

Freehold covenants

RESTRICTIVE COVENANTS

- Control future use of neighbouring land through freehold covenants / restrictive covenants (subdivision: A→B)¹⁰
- Enforceable against anyone who subsequently owns the land (B2, B3 etc)
- Also ensures that the agreement can be enforced by subsequent owners (A2, A3 etc)

The burden of the covenant (e.g. promise not to build above 2 storeys) must run with the burdened parcel

The benefit of the covenant (e.g. not having a view blocked) must run with the benefited parcel

Leasehold covenants vs. freehold covenants

- Last as long as the lease whereas freehold covenants could go on forever

COMMON LAW

- Only enforceable against the original covenantor (B), not successors
- Allowed the benefit to be enforced by successors in title to the covenantee (A)
 - Pointless if burdened land had been transferred (to B2)
- Benefit flows, burden does not
 - Future owner won't be burdened by the covenant

EQUITY

The burden of covenants – 4 conditions (if all satisfied, the burden of a freehold covenant will run in equity)¹¹

1. The covenant must be **negative** (restrictive) in substance
2. The purchaser must have **notice** of the covenant or must be noted on the register: *Tulk v Moxhay*
3. The covenant must **benefit the land** of the covenantee: *Clem v Fareilly*
4. The covenant must be **intended to run** with the covenantor's land

The covenant must be negative

- Positive if covenantor required to incur expenditure in performing the burden of the covenant
- Positive if it requires the covenantor to carry out some positive act
- If both positive and negative covenants, the positive covenants can be severed (unless inextricably intertwined with the negative covenants)

¹⁰ A = **covenantee** (person to whom the promise had been made); B = **covenantor** (person who promised that their land would be burdened)

¹¹ For covenant to be enforceable against the successor in title to the covenantor, it must also comply with the requirements of **s 88(1) CA** (SEE BELOW)

The purchaser must have notice

- **s 88(3) CA**: restrictive covenants noted on the Folio of the burdened land
 - = the covenant is an 'interest' for the purposes of **s 42 RPA**, with the result that the transferee takes subject to the recorded covenant
- **s 47(1) RPA**: Registrar required to record the particulars of restrictive covenants on the Folio = actual and constructive notice
- If not on register, mere fact that you have notice does not suffice (because of indefeasibility)

The covenant must benefit the covenantee's land

- At the date of creation of the covenant
- The covenant must 'touch and concern the land' of the covenantee¹²
 - Covenantee must have owned the land at the date of creation of the covenant (rationale: *Tulk v Moxhay* – the covenant must be made for the protection of land held by the covenantee)
- Problem where vendor (e.g. developer) subdivides land into a number of lots, and enters into restrictive covenants with the purchasers of each lot (title derived from common vendor)
 - Each purchaser not only subject to burden, but need to be able to enforce the benefit against each other
 - Problem when lots sold in stages (in order V>A; V>B; V>C, C able to enforce covenant against A and B because at the time the vendor entered into the covenant with A and B, the vendor still owned the land to be benefited (now C's land), but A and B unable to enforce against C as at the time covenant entered into with C, the vendor had sold the lots to A and B = original covenantee did not own the land to be benefitted (now owned by A and B) at the time covenant entered into with C)
 - Exception – where subdivision is a building scheme
- *Clem v Farelly* (1978)
 - Requirement unsatisfied (35km away + didn't covenant didn't specifically mention the benefitted land)

The covenant must be intended to run with the land

- Obligation taken on not just personally but that it would bind them and their assignees and successors in title
- Deemed by **s 70A(1) CA**
 - Intention presumed unless covenant indicates otherwise
 - Deems covenant to be entered into by the covenantor on behalf of him/herself and the covenantor's successors in title

THE BENEFIT OF COVENANTS

- For the benefit to run (essential if successor in title of the original covenantee wants to enforce the covenant i.e. A2) the benefit of the covenant has to be annexed to the land itself or directly assigned to the successor in title

¹² But see **ss 88D** and **88E CA**, confer on 'prescribed authorities' the right to enforce 'public positive covenants' regardless of whether the covenant benefits land of the authority.

- Can only be annexed to land that a covenantee currently owns (impossible in sale of large-scale residential subdivision because developers sell land in stages)
- “schemes of development” = allowed covenants to be enforced by earlier sold lots on the principle of mutuality, but requires an investigation of the circumstances in which the original development was created (searches beyond Torrens register)
 - Unlikely that this doctrine is valid in relation to Torrens land – *Westfield Management Ltd v Perpetual Trustee Co Ltd* [2007]
- NOW = **s 88B**: allows developer to attach a s 88B ‘instrument’ to a plan of subdivision when it is lodged for registration
 - Instrument can set out any easements and covenants that are intended to affect the various lots in the subdivision
 - Easements and covenants created simultaneously by the registration of the plan of subdivision with the s 88B instrument attached
 - NOTE: formalities required under **s 88(1)**
 - The instrument must clearly indicate:
 - The land benefitted by the covenant;
 - The land burdened by the covenant;
 - The persons (if any) having a right to release, vary or modify the restriction; and
 - The persons (if any) for whose consent to a release, variation or modification of the land is stipulated

ENFORCEABILITY OF FREEHOLD COVENANTS

- Private property right
- If a breach of covenant is threatened, it can only be restrained by someone who has the benefit of the covenant (the original covenantee and/or their successors in title)
- Equitable interest = equitable remedies
 - Injunction or equitable damages in lieu
 - But discretionary – if damage sustained is negligible, court may decline remedy
- **s 89 CA**: gives court power to modify or wholly or partially extinguish an easement, profit a prendre or freehold covenant if satisfied of certain conditions
 - *Levi v Spicer* [2001] NSWSC 924

MODIFICATION AND EXTINGUISHMENT OF COVENANTS

1. Express agreement
2. Implied agreement
3. Merger
4. Order of Supreme Court under **s 89(1) CA**

Express agreement

- Covenantee (holder of the benefit) may modify/extinguish by express agreement
- Must comply with formalities necessary for dealing with equitable interests → **s 23C(1) CA**
- **Torrens – s 88(3)(A) CA** gives Registrar power to delete/amend recording of covenant on Register if the parties have agreed

Implied agreement

- Owner of burdened land released by conduct of the covenantee
- Conduct must be seen as amounting to implied agreement to modify/extinguish
 - Clear breach of covenant over substantial period which is inconsistent with the survival of the covenant, or which the covenantee and his successors have ignored
 - e.g. change in neighbourhood (D must show that covenant now completely useless); or implied release (must establish that P and their predecessors had 'by their acts or omissions represented to D that their covenants are no longer enforceable': *Chatsworth Estates v Fewell*)
- Waiver, **s 89(1)(B)**:
 - Court order modifying/extinguishing where those 'entitled ... to the benefit of the restriction ... by their acts or omissions may reasonably be considered to have ... waived the benefit of the restriction wholly or in part'

Merger

- Covenant extinguished where ownership and possession of both the dominant and servient tenements pass to one person: *Kerridge v Foley*
 - If land consequently severed, common owner must require purchaser to enter new covenant to retain original benefit
- **Torrens** – doctrine of merger does not apply where covenants are noted on the title: *Post Investments v Wilson*
 - **s 47(7) RPA** incl. restrictive covenants among registered interests that are not extinguished by the same person becoming the owner of both the benefited and burdened parcels of land

Statutory extinguishment

- **s 89(1) CA**: Supreme Court given power to modify, or wholly or partially extinguish, a covenant
- Court satisfied that the covenant should be deemed obsolete because of:
 - a **change of use** of the benefited land or a **change in the character** of the neighbourhood (deemed obsolete) or other circumstances the court thinks material¹³
 - **s 89(1)(B)**: waiver/implied agreement to (there has been a breach but you choose not to do anything about it, after a certain amount of time)
- Also if continued existence of the covenant would impede the reasonable use of the burdened land without securing a practical benefit to the persons entitled to the benefit of the covenant (**s 89(1)(A)**)
- Also if the proposed modification/extinguishment will not **substantially injure** those entitled to the benefit (**s 89(1)(c)**)

CA s 89(1)

- (a) Change in use or change in character of neighbourhood which deems covenant obsolete or if the continued existence of the covenant would impede the reasonable use of the burdened land without securing a practical benefit to the persons entitled to the benefit of the covenant

¹³ **s 89(1)(A)**

- (b) Person with the benefit agree to modification/extinguishment or implied abandonment (by their acts or omissions may reasonably be considered to have abandoned), or waiver (there has been a breach and people haven't acted on the breach)
- (c) That the proposed modification/extinguishment will not substantially injure those entitled to the benefit (*if you haven't been able to get express agreement from the neighbour then it is likely that neighbours will object to court application – those objections are likely to indicate to the court that neighbours (people with the benefit) will be substantially injured by the modification/extinguishment*)

Levi v Spencer:

- Application for modification of covenant prohibiting construction of colourbond structure on part of burdened land visible from street
- Application under **s 89(1)(c)** – requires court to be satisfied that the modification **will not substantially injure** the persons entitled to the benefit of the covenant

Outlines what must be considered:

- *Webster v Bradac*:
 - Injury may be **economic** (e.g. reduction in value of land), **physical** (e.g. subjection to noise and traffic) or **intangible** (e.g. impairment of views, intrusion upon privacy, unsightliness, or alteration to the character or ambience of neighbourhood)
 - Injury to *person* in the enjoyment of their land (not necessarily injury to the land)
 - Person may be substantially injured notwithstanding that the value of his land would be unaffected or even increased by the proposed modification
- What is the **intention** of the covenant? (**subjective element**)
 - Statements of people whose land benefits from covenant (that is evidence before court)
 - Objection must be sincere and **reasonable** (*Re Chamberlain*)
 - If an objector had breached the covenant themselves then their objection is given little weight

Held:

- Refused modification of covenant on basis that to do so would cause *substantial injury* to owner of benefited land
 - 'injurious affectation to the appearance of the streetscape in which one's house is seen' can come within the concept of injury as outlined in *Webster v Bradac*

Covenants that are 'obsolete' or impeding reasonable use without 'practical benefit'

- **Obsolete** = if the original purpose of the covenant can no longer be achieved¹⁴
 - If some benefit accrues to covenantee from continued enforcement, then not obsolete
- **Impedes reasonable use** = examine proposed use of the burdened land by reference to its situation and surrounding land¹⁵
 - **Without practical benefit** = no present benefit for dominant owner¹⁶

¹⁴ e.g. land originally planned to be agricultural becomes residential, or where original covenant has been rendered valueless

¹⁵ e.g. restricted building to a height of 33ft, yet surrounding land in CBD had multi-storey office buildings – any reasonable use of the land would require building beyond 33ft

¹⁶ Practical benefits incl.: the retention of privacy and seclusion, protection of view, prevention of traffic increase

- Practical benefit can be shown even if dominant owner who objects to the application does not directly benefit¹⁷

Suspension of covenants

- **EPA Act s 28(2)** allows covenants to be overridden by, among other things, council's local environmental plan or development consent (to extent necessary to allow development of the land)
- Only suspended, not extinguished

¹⁷ As where the retention of a good view over a neighbouring landscape would primarily be enjoyed by others: *Gilbert v Spoor*