Covenants

Positive

- Agreement (contract) creating a positive obligation
  - Does not run in the land (*Austerberry v Corp of Oldham* (1885))
  - Can only enforce against original covenantr
- Covenantor person subject to obligation, covenannte person receiving benefit of covenant
- Can run with an easement to be part of land (*Frater v Finlay*)
  - Maintenance was essential part of easement due to reciprocity of benefit and burden
- Test often applied is whether covenant requires expenditure of money for its performance (*Haywood v Brunswick Permanent Benefit Building Society*)

Restrictive

- Enforceable without privity of contract or estate in equity

1. Must be restrictive within *Tulk v Moxhay*
2. Needs to buy with notice of the covenant (or recorded on register pursuant to s 88(3))
3. Covenant needs to be registered (subject to s 88B post 1964)
   a. Restrictive;
   b. Formal compliance with s. 88(1) of the CA;
   c. The covenant is included in plan of subdivision
4. No construction problems
   a. No words excluding ss 70-70A of CA
      - Presumption the covenant can be assigned
   b. Benefits individual parts and not land as a whole (*Ellison v O’Neill*)
      - Onus lies on party asserting benefit is intended to be annexed to part of land and not undivided whole (*Re Arcade Hotel Pty Limited*)
5. Touches and concerns

- Cannot be greater that can reasonably be benefitted (*Re Ballard’s Conveyance*)
  - 18 v 1700 acres
  - If there’s a breach what part of the land is affected?

6. Original covenannte owned land benefited at time of covenant (*Kerridge v Foley*) or there is a scheme of development (*Elliston v Reacher*)

- Both plaintiff and defendant taking title from common vendor
- The estate subject to scheme of development must have been laid out by vendor subject to restrictions intended to be imposed on all lots
  - Not necessary now (*Baxter v Four Oaks Properties Limited*)
- Each lot sold by common vendor to initial purchaser on basis that each lot was burdened for benefit of other lot
o Inferred to increase value (*Elliston v Reacher*)
  ▪ Advertisements, auctions etc. suggesting so
• Current owners purchased lots upon basis that restrictions were made for benefit of other lots
  o Inferred if they have actual knowledge (*Elliston v Reacher*)

7. Must comply with s 88(1) of CA

• Land benefited by restriction
• Land burdened by restriction
• Persons (if any) having right to release/vary/modify restriction other than persons having the right by law
• Persons (if any) whose consent to a release/variation/modification is stipulated for