Personal Obligations Made Binding on Future Landowners — the Unstable Edifice that is Jackson Mews v Menere

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The purpose of this article is to explain why the result achieved by the Court of Appeal and Supreme Court in Jackson Mews Management Ltd v Menere *is unsatisfactory and conflicts with our understanding of the nature and character of real property obligations. Flowing from those decisions, encumbrance instruments securing performance of personal obligations may be imposed in New Zealand against future landowners (perhaps) in perpetuity. The result brings into question whether there is justification in continuing to impose obligations by easements, leases or land covenants, given the same or more onerous performance may be imposed by using encumbrance instruments. The New Zealand Law Commission recognised the problems arising from* Menere *and proposed a legislative solution. However, this was not enacted as part of the Land Transfer Act 2017. Consequentially, the two* Menere *judgments need to be closely scrutinised to better comprehend their impact and also to assist in future judicial consideration of this issue.*

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I Introduction

The Court of Appeal and Supreme Court judgments in *Jackson Mews Management Ltd v Menere*[1] have been taken to settle the proposition that the performance of personal obligations (perhaps in perpetuity) can be imposed on landowners by use of encumbrance instruments.[2] However, this article holds the reasoning adopted by both Courts on this issue is difficult to follow and runs contrary to established legal principles.

The discussion proceeds in the following way. First, the problems arising from both judgments are outlined after a brief synopsis of the relevant facts. To better comprehend the problems emerging from *Menere*, we then consider the way in which the general law has previously imposed limitations on the performance of obligations by future landowners and under mortgage securities leading to enactment of various remedial measures in New Zealand. How encumbrance instruments (which are created in New Zealand as a form of statutory mortgage)[3] were then developed to secure the performance of personal obligations is then explained. This usage is shown to be an "invention" unique to New Zealand.[4]

Against this background, we return to the two *Menere* decisions and subject them to closer scrutiny. This shows the reasoning of both judgments is problematic, if not confusing, riding roughshod over established common law principles and statutory controls regulating the shape and form of obligations that may be imposed on future landowners. The Law Commission's understanding of this issue and its suggested solution are then discussed, together with an explanation as to why its proposed solution was not legislated as part of the Land Transfer Act 2017.

The article concludes with a discussion on why this matters. It proposes that, if this understanding is left unresolved, we have in fact reintroduced something akin to subinfeudation, which was repealed by the Statute of Quia Emptores 1290. Further, the result brings into doubt the need to adhere to legal principles that presently form our understanding of the law of easements, land covenants and leases. It asks why existing legal requirements for creation of those interests should be adhered to, if more onerous obligations can instead be imposed by use of encumbrance instruments. The result in *Menere* is argued to be contrary to our understanding of the nature of rights

1 *Jackson Mews Management Ltd v Menere* [2009] NZCA 563, [2010] 2 NZLR 347 [*Menere* (CA)]; and *Jackson Mews Management Ltd v Menere* [2010] NZSC 39, [2010] 2 NZLR 347 [*Menere* (SC)].

2 *Navilluso Holdings Ltd v Davidson* [2012] NZHC 2766, (2012) 13 NZCPR 715 at [21].

3 Land Transfer Act 1870, s 58 (repealed). See now the Land Transfer Act 2017, s 100.

4 Rod Thomas "Creation of Estates for Services: New Zealand Style" (2018) 92 ALJ 231 at 232.

and obligations that should bind future landowners and to amount to an impediment to the best utilisation of land.

II The *Menere* Judgments

A Menere *in the High Court and Court of Appeal*

In *Menere*, an encumbrance instrument was registered against freehold titles issued under the (then) Unit Titles Act 1972. This required retirement village residents to pay the cost of personal services being provided.[5] The terms also required each owner to enter into a service agreement with Jackson Mews, being the village manager.[6] Jackson Mews was a legal entity related to the developer of the complex,[7] as well as the owner of a unit in the development. Menere was not one of the original owners in the village and had not in fact entered into a management contract with Jackson Mews.[8]

The nature of the services were as follows: Jackson Mews was required to (inter alia) provide a 24-hour pager service, collect rubbish, distribute mail, and collect prescription medicines.[9] Under the encumbrance terms, the owners also had to pay a rentcharge of 10 cents per annum for a period of 99 years to Jackson Mews, if demanded.

Ms Menere asserted the charged fees were inflated and that many of the services were in fact not delivered. She and other residents tendered sum of $9.99 being the total sum of the rentcharge secured to Jackson Mews under the encumbrance instrument. In response, the manager refused to accept the payment or to provide a discharge.

The High Court made orders for the security to be discharged, following payment. The order was made under s 81 of the Property Law Act 1952, which allowed redemption of mortgage securities once the secured amount had been paid.

The Court of Appeal reversed this finding. It held that a discharge could not be demanded until the term of 99 years had run its course. The Court sought to limit its reasoning to positive covenants intended to benefit developments. It held that such covenants had "none of the problems

5 The facts are usefully set out in a summary in *Menere* (CA), above n 1.

6 At [3] and [50].

7 *Menere* (CA), above n 1, at [1].

8 *Menere v Jackson Mews Management Ltd* (2008) 9 NZCPR 898 (HC) [*Menere* (HC)]. It appears Menere had initially paid for the services set out in the encumbrance instrument: at [4]–[5].

9 At [5]–[7].

associated with covenants in gross".[10] The Court found such covenants were in the nature of "third category rentcharges",[11] which it held to be a New Zealand translation of "estate rentcharges", being a statutory form of rentcharge legislated by the Rentcharges Act 1977 (England and Wales). The Court noted encumbrance instruments were commonly used in New Zealand to secure the performance of obligations by landowners and considered that this usage should be supported.[12]

The Court of Appeal justified its refusal to order a discharge by a literal reading of s 97(2) of the Property Law Act 2007, which it held to apply in place of the (now) repealed s 81 of the Property Law Act 1952. However, it recorded it would have reached the same result had s 81 applied.[13] In so far as there was a difference in wording between the two provisions, the Court suggested that the later 2007 provision may simply have been reworded to make "explicit what was already implicit".[14]

B Menere *in the Supreme Court*

The Supreme Court refused leave to appeal. It did not engage with or consider the niceties of estate rentcharges of England and Wales or their application to New Zealand conditions. It dealt only with the issue of whether a discharge could be demanded under s 97(2) of the 2007 Act. The Court expressed its finding in the following, albeit brief, manner:[15]

> The words of [s 97(2) of the Property Law Act 2007] could not be more clear in requiring a discharge only upon payment of all amounts "and the performance of all other obligations" which are secured. To conclude that the applicant is entitled to a discharge would also defy commonsense; the obvious purpose of the obligation to pay a nominal amount (if demanded) is to secure performance of the management services agreement, which could not be brought to an end unilaterally if there were no breach by the respondent. The proposed appeal is therefore hopeless. Leave to appeal is refused.

10 *Menere* (CA), above n 1, at [51] per Hammond and Chambers JJ.

11 At [27]. From [23]–[27], Chambers J explained how he derived this label. That explanation is not necessary for this article.

12 At [2], [9] and [53] per Hammond and Chambers JJ.

13 At [20].

14 At [43].

15 *Menere* (SC), above n 1, at [5].

C *Why this result is problematic*

Two issues emerge from these findings: first, the Court of Appeal's support of the use of encumbrance instruments to secure the performance of obligations against future landowners; and secondly, the Courts' analysis of s 97(2) of the Property Law Act 2007 and, impliedly, s 81 of the now repealed Property Law Act 1952. It is unclear whether the Supreme Court's interpretation of s 97(2) was intended to somehow be restricted only to encumbrance instruments, and if so, to those securing third category rentcharges. Suffice to say that the statutory language of each provision makes no mention of encumbrance instruments.[16]

Before we consider further the impact of these findings, we need to examine key legal principles regulating when future landowners may be obligated to perform services. The discussion begins by identifying core real property principles. This is followed by a discussion of why certain obligations have been found to bind future landowners. Land covenants are addressed first and then mortgage securities, concerning both assigns of mortgaged land and of the mortgage security. The latter issue is particularly relevant given encumbrance instruments are created under our land transfer system as a statutory form of mortgage.

III Praedial Principles, Judicial Conservatism and Subinfeudation

At a basic level, our understanding of common law obligations that can be made binding on future landowners emanates from what Roman law describes as "praedial" rights. "Praedial" relates to land or the cultivation of land. The construct is intended to limit the nature of obligations that can attach to land ownership in the future. The Scottish Law Commission put this point simply: "Real burdens must concern land. That is their whole justification. If real burdens were about persons and not land, their purpose could be achieved under the ordinary law of contract."[17]

The land subjected to performance is conventionally described as the servient tenement with the benefiting land being the dominant tenement.[18] Any activity binding on future landowners has to relate to the *use* of the servient land, as opposed to an activity *on* it. This gives rise to subtle

16 See further Rod Thomas "Encumbrance instruments — A Real Burden" (2009) 127 NZ Lawyer 14.

17 Scottish Law Commission *Report on Real Burdens* (Scot Law Com 181, October 2000) at [2.9].

18 However, at common law, profits-à-prendre can be created in gross, and the rights granted under the profit will bind future landowners.

distinctions. It is the difference between growing grapes on the land and selling wine from the property.[19] The latter runs the risk of being considered a mere activity on the land. Further examples of obligations which do not run with the land to bind successors are "to buy petrol, write a song or pay an annuity".[20] At common law, this distinction has determined the sort of obligations that may be imposed on future owners by use of easements, leases and (more recently) by land covenants.[21]

Given this understanding, historically the common law has been slow to extend the nature of obligations that may be imposed.[22] By way of example, we turn to *Keppell v Bailey*. Here, the issue concerned lease covenants. The lessees of an ironworks covenanted that, for as long as they occupied the leased land, they would buy all their limestone from a quarry.[23] The covenant was expressed to bind successors and assigns. However, such an extension was not permissible. Lord Brougham LC famously held:[24]

> But it must not therefore be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner. It is clearly inconvenient both to the science of the law and to the public weal that such a latitude should be given … great detriment would arise and much confusion of rights if parties were allowed to invent new modes of holding and enjoying real property and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote. Every close, every messuage, might thus be held in a several fashion; and it would hardly be possible to know what rights the acquisition of any parcel conferred, or what obligations it imposed.

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19 The sale of wine from a vineyard may be considered ancillary to growing grapes on the land and therefore valid. This difference is further explained by the Law Commission *A New Land Transfer Act* (NZLC R116, 2010) [NZ Law Commission 2010] at [7.3] and [7.48]–[7.52]. That discussion usefully references both the Law Commission for England and Wales and Scottish Law Commission discussion of the same point, and in the same terms.

20 At [7.48].

21 The lessee covenants must relate to the use of the leased premises and run in favour of the lessor's reversion interest, which is seen as being a separate interest in the land. For a discussion of the nature of the lessor's reversion interest see Charles Harpum, Stuart Bridge and Martin Dixon *The Law of Real Property* (8th ed, Sweet & Maxwell, London, 2012) at [20-004]–[20-005]. The application of this principle to land covenants is addressed in part IV of this article.

22 *Hill v Tupper* (1863) 2 H & C 121 at 128, 159 ER 51 (Exch Ch) at 53 per Pollock CB: "[a] new species of incorporeal hereditament cannot be created at the will and pleasure of the owner of property".

23 *Keppell v Bailey* (1834) 2 My & K 517, 39 ER 1042 (Ch).

24 At 535–563 and 1049–1050.

A *Subinfeudation*

To further put this issue in context we also need to mention the practice of subinfeudation. Following the Norman Conquest, the Crown created a system of land tenure reliant on performance of personal services, commencing with a grant of tenure from the Crown. Being personal, those services stood outside the praedial construct.

The services became divided into grand serjeanty and petty serjeanty. Grand serjeanty was (and remains in the United Kingdom) the performance of prestigious personal services to the Crown arising from the grant of land.[25] Petty serjeanty was different. It was the performance of lesser services arising from land grants made mostly by mesne (or intermediate) lords. There was no apparent limitation on what those personal services could be.[26]

Over time, the performance of the services resulting from petty sergeanty became devalued or irrelevant. They were perceived as an impediment to the best utilisation of land and socially inappropriate. An obligation arising from a land grant to provide, say, a specified quantity of pepper to one's lord every year would became meaningless if pepper was a commonplace, cheap commodity. Consequently, Quia Emptores, sometimes known as the Statute of Westminster III, was legislated in 1290 to end the practice of subinfeudation. Some 370 years later, the Tenures Abolition Act 1660 followed.[27] Among other things, this Act replaced the performance of remaining services with "free and common socage". This measure still remains part of the laws of New Zealand.[28] Thus, in terms of New Zealand law, we must return to how obligations to perform were developed at common law under praedial principles.

25 The role of the "Queen's Champion" is presently performed by a chartered accountant, one Francis John Fane Marmion Dymoke. See Wikipedia "Queen's Champion" (21 August 2019) <en.wikipedia.org>. The owner of the Manor of Kingston Russell has responsibility for counting the King's chessmen and storing them away after a game. See Wikipedia "Kingston Russell" (26 May 2019) <en.wikipedia.org>.

26 They might relate to providing men and arms for a set period of any year or as mundane a task as providing food or labour for the lord.

27 Tenures Abolition Act 1660 (Eng) 12 Cha II c 24.

28 See Property Law Act 2007, s 57.

IV Legal Developments Concerning Land Covenants and Mortgage Securities

A *Making obligations binding on title assigns*

As a matter of general law, benefits could (and can) be assigned at common law without the consent of the party obligated to perform.[29] However, an obligation to perform could not be imposed on a title successor without that assignee's consent.[30] Yet, from the mid to late nineteenth century, courts of equity began to allow the enforcement of some negative obligations against future landowners. For this to occur, the covenant had to restrict the use of the servient tenement in a way that was considered to benefit a nominated dominant tenement. As common law courts did not recognise such obligations (due to the judicial conservatism that has been discussed), this development took place in equity only.[31]

The general acceptance of such principles in New Zealand was initially problematic. This is because the first Torrens statute legislated in 1870 only allowed legal interests to be registered.[32] Thus we had to wait until the enactment of s 126 of the Property Law Act 1952 before transferees of Torrens titles could be bound by negative land covenants. Under this provision, such covenants had to be notified on the servient tenement title issued by the Registrar before they could bind assigns.[33]

New Zealand then legislated a similar regime for positive covenants in 1986.[34] The same criteria applied. Again, the obligation had to relate to a use of the servient land and be in favour of identified dominant land. Importantly, under the applicable Property Law Act provisions, praedial principles dictated the obligations that could be imposed for both negative and positive land covenants. This remains so. We find this by examination of the applicable provisions, now found in the Property Law Act 2007. First, for a restrictive covenant:[35]

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29 Benefits may also be assigned in equity. The rules relating to assignment in equity are somewhat different, though that difference is not discussed here. Some benefits regarding the performance of personal services cannot be assigned without consent. This analysis does not extend to consideration of leases, profits-à-prendre or easements.

30 DW McMorland and others *Hinde McMorland and Sim Land Law in New Zealand* (looseleaf ed, LexisNexis) vol 2 at [17.002 (c)].

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

32 See *Staples & Co Ltd v Corby and District Land Registrar* (1900) 19 NZLR 517 (CA) at 536.

33 Property Law Act 1952, s 126(a) (repealed).

34 This was done by enactment of s 126A of the Property Law Act 1952 (repealed).

35 Property Law Act 2007, s 4 (emphasis added).

> **restrictive covenant** means—
> (a) a covenant, including a covenant expressed or implied in an easement, under which the covenantor undertakes to refrain from doing something *in relation to the covenantor's land which, if done, would detrimentally affect the value of the covenantee's land or the enjoyment of that land by any person occupying it* …

Then for positive covenants:[36]

> **positive covenant** means a covenant, including an express or implied covenant in an easement, under which the covenantor undertakes to do something *in relation to the covenantor's land* that would *beneficially affect the value of the covenantee's land or the enjoyment of the covenantee's land by any person occupying it*

Thus the covenantor has to do or refrain from doing an activity "in relation to the covenantor's land". This is a use of the land and not an activity on the land. Secondly, the activity has to "beneficially affect the value of the covenantee's land or the enjoyment of the covenantee's land by any person occupying it". Again, the covenants are only valid if they are notified on Torrens titles,[37] and in so far as a court of equity will recognise and enforce them.[38]

Thus we have an extension of praedial principles, but only of the limited purpose of restricted activities on the servient land which benefit the dominant tenement in a stipulated manner.

What then of the enforcement of obligations imposed under encumbrance instruments? For this we have to turn to the issue of enforcement of mortgage securities against both assigns of the charged land and of the mortgage security itself.

B *Mortgage securities*

A mortgage consists of two things: first, a charge against the land and second, covenants which secure personal liability with regard to the advance. These covenants, being between the mortgagee and mortgagor, are invariably personal in effect and were not taken to run with the land under praedial principles. By way of illustration, mortgagee covenants invariably include a right to charge interest as well as an obligation to provide a discharge

36 Section 4 (emphasis added).
37 Section 307(3).
38 Section 307(5).

on repayment of the principal. For the mortgagor, applicable covenants invariably relate to keeping the land in good husbandry, payment of any secured interest and an obligation to repay the principal.

Given these limitations, under an informal deeds system the mortgagor conveyed ownership of the land to the mortgagee, subject to a right of redemption.[39] This ensured the mortgagor remained in contract with the mortgagee and overcame problems of the mortgagor attempting to sell the reversion interest without the mortgagee's consent.[40] What then happened when either the mortgagee or a mortgagor wished to assign their interest to a third party? For a mortgagee, we remember that an assignment of the benefit of the mortgagor's performance could take place without the consent of that mortgagor. However, if the assignee sought to enforce performance against the mortgagor, problems arose. This would be the enforcement of an obligation. The mortgagor would only be obligated to perform if that party was bound in contract with the assignee of the mortgagee's interest.

Equally, the mortgagor (as owner of the redemption interest in the security) could transfer or assign the redemption interest to a third party. This again was an assignment of a benefit. However, on such an occurrence, the mortgagee's consent would invariably be sought, if only because a potential assignee would want to ensure the mortgagee (as the legal owner of the land) was obligated to transfer ownership of the land to the assignee following repayment of the security. Where the mortgagee's consent to such an assignment was sought, the mortgagee would invariably require the assignee of the reversion interest to accept personal liability for performance of the mortgagor's contractual obligations. This invariably occurred by the affected parties entering into an appropriate deed. As explained in *In re Errington ex Parte Mason*,[41] in the absence of such deeds, there would be no reciprocity of rights and obligations between the assignee of the reversion interest and the mortgagee.[42]

All of this was, and remains, highly technical.

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39 Elizabeth Toomey (ed) *New Zealand Land Law* (3rd ed, Thomson Reuters, Wellington, 2017) at [9.1.04].

40 This is because the title deeds (and ownership) were with the mortgagee.

41 *In re Errington ex Parte Mason* (1894) 1 QB 11 (QB).

42 Even if the assignment of the reversion interest took place without the consent of the mortgagee, it was not unusual for the assignee to continue to perform the terms of the mortgage security. This occurred not because the assignee was somehow bound, but because it was in that party's interest to ensure there was no breach of contract, giving rise to the possibility of a sale. In such a situation, the common law implied an indemnification by the original (and contractual) mortgagor in favour of the assignee or transferee of the land that the terms of the contract would not be breached: see *Ramsay v Brown and Webb* [1923] GLR 71 (SC) at 73. This would, of course, only be useful if the original mortgagor could be found — and was solvent.

V New Zealand Developments for Mortgages

In the early years of the 20th century, New Zealand courts recognised these principles as being problematic.[43] This led to the enactment of provisions which have since become essential to using encumbrance instruments to secure performance of personal obligations.[44] The first provision to be enacted was s 104 of the Property Law Act 1952. This is now s 203 of the Property Law Act 2007, which reads:[45]

> **Person who accepts transfer, assignment, or transmission of land personally liable to mortgagee**
> (1) If a person accepts, subject to a mortgage, a transfer, assignment, or transmission of mortgaged land,—
> (a) the person *becomes personally liable to the mortgagee*—
> (i) *for the payment of all amounts* and the performance of all obligations secured by the mortgage; *and*
> (ii) *for* the observance and performance of all other covenants expressed or implied in the mortgage; *and*
> (b) *the mortgagee has all remedies under or in connection with the mortgage directly against that person as if that person were the person who gave the mortgage.*

This wording appears to have been uncritically accepted as applying to all mortgage covenants, not just those supporting payment of the secured charge and associated interest payments. Indeed, this is probably correct given the provision extends to "all obligations" and the "performance of all other covenants". The result is not privity of contract, but a statutory equivalent.

A similar measure was legislated to cover the situation of the mortgagee selling the security. This is now the Property Law Act 2007, s 84. This provision is less remarkable. It explains the rules one would expect to apply at common law concerning the assignment of benefits. However, it does go further. It gives the assignee/transferee of the security a direct right of enforcement against the title owner for mortgage breaches.

Section 84 provides:[46]

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43 *Ramsay*, above n 42.

44 See discussion in EC Adams *Garrow's Law of Real Property* (5th ed, Butterworths, Wellington, 1961) at 251–252.

45 Emphasis added.

46 Emphasis added.

> **Assignment of mortgage**
> (1) The interest of a mortgagee under a mortgage over property may be assigned …
> (3) An instrument that is duly executed under subsection (1) or registered under subsection (2) operates as if it were a deed and transfers to the assignee—
> (a) *the debt*; *and*
> (b) the benefits of any other obligations secured by the mortgage; and …
> (d) *all* rights, powers, and remedies of the mortgagee *under the mortgage*.

The expression "rights, powers, and remedies" must refer to a positive right to enforce against the current mortgagor all the mortgagor liabilities under the security.

A *The Torrens system overlay*

As a consequence of the Torrens system being enacted in 1870, a further measure was legislated which, for the sake of completeness, should also be mentioned. This was necessary as a Torrens mortgage is registered under that system as a charge and therefore does not take effect as a conveyance of the land, subject to a right of redemption. The measure is presently reflected in s 75 of the Land Transfer Act 2017, which provides:[47]

> **Effect of transfer of leases and mortgages**
> On registration of a transfer instrument that transfers or assigns an estate or interest under a registered … mortgage, the transfer or assignment takes effect in accordance with the Property Law Act 2007 so that—
> (a) the *estate or interest vests in the transferee*; and
> (b) the transferee acquires the *rights* and becomes subject to the *obligations* of the transferor.

Thus the transferee of the mortgage security can enforce the transferor's rights under that security against the Torrens landowner and becomes liable to that landowner for performance of the transferor's obligations. For the position of purchasers of Torrens land subject to an existing charge, we revert

47 Emphasis added. The origin of this provision is the Land Transfer Act 1870, s 69 (repealed).

back to s 203 of the Property Law Act 2007. This provision equally applies to land transfer land.[48]

How this led to encumbrance instruments being used to secure performance of personal obligations against title successors is discussed next.

VI Brookfield's Innovation

For centuries, income derived from land was secured by way of payment of an annuity or rentcharge charged against land.[49] As stated, from the first Land Transfer Act, the rentcharge or annuity was registered by use of the land transfer statutory mortgage form. This form, first described as a "memorandum" of encumbrance,[50] was subsequently renamed an encumbrance instrument.[51] Thus the discussed Land Transfer Act and Property Law Act provisions for assignment of mortgage securities, or for the sale of land subject to securities remaining on the title, have been applied equally to encumbrance instruments.

In 1970, Jock Brookfield published an article suggesting territorial authority planning notifications could be made binding on title successors by use of encumbrance instruments. He advanced this proposal because territorial authorities wished to record planning and other related material on issued titles, to give purchasers notice of restrictions on land use. These notifications were invariably in the nature of covenants in gross. Given they were personal in nature, for the reasons discussed, these notifications were not binding on future landowners.[52]

Brookfield argued that what has now become s 203 of the Property Law Act 2007 could be utilised to oblige future landowners to honour those planning notifications. He argued that if the power of sale were removed

48 Property Law Act 2007, s 84(2).

49 This reflected the needs of a society where land was the prime provider of wealth. Interestingly, the imposition of rentcharges arose as a consequence of the enactment of Quia Emptores. As land could no longer be granted by a lord in consideration for the performance of services, payment of an ongoing rentcharge was imposed instead. See the useful discussion in *Menere* (CA), above n 1, at [22]–[29]. See also NZ Law Commission 2010, above n 19, at [7.6].

50 Land Transfer Act 1870, s 58 (repealed).

51 This change occurred as a consequence of the movement to automation of the registry. See Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002, s 45 (repealed).

52 This was before the advent of the Resource Management Act 1991, which now enables council consent notices to be placed on Torrens titles. Indeed, this is one of the reasons the Law Commission recommended the use of encumbrances to secure collateral obligations be abolished. See NZ Law Commission 2010, above n 19, at [7.5] and [7.15].

from the registered document, courts would take a pragmatic view. They would not construe the resulting document as being in the nature of a charge and would therefore allow the encumbrance instrument to remain on titles, unchallenged.[53]

This suggestion was enthusiastically received and has subsequently been developed beyond its original conception. Over time, parties other than territorial authorities have used this device. Inevitably, the nature of the imposed obligations has grown, limited only by the imagination of the drafting conveyancer.[54] Being created as a rentcharge, these personal obligations could be enforced for the duration of the security which (being a rentcharge) could be in perpetuity. Although no known study has been undertaken to explain this expanded use, it is likely to be attributable to a number of different factors. First, from the 1980s onwards developers sought to impose tighter controls on owners in intensive land developments. Primarily these were intended to compel landowners to contribute to the ongoing cost of shared amenities such as the upkeep of golf courses,[55] tennis courts, swimming pools or (even) water reticulation plants. The device was also developed (as in *Menere*) to impose greater controls than were otherwise possible over landowners in retirement villages or shopping malls.[56]

It should be noted that where the purpose of the encumbrance was intended to secure payment of significant sums, that liability could have been imposed as the secured rentcharge. However this was, and remains today, unusual. Instead (as with *Menere*) the rentcharge was a de minimis sum payable annually, if demanded. Thus liability for breach of the personal obligations remained reliant on enforcement of the provisions of the Property Law Act and Land Transfer Act discussed.[57]

The Brookfield usage met with some resistance, leading to debate.[58] This may be called the "Brookfield Thomas debate". Two principal arguments

53 FM Brookfield "Restrictive Covenants in Gross" [1970] NZLJ 67.

54 See generally discussion to this effect in Rod Thomas "Encumbrance instruments" [2010] NZLJ 10.

55 See *Lakes International Golf Management Ltd v Vincent* [2017] NZSC 99, [2017] 1 NZLR 935 for a recent example of such controls "gone wrong".

56 See also the examples given by the NZ Law Commission 2010, above n 19, at [7.8].

57 This was done to encourage institutional mortgagees subsequently taking a security interest in the title to consider their advance as being in the nature of a first charge on the property. Such an approach was made more tenable following Brookfield's suggestion that the statutory power of sale be removed from the encumbrance document.

58 See Rod Thomas "Possible Hazards of Memoranda of Encumbrance" (1997) 8 BCB 1; FM (Jock) Brookfield "Possible Hazards of Memoranda of Encumbrance: A Reply" (1998) 8 BCB 13; Thomas "Encumbrance instruments — A Real Burden", above n 16; and Thomas "Encumbrance instruments", above n 54.

were advanced against this development. First, given an encumbrance is a form of mortgage, it was suggested that, if an alternative form of security could be provided (or the rentcharge otherwise satisfactorily secured), it would be a clog on the equity of redemption for the mortgagee to refuse a discharge. Secondly, Thomas argued that the proliferation of such devices was not desirable as a matter of public policy. Given the background explained in the earlier part of this article, Thomas argued the result ignored praedial principles and created an effect similar to the grant of estates for services. It was suggested that, over time, this would result in the devaluation of affected land, similar to the circumstances that led to enactment of Quia Emptores in 1290.

VII More Sustained Criticism of *Menere*

Against this discussion, we return to the two *Menere* judgments. Again, the Court of Appeal found that the personal obligations imposed against Ms Menere remained binding on her, even though she had not contracted to receive those services. The Brookfield Thomas debate was before the Court of Appeal, which pronounced itself in favour of Brookfield.[59] The Court recognised the use of encumbrances to secure collateral covenants was widespread in New Zealand and, as has been mentioned, seems to have concluded that the practice should be supported.[60]

Two key aspects of the Court of Appeal's reasoning may be criticised: first, the finding that the *Menere* encumbrance should be supported as it was in the nature of a "third category rentcharge"; second, the finding that s 97(2) of the Property Law Act 2007 confirms encumbrance instruments should not be redeemable on payment of the nominal sum.

A *Third category rentcharges*

The Court held that the *Menere* covenants should be supported as they were in the nature of a third category rentcharge, being a New Zealand translation of the estate rentcharges of England and Wales.[61] This construction is, however, problematic for a variety of reasons. Estate rentcharges are a statutory enactment of the United Kingdom Parliament, having only limited application in that jurisdiction. In fact, that legislation has been criticised

59 *Menere* (CA), above n 1, at [53] per Hammond and Chambers JJ.

60 At [46].

61 At [27].

as being deficient, justifiable only because England and Wales have not yet legislated a positive land covenants regime — as we have in New Zealand.[62]

What then is an estate rentcharge? Emanating from the north of England,[63] a practice arose of requiring the performance of a restricted class of positive covenants by imposition of rentcharges, even though the amount secured was only nominal. The use of this device was limited in scope. It was recognised as an aberration from the prime purpose of a rentcharge, which was to secure the payment of money.[64] The use was understood to be suitable only for intensive forms of land development. So long as the covenants required work to be done *to the land*, a right to enter (or re-enter) was available for the purpose of undertaking the work. The work to be undertaken had to relate to the preservation of the security.[65]

The Rentcharges Act 1977 was enacted following a 1975 recommendation by the Law Commission for England and Wales.[66] Although abolishing the use of rentcharges in general, it expressly preserved the use of estate rentcharges. Thus, s 2 of the Rentcharges Act provides:[67]

> **Creation of rentcharges prohibited.**
>
> …
>
> (4) For the purposes of this section "estate rentcharge" means … a rentcharge created for the purpose—
>
> (a) of making *covenants* to be performed by the owner of the land affected by the rentcharge *enforceable by the rent owner against the owner for the time being of the land*; or
>
> (b) of meeting, or contributing towards, *the cost of the performance* by the rent owner of covenants for the provision *of services*, the carrying out of maintenance or repairs, the effecting of insurance or the making of any payment by him *for the benefit of the land* affected by the rentcharge or for the benefit of that and other land.
>
> (5) A rentcharge of more than a nominal amount shall not be treated as an estate rentcharge for the purposes of this section unless it represents a *payment for the performance by the rent owner of any such covenant* as

62 See discussion in NZ Law Commission 2010, above n 19, at [7.24].

63 The Law Commission *Transfer of Land: Report on Rentcharges* (Law Com No 68, 5 August 1975) [Law Com 68] at [16]. Why this occurred in that location is not explained in this Report, or other explored resources.

64 The Law Commission *Transfer of Land: Rentcharges* (Working Paper No 49, 18 April 1973) [Law Com 49] at [73].

65 Law Com 49, above n 64, at [109].

66 Law Com 68, above n 63.

67 Rentcharges Act 1977 (UK), s 2 (emphasis added).

> is mentioned in subsection (4)(b) above which is reasonable in relation to that covenant.

From this section, we understand estate rentcharges can be created either for the performance of "covenants" or for the purpose of meeting or contributing towards the cost of "services". The "covenants" under s 2(4)(a) are limited to those "to be performed by the owner of the land". They may be negative or positive in nature. An example would be a repair obligation imposed on flat owners.[68] Services, work or payments are given a different construct. By the section, they may be for the purpose of "maintenance, repairs, the effecting of insurance or the making of any payment … for the benefit of the land … or for the benefit of that and other land". *Halsbury's Laws of England* suggest "services" extend to an obligation to repair a property or to pay towards the cost of maintenance of shared facilities such as drains or septic tanks.[69]

However, there are limits. Praedial principles influence the sort of obligations that can be imposed. Thus, the Law Commission for England and Wales reflected as follows:[70]

> … estate rentcharges can be used to enforce requirements imposed by grant-making bodies that do not hold any estate in land to which the benefit of a covenant can attach. The requirements may have a social function, for example, that the land be used for social housing, or they may ensure the retention of original or period features when a grant is made for restoration. These are important arrangements, and the estate rentcharge has proved to be an effective tool for supporting them.

Further, the device is not intended for general usage. Importantly:[71]

> We take the view that this is a valid reason for the retention of estate rentcharges for use in these special and unusual cases. We anticipate that the enactment of our recommendations for land obligations will mean that

68 See discussion in *Menere* (CA), above n 1, at [28].

69 *Halsbury's Laws of England* (5th ed, 2017) vol 87 Real Property and Registration at [1037], n 5. See *Canwell Estate Co Ltd v Smith Brothers Farms Ltd* [2012] EWCA Civ 237, [2012] 1 WLR 2626 where the dispute concerned unpaid contributions to the cost of upkeep of the roads within a developed estate. For further discussion see Law Commission *Making Land Work: Easements, Covenants and Profits à Prendre* (Law Com No 327, 7 June 2011) [Law Com 327] at 58. See also Law Com 68, above n 63, at [49] which mentions rentcharges may be used by management companies.

70 Law Com 327, above n 69, at [2.47].

71 At [2.48].

> they are needed only occasionally where a positive obligation has to be imposed by a specialist body that does not hold land that can meet the "touch and concern" requirement.

(1) Why estate rentcharges are different

From this analysis, we can see estate rentcharges are a creation unique to the jurisdiction of England and Wales. They are intended to operate only within the confines of an estate development and relate to work to be done on that estate, or services to be provided related to maintenance, repairs, insurance or other payments benefiting the estate. Prior to *Menere* their relevance to New Zealand had never, apparently, been suggested.[72]

There are other differences between rentcharges and encumbrance instruments. The remedy available for breach of a rentcharge is enforcement of the secured charge, not performance of the secured (perhaps collateral) services. This is the right to enter onto the charged land to undertake remedial work required to better secure the charge. In this regard, Bright explains as follows:[73]

> [The use of a rentcharge] … will only be suitable to attach the right of entry to covenants which are of such a nature that in the event of breach by the rent payer the rent owner can carry out the covenant (eg a repairing obligation) and recover the expenses of doing so from the rent payer because of the fact that distress and possession enabling costs to be recovered from rents and profits of the land are both remedies of a financial nature. It would therefore be inappropriate as a remedy for wrongful use of the property or for breach of a restrictive covenant.

Accordingly, the landowner can ignore collateral or personal obligations that fall outside this categorisation.[74] The point is neatly summarised in *Halsbury's Laws of England*:[75]

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72 At least, our research has not uncovered any such suggestion prior to *Menere*.

73 Susan Bright "Estate Rentcharges and the Enforcement of Positive Covenants" [1988] Conv 99 at 104–105.

74 We must recall by way of contrast that, following Brookfield's suggestion, the power of sale and right of re-entry is often removed from encumbrance instruments in New Zealand to ensure the security is never sold.

75 *Halsbury's Laws of England*, above n 69, at [1037]. In *Menere* (CA), above n 1, at [32] Chambers J was incorrect to state that no power of sale arose for breaches of estate rentcharges. The exercise of the power of sale is common, being the only form of final enforcement of the security.

> One of the remedies for non-payment of a rentcharge is a right of re-entry. By linking the performance of a positive covenant to the rent charge, that remedy will be available for non-performance with the covenant. The threat of the right of re-entry can thus be used as a means of enforcing compliance with a positive covenant.

The result is patently awkward. As recognised by the Law Commission for England and Wales:[76]

> [the] re-entry is clumsy and draconian; and the device is artificial and technical in the extreme. Moreover, since the rentcharge is of only nominal amount, the idea that positive covenants are needed to support it has little basis in reality.

These deficiencies have led the Law Commission for England and Wales to recommend that estate rentcharges should be replaced by differing measures limited to "development schemes".[77] However, to date this has not occurred.

These are patently different from the services imposed under the *Menere* encumbrance instrument, which related to operating a pager service, delivery of medicines and such like. Indeed, we may speculate that the reason that the *Menere* obligations were not imposed as positive land covenants was probably the drafting conveyancer's comprehension that the obligations were of a personal nature and, therefore, not capable of being cast as positive land covenants under our Property Law Act regime.[78]

B *The discharge issue*

That, however, is not the end of the *Menere* issues. We recall that, in refusing relief, the Court of Appeal placed reliance on s 97(2) of the Property Law Act 2007, holding this applied in place of s 81 of the 1952 Act, being the supposedly "modern equivalent" of that earlier provision.[79] Section 97(2) of the 2007 Act reads as follows:[80]

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76 The Law Commission *Transfer of Land: The Law of Positive and Restrictive Covenants* (Law Com No 127, 26 January 1984) at [3.42].

77 At [24.39]–[24.25] and [27.1]. This would include a measure whereby a "manager" of a development could charge for provided services: at [4.33].

78 Property Law Act 2007, s 4 gives the statutory definition, which has already been discussed.

79 *Menere* (CA), above n 1, at [40].

80 Property Law Act 2007, s 97(2) (emphasis added).

> **Equity of redemption**
> (1) The current mortgagor or any other person entitled to redeem mortgaged property may redeem it in accordance with this subpart at any time before it has been sold, under a power of sale, by the mortgagee or a receiver.
> (2) The mortgagee must, on payment to the mortgagee of all amounts *and the performance of all other obligations secured by the mortgage*, at the expense of the current mortgagor or other person seeking to redeem the mortgaged property, discharge the property from the mortgage …

Section 97(2) differs from s 81 of the 1952 Act, which provided:[81]

> **Equity of redemption**
> (1) A mortgagor is entitled to redeem the mortgaged land at any time before the same has been actually sold by the mortgagee under his power of sale, *on payment of all money due* and owing under the mortgage at the time of payment.
> (2) A mortgagor is entitled to redeem the mortgaged land although the time for redemption appointed in the mortgage deed has not arrived; but in that case he shall pay to the mortgagee, in addition to any other money then due and owing under the mortgage, interest on the principal sum secured thereby for the unexpired portion of the term of the mortgage.

The point of difference between the two provisions is that, in s 81, there is no reference to "the performance of all other obligations secured by the mortgage".

On this point, Chambers J explained:[82]

> It is unclear the extent to which s 97(2) changed the law, if at all. It certainly made explicit for the first time that the mortgagee/encumbrancee is not obliged to discharge the property from the mortgage/encumbrance until all amounts payable under it have been paid *and all other obligations secured by the mortgage have been performed*.

The Judge went on to suggest the change in wording may have simply been a restatement of the earlier provision, providing an express acknowledgement that the provision applied to third category rentcharges. Thus, he stated:[83]

> The addition of the words "and the performance of all other obligations secured by the mortgage" to s 81(2) of the 1952 Act in the Commission's

81 Property Law Act 1952, s 81 (emphasis added).

82 *Menere* (CA), above n 1, at [43] (emphasis in original).

83 At [47].

> replacement section (now s 97) may be seen as confirmation that these third category rentcharges should not be redeemable on payment of the nominal sum of the annual rent. The Commission was making quite clear that such payment would not, of itself, entitle the mortgagor to a discharge of the mortgage; to permit redemption on payment of the nominal rentcharge would be to render the encumbrance device useless in these third category rentcharge situations. There is no indication in the Act that our Law Commission considered continued use of the rentcharge device undesirable.

With respect, this suggestion is somewhat speculative. There was no discussion of this issue by the Law Commission preceding implementation of the 2007 Act.[84] Nor is there any suggestion that the Law Commission was aware of the relevance (or workings) of the Rentcharges Act.

(1) What does "all obligations" mean?

Baragwanath J, the third member of the Court, took a slightly different tack. He suggested s 97(2) of the 2007 Act should not apply to encumbrance instruments. This was on the basis that the purpose of an encumbrance instrument is not to secure repayment of a principal sum, but invariably to enforce collateral obligations against third party purchasers.[85] His Honour backed his reasoning by emphasising the document had to be construed by use of normal principles of contractual interpretation, and parties should be obligated to stick to their contracted bargain.[86]

This line of reasoning also calls for some comment. It sidesteps the issue of whether, as a matter of public policy, encumbrance instruments should be used to secure the performance of personal obligations for 99 years. On different facts to *Menere*, performance of the obligation (whatever it was) may have been imposed in perpetuity. Further, Baragwanath J's assertion that people should be held to their bargains and that "contracts are to be performed"[87] overlooks the fact that Ms Menere purchased with the encumbrance in place.[88] There was no signed contract between her and Jackson Mews.

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84 Law Commission *A New Property Law Act* (NZLC R29, 1994) [Law Commission 1994].

85 *Menere* (CA), above n 1, at [63]. This approach also has synergy with the comments made by Hammond and Chambers JJ that the redemption provision may have a different meaning when applied to third category rentcharges but (potentially) not to other forms of mortgage liability: at [53].

86 At [59]–[60] and [63].

87 At [65].

88 The question of whether the body corporate could cancel its services agreement with

C *The Supreme Court's analysis*

The Supreme Court then refused leave to appeal in a summary manner. It considered the appeal was "hopeless" because the wording of s 97(2) was clear. This suggests the Court considered the provision should be read to apply in the same way to conventional mortgage securities and encumbrance instruments.

This leaves us with a problem. The extent to which this interpretation alters the law regarding the equitable principle prohibiting clogs on the equity of redemption remains unaddressed. This equitable doctrine is of long standing and (until now) was considered to have universal application.[89] It is difficult to accept that such a key equitable doctrine was intended to be overturned by the enactment of s 97(2), where the Law Commission reports preceding enactment of the new Property Law Act were silent on this point. Equally, if the measure is intended to operate differently for encumbrance instruments, then on what basis? Such an analysis was not undertaken by the Supreme Court.

D *An alternative analysis of s 97(2)*

If it is accepted (as the Court of Appeal suggested) that the wording of s 97(2) was not intended to create a significant law change, a more conservative understanding is called for.

Albeit clumsily worded, the reference in s 97(2) to "performance of all other obligations" may be understood as intended to apply to "obligations" that support the charge whilst debt remains. Indeed, the Law Commission Report preceding the enactment of the 2007 Act provides support for this view.[90] For guarantees and rentcharges, the Law Commission noted it should not be possible to redeem the security until it was clear "what moneys or other obligations are secured". The example then given for a rentcharge was one "during the lifetime of the holder".[91] If the purpose of the security is recognised as supporting advances made "from time to time", or where the

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Jackson Mews adds further confusion: at [6] per Hammond and Chambers JJ. The NZ Law Commission 2010, above n 19, briefly touches on this at [7.18].

89 DW McMorland and others *Hinde McMorland and Sim Land Law in New Zealand* (looseleaf ed, LexisNexis) vol 2 at [MG4.02].

90 Law Commission 1994, above n 84, at [380].

91 This discussion was recognised in *Menere* CA, above n 1, at [44] per Hammond and Chambers JJ.

purpose of the security is to provide a guarantee for third party liability to (say) a bank, the expression "all other obligations" invites a more restricted meaning. The security is required only so far as the guarantee has not been withdrawn, or the third party liability has not been concluded.[92]

Under this reasoning, a discharge of a rentcharge should be available under s 97(2) on repayment, by provision of alternative security "during the lifetime of the holder", or by payment of a "specified amount" to otherwise secure the totality of the periodic payments.

Finally, neither the Court of Appeal nor the Supreme Court addressed s 115 of the Property Law Act 2007. This provides as follows:

> **Court may order discharge of mortgage if periodical payments secured are otherwise provided for**
>
> (1) This section applies if a mortgage over property secures the payment to any person of a periodical payment, other than interest on the amounts secured by the mortgage.
>
> (2) A court may, on the application of the current mortgagor or any other person entitled to redeem the mortgaged property, make an order directing or allowing the payment into court of a specified amount that, in the opinion of the court, is sufficient to constitute a fund that will produce enough income to meet any periodical payment secured by the mortgage as it falls due.

Given this measure exists in the same legislation and deals expressly with rentcharges, why should s 97(2) be the primary source for determining when discharges of encumbrance instruments should be given?[93] Surely by legislating s 115, Parliament intended that it should principally apply for discharges of encumbrance instruments, rather than s 97(2). How do these two measures then operate in tandem?[94] Such analysis was not carried out by either Court.

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92 See also Thomas "Encumbrance Instruments", above n 54, at 11.

93 This measure was previously s 151 of the Property Law Act 1952. This issue is addressed in FM Brookfield *Goodall and Brookfield's Law and Practice of Conveyancing with Precedents* (4th ed, Butterworths, Wellington, 1980) at [23.24]. Brookfield argues a court should exercise its discretion not to allow a discharge under s 115 where the encumbrance is intended to secure the performance of collateral obligations.

94 In its 1994 Report the Law Commission (as with s 81 of the Property Law Act 1952) did not discuss whether s 115 was to be read differently for encumbrance instruments securing performance of collateral covenants. See Law Commission 1994, above n 84, at [397].

VIII The Law Commission Gets Involved

Following *Menere*, the Law Commission released its 2010 Report on the proposed new Land Transfer Act. In this report, it addressed the findings in *Menere* and the practice of using encumbrance instruments to secure performance of personal obligations.[95] From this discussion, we can take it that the assumption made in *Menere* that the Law Commission had earlier intended to validate the use of encumbrance instruments by rewording s 81 of the old Property Law Act[96] into what is now s 97(2) may have been speculative.

Commenting on *Menere*, the Law Commission reflected that estate rentcharges in England and Wales were intended to operate differently from encumbrances. They were not a type of mortgage and were not considered to operate "in gross". Additionally, the benefited land for rentcharges is *all the units in the development* and not one unit.[97] The Law Commission explained:[98]

> The rationale for the estate rentcharge exception was that, in such a situation, the preservation, value and enjoyment of each unit may well depend upon the observation of certain covenants by the owners of the other units. The reason for this exception at that stage was that, although restrictive covenants could run with the land in England, positive covenants (allowing the burden to run with the land affected) could not do so. Conveyancers therefore resorted to rentcharges, as a conveyancing device, imposed on each unit for the benefit of the other units, supported by de facto positive covenants to repair and insure. The purpose of the scheme was to create a set of positive covenants designed to preserve the development as a whole. The amount of the rentcharge might be nominal, but could be quite substantial if a management company needed funds, for example to cover maintenance and insurance.

The Law Commission then referred to the Brookfield Thomas debate. It acknowledged policy concerns arose through using encumbrance instruments to secure the performance of personal obligations — perhaps in perpetuity. In particular, the Report notes that by this device, covenants to secure personal obligations obtained greater protection than covenants that benefit other

95 NZ Law Commission 2010, above n 19, at ch 7.

96 *Menere* CA, above n 1, at [47] per Hammond and Chambers JJ.

97 NZ Law Commission 2010, above n 19, at [7.25].

98 At [7.24].

land (positive or negative) under normal praedial principles. In the Law Commission's view, this was likely to be contrary to Parliament's intention.[99]

Furthermore, since the release of its initial Issues Paper, the Law Commission noted submitters, including the New Zealand Law Society Property Law Section, had expressed concern over the continued "use of encumbrance instruments and their proliferation on the register".[100] In light of these concerns, the Law Commission considered remedial legislation was necessary.

A *The Law Commission's recommendation*

The Law Commission considered encumbrance instruments should no longer be used to secure the performance of personal obligations. It illustrated this point by reference to the facts of *Menere*, where "a person may be bound by the encumbrance, which requires using a particular service provider, even where the service provider is not fulfilling their obligations".[101]

Justifying this conclusion, the Law Commission noted that no legislative safeguards existed to control the use of encumbrance instruments as a device:[102]

> There will often be an imbalance of power between the person seeking to impose the encumbrance and the person who will be bound by it (in a retirement village situation for example). This risks imposing onerous and long-lasting obligations on individuals who may not have substantial bargaining power.

The Law Commission therefore proposed "mortgage" be defined "in such a way that it exclud[ed] rentcharges the principal purpose of which [was] not to secure the payment of money".[103]

By way of recompense, the Law Commission proposed enactment of a "covenants in gross" regime. Such covenants could be "notified" on land titles, in the same manner as restrictive and positive land covenants pursuant to the relevant provisions of the Property Law Act 2007.[104] In alignment with praedial principles, it proposed the covenants should still be required

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99 At [7.30].

100 At [7.1]. See also concerns expressed by the Court of Appeal in *ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd* [2006] 3 NZLR 351 (CA) at [76].

101 NZ Law Commission 2010, above n 19, at [7.29].

102 At [7.29] and [7.32].

103 At [7.33].

104 At [7.2]–[7.37]. See now the Land Transfer Act 2017, ss 73, 115–116, 242 and 246.

to "touch and concern" the affected land. It also proposed enactment of a mechanism to remove such covenants, in the event they became redundant or inappropriate.[105]

The covenants in gross regime was enacted as part of the Land Transfer Act 2017.[106] Section 318A(2) of the Property Law Act 2007 now provides as follows:[107]

> In this section, *positive covenant in gross* means a covenant in gross that requires the covenantor to do *something in relation to the covenantor's land*.

This definition aligns with the statutory definitions of restrictive and positive covenants previously discussed. As with those definitions, the need for the activity to do "something in relation to the covenantor's land" adheres to praedial principles.

IX The Mischief Remains

No doubt to the surprise of submitters,[108] the proposed Bill was amended prior to enactment to follow a different path concerning the future use of encumbrance instruments. The definition of "mortgage" under the Land Transfer Act was altered to include rentcharges securing "the performance of other obligations".[109] Secondly, a discharge can now be sought only in

105 At [7.37]–[7.38]. In closing we should reflect that the Law Commission for England and Wales turned away from a proposal to create covenants in gross. It was concerned with the "complexity that would result, to the overburdening of land, and the inevitable fragmentation of the benefit when the land is divided".

106 Land Transfer Act 2017, ss 115–116, 244 and 246, inserting into the Property Law Act 2007, ss 318A–318F.

107 Section 318A(2) (emphasis added).

108 Katherine Sanders of the University of Auckland made submissions on the Bill to the same effect by letter of 4 May 2016. She commented that the changes made to the Bill appeared to "undermine the recognition of covenants in gross, particularly the requirement that the covenant relate to the land itself". See Katherine Sanders "Submission to the Government Administration Committee on the Land Transfer Bill 2016" at [19]. The Law Society equally suggested the power to modify or extinguish covenants should be extended to encumbrance instruments. This also has not been taken up. See New Zealand Law Society "Submission to the Government Administration Committee on the Land Transfer Bill 2016" at [9.6].

109 Land Transfer Act 2017, s 5, definition of "mortgage".

circumstances where the "rentcharge has ceased to be payable in accordance with the terms of the mortgage instrument".[110]

The changes were intentional. In this regard, the government department responsible for the new legislation recorded as follows:[111]

> The definition [of mortgage] allows the use of encumbrances to secure collateral covenants because this reflects current government policy. In 2015, Cabinet rescinded its earlier decision to prohibit the use of encumbrances to secure collateral contracts.

This change calls for comment. It arose because the Land Registry realised it would be difficult for registry staff to police whether encumbrances submitted for registration were for a purpose other than for securing "the payment of money" using automated land registration procedures.[112] The Hon Louise Upston as the Minister responsible for the Bill further justified this change on the following grounds: "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."[113]

Thus despite both the Law Commission and Land Registry's work on this issue, at the end of the day pragmatism overrode principle. The use of encumbrances to secure personal obligations continues. Indeed, the enacted provisions now even appear by their wording to support such practices. Last-minute technical issues were used to trump policy concerns where alternatives were surely available.[114]

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110 Land Transfer Act 2017, s 106(2)(a). It can be argued this wording is clumsy as it continues the focus on the rentcharge being "payable" instead of focusing on continued performance of the secured collateral covenants.

111 *Report of Land Information New Zealand to the Government Administration Committee* (July 2016) at [98].

112 See Land Information New Zealand "Modernising New Zealand's land transfer laws" (5 July 2017) <www.linz.govt.nz>.

113 Louise Upston *Land Transfer Bill — Minor Changes to 2010 Policy Decisions and Additional Policy Decisions* (Proposal for Cabinet, 2015) at [30].

114 The High Court could have been authorised by the legislation to order discharges of encumbrance instruments where that court found they no longer served a useful purpose and that their continuation offended public policy considerations. A comparable measure is included in the new covenants in gross regime. See Land Transfer Act 2017, s 246, adding s 318A to the Property Law Act 2007. What makes this a bitter pill to swallow is that the Registry assisted the Law Commission in drafting the initial Bill.

X Why Does This Matter?

Although the Minister suggested that landowners are "likely to voluntarily stop using encumbrances over time", this appears a rather speculative comment.[115] Why would this occur? It fails to recognise there is a seminal difference between the now legislated covenants in gross regime[116] and the use of encumbrance instruments. The enacted regime adheres to praedial principles as the servient land still has to adhere to the "touch and concern" test in terms of land use. However, encumbrance instruments operate free from this controlling principle.

Further, although the Court of Appeal in *Menere* was careful to limit its reasoning to third category rentcharges having "none of the problems associated with covenants in gross",[117] experience has since shown a lack of adherence to, or understanding of, this limitation. Thus, in *Escrow Holdings Forty-One Ltd v District Court at Auckland*,[118] the Supreme Court held that a land covenant supported by an encumbrance instrument secured the right to park on adjacent land notwithstanding the absence of parking easements.[119] Then, in *Spark New Zealand Trading Ltd v Clearspan Property Assets Ltd*, the Court of Appeal held that by use of an encumbrance instrument, a co-owner could control a discrete portion of the charged land.[120] This finding was made notwithstanding the Environment Court had initially held this activity to constitute a de facto subdivision.[121] Finally, in *ABCDE*

115 Upston, above n 113, at [30]. Equally, it has been suggested that, after enactment of the Land Transfer Act 2017, conveyancers would not use encumbrance instruments through a sense of social responsibility: see Thomas Gibbons "Covenants and Encumbrances under the new Land Transfer Act" (paper presented to New Horizons for Torrens Conference, Auckland, 30 August 2018).

116 Now Property Law Act 2007, ss 318A–318F.

117 *Menere* (CA), above n 1, at [51] per Hammond and Chambers JJ.

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

119 As a matter of law, right of way easements cannot be imposed without local body consent first having been obtained: see Local Government Act 1974, s 348 which prohibits the grant of "access ways" over other land without the prior consent of the local territorial body. However, the Supreme Court held that, as the parking rights were protected by both an encumbrance and land covenant, they were nevertheless enforceable. See *Escrow Holdings*, above n 118, at [59].

120 *Spark New Zealand Trading Ltd v Clearspan Property Assets Ltd* [2018] NZCA 248 at [27].

121 *Spark New Zealand Trading Ltd v Clearspan Property Assets Ltd* [2016] NZEnvC 115. Although the High Court held the encumbrance instrument covenants created an "artificial contrivance", the result was nevertheless held to be legal: see *Clearspan Property Assets Ltd v Spark New Zealand Trading Ltd* [2017] NZHC 277, (2017) 18 NZCPR 587 at [3]–[4].

Investments Ltd & Ors v Van Gog & Body Corporate S89906, unit title owners were obligated by an encumbrance instrument to recognise a third party had exclusive letting rights of their units for a period of 999 years.[122] In none of these judgments was there any discussion of third category rentcharges or any perception that the obligations should be required to have synergy with estate rentcharges secured by the Rentcharges Act. Indeed in *Navilluso Holdings Ltd v Davidson* the High Court went so far as to suggest "[i]t is now established … that a memorandum of encumbrance is an effective conveyancing technique which may be deployed in lieu of a restrictive covenant in gross".[123]

A *Arguments either way*

Are there, then, arguments that this extensive usage should be left intact? Should we accept that New Zealand has forged its own unique path on this issue? Why not accept personal obligations should be made binding on title assigns into the future? After all, the use of encumbrance instruments to secure collateral obligations has grown extensively since 1970 when Brookfield first proposed this usage. This suggests a need for such a device. Further, could it not be argued that adherence to praedial principles is now an outdated construct, honoured more in the breach than the observance? In this regard we must recognise we have legislated regimes enabling the creation of easements in gross[124] and covenants in gross.[125] In both situations, there is no need for a dominant tenement. Further, for leasehold estates, we have legislated to make lessee covenants binding on assignees, even if the imposed obligations are personal in nature.[126] Collectively, this may suggest praedial constructs, emanating as they do from Roman law, are somewhat outdated, serving no useful function.

Further suggestions can be advanced. Why shouldn't purchasers of Torrens titles be required to perform obligations clearly set out on the face of the Register?[127] After all, arguably those registrants paid a purchase price commensurate with knowledge from the title search of the requirement to perform? As a "control" factor, could we then not rely on some form of

122 *ABCDE Investments Ltd v Van Gog* [2013] NZCA 351, (2013) 14 NZCPR 736.

123 *Navilluso Holdings*, above n 2, at [21]. Interestingly, here the encumbrance covenant found enforceable by the High Court was a restraint of trade.

124 Property Law Act 2007, s 291.

125 Sections 307A–308F.

126 Section 240(3)–(4).

127 See generally Brendan Edgeworth "The *Numerus Clausus* Principle in Contemporary Australian Property Law" (2006) 32 Mon LR 387.

"inherent" High Court jurisdiction to expunge redundant or mischievous obligations registered against titles? After all, such a regime has been enacted in relation to negative, positive covenants and easements.[128] The same principles now also extend to the new covenants in gross regime.[129] Given this, perhaps an inherent discretion could be developed to remove personal obligations from titles if they offend public policy or are found to be redundant or mischievous in nature?

However, there are responses to these suggestions. The possible range of obligations imposed by encumbrance instruments is vast, limited only by the imagination of the drafter. They may literally extend to singing a song, buying petrol, or even wearing purple socks on a Tuesday. It does not take too much imagination to understand that, over time, such personal obligations will become redundant or irrelevant, as occurred with obligations arising from medieval petty serjeanty. Even if we return to the facts of *Menere*, will the obligation to pay for medicines, provide postal delivery or a 24-hour pager service still have value some 70 or 80 years from now? On grounds of economic utility alone, the result can be argued to be an evil.

Further, if this trend continues, we are surely in danger of bypassing the legal framework regarding existing controls on future land use.[130] Why, for example, with reference to the case law that has emerged since *Menere*, should a developer adhere to legal rules pertaining to the grant of easements, leases or land covenants when bespoke obligations having more onerous consequence can instead be imposed on title assigns?

What then of the suggestion that the High Court may have inherent jurisdiction to expunge personal obligations from titles, where they offend public policy? To explore that possibility (if it exists), what would that public policy be? It cannot be that the covenants offend praedial principles, where the express purpose of registration is to achieve that very aim. What then, where the obligations are perceived to be either redundant or mischievous in nature? Problems emerge here as well. The court would need to undertake a value assessment. Not only would this involve litigation risk, expense and be accompanied by uncertain cost consequences, but the result would be uncertain. A party entitled to demand performance could assert a property entitlement through being able to control activities on the servient land. This could be argued to constitute a valuable right, as discharge of the obligation has the effect of unlocking the servient land's development potential, increasing its market value.[131] The encumbrancee could therefore assert a

128 Property Law Act 2007, ss 308–312, 318A.

129 Sections 318C–D.

130 The NZ Law Commission 2010, above n 19, touched on this at [7.13]–[7.15].

131 This calls to mind one of the complaints that led to the English Civil War, with Charles I enforcing old medieval tariffs, such as ship money. See Wikipedia "Ship money" (2 May

right to payment of appropriate "compensation". However, in the absence of legislation, a court would surely be unable to award such quantum.

B *Gameplaying and registration difficulties*

Equally, there is a practical issue, yet to arise in terms of encumbrance instruments used as a device. The Land Registry requires the consent of an encumbrancee (as a mortgagee) to the grant, surrender or variation of any registered lease, easement or profit-à-prendre.[132] The encumbrancee, who under *Menere* reasoning cannot be discharged from a title, could, with impunity, either withhold consent or charge exorbitant fees for giving consent. Without such consent, the servient land owner may be rendered impotent in terms of not being able to register the necessary dealings.[133] If the encumbrance terms are imposed in perpetuity, this could be a significant technical issue to overcome in terms of achieving registration.

XI Conclusion

Principles are important. The two *Menere* judgments have effectively ignored core praedial concepts defining the nature of obligations capable of binding successors in title. Case law post *Menere* shows existing common law and legislative frameworks controlling the grant of leases, easements or land covenants — or even subdivision — are in danger of being bypassed. Why comply with necessary legal requirements if more adventurous and advantageous obligations can be imposed by use of personal covenants?

In its 2010 Report, the New Zealand Law Commission recognised the importance of resolving this issue.[134] Its proposed solution was to restrict the use of encumbrance instruments to the securing of rentcharges and annuities and to legislate a covenants in gross regime. However, the proposed draft Land Transfer Bill was altered by Parliament prior to enactment, preserving

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2019) <en.wikipedia.org>. The subsequent Tenures Abolition Act 1660 (Eng) 12 Cha II, c 24, s 3 abolished the Court of Wards and Liveries, which had been established in 1540 to collect revenue due by operation of the feudal tenure system.

132 Land Transfer Act 2017, ss 91(4), 93, 94(4) and 109. See also Land Information New Zealand "Consents — Mortgagee" (7 October 2019) <www.linz.govt.nz>.

133 Possibly the consent issue could be dealt with by applying for judicial review. See the applicable provisions of Judicial Review Procedure Act 2016, ss 3, 5 and 8. This is argued on the basis that the issue of "giving" consent is the exercise of a statutory power.

134 On this issue see NZ Law Commission 2010, above n 19, at [7.32] which also refers to the imposition of restraints of trade or a requirement that the landowner (for the time being) execute a power of attorney.

the present practice. We have consequentially legislated the remedy without curing the evil.

We must therefore return to *Menere* and consider whether the Court of Appeal and Supreme Court decisions are correct. In this regard, the courts may be considered to have delivered two hammer blows. The first of these blows is the suggestion that encumbrances to secure third category rentcharges should not be discharged. Third category rentcharge is a term not previously known to New Zealand law and any ensuing analysis is both speculative and unsatisfactory. Indeed, we find courts subsequently have not engaged in such dialogue, instead simply holding encumbrance instruments securing personal obligations to be enforceable.

Secondly, we must return to the meaning of s 97(2) of the Property Law Act 2007. This is perhaps the more serious issue. Are we now in a position that the discharge of any mortgage security (including encumbrances) can be refused until all personal obligations have been performed? If this provision is to be read more broadly for encumbrance instruments than conventional securities, we revert to the prior issue — do the discharge provisions apply differently for encumbrance instruments and, if so, for all, or only those which secure third category rentcharges? This then takes us back to the earlier issue.

The matter is not beyond resolution. Not only does the Court of Appeal's reasoning on this issue require closer scrutiny than has occurred to date, but the new Land Transfer Act still requires that a discharge be registered following "the rentcharge [ceasing] to be payable in accordance with the terms of the mortgage instrument".[135] This enables a fresh appraisal to be undertaken regarding when a discharge may be demanded. The only other recourse would be to have the matter re-addressed by the legislature. However, given the recent enactment of the Land Transfer Act 2017, this is an unlikely avenue for fruitful endeavour.

135 Land Transfer Act 2017, s 106(2)(a).