

# RESTRICTIVE COVENANTS

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## Step 1:

**WRITE: A Restrictive covenant** is a **condition** placed on the **use of specific parcel** of land, which is intended to **bind the current** and **subsequent owners** of the land and those who have notice of it. [X] will assert there is a RC over the land. To do this, [X] will have to prove that there is a validly created, enforceable RC over the affected land that has not been removed or varied.

**NOTE:** It forbids a certain act. Usually enacted to maintain the value of a property OR to preserve the enjoyment of a property

### Examples of RC:

- Ability to erect only one dwelling house on land
- Building a dwelling of a certain height only
- Use of a dwelling as a private residence only
- Covenant not to excavate earth, build a dwelling with unapproved material or away from predetermined plans/designs/models.
  
- Refers to a special type of covenant in an agreement, affecting a **freehold interest** in land
- Is **binding** on those **with notice** of it
- It intrinsically benefits a parcel of land owned by the other party and they **run with the land**
- **RC** can be created by contract, building scheme or statute substantially overlaps with, but it is not an easement
- **A RC substantially overlaps with, but is not, an easement.**

## Step 2: ELEMENTS – characteristics of a restrictive covenant

In order to establish that there is a RC, must satisfy each of the following elements.

**There must be a DT and ST and the RC must benefit the DT – (Pollard)**

There are 3 ways that a party (not being of the original parties) may show the land is benefitted:

- 1) Annexation – need clear identification of land annexed to the RC
  - Look for **express identification** of burdened/benefitted land in the covenant
  - The covenant must **clearly identify the land to which it is annexed**
  - The covenant is annexed to the whole of each land to be protected as well as each and every part of it
- 2) Assignment
  - Look for express assignment by conveyance (*Tulk – ‘elms, his heirs and assigns*)
- 3) Building Scheme
  - To establish there is an RC enforceable as part of a building scheme, must meet the following requirements: (*Fitt v Luxury Developments*):
    - o P and D derive title from common vendor (common title). Must trace it back to a single owner.
    - o Before sales, vendor laid out estate in lots subject to RC intended to impose on all, consistent with development scheme (can be done AFTER sale)
    - o RC must be intended to benefit all lots sold
    - o Plaintiff and defendant must have bought the lots on basis RCs benefitted other lots

- And of course, the area affected by scheme must be defined.

#### The RC is intended to run with the land

- There are statutory presumptions that the covenant runs with the covenantor's land
- **TEST:** same as easements, it must **touch and concern** the land
- **S 78 PLA:** deems covenantors to have covenanted re **benefit** of covenant **on behalf of successors**
- **S 79 PLA:** deems covenantors to have covenanted re **burden** of covenant **on behalf of successors**

#### The RC must be NEGATIVE

- ➔ In determining whether a covenant is negative or positive in nature, the courts will examine the substance, rather than the form, of the agreement
  - Can it be satisfied by doing nothing? i.e. no expenditure and inaction
- ➔ **NOTE:** even if it is **framed in a positive way**, it may be **reworded** in a negative manner
  - **EX.** To 'use a dwelling as a private residence only' can be reworded to be 'not use a dwelling as anything but residential'

#### There must be NOTICE of the RC

- ➔ Unlike EM cannot register a RC on the certificate of title.
- ➔ However, RC may be **recorded on title** as per **s88 TLA**
  - If it is recorded on title, and is enforceable in equity, then **any** successor is deemed to have constructive knowledge of the RC so are bound by it.
    - Any purchaser takes land subject to encumbrances recorded on title as per **s 42(1) TLA**
  - If **not recorded on title** will need to establish on facts that notice of RC came from the contract or from being told.

#### *Fitt v Luxury Developments [2000] – sub-division case*

F were RP of land subject to single dwelling RC LD purchased nearby land with same RC and started construction of 3 dwellings (had permit but objections were raised)	Annexation was satisfied – RC identified “the estate and each part of it” and the court held that was sufficient to annex it to the whole land.	See above for building scheme test. A RC will remain enforceable <b>despite</b> a party obtaining a building permit.
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#### *Tulk v Moxhay*

T owned undeveloped land and sold to E who covenanted inter alia to reain the land in an open state. Land sold to M who was aware of covenant and the price reflected the restrictions.	RC enforceable. M purchased KNOWING about the RC and it was unconscionable to renege on the RC when the purchase price reflected the covenant.	Affirmed numerous times in Australia. Was the first time a <b>negative covenant</b> was recognised. Highlights the importance of notice in regards to passing of the burden of a RC.
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### **Pollard v Registrar of Titles**

P was RP of land in Brunswick with RC.  
'single dwelling' not to be constructed without consent of original owner.  
Original conveyance **did not identify the land** intended to benefit.  
No other transfer of surrounding land included similar covenant.

Covenant unenforceable.  
Examined three methods of passing burden of RC:

- Annexation
- Assignment
- Building scheme

There are three ways in which a person who is not the original covenantee may be able to enforce a RC:

- 1) Showing the covenant has been annexed to the land expressly or impliedly.
- 2) Showing the benefit of the covenant has been assigned to him in respect of the land
- 3) Both he and defendant own part of a building scheme that imposed reciprocal rights and obligations.

### **Step 3: CREATION OF RC**

**ASK:** has the RC been validly created?

- 1) A RC may be created by **contract in original transfer** (i.e. Tulk v Moxhay); OR
- 2) A RC may be created by **building scheme** (i.e. Fitt v Luxury Developments); OR
  - Building scheme restrictive covenants affecting TS land are not enforceable in Victoria unless the registrar records on the folio of the burdened land the nature of the restrictions and the identity of the benefited land
  - Requirements for building scheme in **Fitt v Luxury Developments**
- 3) A RC may be created by **Subdivision Act 1988 VIC:**
  - Developers can include restrictions in the plan, but unclear what effect they have – only valid as RC's if contain all the above elements.
  - **S6(1) SDA:** the council must certify a plan if certain conditions are met, including compliance with planning schemes
  - **S7 SDA:** the developer has 5 years to register the plan or it lapses
  - **S23 SDA:** where any planning schemes or permit creates (or removes/varies) EM or RC's the owner of burdened land must lodge certified plan with the Titles Office.
  - **S24(2)(d):** effect of registration of plan: upon registration, any EM or RC is created, varied or removed as specified in the plan.

### **Step 4: REMOVAL AND VARIATION OF RESTRICTIVE COVENANTS**

**Applying for a court order from Supreme Court under ss 84 and 85 of PLA** *Must show that there is one or more of the following*

**WRITE:** The court has power to order wholly or partially to discharge or modify any such RC if they are satisfied that:

- **S84(1)(a) PLA:** changes in the **character of the property** or the **neighbourhood** or other **circumstances** such that the restriction **ought to be deemed obsolete**; **OR**
- 'Neighbourhood' is at the **date of the hearing**, not the date of covenant
  - **TEST:** whether, as a result of changes in the character of the property or the neighbourhood, or other material circumstances, the restriction is no longer enforceable or has become of no value? (**Vrakas**)

→ **S84(1)(a) PLA**: the **continued existence** of the RC would **impede** the **reasonable user** of the land without **securing the practical benefits** to the other persons.

- For the covenant to impeded the reasonable user of the land 'the continuance of the unmodified covenant hinders, to a **real and sensible degree**, the land being **reasonably used**, having regard to the **situation it occupies** to the surrounding party. **Vrakas**.
- Practical benefits = any real benefits to a party taking the benefit of an RC.
- **S84(1)(c)**: the proposed discharge or modification will not substantially injure the persons entitled to the benefit of the RC.
  - Required a comparison between the benefits initially intended to be conferred and actually conferred by the covenant, and the benefits, if any, which would remain after the covenant had been discharged or modified.
  - The injury must be **real and not a fanciful detriment** – **this is a question of fact**

#### **Via planning legislation**

May be achieved by **applying for a planning permit** under part 4 of the **Planning and Environment Act** (most common):

- This is useful for individual owners. Application to council and if rejected can proceed to VCAT.
- Council is unable to issue a planning permit that would result in a breach of a RC.
- RC created **before 25<sup>th</sup> June 1991**
  - **S60(5) PEA**: can only **remove covenant** where the owner of any land benefited will be **unlikely to suffer detriment** of any kind (including any perceived detriment), and if the owner has objected to the removal the objection is vexatious or not made in good fath.
- RC created **after 25<sup>th</sup> June 1991**
  - **S60(2)PEA**: RC cannot be removed or varied unless the benefited owner will be unlikely to suffer:
    - Financial loss; or
    - Loss of amenity; or
    - Loss arising from change to the character of the neighbourhood; or
    - Any other material detriment

[Y] could also **request an amendment** to the planning scheme affecting the land under part 3 of the **PEA**

- The removal or variation of a RC can be authorised or required by a planning scheme under **s6(2)(g)** of the **PEA** and then implemented by registration of plan under **SDA s 23(1)**
- this is **expensive and time consuming**: most likely used for rezoning issues, rather than for individual lots.
- Final decision rests with the minister for planning.

#### **Vrakas v Register of Titles [2008] VSC – sets out structure for removing RC**

V applied under PLA s 84(1)(a) and (c) to discharge a single dwelling RC on basis RC was 'obsolete'.

**No current plans** to build

**Had notice of RC** when purchased land.

Bought two lots over 3 year

Argued neighbourhood had changed and subdivisions were occurring, that it was a new parcel of land as he had two blocks consolidated to one title

**HELD**: not sufficient change. Was still largely single dwelling area. Second land parcel was

Need to be able to show more than changes just at the margins

	small++ and both old titles were subject to RC. The consolidated titled was also subject to the RC	
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