

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 covenantor
- Covenantor person subject to obligation, covenantee 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 than 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 covenantee 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

- 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
 - 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