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Bevan, Chris (2018) The doctrine of benefit and burden: reforming the law of covenants and the numerus clausus “problem”. *Cambridge Law Journal*, 77 (1). pp. 72-96.
ISSN 1469-2139

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THE DOCTRINE OF BENEFIT AND BURDEN: REFORMING THE LAW OF COVENANTS AND THE NUMERUS CLAUSUS “PROBLEM”

Christopher Bevan*

ABSTRACT. The doctrine of benefit and burden - an indirect method for enforcing the burden of positive freehold covenants – developed as an exception to the strict Austerberry rule that the burden of positive covenants cannot bind successors directly at law. Three recent Court of Appeal cases (Davies v Jones; Wilkinson v Kerdene and Elwood v Goodman) confirm the continued existence and application of the doctrine but also reveal its deficiencies and limitations. This article explores the contemporary application of the doctrine, identifies its theoretical, historical and elemental frailty and, drawing on recent reform proposals of the Law Commission, highlights the case for reform. In so doing, this article argues that a vital theoretical issue has been overlooked in the reform debate: the numerus clausus principle.

KEYWORDS: property; benefit and burden; freehold covenants; positive obligations; numerus clausus

I. INTRODUCTION

Since the early 19th century, freehold covenants have occupied a central place in property law and continue to do so today. How and in what circumstances landowners and those acquiring land are bound by freehold covenants therefore really matters. It matters because whether land is burdened by a freehold covenant can have significant ramifications not just for the use to which the land can be put but also for its economic value, its saleability and its amenity. Perhaps unsurprisingly then, strict rules have developed as to when freehold covenants will and will not be binding under English and Wales law. One intriguing and rather anomalous “workaround” to these often-harsh rules is the so-called “doctrine of benefit and burden”. It is this “enforceability question” and the doctrine of benefit and burden in particular which form the focus of this article. This article revisits the origins and development of the doctrine and scrutinises its contemporary application in order to unearth a new perspective on the Law Commission’s recent proposals for reform to the law of covenants which would see the introduction of an entirely new proprietary right, the “Land Obligation”. In so doing, the theoretical and historical fragility of the doctrine of benefit and burden is exposed thus buttressing the case for reform. Yet, it is argued here that, if the Commission’s significant reform proposals are to be accepted, a stronger and more convincing case must be made as why the established, closed list of proprietary rights (the so-termed “*numerus clausus*”) should be opened and expanded. This article explores the inherent difficulties of this commonly-overlooked *numerus clausus* “problem” and reflects on how it might be overcome and accommodated within the Commission’s reform agenda.

* Address for correspondence: Nottingham School of Law, University of Nottingham, University Park, Nottingham NG7 2RD. Email: Christopher.Bevan@nottingham.ac.uk.

The Law Commission estimates that around 80% of land in England and Wales is subject to at least one freehold covenant.¹ A freehold covenant is simply a promise made in a deed. A positive freehold covenant is a promise in a deed by one freehold land owner (the covenantor) with another freehold owner (the covenantee) whereby the former promises to actively do something on or in relation to his land for the benefit of the latter such as the planting of trees, the painting of fencing or the payment of a contribution to the maintenance of a road. The covenantor is the party subject to the burden of the promise; the covenantee enjoys the benefit of that promise. Freehold covenants are therefore an important means by which landowners can achieve a more particularised, bespoke control, management and ultimately enjoyment of their own land.

Freehold covenants are, first and foremost, contracts and are therefore necessarily binding between the original parties to the covenant deed. However, they may, if certain conditions are met, also be enforceable by and against successors in title of these original parties. This makes covenants extremely potent proprietary rights in land. It is vital, then, that the circumstances and conditions under which successors in title of the original parties will be bound by these covenants is determined and delimited with clarity. Whilst the starting point remains the strict doctrine of privity of contract, it has been settled since the fourteenth century² that, in certain situations, the *benefit* of a positive freehold covenant is capable of running with an estate in land and therefore binding a successor in title. More controversial, however, is the position regarding the *burden* of positive covenants. Whilst equity has recognised, since *Tulk v Moxhay*,³ that the burden of a negative, restrictive covenant (a promise not to do something on land) can run with the land and so bind successors, the burden of a positive freehold covenant at law cannot bind successors directly.⁴ This rule has been affirmed and re-affirmed by the courts on several occasions from *Keppell v Bailey*,⁵ famously in *Austerberry v Corporation of Oldham*⁶ and more recently in the House of Lords in *Rhone v Stephens*.⁷

The doctrine of mutual benefit and burden, which forms the subject of this article, therefore developed as an indirect method by which, at law and despite the *Austerberry* rule, the burden of positive freehold covenants can run with the land and so be enforceable against successors. Yet this doctrine, described by Wade as an “innovation of considerable potentiality”⁸ and said to “give expression to a broad principle of justice”⁹ that he who takes the benefit of a grant must also bear the burden, is deeply elusive. This article seeks to cast light on and scrutinize this doctrine and contribute to a field of surprisingly sparse academic scholarship. The doctrine of benefit and burden stands as an exception or “workaround” to the established *Austerberry* rule yet the precise ambit of the doctrine has received very little academic attention since its enunciation in *Halsall v*

¹ Law Commission, *Easements, Covenants and Profits à Prendre: A Consultation Paper* (2008) (Law Com. Report No. 186).

² *Pakenham's Case* (1369) Y B 42 Edw III Hil, pl 14, f 3; see A.W.B. Simpson, *A History of Land Law* 2nd ed., (London 1986), 116-118.

³ *Tulk v Moxhay* (1848) 2 Ph. 774, 41 E.R. 1143.

⁴ *Austerberry v Oldham Corporation* (1885) 29 Ch. D. 750.

⁵ *Keppell v Bailey* (1834) 2 My. & K. 517, 39 E.R. 1042.

⁶ *Austerberry v Corporation of Oldham* (1885) 29 Ch. D. 750; see also *Haywood v The Brunswick Permanent Benefit Building Society* (1885) 8 Q.B.D. 403.

⁷ *Rhone v Stephens* [1994] 2 A.C. 310; [1994] 2 All E.R. 65.

⁸ H.W.R. Wade, “Covenants – a broad and reasonable view” [1972] C.L.J. 157, at p. 158.

⁹ K. Gray and S. F. Gray, *Elements of Land Law*, 5th ed., (Oxford, 2009), at [3.3.35].

Brizell.¹⁰ This article fills this gap and comes, crucially, after a triptych recent decisions of the Court of Appeal which have sought to further delimit the doctrine: *Davies v Jones*;¹¹ *Wilkinson v Kerdene*¹² and *Elwood v Goodman*.¹³ This article seeks to do four things: first, it offers an examination of the origins and development of the doctrine of benefit and burden. Secondly, it locates and evaluates the scope of the doctrine in contemporary property law in view of recent case law developments. Thirdly, and in so doing, it reveals the theoretical, historical and elemental frailty of the doctrine which, finally, and in turn, it will be argued enlarges and bolsters the case for reform of the law of covenants and the reform agenda of the Law Commission. Crucially, this article examines a severely overlooked issue for reform of the law in this area: the *numerus clausus* principle. This article therefore employs analysis of the doctrine of benefit and burden as a prism through which to assess the Commission's significant reform proposals as well as consideration of how the *numerus clausus* "problem" impacts upon and must be accommodated within the proposed reform agenda.

II. THE ORIGINS AND DEVELOPMENT OF THE DOCTRINE OF BENEFIT AND BURDEN

It is only by first revisiting the origins and development of the doctrine of benefit and burden that we can then move meaningfully to analyse and assess its contemporary status and, ultimately, to probe the cogency of the Law Commission's recent reform agenda. The doctrine of benefit and burden has evolved piecemeal through case law and has undoubtedly been shaped incrementally throughout its historical development. As such, it cannot be fully understood without examining its inception, adoption and early application by the courts. An appreciation of the provenance and early exposition of the doctrine is therefore critical. This is addressed in this section. The House of Lords in *Austerberry v Corporation of Oldham* confirmed that the burden of positive freehold covenants cannot run with the fee simple at common law. Thus, a landowner in whose favour a positive covenant has been extracted will not, at law, be able to enforce the burden of the covenant directly against a successor of the original covenantor. Freehold contracts are contractual rights. There is no privity of estate between the successor of the original covenantor and the original covenantee and so the burden of the covenant cannot pass with the land.¹⁴ This strict position has represented the law for over a century and was confirmed more recently by the House of Lords in *Rhone v Stephens*¹⁵ where Lord Templeman noted that:

For over 100 years it has been clear and accepted law that equity will enforce negative covenants against freehold land but has no power to enforce positive covenants against successors in title of the land. To enforce a positive covenant would be to enforce a personal

¹⁰ *Halsall v Brizell* [1957] Ch. 169; [1957] 1 All E.R. 371 ; see C. Davis, "The Principle of Benefit and Burden" [1998] C.L.J. 522.

¹¹ *Davies v Jones* [2009] EWCA Civ 1164; [2009] All ER (D) 104.

¹² *Wilkinson v Kerdene* [2013] EWCA Civ 44; [2013] 2 E.G.L.R. 163.

¹³ *Elwood v Goodman* [2013] EWCA Civ 1103; [2013] 4 All E.R. 1077.

¹⁴ See Megarry and Wade. C. Harpum, S. Bridge and M. Dixon, *Megarry & Wade: The Law of Real Property*, 8th ed., (London 2012).

¹⁵ On which see generally J. Snape, "The Burden of Positive Covenants" [1994] Conv. 477; N. Gravells, "Enforcement of positive covenants affecting freehold land" (1994) 110 L.Q.R. 346.

obligation against a person who has not covenanted. To enforce negative covenants is only to treat the land as subject to a restriction.¹⁶

The rule has deep roots¹⁷ and remains in place today albeit that a number of ingenious devices have been concocted by conveyancers to avoid the harshness of the effects of the *Austerberry* rule. These “indirect” methods (of which the doctrine of benefit and burden is one¹⁸) allow for enforcement of the burdens of positive freehold covenants and are a response to the “illogical, uncertain, incomplete and inflexible”¹⁹ law in this area. The inability for the burdens of positive covenants to pass at law has long been a source of ire and the direct enforcement of positive covenants has been recommended in consecutive Law Commission reports going back to the 1960s.²⁰ The Commission in 1984, by way of example, located the *Austerberry* rule as the “main defect in the present law” and described it as “of course both simple and devastating.”²¹ The most recent recommendations for reform are those contained in the 2011 Report No. 327 *Making Land Work: Easements, Covenants and Profits à Prendre* and are discussed further below. In the face of Parliamentary inertia, the *Austerberry* rule endures for the foreseeable future at least and thus the indirect methods of enforcement of burdens of positive covenants remain significant and are worthy of scrutiny. Perhaps the most controversial and least explored is the doctrine of benefit and burden.

The doctrine was first applied by Upjohn J. in the case of *Halsall v Brizell*.²² In *Halsall*, land was subdivided and sold as plots for redevelopment. The vendors retained ownership of the roads, sewers, sea wall and promenade but granted rights to the purchasers to make use of these facilities. The purchasers covenanted to make a contribution to the cost of maintaining these facilities. Under the *Austerberry* rule, the burden of these positive covenants could not pass to the purchasers directly at law. Nevertheless, the court held that the purchasers were required to make the contribution if they wished to take advantage of the facilities. This principle, said the court, sprung from an “ancient law” of reciprocal benefits and burdens: a man could not take the benefit under a deed without also accepting its obligations.²³ The doctrine was subsequently applied in *Ives v*

¹⁶ *Rhone v Stephens* [1994] 2 A.C. 310 at 321 per Lord Templeman.

¹⁷ See discussion in Law Commission, *Making Land Work: Easements, Covenants and Profits à Prendre* (Law Com. Report No.327) at [5.12]-[5.16].

¹⁸ Other methods include the use of leasehold title; a chain of indemnity covenants; estate rentcharges and commonhold.

¹⁹ Law Commission, *Appurtenant Rights* (1971) (Law Com. Report. W.P. No. 36) at [31]-[35].

²⁰ *Report of the Committee on Positive Covenants Affecting Land* (1965), Cmnd. 2719; Law Commission, *Restrictive Covenants* (1967) (Law Com. Report. No. 11), Law Commission, *Appurtenant Rights* (1971) (Law Com. Report. W.P. No. 36); Law Commission, *Positive and Restrictive Covenants* (1984) (Law Com. Report. No. 127); *Report of the Aldridge Working Party on Commonhold* (1987) Cm. 179; *Lord Chancellor's Consultation Paper on Commonhold* (1990) Cm. 1345.

²¹ Law Commission, *Positive and Restrictive Covenants* (1984) (Law Com. Report. No. 127)

²² *Halsall v Brizell* [1957] Ch. 169; [1957] 1 All E.R. 371.

²³ In the event, the contribution was held to be void on the basis that it represented more than a “due and just proportion” of the upkeep of the facilities: *Halsall v Brizell* [1957] Ch. 169 at pp.183-4 per Upjohn J.

*High*²⁴ where Lord Denning M.R. explained the doctrine of benefit and burden in the simplest of terms: “He who takes the benefit must accept the burden ... a party cannot enjoy the benefits of an arrangement without giving effect to the burdens imposed on such benefits.”²⁵ The “universe” of the doctrine was expanding²⁶ in that, in *Ives*, the principle was applied to a parol agreement. In *Ives*, successors in title erected a block of flats whose foundations reached into neighbouring land. It was agreed orally between the parties that the foundations could remain in place and that the defendant would be given a right of way to enable access to the yard at the back of the flats. According to Lord Denning M.R., the doctrine of benefit and burden applied even though there was no agreement by deed. A decade later in *Tito v Waddell (No.2)*,²⁷ Megarry V-C. revisited the doctrine and drawing on *Halsall* and *Ives* identified what he coined the “pure principle of benefit and burden” doctrine. Megarry V-C. made plain that this principle was to be regarded as distinct from the “conditional benefit principle”. Under the conditional benefit principle, as a matter of construction, there is a grant of rights whose enjoyment is conditional upon or qualified by the assumption of a burden.²⁸ Under the “pure principle of benefit and burden”, the burden is independent from and is not a condition of the grant. The burden must be shown to have intended to pass with the benefit and, additionally, that a “sufficient benefit” has been taken. Megarry V-C. explained:

[T]here is ample authority for holding that there has become established in the law what I have called the pure principle of benefit and burden. Second, I also think that this principle is distinct from the conditional benefit cases, and cases of burdens annexed to property ... A burden that has been made a condition of the benefit, or is annexed to property, simply passes with it: if you take the benefit or the property you must take it as it stands, with all its appendages, good or bad. It is only where the benefit and the burden are independent that the pure principle of benefit and burden can apply ... [this] is a question of construction of the instrument or transaction, depending on the intention that has been manifested in it, whether or not it has created a conditional benefit or a burden annexed to property.²⁹

Certain issues remained unresolved,³⁰ in particular, as to the dividing line between the “pure” and the “conditional” principles. In *Rhone v Stephens*,³¹ the House of Lords revisited this “pure principle” with Lord Templeman casting significant doubt on Megarry’s interpretation, noting that he was “not prepared to recognise the ‘pure principle’ that any party deriving any benefit from a

²⁴ *Ives v High* (1967) 2 Q.B. 379.

²⁵ *Ibid.* at pp. 394, 400.

²⁶ Gray and Gray describe the “expanding universe” of the doctrine in its early development: note 9 above at para. [3.3.35].

²⁷ *Tito v Waddell (No.2)* [1977] Ch. 106; [1977] 3 All E.R. 129 on which see generally: Crane (1977); Aughterson [1985] Conv. 12.

²⁸ *Tito v Waddell (No.2)* [1977] Ch. at 290.

²⁹ *Ibid.* at p. 302.

³⁰ On which see Aughterson [1985] Conv. 12, at 16.

³¹ *Rhone v Stephens* [1994] 2 A.C. 310; [1994] 2 All E.R. 65 ; on which see: L. Tee, “A Roof Too Far” [1994] C.L.J. 423, 446; A. Jones, “Thinking positively about the law of covenants?” (1994-5) 5 K.C.L.J. 136; J. Snape, “The benefit and burden of covenants – now where are we?” (1994) 3 Nottingham Law Journal 68.

conveyance must accept any burden in the same conveyance.”³² In truth, Lord Templeman’s construction of the *Tito* decision was itself a broad-brush gloss of the lengthy discussion in that case and did not do justice to Megarry’s distinction between pure and conditional benefits. Nevertheless, Lord Templeman went on to affirm the decision in *Halsall* and so the doctrine of benefit and burden endures albeit that the “pure” nomenclature has been dropped. In essence, the doctrine was recast in *Rhone* and, as Lord Templeman explained, the doctrine was to be constrained in view of the continuing potency of the *Austerberry* rule which was affirmed. So when would the doctrine of benefit and burden operate? First, Lord Templeman explained that it was not the case that any burden would be enforceable simply by attaching it to a right. The burden had to be *relevant* to the exercise of the right for the doctrine to apply. In other words, only reciprocal benefits and burdens would be enforceable. Secondly, the doctrine would only operate where there was an opportunity to renounce the benefit and thereby escape the linked burden. The principle therefore did not apply on the facts of *Rhone* itself which was a case in which the owners of dwelling house whose roof extended over an adjoining cottage could neither in theory nor in practice refuse to repair the roof and so be deprived of the benefit of mutual rights of support. By contrast, in *Halsall*, the defendant could “in theory at least” elect between paying the contribution towards maintenance of the facilities and forsaking the right to use them and thereby save the money. The effect of the decision in *Rhone* was therefore to affirm *Halsall* but also to acknowledge that there needed to be limitations on the operation of the principle of benefit and burden. The two conditions for the operation of the doctrine, namely the requirement of (i) “relevance” between benefit and burden, and (ii) the opportunity to renounce the benefit and eschew the burden were subsequently confirmed by the Court of Appeal in *Thamesmead v Allotey*.³³ The doctrine’s status had therefore been affirmed but curtailed and bounded. Despite the discussion of the parameters of the doctrine in *Rhone* and *Allotey*, how the doctrine would operate across distinct factual nexuses remained unclear. This is unsurprising. The doctrine of mutual benefit and burden is a principle whose limits have never been clear. In *Tito* and *Rhone* themselves, there was a recognition of the haziness and mysterious nature of the doctrine: Megarry V-C., for example, conceding that “the full features of the principle” remained to be worked out. Since then, this has been the task embarked upon by the courts and one which still occupies the judiciary in a recent triptych of decisions of the Court of Appeal. The doctrine has, in fact, been subjected to very little close analysis by the court and is applied relatively sparingly. Fortunately, a series of recent cases, offers a useful moment to consider the contemporary scope of the doctrine and how the courts are defining its operation.

III. THE CONTEMPORARY SCOPE AND EVOLUTION OF THE DOCTRINE OF BENEFIT AND BURDEN

This section examines the contemporary operation of the doctrine of benefit and burden as applied in three recent Court of Appeal decisions: *Davies*, *Wilkinson* and *Elwood*. This analysis confirms the continued utility and value of the doctrine but also, importantly, reveals a notable narrowing in the doctrine’s scope which, in turn, highlights the deficiencies and brings into sharp focus the indeterminacy of the doctrine. This section begins by reflecting on the three recent

³² *Rhone v Stephens* [1994] 2 A.C. at p. 322.

³³ *Thamesmead v Allotey* [1998] EWCA Civ 15; (1998) 30 H.L.R. 1052.

decisions and assesses how the doctrine operated and was circumscribed in each and what these cases have to tell us about the doctrine's current status and its future.

*Davies*³⁴ in the Court of Appeal offered a long-overdue opportunity to re-consider the scope of the doctrine. *Davies* concerned a dispute arising from a contract for sale of land to a supermarket for redevelopment. The supermarket, Lidl, entered a contract to purchase a site from Mr Jones that it wished to develop into a new store. At the time, freehold to the land was vested in the claimants, Davies, who were trustees of a retirement benefit scheme but also to a lesser extent in Mr and Mrs Thomas. Mr Jones contracted with Mr and Mrs Thomas to purchase that part vested in them (the "Jones-Thomas Contract") and, subsequently, contracted to purchase the larger, remaining part vested in the claimants, Davies (the "Jones-Trustees Contract"). Mr Jones later assigned his right, title and interest in both the "Jones-Thomas" and "Jones-Trustees" contracts to Lidl. The contracts were completed by Mr and Mrs Thomas and the claimants transferring the land directly to Lidl. By way of clause 18 of the "Jones-Trustees Contract", Mr Jones was permitted to retain £100,000 of the purchase price payable to the claimants, Davies, until clearance and preparation work on the site had been carried out. The cost of these works was to be shared jointly by Jones and Davies with Jones entitled to retain half of the proper costs from the £100,000 retention. The remaining balance was then to be released to Davies. The works were completed but no retention money at all was paid to the claimants, Davies. Davies, contended that the true cost had been just £30,000 and sought the release of the sum retained by Lidl. Lidl argued the works had, in fact, cost in excess of £200,000 and that it was not bound by clause 18 of the contract between Mr Jones and Davies.

At first instance, it was held that Lidl was bound by the terms of clause 18 as, having taken the benefit of the contract between Mr Jones and Davies, it was bound to accept the burden and therefore comply with clause 18 under the doctrine of benefit and burden. The judge found that:

[T]here was a clear understanding that ... the rights of Mr Jones under his contract with [Davies] would be given to Lidl. There was a clear benefit to them of that operation. It gave them the likelihood of completion without going through the intermediary of Mr Jones and being left perhaps with a worthless judgment in damages ... It seems to me that they did have a choice whether to take that benefit or not. That was the basis of the correspondence between the parties' solicitors from July. They had a choice to continue the sub purchaser arrangement. They had no need, from a legal point of view, to deal directly with the trustee's solicitors but that they did ... Having taken the benefit of that arrangement, in respect of the contract in question, in my judgment, they are bound by the burden under it to pay the £100,000.³⁵

Lidl appealed to the Court of Appeal arguing that the doctrine of benefit and burden had been wrongly applied. In particular, it argued that a "clear understanding" was not a sufficient basis for operation of the doctrine; the benefit conferred on Lidl was unconditional and, finally, that in any event, Lidl had no choice whether or not to accept or refuse the benefit and thereby avoid the burden. This case therefore gave the Court of Appeal an opportunity to rule on and clarify the scope of the doctrine. Lidl's appeal was allowed, the Court of Appeal holding that the doctrine of benefit and burden did not apply on the basis of a "clear understanding" alone. Where land was

³⁴ *Davies v Jones* [2009] EWCA Civ 1164; [2009] All E.R. (D) 104.

³⁵ *Ibid.*, at para. [6].

concerned, said Sir Andrew Morritt C., a deed or other writing was required. The “clear understanding” identified by the judge was insufficient. The deed of assignment conferred the benefit but did not impose any burden and so could not be relied upon here. The doctrine did not therefore operate. Sir Andrew Morritt C., having reviewed the authorities, distilled the contemporary scope of the doctrine into three requirements which represent a re-working of the two factors laid down by the House of Lords in *Rhone*:³⁶

1. The benefit and burden must be conferred in or by the same transaction;
2. The receipt or enjoyment of the benefit must be relevant to the imposition of the burden in the sense that the former must be conditional on or reciprocal to the latter: this is a matter of construction of any deed or document in the case;
3. The person on whom the burden is alleged to have been imposed must have or have had the opportunity of rejecting or disclaiming the benefit, not merely the right to receive the benefit.

Davies therefore represents a narrowing of the doctrine by making clear that it will not apply based alone upon an “understanding” between the parties however “clear” that may be in the view. What is required is a deed or other writing. This reflects a tightening, a constraining of the doctrine from its earlier, more flexible operation. In particular, it signals a shift away from the decision of *Ives* where the doctrine was held to apply to a parol agreement. *Davies* further establishes that the benefit and burden must be conferred in the same transaction. This requirement will be determined in most cases by construing the deed effecting the conveyance and associated documents. The second requirement that the benefit be “relevant to the imposition of the burden” has been held to be “a matter of substance rather than form.”³⁷ The effect of this is that the benefit does not need to be expressed in the deed to be conditional upon the burden provided there is a clear and obvious link between the two. By far the most uncertain aspect of the doctrine is the second factor identified, namely, the requirement of “relevance”; that the benefit and burden must be relevant, related, linked to one another. A measure of guidance is provided by the two subsequent decisions of the Court of Appeal in *Wilkinson v Kerdene* and *Elwood v Goodman*.

In *Wilkinson v Kerdene*, Mr Wilkinson purchased a bungalow situated in a holiday village. Under Schedule 1 of the conveyance, Mr Wilkinson was granted rights of use of the roads, footpaths, lawns and recreational facilities in the village and, under clause 4 of the conveyance, the vendor covenanted to maintain the roads, drives, car parking spaces, footpaths, lawns, recreational facilities and paint the external surfaces of the bungalow. The holiday village fell into disrepair and ultimately came into new ownership under Kerdene Ltd. Kerdene sought to enforce the covenants in order to recover from Mr Wilkinson (and other bungalow owners) the sums it had paid in seeking to restore the amenity of the village. As Mr Wilkinson was a successor in title to the original purchaser, the burden of the positive covenant could not be enforced directly at law. Mr Wilkinson could therefore only be required to pay if the doctrine of benefit and burden applied. Mr Wilkinson argued that the payment covenant was linked to the obligation to repair under clause 4 rather than to the grant of rights under Sch.1. The judge rejected this argument, holding that the payment provision was relevant to and correlated with the right to use the facilities broadly drawn.

³⁶ *Ibid.*, at para. [27].

³⁷ Patten L.J. in *Elwood v Goodman* [2013] EWCA Civ 1103; [2013] 4 All E.R. 1077.

The Court of Appeal upheld the trial judge's finding and dismissed Mr Wilkinson's appeal. According to Patten L.J.:

[I]n substance, the payment of an annual charge for the maintenance of facilities which the defendants are only entitled to use by virtue of rights granted under the deed is relevant to the continued exercise of those rights even though it is in fact (and in terms) a contribution to the cost of their maintenance. The two are not inconsistent. Quite the contrary.³⁸

Mr Wilkinson could only escape paying the contribution if it could be shown that the payment had no relation to the rights to use the facilities of the village as provided for in Schedule 1. On the facts, the payment was clearly relevant to these rights even though exercise of these rights was not made expressly conditional on payment.

The approach taken in *Davies* and *Wilkinson* was subsequently affirmed in *Goodman v Elwood*. In *Goodman*, the owner of an industrial estate in Nottingham, Dobson, leased industrial plots to several tenants who subsequently formed a consortium to purchase the units. In September 1986, Elwood purchased land on the estate including the access road. Dobson reserved for itself, its successors in title, their tenants and licensees, a right of way over the road. In return, Dobson covenanted to make a contribution towards maintenance of the road. In December 1986, Dobson sold a single unit on the estate to Goodman and as part of the conveyance, Goodman covenanted to pay a proportion of Dobson's contribution to the maintenance of the access road. Elwood subsequently sued Goodman to recover unpaid maintenance contributions and, additionally, claiming that Goodman was liable to contribute to an extension to the road by one metre instigated by Elwood. Applying the doctrine of benefit and burden as clarified in *Davies* and *Wilkinson*, the Court of Appeal held that Goodman was liable to contribute "a fair and reasonable proportion"³⁹ of the maintenance costs which was to be calculated by reference to the portion of land Goodman's unit abutted. Patten L.J. observed that:

As ... pointed out in *Wilkinson v Kerdene Limited* [2013] EWCA Civ 44 at [27], the requirement for the rights to be conditional on the performance of the payment obligations is a matter of substance rather than form and in this case there is a clear and obvious link between the rights of way reserved over the Roadway ... and the obligation to contribute to the cost of repairs.⁴⁰

Counsel for Goodman had advanced two grounds on which it was contended that the doctrine of benefit and burden did not apply. First, it had been argued that any liability arising was personal in nature only and further liability had been excluded by the terms of the conveyance. On a true construction of that conveyance, this argument was rejected by the court. There was nothing to support the submission that liability was to be personal only. Secondly, it was submitted that there was a "mismatch" between the rights granted and the scope of the maintenance covenant. The rights of way granted under the conveyance were said to be in general terms over all the estate roads of the industrial park, whereas the covenant to contribute to the cost of road maintenance extended only to a specific part of the access roadway. On this basis, the doctrine should not

³⁸ *Wilkinson v Kerdene* [2013] EWCA Civ 44; [2013] 2 E.G.L.R. 163, at [28].

³⁹ *Elwood v Goodman* [2013] EWCA Civ 1103; [2013] 4 All E.R. 1077, at [16].

⁴⁰ *Ibid.*, at para. [28].

operate, argued counsel for Goodman. This was also rejected. The court found the right of way was relevant to the burden of the covenant. The answer, said, the court was to require payment of a fair and reasonable proportion of the maintenance cost referable to the specific portion of roadway over which rights were enjoyed. Further, it did not matter that the burden of the positive covenant had not been registered as the burden of a positive covenant does not create an estate or interest in land as do restrictive covenants and Goodman was not to be expected to contribute to the costs of the road extension. Given Goodman enjoyed no right to use the road extension, there was no inextricably linked benefit and burden.⁴¹

The Court of Appeal decisions in *Davies*, *Wilkinson* and *Elwood* offer an important moment to re-evaluate and re-appraise the doctrine of benefit and burden. These cases raise three key observations. First and importantly, the decisions confirm that the doctrine of benefit and burden endures, it continues to exist and play a role in contemporary property law jurisprudence. Simply stated, the doctrine still matters. Suggestions of the doctrine dying out and its demise are therefore disproved.⁴² Secondly, whilst the doctrine persists, taken-together, the recent decisions of the court reflect a narrowing of the doctrine's scope; a trend which is discernible from the decision *Rhone* onwards. To re-formulate the language of Gray and Gray, the "universe" of the doctrine is today far less extensive than witnessed in its early incarnations under *Tito*, *Halsall* and *Ives*. The doctrine is therefore more clearly constrained, bounded and appears to be narrowing with each judgment. Thirdly, the combination of the first and second of these observations gives expression to the third. The recent flurry of cases confirms the survival of the doctrine, the continuing desire for the burden of positive freehold covenants to bind successors but also it underscores the deficiencies and limitations of the doctrine as a means of achieving this end. This, it is argued, necessitates enquiry into why the doctrine exists by locating, critiquing and probing its underpinning, its rationale. This forms the subject of the next section.

IV. THE DOCTRINE OF BENEFIT AND BURDEN: LOCATING A CONVINCING RATIONALE

Despite the doctrine of benefit and burden having been applied in a range of decided cases, the doctrine rests on surprisingly unsteady doctrinal foundations. Thus, while the court from *Halsall* to *Tito*, from *Rhone* to the recent triptych of Court of Appeal judgments, have accepted the existence of the doctrine, there has been very little attempt to clarify or probe its rationale or to interrogate the case for its continued justification. Delving more deeply exposes that the principle, in fact, springs from less than settled doctrinal beginnings and has a more uncertain, contested history than textbooks and practitioner texts would suggest. This is important because it goes to the legitimacy of the principle, its continued currency in property law and vitally to its doctrinal force more broadly. A case must be made for the continued existence of the doctrine. A convincing rationale must be located and established. With this in mind, and given that this article ultimately moves to suggest a new underpinning for the passing of mutual benefits and burdens, it is necessary to first consider the foundations of the doctrine and why it exists.

⁴¹ *Elwood v Goodman* [2013] EWCA Civ 1103; [2013] 4 All E.R. 1077, at [37]-[40].

⁴² See Child, "The demise of pure principles" (2010) 243 P.L.J. 14-15.

The doctrine of mutual benefit and burden has been described as a “principle of justice” and is said to operate broadly on the basis of fairness.⁴³ This is captured most clearly by Megarry V-C. in *Tito* who rationalised the doctrine by reference to a series of everyday, non-legalistic adages. According to Megarry V-C., the doctrine was said to hail from:

The simple principle of ordinary fairness and consistency that from the earliest days most of us heard in the form “You can’t have it both ways,” or “You can’t eat your cake and have it too,” or “You can’t blow hot and cold.”⁴⁴

It is striking perhaps that a doctrine sitting in such clear conflict with the long-standing and celebrated *Austerberry* rule’s is justified on such slender and colloquial materials and according not to legal doctrine but by reference to non-scholastic cliché. Striking also that the potency and enforceability of property rights should fall to be determined by reference to a broad construct of “ordinary” fairness and consistency; notions which, whilst doubtless central to any functioning legal system and to the interests of natural justice, are not the primary drivers of property law. The doctrine is said to be supported by the Latin maxim *qui sentit commodum sentire debet et onus* which translates roughly as “he who derives a benefit from a thing, ought to feel the disadvantages attending it.” This maxim is often cited to buttress the doctrine of benefit and burden on the basis that they reflect the same “spirit.”⁴⁵ Yet, as Megarry V-C. was prepared to concede in *Tito*,⁴⁶ the relationship between the maxim and a doctrine of mutual benefit and burden is somewhat murky:

This ancient maxim, to be found in 2 Co. Inst. 489, bears an uncertain relationship to the principle under discussion. In spirit it is the same: yet the instances of its operation given in the books are curiously restricted and haphazard.⁴⁷

In *Halsall*, the case which many regard as representing the cradle of the doctrine of benefit and burden, Upjohn J. notably failed to scrutinize the doctrine beyond holding that its existence is “conceded.”⁴⁸ This concession is reached by Upjohn J. by reference to a passage taken from *Norton on Deeds*,⁴⁹ and by drawing on a single observation by Lord Cozens-Hardy M.R. on *Coke upon Littleton* at 230b taken from the decision of *Elliston v Reacher*.⁵⁰ As a foundation for the doctrine, this is exceptionally thin. First, Lord Cozens-Hardy’s observation in *Elliston* was made as part of the address by counsel, did not form part of the judgment and, as a result, does not amount legal precedent. Secondly, the particular passage cited by Cozens-Hardy in *Coke upon Littleton* confines quite plainly the benefit and burden principle to cases where a party is specifically named in a deed but the deed is not executed. Thirdly, the passage cited from *Norton*

⁴³ See C. Davis, “The Principle of Benefit and Burden” (1998) 57 C.L.J. 522; K. Gray and S. F. Gray at note 9 above.

⁴⁴ *Tito v Waddell (No.2)* [1977] Ch. 106 at p. 289 per Megarry V-C.

⁴⁵ *Ibid.*, at p. 290.

⁴⁶ *Ibid.*

⁴⁷ See H. Broom, *Broom’s Legal Maxims*, 10th ed. (London, 1939), 482-486.

⁴⁸ *Halsall v Brizell* [1957] Ch. 169 at p.180.

⁴⁹ *Ibid.*, per Upjohn J. citing R. F. Norton, *A Treatise on Deeds: Norton on Deeds*, (2nd ed., London, 1928), at p. 26.

⁵⁰ *Elliston v Reacher* [1908] 2 Ch. 665 at p. 669.

on Deeds itself relies heavily on the authority of *Elliston* and is therefore unhelpfully circular. In addition and strictly-speaking, Upjohn J.'s dicta in *Halsall* as to the doctrine must also be seen as *obiter* given that, on the facts of the case, a resolution which was passed by the proprietors of land allowing for additional calls for charges to maintain the facilities was found to be *ultra vires* and void. The doctrine did not therefore arise.

Where does this leave us? In defence of the doctrine of benefit and burden, Aughterson⁵¹ has pointed to a more pragmatic underpinning to the doctrine which, it is suggested, proves eminently persuasive. Aughterson notes that the doctrine exists simply to “remove the need for complex and inefficient mechanisms devised to circumvent the rigour of the common law.”⁵² According to this view, the existence of the doctrine is less concerned with fairness and is focused on tempering the harshness of the traditional *Austerberry* principle. In particular, the doctrine allows conveyancers to avoid the travails of having to devise and sustain an unbroken chain of indemnity covenants; a common device used to avoid the *Austerberry* rule and which permits covenants to be enforced indirectly but only where the chain remains unbroken. The doctrine of benefit and burden obviates the need to have recourse to the precarity of indemnity covenants. In other words, the doctrine exists, pure and simple, as a means of circumventing the strictures of the common law. Of course, while this may explain the doctrine's practical utility, it does not amount to a robust, principled justification for the existence of the doctrine. Rather, Aughterson's pragmatic defence of the principle treats the symptoms of the disease but fails to diagnose the cause. More defensible, in these circumstances, would be the removal or amendment of the maligned rule. Of course, this is the stance of the Law Commission whose reforms, thus far, have languished in the face of Parliamentary inertia. Aughterson's pragmatism is picked up in Megarry & Wade where the doctrine of benefit and burden is regarded with skepticism; the authors lamenting the principle as a “slight of judicial hand.”⁵³

Little assistance or succor for the doctrine is forthcoming from other common law jurisdictions. In Australia, the doctrine's shaky doctrinal foundations have been exposed even more unflinchingly. Indeed, the doctrine was rejected outright by the Supreme Court of Victoria in Australia and the Northern Territory in *Government Insurance Office (N.S.W.) v K.A. Reed Services Pty. Ltd*⁵⁴ and *Calabar Pty. Ltd v Ampol Pty. Ltd*⁵⁵ after a lengthy consideration and evisceration of the provenance of the principle by Brooking J. In the more recent decision of *Cooke v Dove*,⁵⁶ Bryson J explained that the courts had not reached a final, settled view on the doctrine but insisted that, “the principle of benefit and burden had not become established as a general legal principle” in Australia.⁵⁷

⁵¹ Aughterson, “In Defence of the Benefit and Burden Principle” (1991) 65 Australian Law Journal 319.

⁵² *Ibid.*

⁵³ C. Harpum., S. Bridge., M. Dixon, *Megarry & Wade: The Law of Real Property* (8th ed.), p. 1388 at [32-026].

⁵⁴ *Government Insurance Office (N.S.W.) v K.A. Reed Services Pty. Ltd* [1988] VicRp 75; [1988] V.R. 829.

⁵⁵ *Calabar Pty. Ltd v Ampol Pty. Ltd* (1990) 71 N.T.R.

⁵⁶ *Clifford v Dove* [2003] NSWSC 938; 11 BPR 21,149; [2004] ALMD 4806.

⁵⁷ *Ibid.*, at p. 67.

V. EXPOSING THE THEORETICAL, HISTORICAL AND ELEMENTAL FRAILTY OF THE DOCTRINE OF BENEFIT AND BURDEN

As this article exposes, the doctrine of benefit and burden evinces a theoretical and “historical frailty”⁵⁸ and the rationale traditionally advanced to justify its operation is based on broad and clichéd notions of fairness, of not having one’s cake and eating it. Such a rationale is unconvincing as justification for a principle of law. The orthodox rationale offered for the doctrine is founded squarely upon maxims; maxims of “fairness”, “justice” and reciprocity. Yet, despite recent judicial pronouncements on the increasingly important role of fairness in the context of the quantification of beneficial interests in the family home,⁵⁹ it is argued here that generalized maxims cannot alone offer a stable basis for a doctrine which carries with it the potential force of quasi-proprietary effect. As Gardner has noted:

statements of legal doctrine sound both more determinate and more authoritative than they necessarily are ... For it follows that reasoning based on a maxim especially facilitates the introduction of unarticulated value-judgments; and indeed that such reasoning carries an unusually high risk of actual error, as the judges themselves miss their way.⁶⁰

Maxims provide an unstable and unreliable foundation for the construction of secure legal doctrine.⁶¹ As Salmond⁶² argues, maxims are best regarded as the “proverbs of the law” carrying with them the same attributes and defects that do proverbs. Maxims are brief, pithy statements of only partial truths. Lord Esher in *Yarmouth v France*⁶³ went further describing the use of maxims as, “almost invariably misleading: they are for the most part so large and general in their language that they always include something which really is not intended to be included in them.”⁶⁴ As Sir Frederick Pollock has explained:⁶⁵

A maxim is a phrase embodying some legal idea of common application in a concise and portable form. It is a symbol or vehicle of the law, so far as it goes, it is not the law itself,

⁵⁸ *Tito v Waddell (No.2)* [1977] Ch. 106 at p. 295 per Megarry V-C.

⁵⁹ See in particular *Jones v Kernott* [2011] UKSC 53 and discussion of *Stack v Dowden* [2007] UKHL 17 in M. Dixon, “The Never-Ending Story: Co-Ownership after *Stack v Dowden*” [2007] Conv. 456.

⁶⁰ S. Gardner, “Two Maxims in Equity” [1995] C.L.J. 60.

⁶¹ On the maxims, see W.M.C. Gummow and J.R.F. Leane, *Equity-Doctrines and Remedies*, 3rd ed. (Sydney, 1992), ch 3; P. Jackson, “The Maxims of Equity Revisited,” in S. Goldstein (ed.), *Equity and Contemporary Legal Developments* (Jerusalem 1992); R. Pound, “On Certain Maxims of Equity”, in P.H. Winfield and A.D. McNair (eds.), *Cambridge Legal Essays* (Cambridge 1926), at p. 259. Pound suggests that the maxims greatly assisted in the development of equity in the United States, where it was regarded with suspicion. Their (frequently spurious) antiquity and so authority enabled the results to appear as true law, rather than as the personal opinions of individual judges, whilst in practice their lack of determinacy gave scope for judicial innovation.

⁶² J. W. Salmond, *Jurisprudence*, 10th ed. (London 1966), 498.

⁶³ *Yarmouth v France* (1887) 19 Q.B.D. 647.

⁶⁴ *Ibid.*, at p. 653.

⁶⁵ Sir Frederick Pollock, *Jurisprudence*, 6th ed. (London 1929), 235-6.

still less the whole of the law, even on its own ground. One of the commonest mistakes ... is to take a maxim for an authentic and complete expression of the law, and go about to deduce consequences from its words as if it were a modern Act of Parliament.

The “mistake” Pollock outlines describes precisely what has taken place with the doctrine of benefit and burden. A general maxim of fairness has been conceded without close exposition of its merits. A broad concept of fairness has been accepted, adopted and enlarged into a fully-fledged doctrine. With each decided case, this concession has ossified further into a doctrine which is consequently weak, largely ungrounded and lacking in a robust and sustainable underpinning. The consequence, as this article exposes, is a hollow doctrine teetering on unstable legal footings or as Wade described it “a novel and widely generalized proposition” deriving from “some unexplained alchemy distilled from an ancient and narrow rule.”⁶⁶

In addition to the historical frailty of the doctrine, in its contemporary application as epitomized by *Davies*, *Wilkinson* and *Elwood*, the doctrine betrays an additional, elemental fragility or “internal inconsistency.”⁶⁷ On the one hand, as has been demonstrated, the doctrine has been constrained and subjected to narrow pre-requisites such as the requirements of a single transaction and that there be an opportunity to reject the benefit. On the other hand, these requirements are often themselves loosely-defined and unacceptably vague in application giving rise to unpredictability and an absence of legal or doctrinal certainty. The result is a large measure of artificiality in the operation of the contemporary doctrine. By way of illustration, since *Rhone*, it has been a requirement that the doctrine can only operate where a party is able to refuse to take the benefit and thereby not be fixed with shouldering the associated burden. Yet, this need not amount to a real, tangible, practical choice to refuse the benefit but rather can be satisfied by a theoretical, conjectural or a mythic conception of whether a party would conceivably have been able to elect to receive the benefit or not, in the court’s subjective view. Lord Templeman, in seeking to constrain and elucidate the doctrine thus devised what Snape has described as a “contextually unconvincing rationalization”⁶⁸ of *Halsall v. Brizell* that there must be an opportunity to elect whether or not to accept the benefit. Tee,⁶⁹ discussing the decision in *Rhone*, suggested that this issue of election would likely be the source of much litigation because it raised so many questions.⁷⁰ However, outside the case of *Rhone* itself, this requirement has been barely discussed and is readily assumed to be satisfied in nearly every case in which the doctrine arises. In *Davies*, *Wilkinson* and *Elwood*, the Court of Appeal thus reduces the requirement of election to almost vanishing point concluding forthwith and, without further analysis, it was “theoretically possible”⁷¹ for the benefit to be rejected and the burden not undertaken. The requirement is therefore so diluted as to be practically almost never determinative of the issue. When any element in a legal test is satisfied on the basis of theoretical possibility, its value must surely be doubted. The effect is that the application of the doctrine appears to rise and fall chiefly on the basis of the requirement of “relevance” between the benefit and burden. This is the heart of the current inception of the doctrine. Unfortunately, this requirement, while easily stated, is itself highly

⁶⁶ Wade, note 8 above, at p. 158.

⁶⁷ Snape, note 31 above, at p. 86.

⁶⁸ *Ibid.*

⁶⁹ L. Tee, “A Roof Too Far” [1994] C.L.J. 423.

⁷⁰ *Ibid.*, at p. 448.

⁷¹ *Elwood v Goodman* [2013] EWCA Civ 1103; [2013] 4 All E.R. 1077, at [25] per Patten L.J.

indeterminate and elusive in practice. Pinning down precisely what is to be understood by “relevance” is challenging. In both *Wilkinson* and *Elwood*, for example, the requirement is condensed into a broad and non-specific search for an apparent *quid pro quo* between the parties. Where such a *quid* and a *quo* can be identified, the doctrine will apply. Where it cannot be located, the doctrine will fall.⁷² Knowing when such an arrangement will be found is, however, not entirely clear and rests on an exclusively case-by-case determination of the wider factual nexus.

VI. ENLARGING THE CASE FOR REFORM: CHALLENGING THE NUMERUS CLAUSUS PRINCIPLE

The absence of a coherent and convincing rationale for the doctrine of benefit and burden coupled with the lack of clarity surrounding the principle’s elemental requirements as established above serves only to strengthen the long-standing and strident criticisms of the *Austerberry* rule against the direct enforcement of the burden of positive freehold covenants. Put differently, the doctrine, which has only ever offered an indirect and imperfect method for circumventing the harsh *Austerberry* position, is exposed as deeply and fatally flawed thus bolstering the case for reform of the law of covenants.⁷³ Whilst there are those such as Snape⁷⁴ who have argued that such indirect methods for the enforcement of freehold covenant burdens can be made to work and are therefore “acceptable”, there is doubtless force in Turano’s assertion that “it is undesirable that people be encouraged to take circuitous routes to avoid the effect of a legal rule.”⁷⁵ Far better is to challenge and reform the rule. The recent application of the doctrine in *Davies*, *Elwood* and *Kerdene* underscores the enduring practical utility of positive covenants and the desirability that the burden of such covenants be permitted to run with the land. Given the deficiencies of the doctrine of benefit and burden, the case for reform of the law is enlarged. Plainly, however, a more direct and coherent scheme to achieve the enforcement of the burden of freehold covenants is warranted than the sticking plaster or imperfect “workaround” built on “fictitious (not to say preposterous)”⁷⁶ foundations as Rudden has described. Certainly, the criticisms of the status quo of the *Austerberry* rule are both significant and now very well-rehearsed.⁷⁷ As Gravells has noted:

⁷² As happened in *Rhone* itself.

⁷³ Reforms permitting the enforceability of the burden of positive obligations have already been introduced in several common law jurisdictions New South Wales, Northern Territory, Northern Ireland, Trinidad and Tobago, New Zealand, Hong Kong and more recently in the Republic of Ireland.

⁷⁴ Snape, see note 31 above.

⁷⁵ L. Turano, “Intention, Interpretation and the ‘Mystery’ of Section 79 of the Law of Property Act 1925” [2000] 64 Conv. 377.

⁷⁶ B. Rudden, “Economic Theory v Property Law: The Numerus Clausus Problem” in J. Eekelaar and J. Bell (eds.), *Oxford Essays in Jurisprudence*, 3rd series, (Oxford 1987), at p. 262.

⁷⁷ See, for example, E. Cooke, “To restate or not to restate? Old wine, new wineskins, old covenants, new ideas” (2009) 73 Conv. 448, at 455–459; *Report of the Committee on Positive Covenants Affecting Land*, (HMSO, 1965); *Transfer of Land: The Law of Positive and Restrictive Covenants* (1984) (Law Com. Report No. 127); Law Commission, *Easements, Covenants and Profits à Prendre: A Consultation Paper* (2008) (Law Com. Report No. 186).

Few would dissent from the view that in appropriate circumstances positive covenants should be capable of enforcement against successors in title to the original covenantor; that enforcement should be through direct means rather than through indirect means, which are artificial and frequently unreliable; and that the continued absence of such direct means is inconvenient and potentially unjust. Since the House of Lords has now clearly ruled out a judicial solution it is for Parliament to provide a legislative solution.⁷⁸

Yet reform would be no small change. Reform would mean recognising positive freehold covenants as proprietary rights in both status and effect and not merely contractual rights as is presently the situation. There is much support for this but it is far from uncontroversial. Writing in 2009, Cooke, the then Law Commissioner recognised the “growing consensus that there is no reason in principle why positive obligations should not be proprietary provided that certain concerns are taken seriously.”⁷⁹ Indeed, this reflects the Law Commission’s latest proposals which, in their Final Report in 2011⁸⁰ recommend the introduction of a new form of legal, proprietary interest: “the Land Obligation” to replace prospectively⁸¹ the current law of covenants (both positive and restrictive).⁸² If implemented, the effect would be that positive freehold covenants (albeit re-labelled as Land Obligations) would be positive, proprietary obligations capable of registration and, crucially, of being enforceable against successors (provided they “touch and concern” the land)⁸³ thus obviating the need for indirect methods of enforcement such

⁷⁸ N. Gravells, “Enforcement of Positive Covenants Affecting Freehold Land” (1994) 110 L.Q.R. 346, 350.

⁷⁹ E. Cooke, note 77 above, at p 460.

⁸⁰ Law Commission, *Making Land Work: Easements, Covenants and Profits à Prendre* (Law Com. Report No. 327).

⁸¹ Under the Commission’s proposals, the old law of covenants (including the complex rules for the passing of the benefit and burden) continue to apply for those covenants pre-dating implementation of the reforms.

⁸² Capitalisation of “Land Obligation” sets this latest reform apart from its forerunner which was also described as “land obligation” but in lower case. In its 1984 Report, *Transfer of Land: The Law of Positive and Restrictive Covenants* (1984) (Law Com. Report No. 127), the Commission had recommended the replacement of the law on covenants with a scheme of land obligations. Land obligations would have been legal interests in land, embodying positive and negative obligations, segregated by type (positive or negative) and context. The 1984 recommendations were not implemented.

⁸³ Law Commission, *Making Land Work: Easements, Covenants and Profits à Prendre* (Law Com. Report No.327).at [5.23]; Law Commission, *Easements, Covenants and Profits à Prendre: A Consultation Paper* (2008) (Law Com. Report No. 186) at [8.68]-[8.80]; E. Cooke, note 77 above at 458.

as the doctrine of benefit and burden.⁸⁴ Whilst gathering much academic support,⁸⁵ the 2011 recommendations have thus far also gathered hefty Parliamentary dust and have been rather left on the shelf. However, the purpose of this section of the article is not to rehearse the arguments in favour of reform – they are accepted almost universally as persuasive. No, the point made is that, in rushing to propose reform, a more significant theoretical barrier to reform has been downplayed, under-explored and overlooked. Parliamentary inaction is, arguably, not the most significant impediment to the reform of the law in this area. There is a far taller, theoretical, property law obstacle to surmount: the *numerus clausus* principle.⁸⁶

The *numerus clausus* principle can be seen as sitting at the heart of the debate about the reform of covenants relating to land⁸⁷ and whilst not casting doubt on the precise motivations necessitating reform, it does have something to say about whether the proposals of the Commission should be adopted. The *numerus clausus* principle is generally said to hold that there is a fixed or closed list, a finite menu, of property rights; a list to which new property rights should be admitted only where they are closely analogous to already-recognised property rights and, even then, only where compelling reasons are presented as to why such a new right be admitted.⁸⁸ The *numerus clausus* principle has a long pedigree in legal systems all around the world⁸⁹ but is surprisingly under-examined in this jurisdiction. The principle embraces two core aspects:⁹⁰ first, it provides a limitation on contracting parties or individuals' powers to create novel property rights. Thus, contracting parties are not able, as between themselves, to contract for the creation of a new form of property right. It will not be respected and will not carry proprietary effect. As Pollock CB observed in *Hill v Tupper*:⁹¹

⁸⁴ The draft Bill defines such obligations as obligations to do something on one's land or on a boundary structure or to make a payment in return for the performance of another obligation. There would be no requirement that they be drafted as covenants or that particular words be used in their creation. They would be able to bind successors in title, but would also be registrable, so as to make publicly available the details of the land that they burden and benefit: Law Commission, *Making Land Work: Easements, Covenants and Profits à Prendre* (Law Com. Report No.327) at [1.17].

⁸⁵ See, for example, T. Sutton, "On the brink of land obligations again" [2013] Conv., 17. For a contrary view, see P. O'Connor, "Careful what you wish for: positive freehold covenants" [2011] Conv., 191.

⁸⁶ On which, see generally N. M. Davidson, "Standardization and Pluralism in Property Law" (2008) 61 *Vand L.R.* 1597; B. Akkermans, *The Principle of Numerus Clausus in European Property Law* (Intersentia, Belgium, 2008); J. H. Merryman, "Policy, Autonomy, and the *Numerus Clausus* in Italian and American Property Law" (1963) 12 *American Journal of Comparative Law*, 224-31; W. Swadling, "Opening the numerus clausus" (2000) 116 *L.Q.R.* 354.

⁸⁷ B. McFarlane, "The Numerus Clausus Principle and Covenants Relating to Land" in Bright (ed.) *Modern Studies in Property Law Vol 6* (London 2011), 311.

⁸⁸ See W. Swadling, "Property" in Burrows (ed) *English Private Law*, 2nd ed., (Oxford 2007) at [4.09], [4.129]; Swadling, "Opening the Numerus Clausus", note 86 above; T. W. Merrill and H. E. Smith, "Optimal Standardization in the Law of Property: The Numerus Clausus Principle" (2000-2001) 110 *Yale L.J.* at p. 3.

⁸⁹ See Rudden, note 76 above, at 239-245.

⁹⁰ McFarlane, note 87 above, at 313.

⁹¹ *Hill v Tupper* (1863) H. & C. 122 at p. 127.

A new species of incorporeal hereditament cannot be created at the will and pleasure of the owner of property, but he must be content to accept the estate and the right to dispose of it subject to the law as settled by decisions or controlled by Act of Parliament.⁹²

This first aspect was perhaps captured most colourfully and most famously by Lord Brougham LC in *Keppell v Bailey*⁹³ noting that:

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 ... incidents of a novel kind [cannot] be devised and attached to property at the fancy or caprice of any owner.⁹⁴

The second aspect of the *numerus clausus* principle serves as a limitation on the court's power to create novel forms of property right. This aspect has been described as "judicial self-governance"⁹⁵ or judicial self-restraint. The principle prevents courts unilaterally creating new forms of property rights. This is demonstrated in English and Welsh Law through section 1 of the Law of Property Act 1925 which offers a fixed and closed list of those estates and interests capable of operate at law. Concern has been expressed of a judicial abdication of proper duty if this aspect of the *numerus clausus* principle is observed too rigorously.⁹⁶ This is not, however, the full picture as courts are therefore free to reason analogously with already-existing property rights as part of the solution to what Raz identified as "the problem of partial reform."⁹⁷ We see just such analogous reasoning in the law of easements where easements of car parking have been recognized judicially by analogy to long-established easements of way or access.⁹⁸

Reform of the law of covenants in the way suggested by the Commission and the proposed creation of a novel property right is an unavoidable challenge to the *numerus clausus* principle. As a corollary, an argument must be made as to how the *numerus clausus* principle is to be overcome. Thus, the "*numerus clausus* problem" as Rudden has framed it, must be resolved. The difficulties standing in the face of the reform of the law of covenants have long been acknowledged. Rudden in his famous article⁹⁹ explored many of the often-cited grounds for refusing to permit the passing of the burden of positive covenants: from practical considerations (such as the absence of demand, absence of notice and concerns that permitting the enforceability

⁹² *Ibid.*, at p 127.

⁹³ *Keppell v Bailey* (1834) EWHC Ch J77.

⁹⁴ (1834) 2 My & K 517, 536; 39 ER 1042, at 1049, per Lord Brougham LC.

⁹⁵ T. W. Merrill and H. E. Smith, "Optimal Standardization in the Law of Property: The Numerus Clauses Principle" (2000-2001) 110 Yale L.J., 3, at 9.

⁹⁶ See K. J. Gray and S. F. Gray, "The Rhetoric of Realty" in J. Getzler (ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (London, 2003), at 222.

⁹⁷ J. Raz, *The Authority of Law: Essays on Law and Morality* (Oxford, 1979), at 200.

⁹⁸ See, for example, the acceptance of easements of car parking by analogy with pre-existing right of way easements: *London & Blenheim Estates v Ladbroke Retail Parks* (1992) 1 WLR 1278 (Ch); [\(1994\) 67 P. & C.R. 1.](#)

⁹⁹ Rudden, at note 76.

of positive burdens would “encrust” land with layers of obligation) to economic considerations (such as the need to avoid hampering and reducing the marketability of land and increases in information costs i.e. costs on third parties wishing to discover what rights will be binding on them should they acquire property) to philosophical Kantian,¹⁰⁰ Austinian¹⁰¹ and Helgelian¹⁰² arguments. For Rudden, these concerns and more can be overcome if positive obligations are carefully and clearly defined and subject to the protections of a fully-fledged land registration system. Lord Templeman in *Rhone* expressed the court’s view that only Parliament legislating could change the status of positive covenants on the basis that judicial legislation would:

create a number of difficulties, anomalies and uncertainties and affect the rights and liabilities of people who have for over 100 years bought and sold land in the knowledge, imparted at an elementary stage to every student of the law of real property, that positive covenants, affecting freehold land are not directly enforceable except against the original covenantor. Parliamentary legislation to deal with the decision in the *Austerberry* case would require careful consideration of the consequences.

Yet, neither Rudden’s analysis nor Lord Templeman’s insistence that only Parliamentary intervention can change the law addresses adequately the *numerus clausus* issue. For, while the proposed introduction of a new property right “the Land Obligation” may be regarded as “practically convenient and theoretically tidy”¹⁰³ a strong case must first be made that the closed list of proprietary rights be opened and expanded. This is not an altogether simple argument to make. Strong grounds exist for not doing so. Indeed, proponents favouring retention of the *Austerberry* rule who argue that it strikes a fair balance between competing interests such as the parties’ freedom to contract versus the need to avoid overburdening land and achieve inter-generational equity, would argue that reform (and thereby opening the *numerus clausus*) is unnecessary.¹⁰⁴ A particular difficulty springs from the imposition of positive obligations on successors of land that the reform would usher. As Templeman was at pains to highlight in *Rhone*, positive covenants impose an affirmative duty or compulsion to actively *do* something. As Rudden has observed, while “duties-not are frequently imposed on us without our consent [such as in tort] ... duties-to are not.”¹⁰⁵ Permitting the enforceability of positive covenant burdens through the “Land Obligation” means imposing on third parties a positive liability to comply with the terms of that positive obligation. Imposing positive liability or duty to act in this way has the potential to undermine fundamental justifications for recognising property rights such as autonomous choice, freedom of contract, privacy and independence.¹⁰⁶ This mitigates strongly against breaching the *numerus clausus*. Beyond this, powerful economic and practical reasons

¹⁰⁰ I. Kant, *Philosophy of Law* (translation by W. Hastie, Edinburgh 1887).

¹⁰¹ J. Austin, *Lectures on Jurisprudence*, 5th edn., ed. R. Campbell, 2 vols., (London 1885).

¹⁰² G. W. E., *Philosophy of Right* (translated by T. M. Knox, Oxford 1942).

¹⁰³ E. Cooke, note 77 above, at 463.

¹⁰⁴ See S. E. Sterk, “Freedom from freedom of contract: the enduring value of servitude restrictions” (1985) 70 *Iowa L.R.* 615, at 617; P. O’Connor, “Careful what you wish for: positive freehold covenants” [2011] *Conv.*, 191, at 205.

¹⁰⁵ Rudden, note 76 above, at 252.

¹⁰⁶ See B. McFarlane, note 87 above, at p. 326; J. Harris, *Property and Justice* (Oxford 1996), 172.

have been advanced for controlling and keeping closed the *numerus clausus*. Merrill and Smith,¹⁰⁷ have defended the “deep design feature” of the law of property that property rights come in “standardized packages that the layperson can understand at low cost.”¹⁰⁸ This, they argue, justifies insisting on a strict standardization of recognised property rights and robust adherence to the *numerus clausus* principle.¹⁰⁹ On this view, the principle “makes sense from an economic perspective ... [it] strikes a balance between the proliferation of property forms, on one hand, and excessive rigidity on the other.”¹¹⁰ In this way, the *numerus clausus* offers protection to potential purchasers of land from the cost, uncertainty and effort of discovering how far their prospective purchase is encumbered by fragmented property rights. By simplifying the range of rights that enjoy proprietary effect, this process is streamlined and the so-called “information costs” of enquiries are reduced. Rose,¹¹¹ another powerful voice resisting any erosion of the *numerus clausus* principle, has argued, in the US context, that whenever the range of property rights is widened, the result is not the elimination of problems such as the information costs associated with discovery or notice of interests which affect land or land value but in fact has served to re-create the same difficulties in new forms, where, for example, land becomes fixed with the burden of a positive obligation with little scope to discharge or vary that burden through negotiation of the parties. Departure from the “fixed universe” of the *numerus clausus* therefore requires that a convincing case be made. This is particularly apparent in relation to reform of the law of covenants where reform, as discussed, will result in the imposition of positive obligations on third parties not party to the original agreement creating the right. It is a central concern and tenet of the *numerus clausus* principle that an agreement by contracting parties (or indeed a unilateral act of one party) should not be able to impose positive obligations on third parties. This is largely because, as Rose has noted, the scope of positive obligations is potentially so limitless: “covenants might potentially include anything that might be done on a property ... [including that] a jig be done every Monday at 8 p.m. on the patio.”¹¹² Such a step requires strong justification. So, how might such a case be mounted? More precisely, how can the economic, practical and theoretical difficulties inherent in breaching the *numerus clausus* be overcome? It is this question which has, thus far, in the debate surrounding reform of the law of covenants that been largely overlooked. From the Law Commission’s recommendations for reform, it is suggested that 3 grounds for breaching the *numerus clausus* principle can be identified. These are 3 inter-locking grounds which we might term “safeguards” or ripostes to the arguments against such a move outlined above. These grounds are as follows:

Ground 1: Prevention of an open-ended range of positive obligations capable of burdening land through the “filter” of a requirement that only positive obligations which “touch and concern” the land will be enforceable as proprietary interests. This, it is said, will prevent land becoming overburdened with potentially “unsuitable burdens.”¹¹³

¹⁰⁷ T. W. Merrill and H. E. Smith, “What Happened to Property in Law and Economics?” (2001) 111 Yale L.J. 357; see also H. Hansman and R. Kraakman, “Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights” (2002) 31 J. Legal Studies 373.

¹⁰⁸ *Ibid.*, at p. 359.

¹⁰⁹ See Merrill and Smith, notes 88 and 95 above.

¹¹⁰ Note 107 above, at p. 369.

¹¹¹ C.M. Rose, “Servitudes” *Arizona Legal Studies, Discussion Paper No. 09-13*, March 2009.

¹¹² *Ibid.*, at 18.

¹¹³ Law Commission, *Making Land Work: Easements, Covenants and Profits à Prendre* (Law

Ground 2: Registration of both the benefit and burden of positive obligation against land titles under the Land Registration Act 2002 as a means of providing publicity to (and thus protection for) those prospective purchasers to assist them to discover rights affecting land that may impact on issues of whether or not to purchase and on issues of marketability.

Ground 3: Expansion of the jurisdiction of the Lands Chamber under section 84 of the Law of Property Act 1925 to discharge and vary restrictive covenants to cover variation and discharge of positive obligations.

The Commission takes the view that, with such “safeguards” in place, it is able to reform the law of covenants in a manner that, “minimise[s] practical and economic risk.” However, the overlooked question is, surely, how far these grounds offer the convincing case needed to open the *numerus clausus*? On one view, they do. Certainly, if one takes as a core concern of the *numerus clausus* principle the need to prevent unsuspecting third party purchasers from being bound by a potentially unlimited range of novel proprietary interests then the proposal to permit registration of the benefit and burden of positive obligations against land titles appears to quash this fear. The Land Registration Act 2002 has introduced cheap, efficient and mostly accessible and robust rules on registration and notice which must surely allay much of the concern targeted by the *numerus clausus* principle. As Edgeworth has argued, in the Australian context:

[T]he reasons advanced by Lord Brougham [in *Keppell v Bailey*] and CB Pollock [in *Hill v Tupper*] no longer retain the force they did, as the key mischief they identified for retaining the *numerus clausus* has been removed by Torrens registration systems.¹¹⁴

The point is this: where the existence, scope and nature of positive obligations can be recorded on a readily-accessible register for any and all prospective purchasers of burdened and to investigate at little cost, such third parties are unlikely to be disadvantaged by these obligations and the burdened land, rather than constrained and over-burdened may, in fact, be enhanced in value and amenity by recognition of such obligations.¹¹⁵ Equally, the proposed extension of jurisdiction to permit the discharge and variation of positive obligations also addresses the concern that expanding categories of proprietary rights might expose third party successors to burdens that are impossible or, at least, very difficult to remove from the land. However, the argument is not all one way. Problems remain. The strength of the grounds for opening the *numerus clausus* listed above and, consequently, the potency of the safeguards depends on certain crucial factors: first, the “touch and concern” requirement, which the Commission recommend as a means of controlling the categories of positive obligations that will enjoy proprietary effect, is highly indeterminate, very much at the subjective whim of the court adjudicating the issue and, as the Commission itself

Com. Report No.327) at [5.51] and the proposal that overage should not be able to be secured by way of positive obligations.

¹¹⁴ B. Edgeworth, “The *Numerus Clausus* Principle in Contemporary Australian Property Law” (2006) Monash U. L.R. 387, 417.

¹¹⁵ *Ibid.*, at p. 418.

concedes, generally “vulnerable to the uncertainties of judicial interpretation.”¹¹⁶ Secondly, the failure to adopt the approach of, for example, New South Wales and Northern Ireland where a circumscribed list of positive obligations capable of proprietary effect is provided in statute,¹¹⁷ means uncertainty will persist as to precisely which positive obligations will enjoy proprietary status (subject to the “touch and concern” test). Finally, as to the proposal to extend the jurisdiction to discharge and vary to positive obligations. This will only prove effective if the jurisdiction can be accessed with relative ease, at low cost and without delay. Should this not be possible, the case for extending proprietary effect to positive obligations appears rapidly to be ever less convincing as land may very well be burdened with additional obligations that prove arduous to remove.

VII. CONCLUSION

Almost 20 years ago in this very journal, Davis wrote that the doctrine of benefit and burden was, “a principle, reasonably clear in its application, that promotes fairness and, consequently, far greater use should be made of it.”¹¹⁸ This article has examined the doctrine and found it wanting. This article has done three things: it has examined the contemporary scope of the doctrine of benefit and burden and has exposed the doctrine as exhibiting both historical as well as elemental fragility. The doctrine is one for which a convincing, strong rationale is hard to locate. In so identifying, it has been argued that the case for reforming the law of covenants is strengthened. However, reform along the lines proposed by the Law Commission such that positive obligations become proprietary rights in effect raises a further and hitherto overlooked challenge to the *numerus clausus* principle. The *numerus clausus* has been described as one of the “driest and dustiest”¹¹⁹ aspects of property law and certainly it has been wildly under-explored in the debate surrounding reform of the law of covenants. This article has sought to place these issues centre-stage and, in particular, to highlight that if reform of the law in this area is to introduce, as the Commission recommends, a new proprietary right, a clear, coherent and convincing case must be made as to why the *numerus clausus* principle is to be breached. Drawing on the work of the Commission, this article has offered an argument as to how such a convincing case might be mounted.

¹¹⁶ Law Commission, *Making Land Work: Easements, Covenants and Profits à Prendre* (Law Com. Report No.327) at [5.51].

¹¹⁷ See Section 88BA of the Conveyancing Act 1919 and Section 34(4) of the Property (Northern Ireland) Order 1997 respectively.

¹¹⁸ Davis, note 10 above, at p. 552.

¹¹⁹ Merrill and Smith, note 88 above, at p. 70.