

Cayman allows registration of positive covenants. Why is that significant?

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The Registered Land (Amendment) Law, 2017 of the Cayman Islands effected a very important change to Cayman's law of property: it now permits the registration of positive covenants, not merely restrictive covenants.

This client update is about the nature and scope of this change.

Introductory observations about proprietary obligations versus contractual obligations

Property law is concerned with different types of ownership in property, whether in land or other forms of property. This update is concerned with proprietary interests in land alone. Contract law, on the other hand, is concerned with the formation and fulfilment of promises. These fields of law intersect when entry into an enforceable contract creates a proprietary interest.

As regards land, a contractual obligation assumed by a landowner is only enforceable by the other party to the contract. On the other hand, an obligation assumed by a landowner that confers a proprietary interest in his land in favour of another is enforceable against the landowner's successors in title. Lawyers refer to such a proprietary interest as "running with the land", so as to bind a transferee of the landowner.

Introductory observations about the nature of proprietary interests

An Australian textbook describes a proprietary interest in these terms:

"As well as the freehold and leasehold estates, the principal proprietary interests in land recognised by the common law are mortgages, rentcharges, profits à prendre, easements and restrictive covenants. To determine whether an arrangement confers a proprietary interest, the arrangement must be examined to see if it satisfies a definition of any one of the recognised proprietary interests."

To this list, one could also add the various types of equitable charges and liens.

While the emergence of new types of proprietary interest in land is not a common occurrence, new interests are defined by the courts or the legislature from time to time. The Registered Land (Amendment) Law, 2017 is one such legislature development.

The short point is this: the parties to an arrangement concerning land are not at liberty to create a proprietary interest at will; for an interest in land to qualify as proprietary, it must be a recognisable proprietary interest. Furthermore, the point of a proprietary interest is to ensure its enforceability amongst the parties' successors in title, not just the original parties.

What was the state of Cayman law as regards positive covenants before the 2017 amendment?

First, what is a positive covenant? The best way to describe a positive covenant is to contrast it with a restrictive covenant. To quote one source:

“A restrictive covenant affecting freehold land consists of an agreement in a deed that one party will restrict the use of its land in some way for the benefit of another's land.

The restrictive covenant may be enforceable by one party's successors in title against the other's successors in title, as well as between the original contracting parties.”

To continue the quote from the same source:

“A positive covenant, generally, imposes an obligation to carry out some positive action in relation to land or requires expenditure of money. In contrast, a restrictive covenant restricts the use and enjoyment of the land.”

(This update does not consider a building scheme. A building scheme (or scheme of development) is a system of mutual covenants or 'local law' existing within a defined area, in which all the property owners enter into the same covenants with the intention that any owner can sue any of the others should there be a breach.)

Next, how did the common law deal with a positive covenant? In the leading 1994 decision of *Rhone v Stephens*, the UK House of Lords reaffirmed that, with very limited exceptions, a positive covenant does not run with the land. In that case, S's predecessor covenanted with R's predecessor to keep in repair a roof that projected from S's house over R's adjoining cottage. Being a positive covenant, the House of Lords held that the repair covenant was not enforceable between parties who were not the original contracting parties.

A very recent example of the same principle is the 2019 decision of the Court of Appeal of England and Wales in *Churston Golf Club Ltd v Haddock* where it was held that an obligation to fence a boundary between the predecessor of a golf club and the predecessor of an adjoining farm was not binding on the golf club. Being a positive covenant, the Court held that the covenant to fence did not bind the original covenantor's successors in title i.e. the golf club.

How did the 2017 amendment change the law?

Amongst other things, the Registered Land (Amendment) Law, 2017 repealed the former section 93 of the Registered Land Law (2004 Revision) which provided for “restrictive agreements” and substituted a new section 93 which provides for the registration and operation of positive and restrictive covenants.

As regards positive covenants:

- the new section 93(3) provides for:
- the registration of an instrument, other than a lease or charge, that contains a positive covenant by one proprietor mandating the building on or the user or other enjoyment of his land or other obligation for the benefit of the proprietor of other land; and
- the notation by the Registrar of Lands of such positive covenant in the encumbrances section of the register of the land or lease burdened by the positive covenant and in the property section of the land which benefits from the positive covenant; and
- the new section 93 (1) provides that a positive covenant, if so registered, is enforceable against the covenantor and the covenantor’s successor in title by the owner or occupier of land benefitting from the covenant.

See, also, section 93(4)-(8).

Apart from registration, the conditions for creating a positive covenant affecting land that will bind the covenantor’s successor in title are these:

- the instrument must contain a positive covenant by a proprietor of land;
- the covenant by the proprietor must mandate:
 - the building on or the user or other enjoyment of his land; or
 - the other obligation; and
- such obligation must benefit the proprietor of other land.

And, upon registration of the relevant instrument, the Registrar of Lands shall enter:

- a notation of the positive covenant in the encumbrances section of the register of the land or lease burdened by the positive covenant; and
- a notation of the positive covenant in the property section of the land which benefits from the positive covenant.

A practical example of the potential use of a positive covenant

In the recent case of *Regency Villas Title Ltd & Ors v Diamond Resorts (Europe) Ltd & Ors* (2018), the UK Supreme Court held for the first time that there could be an easement over recreational facilities (which in that case included a golf course and an outdoor swimming pool). However, the Court made these observations about the nature of an easement:

- An easement cannot require anything more than mere passivity on the part of the owner of the land burdened by the easement.
- While there is nothing inherently incompatible with an easement where the parties share an expectation that the owner of the land burdened by the easement will maintain the subject matter of the easement, it is nonetheless an essential requirement that such owner undertakes no legal obligation of that kind to the owner of the benefitted land.

In other words, whilst the Court recognised that the use of recreational facilities could be the subject of an easement, such an easement could not impose an obligation on the part of the proprietor of the burdened land to maintain and repair such facilities.

Since the 2017 amendment, how might this position be different in the Cayman Islands? Two options suggest themselves. First, an easement for the use of recreational facilities could be coupled with a positive covenant to repair by the proprietor of the burdened land for the benefit of the proprietor of the benefitted land. Secondly, and alternatively, such rights of use and such obligation to repair could be incorporated in the same instrument creating a positive covenant. This alternative might be more appropriate if there were doubts about the enforceability of such an easement.

Other observations about the significance of the Cayman change

It has been observed that the 2017 amendment permitting the registration of positive covenants followed the example of jurisdictions such as Australia and New Zealand law. This observation, however, underplays the extent of the Cayman initiative. For the sake of comparison, let us take the example of the Australian state of New South Wales.

In NSW, there are two types of positive covenant: public and private. A public positive covenant is one in favour of a public authority. (One may include forestry covenants in this category.) Let us consider the private positive covenant. Significantly, it is restricted to a covenant for maintenance or repair.

Unlike the NSW private positive covenant, the Cayman positive covenant is not so restricted; it can extend to any obligation by a covenantor, including the following: to build on his land; to permit the user of his land; or to permit some other enjoyment of his land.

The importance of this difference is best illustrated by way of an example. The example that

follows is taken from a recent article by a UK firm about the limitations of *Regency Villas* as regards what rights may constitute an enforceable easement. The article posits this question:

“I am considering purchasing the freehold of a luxury four-bedroom house set in the grounds of a beautiful country estate. I understand that the property comes with the benefit of: (i) a right to use the extensive leisure facilities including an Olympic-sized swimming pool and riding stables; and (ii) the right to use an adventure theme park within the estate. To what extent are these rights enforceable?”

It concludes that the right to use the adventure theme park could not be an enforceable easement for the following reason:

“It is highly unlikely that the right to use rides at an adventure theme park could be an easement. It would rely on the active and continuous management and operation by the owner of the servient land and it does not obviously have anything to do with the normal use of the property as a home.”

Whilst the NSW private positive covenant could not overcome this situation (as it is limited to a covenant to maintain or repair), a Cayman positive covenant could. If (i) the house (the benefitted land) and (ii) the land on which the amusement park was located (the burdened land) were situated in the Cayman Islands, there would be nothing to prevent proprietor of the burdened land from entering into a positive covenant under which it covenanted, for the benefit of the proprietor of the benefitted land:

- to permit the owner and occupiers for the time being of the benefitted land to have the free use and enjoyment of the amusement park; and
- to operate, and to maintain and repair, the amusement park.

This example points to another aspect (there are others which are beyond the scope of this update) of the Cayman positive covenant: a covenant may be so burdensome that it negatively impacts on the future transferability of the covenantor’s land. In its 2011 report, the UK Law Commission referred to a concern raised by the introduction of positive obligations of “the potential for an open-ended range of obligations which overburden land”. The Cayman amendment does not address this concern; hence, it is a matter that a potential covenantor should consider with utmost care.

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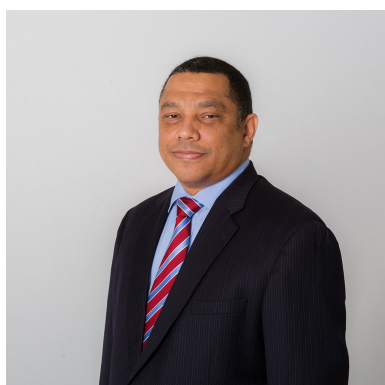
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