

Covenants

Creation – OST

- S23B – by deed and must comply s88(1) CA – (i) burdened and benefitted land; (ii) who can change and release it; (iii) who can authorise the release or change.

Creation – TT.

- S88B RPA allows recording of a covenant. No indefeasibility,
- s88(3)C provides it is an interest for the purposes of s42 RPA and will put new RP on notice.
- Must also comply with s88(1) CA – (i) burdened and benefitted land; (ii) who can change and release it; (iii) who can authorise the release or change.

Burdens - Can never pass at Common Law (*Austerberry*)

However, can pass in equity when:

- Negative in effect
- Intended to run by original parties – (s70A – allows presumed intention)
- Provides a benefit to the covenantee
- Successor had notice of the covenantee. (*tulk v moxhay*)

Benefits will pass at common law and equity provided they:

- Touch and concern the land
- Were intended to pass by original parties. (*Rogers v Hosegoose.*)
- **Touch and concern the land** means that it must benefit the covenantee's land not personally. (*Re Ballard's*)
- **Intention** presumed under s70CA. *Forestview Nominees* touched on s70 but did not discuss it, so this may change upon review from a court.
- If intention for only part to run then only that part runs (*Maquess*)
- **Equity** will need to be used to enforce benefits on a successor of title to the burdened land because they will only have rights for the burden to pass in Equity. (*Tulk v Moxhay*)

Hurdle: **privity** of contract - **covenants are not rights in rem. S36C RPA read down to only allow those named in the covenant to enforce it.** (*Aust. v Balcon*) – need to have express provision.

- Note: tenants can get around this by suing in equity (*Forestview v Perpetual trustees*)

EXTENT

Read given natural and ordinary meaning – contract proferentum when ambiguous (*Farella v Otvosi* – **2 stories from land or road? Soil!**)

EXTINGUISHMENT.

- Common ownership – only severs in OST (*Kerridge v Foley*)
- Not in TT – s47(7) RPA allows same owner.

Implied release when:

- **Inconsistent use** for a long period of time (Hepworth v Pickles)
- Covenantee **waives their right** by accepting breaches. (Chatsworth v Fewell)
- **Neighbourhood changes**: no longer providing a benefit (Application of Fox)

Legislation

S89(9) – a court can, on application, release a covenant when:

- Can prove it **no longer gives benefit**
- **Obsolete – if the purpose can no longer be performed**
- **No longer required for reasonable use.** (*Post investments v Wilson* – increase to high density living – not obsolete (purpose to provide view still good) – nor implied by reasonable use (high density living). Covenant stayed and court enjoined new owner from building high rise.)

S28 – environment planning act – Gov can carry out developments that extinguish covenants. But GG must sign the grant (*Cumerlong Holdings*).