855–6.

²⁴ *Stockport Waterworks v Potter* (1864) 3 H & C 300, 314 per Wilde B.

²⁵ Ben McFarlane “The *Numerus Clausus* Principle and Covenants Relating to Land” in Susan Bright (ed), *Modern Studies in Property Law* (Hart Publishing 2011) vol 6 311 at 313.

²⁶ The *numerus clausus* principle and the 19th century cases that support it such as *Keppell v Bailey* and *Hill v Tupper* will be discussed at greater depth in the discussion that follows.

²⁷ *Escrow Holdings Forty-One Ltd v District Court at Auckland* [2016] NZSC 167, [2017] 1 NZLR 374 at [30].

²⁸ See *Morland v Cook* (1868) LR 6 Eq 252.

²⁹ See *Luker v Dennis* (1877) 7 Ch D 227.

³⁰ See *Staples and Co v Corby* (1899) 17 NZLR 734 (CA) a stand-alone case in New Zealand which relied on a line of precedent in the United Kingdom which supported the idea that notice is sufficient to bind third parties to property rights. This line of precedent has since been overturned: see New Zealand Law Commission, above n 3, at [7.4].

B Closed classes of property rights

Tulk v Moxhay stood apart from other judicial assertions in the nineteenth century which saw value in keeping classes of property rights closed. In particular, both *Keppell v Bailey*³¹ and *Hill v Tupper*³² provided influential judicial statements on the principle of *numerus clausus* in relation to property interests. Both these cases furthered this tacit understanding³³ that restricting the content of property rights serves a valuable regulatory function to a property law system. This was important in an era where there was no effective system of land registration to easily discover burdens over land.³⁴ The principle therefore acted to keep classes of property closed and retain the boundary between property law and contract law. As a result, judges hoped to protect successors in title and third parties generally, from being bound to undiscoverable burdens over land and prevent titles from being hampered with too many layers of onerous or overly personal obligations.³⁵

The principle of *numerus clausus* as described by Brendan Edgeworth is:³⁶

...in English, the ‘closed list’ principle — it expresses the stringency of the common law’s approach to property rights, particularly over land. In essence, the principle holds that landowners are not at liberty to customise land rights, in the sense of reworking them in an entirely novel way to suit their particular individual needs and circumstances. Rather, any new rights must fit within firmly established pigeonholes, of which the law permits only a small and finite number.

These conventional common law doctrines have long attempted to ‘patrol the frontier’ between contract and property law.³⁷ The *numerus clausus* principle continues to guard against the recognition of novel interests and polices the boundaries of existing interests.³⁸ The ‘metaprinciple’³⁹ reflects the strict attitude toward property rights at common law. Judges

³¹ *Keppell v Bailey* (1834) 2 My & K 517.

³² *Hill v Tupper* (1863) 2 H & C 121, 159 ER 51.

³³ McFarlane, above n 25, at 313.

³⁴ *Escrow Holdings*, above n 27, at [29].

³⁵ *Keppell*, above n 31, at 548.

³⁶ Edgeworth, above n 2, at 387 (citations omitted); Weir, above n 1, at 652.

³⁷ K Gray “Property in thin air” (1991) 50 CLJ 252 at 302.

³⁸ Edgeworth, above n 2, at 390.

³⁹ At 390. Edgeworth refers to the *numerus clausus* as a ‘metaprinciple’, meaning that it acts as a ‘higher order norm’ which influences many of the other principles in particular regions of land law.

accordingly have adopted a cautionary approach to these interests by permitting only those novel rights which are closely analogous to earlier categories of existing property rights to attain proprietary effect.⁴⁰ The more substantial extensions of these categories are left to the legislature.⁴¹ As Lord Brougham noted in *Keppell v Bailey*:⁴²

It must not ... be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner ... great detriment and much confusion of rights if parties were allowed to invent new modes of holding and enjoying real property.

While contract law allows the ‘fullest latitude’ to form rights and obligations between the parties to the contract, property law adopts a different approach over those specified rights which bind third parties. *Numerus clausus* therefore responds by ensuring only those rights which fit into the recognised classes of ‘corporeal or incorporeal hereditaments’⁴³ are given proprietary effect.⁴⁴

The extension of the classes of property rights to accept freehold covenants under *Tulk v Moxhay* has been the only interest to join the jealously guarded class of property interests that *numerus clausus* protects in over a century and a half. But, this is a notable exception to the general position which was, and has remained, that the courts are unwilling to expand the purview of *numerus clausus*.

Tulk v Moxhay expressed an unabashed resistance to the force that *numerus clausus* was steadily gaining regarding the problem of property right proliferation. Lord Cottenham went so far as to explicitly reject Lord Brougham’s previous dicta in *Keppell v Bailey*.⁴⁵ In this way, *Tulk v Moxhay* provides a perfect example of judicial activism in extending the closed list of property rights as a response to the public interest. One critique of Lord Cottenham’s curt

⁴⁰ *Clos Farming Estates Pty Ltd v Easton* [2002] NSWCA 389, (2002) 11 BPR 20 605 at [6] per Bryson J.

⁴¹ Weir, above n 1, at 662. Weir mentions a growing trend in disruptions to *numerus clausus* being left solely to a decision of the judiciary.

⁴² *Keppell*, above n 31; cited in France-Hudson, above n 5.

⁴³ *Keppell* (above n 31) refers to the classes of property rights as “hereditaments”, which denotes the heritability of the rights by incoming successors to the title.

⁴⁴ Edgeworth, above n 2, at 388.

⁴⁵ “He could never have meant to lay down that this court would not enforce an equity attached to the land of the owner, unless under such circumstances as would maintain an action in law”: *Tulk*, above n 19, at 778 per Lord Cottenham.

rejection is that determining whether an equity attached to the land was the very point the Court had been petitioned to decide. As a result, commentators have since regarded the legal reasoning to be viciously circular,⁴⁶ and weak compared to Lord Brougham's 'masterly review of authorities'.⁴⁷ The suggestions reinforce the continued use of *numerus clausus* as a tool to guide the development of property law.⁴⁸

1 The 'touch and concern' doctrine

Numerus clausus has historically been practically expressed by the ancient 'touch and concern' doctrine.⁴⁹ The need for positive and restrictive freehold covenants to benefit a dominant land title at both common law and equity has traditionally meant that the covenant must touch and concern the dominant land.⁵⁰ In essence, the performance or non-performance of the covenant must affect the dominant land itself, purely personal benefits are not enough.⁵¹ The touch and concern test thus reinforces the boundary between contract law and property law by precluding those obligations that are not sufficiently connected to the land.

The touch and concern test has been widely used throughout history in determining the ability for a covenant to run with the land. The requirement that a covenant's content must satisfy the touch and concern test to attach to the land draws similarities to the methods of constraint applied to other types of recognised property interests. Part of the criteria for a valid easement for example is that it must adhere to the rule in *Re Ellenborough Park* to 'accommodate the dominant tenement'.⁵² In the same way the touch and concern test acts, the precepts which define the boundaries of easements aim to exclude rights which confer a personal benefit.⁵³

⁴⁶ Edgeworth, above n 2, at 396, n 33.

⁴⁷ AW Brian Simpson *A History of Land Law* (2nd ed, 1986) at 257-258.

⁴⁸ See authors such as Pamela O'Connor, "Contractual Specification of New Property Rights in Resources: The Problem of Measurement Costs" (2012) 39 Mon LR 38; and Edgeworth, above n 2; and Weir, above n 1. The suggestion that the *numerus clausus* retains value beyond the nineteenth century cases is an important point which will be addressed in more detail in later discussion.

⁴⁹ English Law Commission *Easements, Covenants and Profit à Prendre: A Consultation Paper* (CP 186, London, 2008) at [3.25].

⁵⁰ David Brown "Easements, Profits and Covenants" in Elizabeth Toomey (ed), *New Zealand Land Law* (3rd ed, Thomson Reuters New Zealand 2017) 1106.

⁵¹ James C Fisher "Rethinking the Rules for the Proprietary Effect of Freehold Covenants" in Robin Hickey and Heather Conway (eds) *Modern Studies in Property Law* (2017, Hart Publishing) vol 9, 21 at 25.

⁵² *Re Ellenborough Park* [1956] 1 Ch 131(CA) at 140.

⁵³ O'Connor, above n 48, at 45, n 54.

However, in practice the doctrine has proved difficult to define in a way that is not flawed by circularity.⁵⁴ Judges have struggled to use it effectively to distinguish between personal obligations that should fall outside of the prescribed class of property interests, and obligations which are sufficiently connected to the land. The result is a line of cases which convey a ‘troublingly lax’ approach to determining the proprietary effect of freehold covenants.⁵⁵

In *Wilkes v Spooner* the judge determined that a covenant to sell certain kinds of meat benefitted the dominant tenement and not just the business operating on the land and was therefore valid.⁵⁶ The case of *Newton Abbott Cooperative Society Ltd v Williamson & Threadgold*⁵⁷ extended the touch and concern doctrine again to give proprietary effect to a covenant which prohibited certain business undertakings on the servient tenement. The covenant was deemed to touch and concern the dominant tenement because it increased the value of the dominant land by allowing the owner upon sale to claim that there was proprietary protection from commercial competition. A further line of cases used the touch and concern doctrine to permit covenants based on a reluctance of the judiciary to intrude on a covenant which was mutually agreed upon and intended to have proprietary effect.⁵⁸ The use of the doctrine in this way seems concerning as it sits completely at odds with the purpose of the doctrine in policing the boundary between personal and proprietary rights.

The doctrine is also most commonly applied in relation to the dominant land, even where this was irrelevant, or the concern was the extent of the connection between the covenant and the burdened land.⁵⁹ Attempting to articulate with precision the requirement that a covenant touch and concern the servient land has consequently become troublesome.⁶⁰

All these issues indicate the doctrine is not a suitable mechanism to police the boundary between property law and contract law in practice. The level of discretion the doctrine gives to judges is illustrated in the way they are able to shape their reasoning to fit within the relatively pliable boundaries. Nonetheless, the conventional approach still demands some form of intrinsically land centred link which enforces interactions between two tenements, not two

⁵⁴ K Gray and S F Gray *Elements of Land Law* (4th ed, 2005) at [14.253].

⁵⁵ Fisher, above n 51, at 24.

⁵⁶ *Wilkes v Spooner* [1911] 2 KB 473 (CA).

⁵⁷ *Newton Abbott Cooperative Society Ltd v Williamson & Threadgold* [1952] Ch 286 (Ch).

⁵⁸ See for example *Marten v Flight Refuelling Ltd* [1962] Ch 115 (Ch) at 137.

⁵⁹ Fisher, above n 51, at 24.

⁶⁰ At 24.

people. This is a problem which James Fisher emphasised,⁶¹ and a point which I will later return to in the context of covenants in gross, where other commentators have questioned whether any kind of touch and concern test has been retained at all.⁶²

C Contemporary tensions

The history surrounding the law of freehold covenants is far from streamlined. It is ‘overcomplicated, confusing and unhelpful’.⁶³ Much of this complexity is likely a result of giving proprietary effect to what were historically contractual rights in response to the social context of the nineteenth century. The application of the touch and concern test has only furthered the practical difficulties, and perpetuated the confusion that covenants present to the property and contract boundary.⁶⁴ Nonetheless, much of this background still reinforces the general proposition that the law has historically refrained from expanding this closed list of property rights.

Despite this caution, more recently the historically accepted wisdom has been questioned by commentators in the contemporary context. Notably, Richard Epstein and Bernard Rudden have critiqued the value of *numerus clausus* in the era of modern systems of land registration such as the Torrens system.⁶⁵ More specifically, Epstein has argued that the conservative approach to property rights in the nineteenth century English cases was the best way to address the problem of binding third parties. But now that we have entered into an era of modern registration systems, the value derived from the restrictions of *numerus clausus* has diminished.⁶⁶ As burdens over land are easily discoverable, parties can rely on the register to be informed of these burdens, and land owners should not be restricted in the types of burdens they can impose on their land. Essentially, ‘freedom of contract should control’.⁶⁷

Rudden argues from an economic standpoint that property registration systems which operate on the basis of sufficient notice lead to reduced information costs. He claims modern registration systems significantly reduce the economic cost of education and policing of the

⁶¹ See generally Part VI ‘New Rules’ in Fisher, above n 51.

⁶² Elizabeth Toomey *Land Transfer Act Handbook 2017* (Thomson Reuters NZ 2017) at 20.

⁶³ S Clarke and S Greer *Land Law: Directions* (3rd ed, Oxford University Press, Oxford, 2012) at 339.

⁶⁴ Fisher, above n 51, at 38.

⁶⁵ See generally Richard A Epstein “Notice and Freedom of Contract in the Law of Servitudes” (1982) 55 S Cal L Rev 1353; and Bernard Rudden “Economic Theory v. Property Law: The *Numerus Clausus* Problem” in John Eekelaar and John Bell (eds), *Oxford Essays in Jurisprudence: Third Series* (Clarendon Press, 1987) at 239.

⁶⁶ Edgeworth, above n 2, at 407.

⁶⁷ Epstein, above n 65, at 1358.

poorly defined boundaries of the conventional classes of property rights.⁶⁸ Both commentators therefore support a more flexible approach to creating new property interests which would have previously been precluded.

These recent critiques of the conventional approaches to property interests engage the debate over what the appropriate approach may be for the future of property law. I suggest that judges take a conservative approach to the interpretation of the legislation by adopting the conventional approaches to property rights implemented by the *numerus clausus* and its touch and concern counterpart. Failing to do so risks the potential for a range of negative consequences. In light of these negative consequences, which I will come to discuss in due course, modern arguments that comprehensive registration systems have superseded the conventional concepts do not hold up against the value that the conventional principles retain.

In New Zealand we have historically adopted a conventional approach to property law,⁶⁹ however a conflicting modern school of thought has become more prevalent. The changes to property law in New Zealand more broadly illustrate a growing tension between these two approaches. This leaves judges with two possible ways to interpret the legislation on covenants in gross:⁷⁰

1. Either our system of property law embraces a much wider ability for obligations to attain proprietary effect because the conventional approaches have been superseded by effective land registration systems which were not present in the nineteenth century.⁷¹ – I will refer to this throughout my discussion as the ‘modern approach’.
2. Alternatively, the New Zealand property law system recognises a continuing value in adhering to the conventional property law approaches such as the *numerus clausus*, and the touch and concern doctrine – I will refer to these throughout my discussion as the ‘conventional approaches’.

⁶⁸ Rudden, above n 65, at 246 and 255. Also, for criticisms of the use of ‘touch and concern’ to determine the validity of property rights see generally Fisher, above n 51.

⁶⁹ New Zealand land law owes much of its foundations to English law and their conventional conceptions of property developed in the English common law: see France-Hudson, above n 5, at 3.

⁷⁰ It is worth noting at this point that there are many schools of thought regarding the appropriate method of interpreting legal texts. Analysing these various schools of thought is beyond the scope of this dissertation.

⁷¹ *Escrow Holdings*, above n 27, at [29].

These alternative approaches to property law generally will become particularly important in later discussion in relation to covenants in gross.

II Covenants in gross and the current discourse in the law

Several more recent changes to the New Zealand property law system reflect the growing discourse over the most appropriate approach to property interests in a contemporary context. Much of the debate is illustrated by those changes to the law which push away from conventional approaches such as the *numerus clausus* and the touch and concern doctrine, albeit for the most part by way of legislation rather than judicial activism. These changes give a background to the social demand for covenants in gross, ultimately leading to recommendations for their general introduction in the Land Transfer Act 2017.

Just as was done in the decision of *Tulk v Moxhay*, the law in these areas appears to have extended the classes of property rights in a response to changing social needs. This is illustrated in the legislative changes relating to covenants under the Resource Management Act 1991⁷² and in the context of open space covenants under the Queen Elizabeth the Second National Trust Act 1977 (the QEII Act), but it is also shown through the pushback of lawyers in finding ways to circumvent the conventional restrictions presented in the law.

A Legislative developments

Despite the historical lack of provision for covenants in gross in New Zealand statute, and the unease in the courts in allowing covenants in gross at common law or equity, there was still a societal interest in creating these types of property interests. In response, Parliament has progressively permitted covenants in gross in prescribed circumstances by extending this right to established public bodies. The provisions in the Land Transfer Act 2017 take a much greater step by handing these rights to private individuals.

Local authorities wished to attach burdens to the land which could bind successors where the local authority holds the benefit as opposed to any dominant land – in other words, to create a covenant in gross. There was further demand for the creation of covenants which prevented owners from any further subdivision of a land title. Section 221 of the Resource Management Act⁷³ eventually granted authorities this power. Further powers to establish other types of

⁷² Resource Management Act 1991.

⁷³ Section 221.

covenants in gross to obtain various benefits are also provided in the Resource Management Act through provisions of a similar sentiment.⁷⁴

Provisions in the QEII Act also established a form of covenant in gross known as an ‘open space covenant’.⁷⁵ The QEII Act established the Queen Elizabeth the Second National Trust to encourage the provision, protection and enhancement of open spaces for the benefit of New Zealand people.⁷⁶ The Trust enters into agreements with land owners to create open space covenants which require the covenantor to provide continuing protection and preservation of native bushlands or water bodies. These covenants run with the land and are a notifiable property interest on the register.⁷⁷ Open space covenants also lack an identifiable dominant tenement, and instead operate as a covenant in gross for the benefit of the Trust and the people of New Zealand. The introduction of open space covenants as property interests has been greatly beneficial for the conservation of native New Zealand spaces. As of June 2016, 4,226 open space covenants had been registered protecting a total of 166,699 hectares of land throughout New Zealand from development.⁷⁸

Both of these legislative movements present a quintessential example of recognising covenants in gross as a new form of right that was previously not permitted as property interests at law. It also exemplifies, to a degree, that the distinction between a conventional and modern approach is not binary, and the law will inevitably shift to cater to societal change. However, these developments are tightly constrained and aimed particular circumstances. The legislation on covenants in gross is far less specific, and the ambiguous drafting provides very little constraint. Thus the above examples do not detract from the overall argument that covenants in gross under the Land Transfer Act 2017 pose a serious risk to conventional property law conceptions.

B The encumbrance instrument

Covenants in gross were not only desired by public bodies, and individuals; developers and bodies corporate desired the power to bind owners of titles within subdivisions or unit titles to

⁷⁴ Sections 108 and 240.

⁷⁵ Queen Elizabeth the Second National Trust Act 1977, s 22.

⁷⁶ Long Title.

⁷⁷ Sections 2 and 22; and see the discussion in *Green Growth No. 2 Ltd v Queen Elizabeth The Second National Trust* [2018] NZSC 75.

⁷⁸ *Queen Elizabeth the Second National Trust Annual Report* (2016) at 12.

join residents' associations, enter contracts with utility providers, or set out restraint of trade provisions.⁷⁹ Previously this could only be achieved by contractual obligations which only bound the covenantor personally. This social demand incentivised creative property lawyers to create some push-back to the general preclusion of covenants in gross from the law. The most common and problematic workaround was the creation of 'de facto' covenants in gross contained in encumbrance instruments.⁸⁰

This is achieved by creating what is effectively a mortgage, by inserting the de facto covenant in gross into the terms of a rentcharge⁸¹ and registering it under s 203 of the Property Law Act 2007. The de facto covenant in gross essentially acts as a mortgage which can be enforced on successors to the title with all remedies under the Property Law Act⁸² available to the mortgagee upon non-performance.⁸³ In this way, the encumbrance instrument has created a means of binding third parties to de facto covenants in gross which were not otherwise registrable.⁸⁴

Despite criticism of the artificial nature of the method,⁸⁵ securing covenants in gross by way of encumbrance instrument has been accepted as a valid means of enforcement.⁸⁶ However, this is not without criticisms, including concerns that the purpose of covenants is incongruous with the purpose encumbrance mechanisms were originally enacted for. Encumbrance instruments are more closely aligned to mortgages,⁸⁷ whereas covenants are concerned with obligations relating to the use of land. Furthermore, the Law Commission's report noted where a covenant was not 'in gross', they were explicitly provided for in statute,⁸⁸ and therefore it is ostensibly contrary to Parliamentary intent to use encumbrances to secure covenants as they

⁷⁹ New Zealand Law Commission, above n 3, at [7.8].

⁸⁰ *ANZCO Foods*, above n 15, at [50]–[51].

⁸¹ For further discussion on the use of rentcharges see generally Thomas Gibbons "Land Covenants: Challenges and Opportunities" (2015) 5 Property Law Review 113.

⁸² Property Law Act 2007.

⁸³ *Navillusso Holdings Ltd v Davidson* [2012] NZHC 2766, (2012) 13 NZCPR 715 at [22].

⁸⁴ See *Body Corporate 341188 v District Court at Auckland* [2015] NZCA 393, (2015) 16 NZCPR 667 at [26]. The legislative mechanics of securing and enforcing a covenant in gross by way of an encumbrance mechanism requires the observance of a range of provisions which must be read together. See provisions in Land Transfer Act 1952, ss 2 and 101; and Property Law Act 2007, ss 4, 97 and 203.

⁸⁵ *Navillusso* above n 83 at [20]; see *ANZCO Foods*, above n 15, at [52]; and New Zealand Law Commission, above n 3, at [7.10].

⁸⁶ *ANZCO Foods*, above n 15, at [53]; and *Menere v Jackson Mews Management Ltd* [2009] NZCA 563, [2010] 2 NZLR 347 per Hammond and Chambers JJ at [45]–[53].

⁸⁷ New Zealand Law Commission, above n 3, at [7.28].

⁸⁸ At [7.28].

lack their own statutory mechanisms.⁸⁹ Troublingly, this also meant there were no legislative safeguards to constrain their use.⁹⁰

Another problem identified by the Law Commission was that encumbrance instruments enjoy the protection of indefeasibility (because they are in effect registered mortgages), which goes beyond the protection afforded to appurtenant restrictive and positive covenants under s 307 of the Property Law Act. This makes them difficult to remove from a title⁹¹ which is reflected in the case law decisions that indicated it was unlikely encumbrances could be easily discharged.⁹² This led to the possibility of undesirable outcomes for incoming third-party successors seeking relief from overly onerous burdens on the land.

This concern is further exacerbated by covenants in encumbrance mechanisms which record ‘all manner of contractual obligations’.⁹³ These types of covenants provide a means to secure personal obligations which had never previously been recognised in common law or equity⁹⁴ and are normally dealt with under the laws of contract. This likely represents a push toward more modern approaches to property interests which encompass a broader range of potential burdens over land.

The Law Commission saw the ability to attach tenuously connected personal obligations to the land as highly inappropriate.⁹⁵ In particular, the Law Commission saw the potential for power imbalances to occur, and the exploitation of bargaining powers to impose ‘onerous and long-lasting’ obligations on individuals.⁹⁶ It illustrated this point by referring to covenants in gross in encumbrances instruments in retirement villages which required elderly land owners to sell their house back to the developer⁹⁷ – essentially an unfettered monopoly buy-back power. Overall this led the Law Commission to the conclusion that the use of encumbrance mechanisms should cease,⁹⁸ and made a further call for clarification and a legislative solution.⁹⁹

⁸⁹ At [7.14].

⁹⁰ At [7.15].

⁹¹ At [7.29].

⁹² At [7.29]; and *Menere*, above n 86.

⁹³ New Zealand Law Commission, above n 3, at [7.31]; and New Zealand Law Society Property Law Section “Submission on Review of the Land Transfer Act” (11 May 2009), schedule B.

⁹⁴ New Zealand Law Commission, above n 3, at [7.29].

⁹⁵ At [7.13] and [7.31].

⁹⁶ At [7.32].

⁹⁷ At [7.32].

⁹⁸ At [7.28].

⁹⁹ At [7.27].

Interestingly the Law Commission's concern for the use of encumbrance instruments aligns with many of the justifications the *numerus clausus* principle exists to address, although they fail to expressly make this connection. Most notably, their recommendations express a desire to ensure any extension to classes of property rights is done so with due clarity and regard for the boundary between property law and contract law.

C The proposal for statutory covenants in gross

As outlined, the Law Commission recommended that using encumbrance mechanisms to enforce covenants in gross should cease. They proposed the statutory recognition of covenants in gross as a response to the apparent demand shown by their growing prevalence within encumbrances on the register.¹⁰⁰ Unfortunately, the report fails to provide any analysis of the jurisprudential positions on covenants in gross and the justifications for the substantial extension to the class of property rights,¹⁰¹ but it nonetheless supports the notion of developing covenants in gross via statute to ensure transparency.¹⁰²

The Law Commission extensively considered the “options for limiting covenants in gross”¹⁰³ so that the distinction between personal interests and property interests was maintained for reasons of public policy.¹⁰⁴ They considered several ways to restrict the types of obligations that could be created under the new provisions such as restricting the class of covenantees,¹⁰⁵ limiting in gross covenants to negative obligations only,¹⁰⁶ and restricting the purposes that covenants in gross could be used for.¹⁰⁷ But ultimately these were rejected in favour of some variation of the touch and concern doctrine which ensures all proposed covenants retained a strong connection to the land.¹⁰⁸ They noted the previously raised issues with the doctrine,¹⁰⁹ and that applying the doctrine to the servient land as opposed to the dominant land was generally novel, and thus not entirely applicable.¹¹⁰ But nonetheless, re-emphasised that

¹⁰⁰ At [7.35].

¹⁰¹ France-Hudson, above n 5, at 10.

¹⁰² New Zealand Law Commission, above n 3, at [7.35].

¹⁰³ At [7.38]–[7.57].

¹⁰⁴ At [7.39].

¹⁰⁵ At [7.40]–[7.41].

¹⁰⁶ At [7.42]–[7.43].

¹⁰⁷ At [7.44]–[7.47].

¹⁰⁸ At [7.48]–[7.52].

¹⁰⁹ At [7.48].

¹¹⁰ At [7.48]–[7.50].

something was required to maintain the distinction between property and contract so that personal obligations could not run with the land in perpetuity.¹¹¹

In settling on this limiting principle the report referred to an English Law Commission paper¹¹² which provided examples of obligations which should not be capable of becoming valid covenants such as obligations to repair a car, pay an annuity or write a song.¹¹³ But in concluding these covenants were inappropriately personal, the New Zealand Law Commission's report conceded that some form of land linked test to restrict these types of covenants would be inadequate in itself to resolve all the potential problems with covenants in gross.¹¹⁴ A judicial power to modify or remove covenants in gross from the register was also recommended. This power would provide a discretion to remove any covenant deemed contrary to public policy, or where removal is considered just or equitable.¹¹⁵

The Law Commission's recommendations ostensibly provide support for the value of keeping contract and property separate. The recommendations highlighted several of the negative consequences that may result from conflation of this boundary in relation to covenants in gross. While not explicitly supporting the conventional concepts such as *numerus clausus*, they appear to suggest that the modern approaches on the other side of the debate are not justifiable in light of the undesirable consequences they create – a point which will be discussed in more depth in the following chapter.

D The legislation proposed versus the legislation enacted

The draft Land Transfer Bill provides a statutory expression of the recommendations for reform including the provisions relating to covenants in gross to be inserted into the Property Law Act. The most important provision for this dissertation is the recommended wording of s 307A:¹¹⁶

¹¹¹ At [7.37].

¹¹² English Law Commission, above n 49; and New Zealand Law Commission, above n 3, at [7.48].

¹¹³ English Law Commission, above n 49, at [8.72]; and also see Scottish Law Commission *Report on Real Burdens* (Scot Law Com, no 181, Edinburgh, 2000) at [2.9].

¹¹⁴ New Zealand Law Commission, above n 3, at [7.52].

¹¹⁵ At [7.56].

¹¹⁶ New Zealand Law Commission, above n 3, at 310 (emphasis added).

‘307A Covenants in gross

In sections 307B to 307H, covenant in gross in relation to land, means a covenant that—

- ‘(a) is contained in an instrument; and
- ‘(b) requires the covenantor to act or to refrain from acting in a particular way *in relation to the occupation or use of the land or part of the land;* and
- ‘(c) benefits another person; and
- ‘(d) is not attached to other land.’

This can be compared to the provision which was later enacted by Parliament:¹¹⁷

‘307A Covenants in gross

In sections 307B to 307F and 318A to 318E, **covenant in gross** means a covenant that—

- ‘(a) is expressed in an instrument coming into operation on or after the commencement of this section; and
- ‘(b) requires the covenantor to do something, or to refrain from doing something, *in relation to the covenantor’s land;* and
- ‘(c) benefits another person, but is not attached to other land.’

Both the Law Commission’s version and the legislature’s version of the provisions present a classic definition of a freehold covenant in gross. However, the most evident distinction between the provision proposed and the final version in the Land Transfer Act 2017 is the removal of the phrase “occupation or use”. It has been suggested that had the provisions been enacted in the Bill’s drafted form the potential for problems could have been minimised,¹¹⁸ and to some degree, Parliament’s position as to whether a modern or conventional approach to property should be adopted could have been clarified. The Law Commission’s suggested provision appears narrower when considering the types of obligations that would be precluded where a covenant must relate to the ‘use or occupation’ of the land. A possible explanation for the change of wording could be a response to the New Zealand Law Society’s concern raised in the Bill’s submission process. The Law Society queried whether the proposed wording might

¹¹⁷ Property Law Act 2007, s 307A to be inserted via the Land Transfer Act 2017, s 242 (emphasis added).

¹¹⁸ France-Hudson, above n 5, at 11.

preclude obligations to join residents' associations or precinct societies from notification under the provisions.¹¹⁹ Although, an interpretation where these are permitted is at least tenable.¹²⁰

Both versions of the provision may be inadequate in themselves for different reasons. However, it seems difficult to deny that the wording of the enacted provision is somewhat broader in the sense that it is not limited to constraining the covenantor from acting or refraining from acting in a particular way which is in relation to the use or occupation of the land. It instead requires a much broader identifiable connection to the land of an undefined strength.¹²¹ The issues with these provisions can be illustrated by example:

Figure 1: Possible covenants in gross which could arguably run under both versions of the provision

| Proposed covenant in gross | Land Transfer Bill – “in relation to the occupation or use of the land?” | Land Transfer Act 2017 – “in relation to the land?” |
|---|---|--|
| The covenantor in the course of business in operating a restaurant, must continue to provide free meals on the land at the request and for the benefit of the covenantee | No | Arguably, yes |
| The covenantor grants an option to purchase to the covenantee over the property upon sale, with the intent to bind all subsequent owners with the same option to purchase | No | Yes |
| No one with children under the age of ten years old in their care may occupy this property | Possibly yes, where it relates to the occupation of the land | Yes |

¹¹⁹ New Zealand Law Society “Land Transfer Act Review – Government Response” (submission to Land Information New Zealand, 11 October 2010) at [2.3.3(c)].

¹²⁰ France-Hudson, above n 5, at 13.

¹²¹ Admittedly, I continue to have some reservations about the Law Commission’s suggested provision, but this is a point that will be picked up on in later discussion regarding the continuing need for an intrinsically land-centred link.

Both provisions present potential pitfalls in their ability to provide an effective screening mechanism. Nonetheless, the larger problem at present concerns the finalised provisions. These do not clarify the preferred approach to covenants in gross and the extent to which they should relate to the land within the context of the wider debate in property law.

As the presently enacted provision merely requires the content of the covenant to relate to the land it likely addresses the concern over covenants which require residents' association memberships, as on some interpretation, this could relate to the land. However, the wording also creates uncertainties over the value which conventional property law principles retain in keeping the boundary defined between property law and contract law. Recent commentary on the new provisions query whether any form of touch and concern test has been retained in the law at all.¹²²

Further problems arise from the decision by Parliament to retain encumbrance mechanisms against the Law Commission's recommendations.¹²³ Encumbrances therefore continue to provide a perfectly valid means of securing covenants in gross in a way which attracts the benefits of indefeasibility via registration. It seems the only real constraint Parliament adopted from the Law Commission's recommendations was the power of modification and removal under s 318D. This section provides judges with a power to remove any covenant that is 'contrary to public policy, or to any enactment or rule of law', or 'for any other reason, it is just and equitable to modify or extinguish the covenant'.¹²⁴

Admittedly s 318D seems well drafted as the broad discretion given could permit a release from any covenant in gross which promotes commercial monopolies, or is unduly onerous or burdensome. The difficulty however is that the provision has a retrospective action, so the contested covenant in gross must meet one of the above criteria and therefore any difficulties or damage must have already arisen. It would not be unreasonable to assume that at the point of making a court application, extensive costs would have already accrued in the negotiation

¹²² Toomey, above n 62, at 20.

¹²³ For the possible justifications behind the decision see: Hon Louise Upston *Land Transfer Bill – Minor Changes to 2010 Policy Decisions and Additional Policy Decisions* (Land Information New Zealand, 2015) at 5: "As landowners are likely to voluntarily stop using encumbrances over time and instead have covenants in gross notified on the record of title, I propose to remove this proposal and restore the status quo."

¹²⁴ Property Law Act 2007, s 318D(1)(f)–(g) to be inserted via the Land Transfer Act 2017 s 246. See Appendix for s 318D laid out in full. Note that this does not include the removal of covenants secured in encumbrance instruments. The provision is undoubtedly useful but is by no means a panacea. This is discussed at greater depth in Chapter Four.

process for release from the covenant. Thus, in practice it is very unlikely this will prove to be an effective, efficient or accessible safeguard system which further illustrates the lack of care in the legislative drafting.

The current provisions lead to the conclusion that any previous caution to lawmakers regarding the importance of considering the principle of *numerus clausus*¹²⁵ in proposals for property law reform has been overlooked. Or alternatively, there has been a direct yet silent rejection of these conventional principles in favour of the modern critique that suggests they have been superseded by effective systems of registration.¹²⁶ This decision may reflect a trend in statutory development and judicial decisions toward giving greater recognition to the role of covenants relating to land,¹²⁷ but the uncertainty over this assertion cannot be ignored. The position that covenants in gross sit within this suggested trend remains insufficiently articulated to serve as a sound basis for interpreting this legislation.

The decision seems to have been left open to the interpretation of property lawyers and the judiciary. In arguing that the conventional principles still retain a valid place in the interpretation of these provisions it is appropriate to examine the theoretical arguments and the practical consequences under each approach.

¹²⁵ Ben McFarlane “Keppell v Bailey (1834); Hill v Tupper (1863); The *Numerus Clausus* and the Common Law” in Nigel Gravells (ed) *Landmark Cases in Land Law* (Hart Publishing, 2013) 1 at 28.

¹²⁶ See generally Epstein, above n 65; and Richard A Epstein “Covenants and Constitutions” (1988) 73 Cornell L Rev 906.

¹²⁷ *Escrow Holdings*, above n 27, at [30]–[39].

III Two Pathways of interpretation: Selecting the appropriate approach

*“Two roads diverged in a wood, and I—
I took the one less travelled by,
And that has made all the difference.”*

*The Road Not Taken
Robert Frost (1916)*

Because of the ambiguities in interpretation, the legislation inevitably engages the debate over the most appropriate guiding theory of property law. The conventional approaches and their modern critique exemplify a divergence in opinion which stems back to nineteenth century English case law. In the context of covenants in gross, the debate boils down to a question of legislative interpretation for the judiciary. The Interpretation Act 1999 stipulates that the meaning of an enactment must be ascertained from the wording of the text in light of its purpose,¹²⁸ however as explained, the provisions themselves and purpose of the Property Law Act fail to provide a clear approach to interpretation. Some have suggested the loose wording has done away with any kind of touch and concern test and its conventional counterparts altogether.¹²⁹

Ultimately the ambiguity provided by the provisions enacted requires judges to make a decision on the appropriate approach in determining the validity of covenants in gross. One response is to adopt an approach which recognises Rudden and Epstein's suggestions that for economic reasons and the ability of the Register to notify people of burdens, the purpose that the conventional principles once stood to serve are now obsolete. Adopting such an approach permits much more tenuously connected obligations to be recognised as covenants in gross which would never have previously attracted proprietary status. Perhaps, it could be argued, the social, technological and legal context has simply moved on from where it stood in the mid-nineteenth century, and a broad interpretation is appropriate.

Conversely, a more conservative interpretation suggests the conventional approaches should continue to apply to the new provisions for two main reasons. Firstly, conventional principles do in fact still retain a valuable place in the era of modern land registration systems. Secondly, as Parliament has not clarified the intended application of the provisions, it is not the place of

¹²⁸ Interpretation Act 1999, s 5(1).

¹²⁹ Toomey, above n 62, at 20.

the courts to adopt such a fundamental change to the way property law has conventionally been conceived.

In this chapter I will aim to negate the suggestion that our system of property law has in fact moved on. In doing so I will address the main arguments on both sides of the debate, but conclude on the basis of four main justifications that the conventional principles of property law remain relevant and useful in contemporary property systems, and in the approach to the provisions concerning covenants in gross. Moreover, I will aim to show that a conservative stance is also preferable in response to a failure by Parliament to clarify their intent as to how the provisions should be applied.

A The reality of third party knowledge and consent

The conventional rationale for *numerus clausus* is the idea that by simplifying the possible classes of rights, it becomes easier for prospective purchasers to understand and determine how a specific land right has been fragmented.¹³⁰ However, Edgeworth notes that changing societal norms have meant that contractual rights which were once considered ‘fanciful’ have become socially desirable and therefore ‘legitimate candidates for membership of this exclusive club’.¹³¹ In fact, it has been speculated the conservative approach to property rights illustrated by *numerus clausus* only arose as a response to the nineteenth century need to address the problem of binding third parties.¹³² Now that we have entered an era of modern registration systems, the value placed on the stricture of *numerus clausus* is argued to have diminished.¹³³

The Supreme Court has recently acknowledged the validity of this suggestion in *Escrow Holdings Forty-One Ltd v District Court at Auckland*.¹³⁴ The Court noted the increasing recognition of covenants in statute and common law¹³⁵ and reasoned that the ideas referred to in *Keppell v Bailey*¹³⁶ were best applied in that time, where there were high levels of uncertainty in the methods of notifying land burdens.¹³⁷ However, the case refrained from making any substantive decision on this point.

¹³⁰ Edgeworth, above n 2, at 387.

¹³¹ Edgeworth, above n 2, at 407; and see for example Carol M Rose “The Several Futures of Property: Of Cyberspace and Folk Tales. Emission Trades and Ecosystems” (1998-99) 83 Minn L Rev 129.

¹³² Edgeworth, above n 2, at 407.

¹³³ Edgeworth, above n 2, at 407.

¹³⁴ *Escrow Holdings*, above n 27.

¹³⁵ At [39].

¹³⁶ *Keppell*, above n 31.

¹³⁷ *Escrow Holdings*, above n 27, at [29].

The suggestion regarding the adequacy of land registration systems to notify third parties of burdens arguably provides the strongest argument to adopt a modern approach to interpreting property interests. More specifically, Epstein's articulation of this approach suggests modern systems of land registration can adequately notify third parties of burdens annexed to land, and where a robust system of land registration and notice exists, freedom of contract should control.¹³⁸ His argument aligns with the earlier rationale of *Tulk v Moxhay*¹³⁹ in the sense that issues only arise where successors to the title are bound by undiscoverable burdens over land.¹⁴⁰ Where a system of registration such as the Torren's system in New Zealand is implemented, the incoming purchaser can account for the particular burden when negotiating and factor it into the price paid.¹⁴¹ The market for land would not be stifled by widening the scope of potential property interests, as more onerous or idiosyncratic covenants are counterbalanced by a decrease in market value.¹⁴²

While it is conceded that systems of land registration have become far more accurate and efficient at notifying property interests in the contemporary context, the conventional approaches to property still hold an important role in regulating people's interaction with land. Epstein's argument appears somewhat aspirational in a reality where there is a discernible lack of knowledge relating to land burdens. Moreover, modern approaches fail to recognise the extent to which property rights can be asserted against third parties generally and are not just limited to incoming successors in title.¹⁴³ However both of these issues can be reconciled under a conventional approach which abides by the rules of *numerus clausus*.

I Lack of knowledge

The material lack of knowledge in society relating to registered or notified burdens suggests Epstein's proposition that modern registration systems can readily inform third parties of land obligations is unrealistic. The reality is that people have a very limited understanding of land burdens and limited access to the register itself. The Scottish Law Commission conducted research into the knowledge purchasers and owners had of covenants over their land. Their

¹³⁸ Epstein, above n 65, at 1358.

¹³⁹ *Tulk*, above n 19, at 777-778.

¹⁴⁰ Epstein, above n 65.

¹⁴¹ At 1360.

¹⁴² Epstein "Covenants and Constitutions", above n 126, at 917.

¹⁴³ H Hansmann and R Kraarkman "Property, Contract and Verification: The *Numerus Clausus* Problem and the Divisibility of Rights" (2002) 31 JLS 373.

results found that many purchasers fail to consider the burdens that land is subject to in deciding whether or not to buy.¹⁴⁴ Typically, purchasers bought land with very little knowledge, and just over half of those surveyed had purchased land with no knowledge of the burdens at all.¹⁴⁵ The Scottish Law Commission emphasised that unlike contractual obligations, land burdens were not freely entered into. Where purchasers did have knowledge, they found that it often resulted in the drastic decision to give up the house or property; but more often than not purchasers made decisions on property with a total lack of knowledge of obligations they would eventually become subjected to.¹⁴⁶

This concern was raised by the American Legal Institute¹⁴⁷ in the United States in 1998 when they sought to radically reform their property laws on servitudes. The Restatement of the law¹⁴⁸ sought to address the issues raised in relation to the touch and concern doctrine,¹⁴⁹ and encourage judges to give substantive rationale for holding a servitude invalid.¹⁵⁰ The Restatement abolished the touch and concern test, leaving no ostensible requirement for a covenant to benefit any land. Any form of covenant can be imposed over land no matter how personal the content may be provided it is not ‘illegal, unconstitutional or against public policy’.¹⁵¹ As part of the Restatement, the American Law Institute expressed serious concerns over the ordinary American’s knowledge of property burdens¹⁵² and the limited consideration purchasers gave to the implications a covenant may have.¹⁵³ The Institute’s research determined that buyers focused more on amenities and infrastructure such as location,

¹⁴⁴ Scottish Law Commission, above n 113, at [5.6].

¹⁴⁵ At [5.6].

¹⁴⁶ At [5.6].

¹⁴⁷ The American Law Institute is an independent organisation which produces works to clarify and improve the law. They publish Restatements of the law and model codes which are highly influential in courts and upon legislatures. (See “About ALI” <www.ali.org>).

¹⁴⁸ American Law Institute, *Restatement of the Law Third, Property (Servitudes)* (Philadelphia, 2000).

¹⁴⁹ Dan Tarlock “Touch and Concern is Dead, Long Live the Doctrine” (1998) 77 Neb L Rev 804.

¹⁵⁰ S French, “Highlights of the New Restatement (Third) of Property: Servitudes” (2000-01) 35 Real Prop Prob & Tr J 225 at 233.

¹⁵¹ American Law Institute, above n 148, § 3.1. § 3.1 explains that “servitudes that are invalid because they violate public policy include, but are not limited to: (1) a servitude that is arbitrary, spiteful, or capricious; (2) a servitude that unreasonably burdens a fundamental constitutional right; (3) a servitude that imposes an unreasonable restraint on alienation under § 3.4 or § 3.5; (4) a servitude that imposes an unreasonable restraint on trade or competition under § 3.6; and (5) a servitude that is unconscionable under § 3.7.” Note however that the judiciary has struggled with the Restatement in practice. It has often been ignored altogether in favour of some variation of the ‘touch and concern’ doctrine. See further discussion in Anon “Notes: Touch and concern, the restatement (third) of property: servitudes, and a proposal” (2009) 122(3) Harv L Rev 938 at 944.

¹⁵² American Law Institute, above n 148.

¹⁵³ Victorian Law Reform Commission *Easements and Covenants* (CP, No 9, 2010) at [12.29].

schooling and the property's physical characteristics than on the documents which imposed burdens on the land.¹⁵⁴

Admittedly, a lack of knowledge could be managed through an efficient and accessible regulatory framework which easily allows for the discovery of covenants attached to land. If a covenant can be varied or discharged at a relatively low cost and the process is accessible, pre-emptive control mechanisms become less essential.¹⁵⁵ In the United States this is illustrated by a broad ability to extinguish a covenant provided in the Restatement,¹⁵⁶ but also in the American common law doctrine of 'changed circumstances'. The doctrine was embodied in the Restatement by allowing a court to modify or extinguish a covenant where it is no longer 'practicable or suitable' for the permitted use on the land due to a change in circumstance.¹⁵⁷

In contrast, the English Law Commission decided that in spite of effective registration systems, the conventional property law principles were still valuable. They stated that registration may allow the purchaser to choose not to buy (which as we have seen, is not as effective in practice as originally thought), but it does not prevent the imposition of overly onerous obligations from the outset.¹⁵⁸ They concluded that in England retaining the controls over the initial imposition of covenants was important.¹⁵⁹ Their reasoning is likely rooted in the diverging pathways the United States and England took in relation to permitting positive covenants which dates back to somewhere after *Spencer's Case*,¹⁶⁰ but prior to *Keppell v Bailey*.¹⁶¹ The American Restatement has since brought covenants (both positive and negative), easements and profits à prendre under a unified framework.

The developed systems of registration in the United States (although not Torrens systems) has allowed for land obligations to be much more publicly accessible.¹⁶² The long history of state-

¹⁵⁴ American Law Institute, above n 148, chapter 6, introductory note. Nonetheless, these concerns were evidently ignored in the finalised Restatement.

¹⁵⁵ English Law Commission *Making Land Work: Easements, Covenants and Profits à Prendre* (HC 1067).

¹⁵⁶ See American Law Institute, above n 148, § 7.2 for the powers of judicial modification and termination.

¹⁵⁷ American Law Institute, above n 148, § 7.1-7.2. Note s 318D of the Property Law Act 2007 (NZ) which gives similar *post hoc* powers to the court to modify and extinguish covenants in gross.

¹⁵⁸ English Law Commission, above n 155, at [5.60].

¹⁵⁹ At [5.60].

¹⁶⁰ *Spencer's Case* (1583), 5 Co Rep 16, [77 ER 72].

¹⁶¹ *Keppell*, above n 31; English Law Commission, above n 155, at [5.33].

¹⁶² S F French "Design Proposal for the New Restatement of the Law of Real Property – Servitudes" (1987-88) 21 UC Davis L Rev 1213; see also S F French "Toward a Modern Law of Servitudes: Reweaving the Ancient Strands" (1981-82) 55 SCAL L Rev 1261, 1283, n 114.

specific methods of registration also contrasts to England's relatively recent implementation of effective land registration systems. Greater caution has consequently been observed in common law and legislation regarding obligations which can run with the land in England. This historical divergence seems to justify the English Law Commission's conclusion that any radical move to align their laws with the United States would be unsuitable.

In New Zealand our laws are largely founded upon those of England,¹⁶³ and so far we have only gradually and cautiously extended the classes of property rights through legislative change.¹⁶⁴ To interpret the legislation on covenants in gross as an opportunity for radical extension of property interests ignores the valid concern that the average New Zealander is unlikely to be more knowledgeable than those observed in the Scottish Law Commission's survey. The reality is that idiosyncratic or 'fanciful' covenants in gross imposed in absence of mutual agreement at the negotiation stages are unlikely to be acknowledged by the everyday land purchaser, and will be subsequently difficult to remove. The single method of modification or removal requires an application to the court under s 318D.¹⁶⁵ While the modification provision itself offers a wide level of discretion to the judiciary, it requires application to the courts to access this relief – a process which will be expensive and easily abused by opportunistic parties. The situation is further complicated where the benefit of these rights is held by a third party external to the transaction between the vendor and purchaser which adds a further step in the negotiation process. Because incoming purchasers are unable to discover and understand land burdens easily, an overly permissible interpretation of covenants in gross is undesirable. The provision of information is simply not the same thing as, nor an effective substitute for the effective communication of information.¹⁶⁶

Adopting a conventional approach to covenants in gross would constrain the definition of the interest to beneficially prevent large numbers of idiosyncratic rights from being entered on the register from the outset. Adopting the justifications behind the *numerus clausus* to keep individual rights confined to their defined boxes reduces the inimical effects of poor knowledge of rights. Screening out those rights which are contractual in nature creates reassurance for

¹⁶³ France-Hudson, above n 5, at 3, n 13.

¹⁶⁴ See for example the provisions added to allow positive covenants to run with the land in 1987 through an amendment to the Property Law Act 1952; and s 221 of the Resource Management Act 1991 which has permitted covenants in gross in prescribed circumstances.

¹⁶⁵ Land Transfer Act 2017, s 318D.

¹⁶⁶ O'Connor, above n 48, at 64.

incoming purchasers that the types of rights which will be binding on them are well-defined and limited in scope so as not to impose overly onerous idiosyncratic obligations which the conventional approaches confine to the laws of contract.

2 The broader effect on third-parties

The effect on third parties engages a discussion on the most fundamental justification for the distinction of property law and contract law – the ability to bind subsequent purchasers and assert property rights against third parties generally. This is a concern in the context of covenants in gross as not only successors in title, but third parties more generally are required to observe the stipulated covenant. The Scottish Law Commission has referred to the third party effect as a ‘privilege’ that property interests confer:¹⁶⁷

Real burdens should concern land. That is their whole purpose and justification.

If real burdens were about persons and not about land, their purpose could be achieved under the ordinary laws of contract. If A wants to bind B he need only make a contract. But if A wants to bind B’s land a contract will not do, because B may sell and B’s successors would then be free of the obligation. The privilege accorded to the real burden is that it runs with the land, but in exchange that privilege must concern the land.

Treating land as a commodity in the open market by allowing it to be subjected to obligations which are historically the place of contract does not adequately acknowledge the privilege of the right ‘which is good against the world’.¹⁶⁸ Austin suggests property is resolved into two elements: the power of indefinite use of the subject of a specific right, and second, the power to exclude all others.¹⁶⁹ The ability to assert these rights against all others goes beyond prospective successors to the title. Property rights require a wide class of third parties to access and understand these rights so they do not infringe them.¹⁷⁰ In this way, property rights impose a broad duty on third parties to comply with and respect those rights.¹⁷¹ The law of contract already provides an alternative means of binding persons to idiosyncratic rights which limits

¹⁶⁷ Scottish Law Commission, above n 113, at [2.9] (emphasis added).

¹⁶⁸ Thomas W Merrill and Henry E Smith, “What Happened to Property in Law and Economics?” (2001) 111 Yale LJ 357 at 358 and 397, quoting J E Penner *The Idea of Property in Law* (Clarendon Press, 1997) at 30.

¹⁶⁹ J Austin *Lectures on Jurisprudence* (5th ed, London, 1885) 808 at 938.

¹⁷⁰ T W Merrill and H E Smith, “Optimal Standardization in the Law of Property: The Numerus Clausus Principle” (2000-2001) 110 Yale LJ 1 at 26.

¹⁷¹ O’Connor, above n 48, at 48.

obligations to the original contracting parties.¹⁷² Therefore the need to access and interpret those rights is limited to the original parties to the contract who by nature of creating those rights, are informed of, and better understand the right imposed. There is real merit in the argument that if you are going to bind everyone to a specific right in respect to land, the content of that right should not be too idiosyncratic or complex so as to create a significant burden on third parties to interpret and obey it.¹⁷³

Adopting the conventional approach to covenants in gross likely resolves these concerns by acting to restrict rights to only those which meet the defined criteria presented in the closed list. Any idiosyncratic rights which fall shy of these specifications are left to be dealt with by the laws of contract and are incapable of binding third parties. Third parties are consequently absolved of overly onerous duties to be informed of and interpret a plethora of obligations which where idiosyncratic in nature, may be an increasingly difficult duty to undertake.

Accepting the conventional approaches as the most desirable interpretive method for covenants in gross filters out proposed covenants in gross which may cause negative externalities to society generally by imposing onerous and impractical duties on purchasers of land and third parties generally. The conventional approach allows a balance to be struck so that freedom of contract is still enjoyed between contracting parties, and covenants in gross are structured in accordance with the ‘building blocks’ of the closed list¹⁷⁴ which minimises the wider societal concerns.

B Reducing information and negotiations costs

The modern approach to property law also provides an economic rationale for allowing historically contractual rights into the realm of property. Bernard Rudden has suggested where there is a property registration system, which proceeds on the basis of sufficient notice, information costs are reduced. Accordingly, the economic costs involved with education and policing the boundaries of the often poorly defined conventional restrictions are removed. This suggestion therefore supports a more flexible approach to creating new interests in land which

¹⁷² Henry E Smith “The Language of Property: Form, Context, and Audience” (2003) 55 Stan L Rev 1105 at 1110-1111.

¹⁷³ At 1108.

¹⁷⁴ Merrill and Smith, above n 170, at 50.

would have previously been precluded.¹⁷⁵ The justification is once again balanced by the reflection of the burden in price reduction in the property.¹⁷⁶ Any obligation that is viewed as too onerous would be stymied by a lack of interest in a free market that permits all forms of obligations. In this way, the vendor who insists on the covenant's implementation shoulders the consequences.¹⁷⁷

Conversely, the *numerus clausus* principle reflects a recognition by judges of the expensive task of communicating intensive information to wide and diverse audiences.¹⁷⁸ As explained above, property interests are not merely concerned with incoming successors to the title, but with rights against third parties generally. The use of registration systems is therefore unlikely to materially reduce information costs in light of the fact that legal advice is generally required to access the register system. Additionally, the more idiosyncratic or personal the interest is, the less likely third parties are to have the necessary context to interpret it. Further clarification from an additional party must then be sought.

Transaction costs are likely increased by the need for an extra set of negotiations that are external to the transacting parties, and also in gaining the necessary understanding of the covenant in gross. This undesirably begins to erode the general rule that people should not need to go behind the register to look for contextual extrinsic material.¹⁷⁹ Obligations that subjectively benefit a person, increase the need for context and make identifying the relevant covenantee much harder than in the circumstance of appurtenant tenements where the dominant land owner is more easily identified.

The modern argument that registration systems reduce information costs to a greater extent than the use of conventional concepts also inadequately accounts for the simple fact that people, by their nature, do stupid things.¹⁸⁰ In a normal contractual situation the consequences of stupidity are somewhat insulated. For example where a contract imposes a fanciful obligation which is far more burdensome to observe than the covenantor anticipated, the effect

¹⁷⁵ Rudden, above n 65. Also for criticisms of the definitions of 'touch and concern' in determining the validity of property rights see generally: Fisher, above n 51.

¹⁷⁶ Rudden, above n 65.

¹⁷⁷ Epstein, above n 65, at 1360.

¹⁷⁸ Smith, above n 172, at 1157-1158.

¹⁷⁹ *Westfield Management Ltd v Perpetual Trustee Co Ltd* [2007] HCA 45, (2007) 233 CLR 528 at 539; and *Green Growth*, above n 77.

¹⁸⁰ Jeffrey Stake "Toward an economic understanding of touch and concern" (1998) Duke LJ 925 at 934.

is limited to the contracting parties due to contractual privity.¹⁸¹ But where a land interest such as a covenant in gross is concerned, this effects not only the original parties to the contract, but all successors in title potentially in perpetuity. In the course of ‘perpetuity’, the land may be divided many times, and the attached promise is divided along with it leaving the benefit of the promise to fall into multiple hands.¹⁸² When the covenantor seeks to detach the promise, it becomes far more difficult than a two-party contract, as covenantees may exercise hold outs or opportunistic behaviours which force the covenantor into the courts for relief. All of this raises the initial information costs substantially beyond merely the discoverability of the burdens on the register.¹⁸³

The economic debate over guiding theories of property law has produced an alternative response to Rudden. The response suggests that no matter how efficient a system of registration may be, a legal system can only sustain a certain number of land interests. Where this number stretches beyond the sustainable limit, some form of ‘property interest anarchy’ ensues. This economic justification is referred to as ‘optimal standardisation’.¹⁸⁴

Merrill and Smith argue that Rudden and Epstein fail to consider the significant measurement costs that can be incurred in dealings concerning registration searches for a large number of property rights. Although land registers can notify third parties of land obligations for a smaller price than a doctrine of constructive notice, even with land registration system, some lengthy and error prone searches can still result.¹⁸⁵ Merrill and Smith concede that more accurate and comprehensive land registration systems do allow property law to bear an increase to the optimal number of land interests.¹⁸⁶ But they suggest that a system can never be capable of controlling the costs that result from the proliferation of unconstrained, unusual and idiosyncratic rights which deviate from conventionally recognised rights. Even where these are recorded on the land register, notifying and binding people to idiosyncratic rights becomes a costly endeavour.¹⁸⁷

¹⁸¹ At 935.

¹⁸² At 936.

¹⁸³ See Ellickson “Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights” (1986) 64 Wash ULQ. 723 at 724-725.

¹⁸⁴ See generally Merrill and Smith, above n 170.

¹⁸⁵ Merrill and Smith, above n 170, at 45.

¹⁸⁶ Merrill and Smith, above n 170, at 4.

¹⁸⁷ At 44.

This proposition makes sense when considering the difficulty in understanding idiosyncratic fancies on a register which does not require people to look behind it for further context. To prevent excessive costs and confusion, it seems there will always be a need for an optimal number of interests which property law acts to patrol. By standardising the classes and characteristics of property rights, the conventional principles actively reduce measurement costs at the inevitable expense of frustrating individual freedoms.¹⁸⁸ Because individual rights are constrained, any extension to *numerus clausus* should be incremental and provide a sufficient public benefit so that potential negative consequences can be adequately accounted for and addressed.¹⁸⁹ In this way, granting covenantees these extended powers must be justified against the adverse consequences to third parties and society generally.¹⁹⁰ It is not advisable to take an approach to covenants in gross which greatly extends the categories of rights that conventional principles operate to constrain. Doing so would by no means be an incremental step, as the variation of interests that may be permitted would likely result in drastic increases in information and negotiation costs, making this approach difficult to justify on the basis of public benefit.

Public policy rightly requires some limitations to be imposed on the ability of parties to fragment rights excessively,¹⁹¹ and to limit the types of rights which can attain proprietary effect. Applying conventional approaches aids in preventing idiosyncratic and personal obligations from attaining proprietary effect as covenants in gross. Principles such as *numerus clausus* and the touch and concern doctrine require property rights to be sufficiently defined and attempt to limit the number of obligations that can be imposed over land, and the parties which can hold those rights. The conventional concepts thereby significantly reduce the potential for excessive costs in negotiations with multiple parties, and where this proves unsuccessful, the need to seek relief from the courts is reduced. Adopting this approach to covenants in gross ensures that interests which may make conveyancing complex, hazardous and costly are excluded from being considered under the rules of property.¹⁹²

¹⁸⁸ O'Connor, above n 48, at 48.

¹⁸⁹ Edgeworth, above n 2 at, 405.

¹⁹⁰ McFarlane, above n 25, at 313.

¹⁹¹ Edgeworth, above n 2, at 406.

¹⁹² Edgeworth, above n 2, at 394–395 (citations omitted).

C Effect of proliferation of rights on ownership liberties and co-ordination

Land sets itself apart from other commodities in its ability to sustain large numbers of interests. Inadequately regulating interests in a property system can lead to complicated property relations between holders of rights,¹⁹³ and a proliferation of undesirable interests that subordinate people's ownership rights.

1 The co-ordination factor

One of the purposes of adopting a system which limits the classes of property rights is to allow multiple interests to co-exist, and resolve disputes between interest holders where they arise.¹⁹⁴ Keeping these closed classes to a specified and identifiable number of sustainable interests (which currently sits at approximately a dozen),¹⁹⁵ the scope of each right can be sufficiently defined and better managed where multiple rights exist in that same land.

Extending the ambit of covenants in gross to create property interests which have very tenuous connections to the land could throw these mechanisms out of balance. The more personal in nature these rights are, the more difficult it becomes to clarify and define their scope and address the encroachment it may pose on another property interest in the same land asset. The pieces of the jigsaw puzzle fit together much more harmoniously where there are effective regulation mechanisms to minimise the disruption between owners.¹⁹⁶

The role conventional concepts play in co-ordinating land interests cannot be replaced by any notion of notice through a land register. Recognising the purpose of conventional concepts in limiting the content, and consequently the number of interests in an approach to covenants in gross prevents many of the co-ordination issues arising. To take a broad interpretation to the wording of the provisions on covenants in gross would be to treat property interests in a way that does not acknowledge the differences between land and other commodities. By limiting the types of rights that can attain proprietary effect, the conventional approach to covenants in gross is better placed to address these co-ordination problems.

¹⁹³ O'Connor, above n 48, at 40.

¹⁹⁴ At 40.

¹⁹⁵ Rudden, above n 65, at 255.

¹⁹⁶ O'Connor, above n 48, at 40.

2 Retaining control over ownership rights

Restricting the types of obligations which can become property rights by adopting a conventional approach also allows land owners the greatest freedom to exercise their ownership rights. This may seem contradictory, but where there are minimal restrictions or weak pre-emptive regulation of the types of rights that can attach to land, there is a danger of unwanted proliferations of fanciful rights becoming layered over the land. The result is that land titles are left unduly encrusted with onerous obligations which are difficult to remove.¹⁹⁷ At the extreme end of the spectrum, it is not inconceivable that owners may assume the role of a tenant on their own property where the content of covenants in gross is unrestricted and layers of rights increasingly hamper the title overtime.

The concern for burdening land with a proliferation of essentially unregulated property interests requires an assessment of the value of these types of rights against the necessity of directly consenting to them. With regard to consent, generally the power to alter the legal position of person ‘A’ in an advantageous way by providing ‘A’ with a power they did not have before seems justified whether they wished to be given that power or not.¹⁹⁸ On the other end, the position of the offeror, person ‘B’, in this example is worsened by the offer as they obtain no benefit. However, the fact of B’s consent to the deal justifies the action. The difference between this example and the creation of a property interest is that the property interest erodes the consent process somewhat by granting the power to alter another’s legal position (i.e. the position of C) potentially for the worse, in absence of their direct consent.¹⁹⁹ Dramatic extensions to the class of property rights that permits obligations which have previously been confined to contract must be soundly justified. They must show provide some wider public policy or societal benefit which outweighs the negative impact of eroding individual consent.²⁰⁰

The common law’s hesitance to usurp land owners’ rights has been witnessed not only in relation to covenants, but also in other classes of property interests. The broader recognition of conventional principles in constraining the types of rights which are afforded the privileges of proprietary effect illustrates the value that these conventional approaches retain in interpreting

¹⁹⁷ Rudden, above n 65, at 248.

¹⁹⁸ Rudden, above n 65, at 251.

¹⁹⁹ At 251.

²⁰⁰ Note that this is particularly prudent in light of the apparent lack of real knowledge third parties have of burdens on the register. (Refer to discussion above at page 28).

property rights. In *Re Ellenborough Park*²⁰¹ for example, the Court laid out the necessary requirements to establish a valid easement. These requirements have since been followed by many jurisdictions where they have not been overridden by statute. Even in New Zealand, where some of the requirements have been overridden by legislation, the test remains important; in particular the fourth requirement that to be valid, the easement must satisfy a number of sub-rules.²⁰² *Clos Farming Estates Pty Ltd v Easton*²⁰³ provides a recent illustration of the limitations these conventional approaches impose to prevent subordination of ownership rights. The case concerned a purported easement for harvesting and viticulture on a vineyard comprised of 80 residential titles (the servient tenements) in favour of a small piece of neighbouring land (the dominant tenement). The validity of the easement was disputed, and it was determined that there was no real or intelligible connection between the easement rights and any benefit to the dominant tenement.²⁰⁴ Moreover, the Court found the rights conferred were so extensive that they usurped the rights of owners such that they were only a fraction of what is normally associated with ownership.²⁰⁵ The right was consequently deemed incapable of forming a valid easement. The final claim in the defendant's case was that the rights could be recognised as a *sui generis* interest in land. However, the Court asserted that such obligations had a place in contract, but not in property.²⁰⁶

But fervent wish is not enough. If such an argument were accepted, then it would be possible for many ordinary commercial arrangements to be given perpetual effect in rem merely because the original parties or the original developer possessed and made clear such an intention. The reluctance of Courts to recognise rights and interests in land that too greatly interfere with and limit owners' rights of exclusive possession strongly militates against such a result.

The value of keeping property rights confined to identifiable categories is also illustrated in car parking easements. *Copeland v Greenhalf*²⁰⁷ applied a strict test which determined that a right

²⁰¹ *Re Ellenborough Park*, above n 52, at 163 per Evershed MR; The four requirements as stipulated are: 1) requirement of a dominant and a servient tenement; 2) the easement must 'accommodate' the dominant tenement; 3) the dominant and servient owners must be different people; and 4) it must be capable of forming the subject matter of a grant.

²⁰² *Re Ellenborough Park*, above n 52, at 163.

²⁰³ *Clos Farming*, above n 40.

²⁰⁴ *Clos Farming*, above n 40, at [31] and [43].

²⁰⁵ At [46].

²⁰⁶ At [68].

²⁰⁷ *Copeland v Greenhalf* [1952] 1 Ch 488 (Ch).

to park on another's land was incapable of constituting an easement as it amounted to joint possession, it was instead a right under contract. In *Moncrieff v Jamieson*²⁰⁸ Lord Scott reframed the assessment by condoning the ability for owners to grant servitude rights of any character provided it did not deprive the servient owner of possession of the part of the land utilised by that servitude. This reasoning encounters some issues for however in more complex easements such as water pipes which wholly possess the small part of the land they occupy. *East Fremantle Shopping Centre West Strata Plan 8618 v Action Supermarkets Pty Ltd*²⁰⁹ tried to reconcile the differing approaches to the restrictions by determining that a parking easement was valid where the parking right is temporary and 'transitory in nature', and not acting to oust the owner. The Court thus sought to reconcile both Lord Scott's obiter statements with the previous case lines which emphasised preventing easements that amounted to joint occupation.

To define the validity of an easement by the extent it amounts to joint occupation of the whole tenement, or by the subordination of the servient owner's possessory rights of the part of the land the easement utilises, these cases present two common themes; the importance of retaining ownership rights in land; and the concern most judges have in keeping property rights confined to their various closed categories. An easement is only an easement where the identified criteria are met, and anything less than this only gives parties contractual rights.

A recent article in the Otago Daily Times²¹⁰ exemplifies the dangers that may arise in the context of ownership rights. The article concerned a 'no objections' clause in relation to any planning proposals that had been included in a sale and purchase agreement. The breadth of the clause left land owners feeling ousted from rights over their land and amenities within the subdivision. Despite perhaps the naivety in consenting to the clause, there was still direct consent from the land owners. This is all the more dangerous in the context of covenants in gross because land owners may encounter these types of intrusive personal rights simply by purchasing land that is burdened by such an onerous right. This concern is exacerbated when considering the arguments discussed above, that purchasers often lack the necessary comprehension of the registered land obligations that land may be subject to.

²⁰⁸ *Moncrieff v Jamieson* [2007] UKHL 42, [2007] 1 WLR 2620.

²⁰⁹ *East Fremantle Shopping Centre West Strata Plan 8618 v Action Supermarkets Pty Ltd* [2008] WASCA 180, (2008) 37 WAR 498.

²¹⁰ Mark Price, "Northlake family upset by treatment" *Otago Daily Times* (online ed, Dunedin, 10 July 2018).

Contract law allows parties the ‘fullest latitude’ to formulate rights between themselves, as contractual obligations cannot bind third parties.²¹¹ Incoming owners of land can then be given the choice to negotiate a new contract regarding the fancied obligation if desired. Property rights sit at odds with contractual freedom as property interests can be made to endure by attaching to the land in perpetuity. The dynamic ways that people undertake personal obligations with each other do not cohesively fit into the ideas of enduring proprietary interests where the greater effect is to bind successors in title.

In the context of retaining ownership rights, the application of conventional concepts aid in keeping property interests sufficiently defined and contained in their specified boxes. As stated in the above excerpt from *Clos Farming*,²¹² any obligation which does not meet the criteria, is best left to the laws of contract. The privilege of proprietary effect is only granted to rights which meet the criteria of the specified categories, such as those required of an easement. By deferring to these conventional concepts of property law in the context of covenants in gross (in the same way as other categories of rights in the closed list,) the risk to land owners of becoming hampered by layers of unconstrained obligations is reduced. Adopting the *numerus clausus* justifications in an interpretation exercise likely ensures that owners of land subject to covenants in gross enjoy a greater freedom to exercise their ownership rights. Conventional mechanisms such as the doctrine of touch and concern operate to require an intrinsic link to the land.²¹³ Covenants in gross are then able to beneficially guard against obligations which are idiosyncratic and threaten to subordinate the rights of owners.

D The role of the judiciary versus the role of the legislature

Lastly, but quite possibly most importantly, it is not the place of the judiciary to take an interpretation which radically reconceptualises the way property rights are dealt with in New Zealand. Profound changes to the law should be left to Parliament to clarify and express its intention with the appropriate certainty. Because the provisions relating to covenants in gross ultimately require judges to make a choice over interpretation, taking a conventional approach to the provisions best preserves the distinction between the role of the judiciary and the legislature.

²¹¹ *Keppell*, above n 31, at 536.

²¹² Refer to page 38 above; *Clos Farming*, above n 40, at [68] per Santow JA.

²¹³ While I am unconvincing as to the ability of the touch and concern doctrine to achieve this aim (refer to the earlier discussion at page 9), the conventional concepts more generally aim to achieve this point. This will be discussed in more depth in the following chapter.

Admittedly, changing social values and societal norms do justify changes to the law so that it can adapt in step and at pace with the wider societal views and developments in technology. Societal changes affect the way humans interact with each other and with the surrounding landscape, and it is entirely likely that new property law vehicles will be produced in response. In the modern era of urbanised cityscapes, the law can be expected to play an integral part in guiding what the future looks like.²¹⁴ However more recently, decisions on when to disrupt the closed set of property interests through the introduction of new ‘vehicles’ has been left to the legislature, not the judiciary.²¹⁵ The introduction of the Torrens system itself provides a classic example of the impact legislation can have in overhauling, clarifying and substantially improving economic efficiency.²¹⁶ Many jurisdictions have seen legislative developments to their property law scheme such as strata titles, residential communities comprised of individual titles overlaid with complex covenants, joint ownership of common property spaces and management structures.²¹⁷ In New Zealand, the extension of classes of property rights by enacting specific forms of covenants in gross, such as ‘open space covenants’ under the QEII Act, illustrate a contemporary legislative response to a social need.

There are many advantages of using legislative amendment to alter a jurisdiction’s property law framework. In particular, it provides the most easily identifiable and discoverable means of conveying new property interests in a single authoritative text.²¹⁸ By being furnished with the approval of a democratically elected government,²¹⁹ using legislation to extend the classes of property is inherently more stable, and can better clarify the required scope of application for lawyers and the courts.

On the chance that legislation fails to do so – which admittedly is the case in relation to covenants in gross where the legislature has left much more to be desired – the ‘*ad hoc*’ branch

²¹⁴ Paul Babie “How Property Law Shapes Our Landscapes” (2012) 38 Mon LR 1 at 15.

²¹⁵ Weir, above n 1, at 662.

²¹⁶ Edgeworth and others, *Sackville and Neave Australian Property Law* (8th ed, LexisNexis Butterworths, 2008) at 454–467.

²¹⁷ The Strata Schemes (Freehold Development) Act 1973 (NSW) facilitates the subdivision and development of land with shared property. It deals with, *inter alia*, plan requirements and registration, changes to the subdivision and dealings with the lots. See also Body Corporate and Community Management Act 1997 (Qld); and Weir, above n 1, at 664.

²¹⁸ Merrill and Smith, above n 170, at 61–68.

²¹⁹ Anna Di Robilant “Property and Democratic Deliberation: The Numerus Clausus Principle and Democratic Experimentalism in Property Law” (2014) 62 Am J Comp L 367 at 400.

and root' mechanism of the judiciary²²⁰ cannot provide an adequate substitute to make substantial developments to the law. Where significant development of the law occurs by judges, it necessitates a greater exercise of statutory interpretation and skill to determine its implied limits. The legal skill required to interpret these implied limits results in a far costlier system than explicit legislative limits.²²¹ In addition, courts are not self-starting institutions. They cannot develop the law as and when they desire, but instead must wait until an appropriate case is brought, which could take some time. Transactions costs for third parties are also increased in discerning the number of valid land rights that exist, the scope of the rights, their attributes and validity, as well as the cost of negotiating to acquire them or alternatively be released from the burden where it is overly onerous.²²²

Guarding the boundary between personal rights and property rights is fundamental to 'the whole map of property law',²²³ so property rights should not be readily extended, revised or added to by the judiciary where the legislation itself is unclear. For this reason, in interpreting covenants in gross, judges should be conservative in their approach. This point was illustrated by Kirby J in *Fejo v Northern Territory of Australia* in relation to property rights in Australian aboriginal land. He stated that attaining certainty of precision in rights that affect land is essential and should act as a reason for judicial restraint. Only the clearest necessity derived from the language in the Act in question should permit a court to elaborate statutory terms on such a fundamental matter.²²⁴

However, as emphasised in this thesis, the entire assertion that Parliament is best placed to adequately define these rights is predicated on it enacting laws that are sufficiently clear and carefully worded. While the *numerus clausus* principle has become increasingly overridden by legislative amendments and adaptation to social change,²²⁵ any shift in the *numerus clausus* must be sufficiently defined. As stated in *National Provincial Bank v Ainsworth*:²²⁶

Before a right or an interest [in land] can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by

²²⁰ Edgeworth, above n 2 at 418.

²²¹ O'Connor, above n 48, at 59.

²²² At 40.

²²³ McFarlane, above n 125, at 3.

²²⁴ *Fejo v Northern Territory of Australia* [1998] HCA 58, (1998) 195 CLR 96 at [76].

²²⁵ Di Robilant, above n 219, at 368–369 and 395.

²²⁶ *National Provincial Bank v Ainsworth* [1965] AC 1175 (HL) at 1247-1248.

third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.

It is unfortunate that the legislation governing covenants in gross has failed to clearly define the intended approach to the provisions and their limits. The consequence of this is that the task of achieving clarity is shifted onto judges. But for many of the reasons provided, the most appropriate course of action for judges is to be conservative in applying this legislation rather than choose to radically redefine how we conceive property law in absence of a clear intent from Parliament. Adopting the modern arguments in interpreting covenants in gross will likely result in significantly greater uncertainties over the scope of the rights during the time it takes for the common law to develop a trail of adequate jurisprudence.²²⁷ The most beneficial result can be achieved by taking a conventional approach to interpreting covenants in gross, which recognises the common law limits conventionally placed on classes of property rights. This also acknowledges the substantive law-making authority of Parliament, and allows a degree of certainty to be achieved by keeping with this approach to property law.

Moreover, the judiciary's method of creating and developing precedent should not be used to extend property interests where the boundary is so central to the whole concept of how we define property law.²²⁸ Deriving a meaning from the legislation which pushes the boundary between contract and property does away with the spirit of the Law Commission's recommendations that covenants in gross should have a sufficient link to the land. The operation of *numerus clausus* and the conventional constraints of property law classes act as a form of 'judicial self-governance',²²⁹ a constraint on the freedoms of judicial innovation,²³⁰ and a 'higher order norm' which impacts the development of more specific rules in property law.²³¹ Constraining the judiciary under these approaches recognises the role of the judiciary as distinct from the law-making role of Parliament. It also provides a means of ensuring covenants in gross retain a sufficient connection to the land as the Law Commission recommended. To prevent a plethora of ill-considered negative consequences judicial conservatism achieved through the conventional approach to the legislation is essential where

²²⁷ Marianna Parry "A Property Law Perspective on the Current Australian Carbon Sequestration Laws, and the Green Paper Mode" (2010) 36 Mon LR 321 at 341.

²²⁸ McFarlane, above n 125, at 3.

²²⁹ Merrill and Smith, above n 170, at 11.

²³⁰ O'Connor, above n 48, at 43.

²³¹ Edgeworth, above n 2, at, 391.

there are inadequate measures at the present minute to address the potential for negative consequences.

E Conclusions

One need not scratch too far below the surface of the recent provisions to find that the drafting brings the present discourse in property law to the forefront of interpretation. As the value of *numerus clausus* becomes increasingly overridden by statutes which reflect societal and technological progressions, the suggestion that our system of property law simply has moved on gains traction. Modern registration systems provide a more solid foundation for suggestions that owners of land should have the greatest freedom to exploit the rights they possess,²³² and attach a greater range of burdens to their land. Clever property lawyers have created workarounds such as the encumbrance mechanism for years to achieve the very thing which a wider meaning of covenants in gross could permit. But social demand should not act as a determinative factor for change, and moreover, it should not motivate judicial action on such a fundamental matter where parliamentary intent is unclear.

There is doubts over whether the benefits of allowing covenants that do not touch and concern the land (and are thereby personal in nature) to attain proprietary effect could ever outweigh the wider public benefit of their restriction. Edgeworth argues that there will always be a place for *numerus clausus* in preventing an indefinite proliferation of interests in the law no matter how comprehensive and efficient systems of registration may be. At the very least he argues that any change to *numerus clausus* should be incremental, and novel property interests should be close in form to those on the list.²³³ I cannot help but strongly agree, only adding that these conventional principles of property not only limit the numbers of property rights to prevent the consequences of proliferation, but also stand to ensure that each accepted right is clearly and sufficiently specified and defined.

Deferring to the conventional concepts of *numerus clausus*, closed lists of property rights, and the view that covenants in gross need to retain some form of central link to the land²³⁴ allows many of the negative consequences that the legislation potentially creates to be minimised.

²³² McFarlane, above n 25, at 314.

²³³ Edgeworth, above n 2, at 406.

²³⁴ Note that the touch and concern doctrine is critically assessed in the following chapter. However, the point remains that some form of land-centred test is desirable.

Adopting a conservative approach in the courts also honours the important reasons for the distinction between contract law and property law, gives effect to the intention of the Law Commission's recommendations, and respects the law-making role of Parliament. The responsibility then falls on Parliament to clarify its own intent, and if a greater scope is desired for covenants in gross, it may directly respond to the negative consequences I have raised in a singular authoritative (and hopefully sufficiently clear) text.

IV Practicalities and tying together loose ends

Judges undoubtedly have a crucial role in shaping the jurisprudence on covenants in gross going forward. Despite some suggestions that our system of property law has moved on, for all the reasons mentioned previously, I argue that the conventional concepts of property law retain an important place. In response, judges should adopt the conventional approaches in interpreting covenants in gross to ensure that the jurisprudence develops in a way which creates the most beneficial consequences for society.

Implementing this approach in interpreting covenants in gross can be practically expressed in two alternative ways. Firstly, judges may choose to adopt a restrictive interpretation of the definition of the requirement under s 307A that the covenant be “in relation to” the land. Doing so reinforces the importance of *numerus clausus* via the application of some form of touch and concern test or intrinsically land-centred link. This method effectively would cut proposed covenants in gross off from the root so to speak. But where judges are unprepared to develop or articulate a jurisprudential test, the alternative is to use the powers of modification or removal under s 318D. In using this *post hoc* method would require judges to recognise these conventional concepts, and the potential for the creation of the negative consequences discussed. In particular it may be best to take a more restrictive approach to an assessment of when a covenant is contrary to public policy, any enactment or rule of law; or, is thought to be inequitable or unjust.

This final chapter suggests that a reactive approach, using the definition in s 307A, best gives effect to the rationale that underpins *numerus clausus* – that property rights must be kept in their defined boxes and anything in between is a contractual obligation, not a property right.

Section 307A requires courts to formulate a test to determine whether the proposed covenant is in fact “in relation to” the servient land. In accepting the argument that the conventional approaches provide the most beneficial consequences when interpreting these covenants, judges may formulate some variation of the conventional touch and concern doctrine as a legal yardstick. Implementing this type of test from the outset restricts proposed covenants in gross which do not meet any conventional test and are tenuously related to the land from subsequent purchasers under s 307A. Those obligations that abide by the conventional concepts and therefore satisfy the s 307A requirement to be sufficiently related to the land and thus the

potential for negative consequences that the provision poses to our system of property law can be largely eradicated.

As noted in Chapter Two, the touch and concern test provides a practical expression of the desire to ensure that covenants that are overly personal or capricious cannot run with the land.²³⁵ However, case law has shown that making this distinction is often arbitrary, illogical and not easily drawn in practice.²³⁶ While the Law Commission considered the touch and concern test as a means of ensuring covenants in gross retained a close link with the land,²³⁷ it concluded that the test was not immediately applicable where there is no dominant tenement. However, it remained fundamentally important to the Law Commission that some connection to the burdened land was retained. This was illustrated through the wording of the provision that it proposed.²³⁸

The failed attempts at an effective definition and the level of discretion the touch and concern test provides support the findings of the Law Commission, and indicate that the doctrine is likely unsuitable to apply to an interpretive approach to s 307A. Nonetheless, the overall goal of the touch and concern doctrine and more broadly the general conventional concepts of property law such as *numerus clausus* remain important.²³⁹

Fisher has critically discussed the touch and concern doctrine and proposed in the alternative that a new test is necessary to ensure the content of covenants is more intrinsically land-centred. He proposed that covenants should affect the servient land in a way which provides an equal level of benefit to successors of the dominant land, and an equal level of onerousness to successors of the servient land.²⁴⁰ Of course, Fisher's suggestions concern covenants which continue to have a dominant tenement, however a similar idea could conceivably be implemented under s 307A as a more useful metric to assess the burden of a covenant in gross where a person replaces a dominant tenement.

²³⁵ Refer to discussion at page 9.

²³⁶ *London Diocesan Fund v Phithwa* [2005] UKHL 70, [2005] 1 WLR 3956 at [25]-[26].

²³⁷ New Zealand Law Commission, above n 3, [7.48]-[7.52].

²³⁸ New Zealand Law Commission, above n 3, at [7.48]-[7.50].

²³⁹ English Law Commission, above n 49, at [3.25].

²⁴⁰ Fisher, above n 51, at 37.

While such a test may be beneficial to a degree, it does not ensure that any obligation is explicitly linked to the land itself. In applying s 307A, judges should adopt a test which focuses on the effect of the covenant in gross on that land title specifically, as opposed to controlling the conduct and freedoms of persons on the land. As an example of this approach in practice, a covenant in gross which stipulates that the servient owner must operate a restaurant and provide free meals to the covenantee is concerned with the relationship between the two parties and not with the land title specifically. Conversely, the requirement to join a residents' association on the other hand affects *that* land title within *that* subdivision or residential area. The test is more concerned with the way the proposed covenant in gross affects the nature of the specific land itself, as opposed to how people relate to each other on the land.

The distinction is admittedly a very subtle one. Attempting to string together a sentence which adequately addresses the frequently subtle nuances is not clear cut. Separating a covenant that is sufficiently connected to and concerned with the land, from a covenant that is merely a personal relationship between the contracting parties has proven to be a challenge for some of the most capable minds.²⁴¹ Should judges feel unprepared to articulate a test to address the extent to which the covenant relates to the land, it is advisable that they use the powers of modification and removal conferred under s 318D. This provision gives courts the power to remove covenants that are contrary to public policy or deemed inequitable. This extensive discretion can therefore allow Judges to account for the conventional concepts, and the negative consequences which may arise in relation to overly personal or onerous covenants in their assessment.

Developing a legal metric under s 307A to constrain the definition of covenants in gross is preferable to using the powers of removal or modification under s 318D. Relying on s 318D to constrain covenants in gross means that overly onerous covenants may be imposed by definition from the outset, and the party burdened by the covenant must then seek relief in the courts. A proactive approach to constrain covenants in gross at their creation works better to stop negative consequences from arising which must reactively be remedied. A proactive approach to the definition under s 307A also mitigates the opportunity for covenantees to abuse their powers (particularly where this is imbalanced) in negotiation and court processes. Using s 307A to restrict covenants in gross is more preferable because it sits more in line with the

²⁴¹ See the comments of a similar tune in English Law Commission, Landlord and Tenant Privity of Contract and Estate: Duration of Liability of Parties to Leases (1986) Working Paper No 95 at [6.9].

purposes the conventional concepts aim to achieve; specifically, to protect third parties from onerous burdens. A screening test under s 307A better achieves the purposes that *numerus clausus* exists for by knocking out a proposed covenant in gross because it is not sufficiently related to the land on a conventional interpretation.

Until Parliament clarifies its intention for the legislation on covenants in gross, the application of test which gives effect to the conventional principles is desirable. This is best achieved by limiting the definition of covenants in gross from the outset under s 307A. However, failing this, it is crucially important that judges continue to give recognition to the conventional approaches to property interests in exercising their discretionary powers under s 318D. Only where judges effectively implement the conventional approaches into the development of jurisprudence on covenants in gross can we be confident that the legislation will not pose an undue risk to the conventions of property law that exist for such an important function.

Conclusion

The introduction of covenants in gross is undoubtedly a reflection of a desire to keep in step with the changes of society. As Lord St Leonards declared in *Dyce v Lady James Hay*, “the category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind”.²⁴² As technology advances and cityscapes develop, the need to extend or adapt the law is inevitable. However, reconciling the demand for the law to adapt to societal change with the conservative attitude to the creation of novel property interests in accordance with conventional concepts proves to be a difficult task.

In the contemporary context, a debate has arisen over the continuing value of the conventional principles in the approach to the law on property interests. The ambiguous provisions introducing covenants in gross place judges at the coalface within the context of the debate by the way they choose to interpret the provisions.

I have argued that these conventional concepts continue to be an essential function of land law regulation, and more specifically in the interpretation of covenants in gross. Adopting a conservative approach recognises the continued value the conventional concepts of property law provide in protecting third parties from a range of negative consequences that the legislation has the potential to create. While Parliament may have intended to vastly expand the categories of property rights, (although this would be surprising given the Law Commission’s firm views) the legislation enacted does not adequately clarify this.

In light of this uncertainty, it is hoped that this dissertation has provided both lawyers and judges good reason to act cautiously when faced with the statutory introduction of covenants in gross; and further, that should Parliament choose to clarify their position, many of the negative consequences discussed are more carefully considered and addressed in further amendments.

²⁴² *Dyce v Lady James Hay* (1852) 1 Macq 305 at 312.

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Appendix

Land Transfer Act 2017, S 318D Court may modify or extinguish covenant in gross

- (1) On an application (made and served in accordance with section 318C) for an order under this section, a court may, by order, modify or extinguish (wholly or partly) the covenant to which the application relates if satisfied that—
- (a) the covenant ought to be modified or extinguished (wholly or partly) because of a change since its creation in all or any of the following:
 - (i) the nature or extent of the use being made of the burdened land;
 - (ii) the character of the neighbourhood;
 - (iii) any other circumstances the court considers relevant; or
 - (b) after reasonable inquiries have been made, the covenantee cannot be found; or
 - (c) the continuation of the covenant in its existing form would impede the reasonable use of the burdened land in a different way, or to a different extent, from that which could reasonably have been foreseen by the original covenantor and covenantee at the time of its creation; or
 - (d) every person entitled who is of full age and capacity—
 - (i) has agreed that the covenant should be modified or extinguished (wholly or partly); or
 - (ii) may reasonably be considered, by act or omission, to have abandoned, or waived the right to, the covenant, wholly or partly; or
 - (e) the proposed modification or extinguishment will not substantially injure any person entitled; or
 - (f) the covenant is contrary to public policy or to any enactment or rule of law; or
 - (g) for any other reason, it is just and equitable to modify or extinguish the covenant, wholly or partly.
- (2) An order under this section modifying or extinguishing the covenant may require the applicant for the order to pay to any other person specified in the order reasonable compensation as determined by the court.
- (3) Nothing in this section limits or affects the operation of any other enactment or rule of law under which a covenant in gross may be—
- (a) declared void or voidable; or
 - (b) set aside, cancelled, or extinguished; or
 - (c) modified or varied.