**Restrictive Covenants**

**Making RCs valid for subsequent purchasers**

- RC must be recorded on the folio of burdened land (*TLA* s 88(1)).
  - RP takes land subject to ‘encumbrances’ recorded on folio (s 42(1)).
  - If not recorded, new purchaser takes free of it on registration (*TLA* ss 42-3).
- However, RC has no greater effect than would have under instrument recording it (s 88(3)).
  - i.e. Recording RC affects its priority, but not indefeasible.

**How RCs can run at equity – 4 requirements**

- Must be restrictive in nature (*Tulk v Moxay*).
  - Covenants imposing positive obligations will not be enforceable as RCs (*Austerberry v Oldham*).
  - Look at what owner has to do, not whether the words are positive/negative.
- There must be burdened and benefited land – not necessarily touching but sufficiently close.
  - Usually arises via subdivision – one new lot is burdened with RC, another benefits.
- The RC must be intended to run with the land.
  - This element always satisfied as written in by s 79 *PLA*.
- Must take the RC with notice.
  - Equity’s basis for enforcing RC is that the conscience of the successor in title in bound because they have had notice of the covenant.

**Key case – *Tulk v Moxay***

- T owned fee simple in vacant land, sold to E with covenant in contract.
- Covenant – E, heirs and assignors would maintain ground and garden in an open state.
- After several conveyances, M bought land. Had knowledge of covenant, but argued covenant not binding, as he was not privy to contract.
- Court – Equity will enforce the covenant:
  - Covenant enforceable on grounds of notice, so M must respect it.
  - Burden attached to land and ran with it, not the covenator.
Restrictive Covenant examples

- **Bold** = negative covenant:
  - Not allow rubbish and weeds to accumulate on the lot;
  - **Use the lot for retail purposes only**;
  - Have plans approved by the developer before building on the lot;
  - Not sell or transfer the lot until a dwelling house has been erected on it.

Covenants in Torrens System

- Can record RC on folio – RP takes land subject to this burden (*TLA* s 42(1)).
  - However, RC does not have greater operation than it has under instrument or Act creating it (*TLA* s 88(3)).
  - i.e. If notice not given to RP – whether actual or constructive – RC will not be enforced.

Restrictions under *Subdivision Act*

- Can create statutory restrictions as per easements (*Subdivision Act* s 24(2)(d)).
  - Alternative by council/developers to building scheme covenants.
- Developers can also include such restrictions.
  - Council cannot object, must certify plan if it complies with *SA* s 6(1):
    - *Inter alia*: Regulations, requirements of the planning scheme, permits relating to road boundaries, lots, common property, reserves, and the form/content of the plan.

Removal/Variation of RCs

- Express agreement (difficult if large group of benefited lots);
- Passage of time (if to expire after certain period);
- Equitable defences (laches, acquiescence, delay);
- Under planning legislation;
  - Can remove/modify in accordance with:
    - Planning scheme amendment under s 6(2)(g) *Planning and Environment Act 1987*; or
    - A permit under Pt 4 of *PEA*.
- Court order (*PLA* ss 84-5):
- Court has power to modify/discharge a covenant, and compensate for losses.
- When is a covenant ‘obsolete’ under s 84?
- *Stanhill v Jackson* two-limb test:
  - (1)(a): Ought to be deemed *obsolete* according to ordinary meaning of term – i.e. outmoded or outdated.
  - (1)(b): Impedes any reasonable use of the land.
- Also consider (1)(c): Discharge/modification should not harm anyone entitled to the benefit of the restriction.
  - Must be of ‘real significance or importance’.