Law Commission
Reforming the law

Easements, Covenants and Profits à Prendre
Executive Summary

Consultation Paper No 186 (Summary)
28 March 2008

EASEMENTS, COVENANTS AND PROFITS À PRENDRE: A CONSULTATION PAPER

EXECUTIVE SUMMARY

1.1 This is a substantial project which has the potential to benefit many landowners. It is principally concerned with the law of easements and covenants, but it also considers profits à prendre.

1.2 These areas of the law have practical implications for a large number of landowners. Recent Land Registry figures suggest that at least 65% of freehold titles are subject to one or more easements and 79% are subject to one or more restrictive covenants. Moreover, easements and covenants are often fundamental to the enjoyment of property. The obscure terminology and dry legal complexity of the current law should not hide the fact that easements and covenants remain vitally important in the twenty-first century.

1.3 The Government's recent Housing Green Paper has set a target of three million new homes by the year 2020.[1] Easements and covenants are essential to the successful development of land for housing. Both rights play a vital part in enabling the efficient operation of both residential and commercial estates and in preserving the quality of life of people who live and work there.

1.4 However, there are significant problems with the current law of easements and covenants, and the need for comprehensive reform is long overdue. The aim of the project is to modernise and simplify the law, removing anomalies, inconsistencies and unnecessary complication where they exist. In making the law more accessible and easier to operate (and so more efficient), we believe that the project will provide benefits to those who are affected by the law, such as private homeowners, businesses and organisations that own property, those who deal with and develop land and professional advisers. We consider that reform of the law would also offer net benefits to all those involved in the conveyancing process, be they lay-persons, solicitors, licensed conveyancers or Land Registry.

Background to the project

1.5 The inclusion of this project in the Law Commission's Ninth Programme of Law Reform followed closely upon the joint work of the Law Commission and Land Registry on registration of title to land. In broad terms, the Land Registration Act 2002 (the culmination of the Law Commission and Land Registry's work in the field) sought to rationalise the principles of title registration in order to ensure that the register of title should contain as complete and as accurate a picture as possible of the nature and extent of rights relating to a particular piece of land. The need for further substantive reform, particularly in relation to the law affecting interests in land, was acknowledged throughout that project and it was expected that the Commission would carry forward land law reform initiatives in the following years.

[1] Department for Communities and Local Government, *Homes for the future: more affordable, more sustainable* (2007) Cm 7191.

Definition of the rights

1.6 An easement is a right enjoyed by one landowner to make some limited use of land belonging to someone else (a "positive" easement), or to receive something from that person's land (a "negative" easement). Examples of positive easements are rights of way and rights of drainage. Examples of negative easements are rights of support and rights to light.

1.7 A covenant is a type of promise, usually contained in a deed, made between a covenantor (who has the burden of liabilities it creates) and a covenantee (who has the benefit of the rights it creates). Like easements, covenants can be positive (for example to erect and maintain a boundary fence) or negative (for example not to build, or not to build above a certain height). Covenants, as a matter of contract law, bind only the covenantor. However, where the covenant is made in relation to land and the covenant restricts the use of that land, a covenant can have some characteristics which are normally associated with property rights.

1.8 The third sort of right considered by this project – a profit à prendre (a "profit") - gives the holder the right to remove products of natural growth from another's land. Many profits concern ancient but not necessarily obsolete practices; some, such as the right to fish or shoot on the land of another, can be of great commercial value.

Scope of the project

1.9 The consultation paper addresses the general law governing easements, covenants and profits: the characteristics of such rights, how they are created, how they come to an end and how they can be modified. With a few exceptions, we do not examine purported problems unique to specific rights, such as rights to light or rights of support. We hope that the perceived problems with specific rights may be ameliorated by our provisional proposals for reform of the general law.

1.10 The project is concerned only with private law rights and does not consider public rights such as public rights of way. Nor does the project include covenants entered into between landlord and tenant (in their capacity as such) which are subject to special rules referable to the landlord and tenant relationship.

The case for reform

1.11 The case for reform of the law of easements is widely acknowledged:

(1) The characteristics of easements give rise to difficulties in practice, particularly in respect of the extent to which the dominant owner may make use of the servient land.

(2) Easements can be acquired very easily, and sometimes inadvertently. Not only may they be created by express grant or reservation, they may also be created pursuant to a number of doctrines by implication, as well as by prescription. This leads to unnecessary complexity.

(3) The law of prescriptive acquisition may be criticised, both as a matter of principle and on grounds of complexity. Is it really necessary to have three concurrent means of prescriptive acquisition?

(4) Although long use may result in an easement being created, failure to exercise an easement over a lengthy period rarely results in the easement being extinguished by abandonment.

(5) Unlike restrictive covenants, easements cannot be discharged or modified by the Lands Tribunal in the event of change of circumstances.

1.12 It is possible to identify the following main defects in the law governing covenants:

(1) The burden of positive covenants does not "run with" the land (that is, bind the covenantor's successors in title). Such devices as are available to circumvent this rule are complex and insufficiently comprehensive.

(2) The burden of a restrictive covenant can run in equity, but only if certain complex and technical conditions are met.

(3) The benefit of a restrictive covenant can run, both at law and in equity, but according to rules which are different, and which are possibly even more complicated than the rules for the running of the burden.

(4) There is no requirement that the instrument creating the covenant should describe the benefited land with sufficient clarity to enable its identification without extrinsic evidence.

(5) There is no requirement to enter the benefit of a covenant on the register of title to the dominant land.

(6) The contractual liability, which exists between the original parties to a covenant, persists despite changes in ownership of the land. It is therefore possible for a covenant to be enforced against the original covenantor even though he or she has disposed of the land.

Our provisional approach to reform

1.13 Easements, profits and covenants are clearly distinct under the current law, yet to some extent all can be used to achieve similar ends. We have taken the provisional view that the distinction between easements, profits and covenants is valuable and should be retained. Although we reject the complete assimilation of these interests, we believe that we should not limit ourselves to an entirely piecemeal, ameliorative approach that only addresses specific problems within the existing law.

1.14 Our overarching aim is to have a law of easements, covenants and profits that is as coherent and clear as possible. There should, so far as practicable, be consistency within and between these three types of rights relating to land. Overlapping and alternative doctrines should be rationalised or eradicated wherever possible.

1.15 We consider that there is a need for fundamental reform of covenants affecting land, and we therefore provisionally propose a new interest in land: the Land Obligation. Many of the flaws in the current law of covenants may be explained by the fundamental tension between the contractual origin of the rights and the proprietary effect introduced by the courts. It is obvious from the judicial development of the law of restrictive covenants that there is a significant demand for parties to be able to attach freely negotiated rights and obligations to their land. Rather than eliminating the contradiction by returning the law of covenants affecting land to its contractual roots, we consider that it is preferable to resolve it by creating a new category of property interest that performs this function.

REFORMING THE LAW OF EASEMENTS

Characteristics

1.16 Our review of the law of easements commences, in Part 3, with consideration of the basic requirements to be satisfied before a right can be characterised as an easement. We do not currently believe this is an area where extensive reform is necessary. However, we ask consultees whether they agree with us that the requirements that an easement is attached to, and has some nexus with, a dominant estate should be retained.

1.17 In two areas, we believe some reform may be appropriate in order to prevent unnecessary complications for those dealing with land. First, we examine the difficult issue of the extent to which an easement may restrict the use to which the servient land may be put, with particular reference to rights to park vehicles. Secondly, we review the rigid rule that an easement may not subsist where the dominant and servient estates are in the ownership and possession of the same person. In each case, we make provisional proposals for reform.

Creation

1.18 The principal area in which we consider reform of the law of easements is necessary concerns the circumstances in which they may be acquired, and we review this subject in Part 4.

EXPRESS CREATION

1.19 For the most part, we believe that the law of express creation is satisfactory. However, we doubt the rationale of the rule whereby an easement expressly reserved in the terms of a conveyance is to be interpreted in cases of ambiguity in favour of the person making the reservation, and we provisionally propose its abolition. We also ask consultees whether they think that it would be beneficial for parties to be able to create “short-form” easements by making reference to a form of words prescribed by statutory instrument. Such a facility would simplify the drafting and interpretation of the most common types of easement.

IMPLICATION

1.20 We ask consultees whether they consider that the law of implied creation is in need of reform, and whether the current rules of implication should be replaced or put into statutory form. We provisionally propose that in determining whether an easement should be implied, it should no longer be material whether the easement would take effect by grant or by reservation. We provisionally propose that section 62 of the Law of Property Act 1925, which currently operates to transform precarious benefits, enjoyed with the owner's licence or consent, into legal easements should cease to have such effect.

PRESCRIPTION

1.21 We provisionally propose that the current law of prescriptive acquisition of easements (whereby easements may be prescribed at common law, by lost modern grant and under the Prescription Act 1832) should be reformed. We ask consultees whether it should remain possible for easements to be acquired by long use. If so, we ask whether prescriptive acquisition should only be possible, in relation to land the title to which is registered, following service of an application to register the easement on the servient owner. We also ask whether certain easements (such as negative easements) should no longer be capable of prescriptive acquisition.

Extinguishment

1.22 In Part 5, we consider the circumstances in which easements may be extinguished. We review in particular the law of abandonment, the consequences of excessive user of an easement and the effect of termination of the estate to which the easement is attached.

1.23 We provisionally propose that once an easement has been entered on the register, it should no longer be capable of extinguishment by reason of abandonment. However, where an easement is not registered, abandonment should remain a means of extinguishment, and where such an easement has not been exercised for a specified period of time a presumption of abandonment should arise.

1.24 We consider the effect of excessive use in light of the recent decision of the Court of Appeal in *McAdams Homes Ltd v Robinson*. We provisionally propose a rationalisation of the principles of excessive use, and that the same principles should apply in cases where the dominant owner seeks to exercise the easement for the benefit of land additional to the dominant land.

1.25 We review the effect on the easement of termination of the estate to which the easement is attached in light of the recent decision of the Court of Appeal in *Wall v Collins*. We provisionally propose that where an easement is attached to a leasehold estate, the easement should be automatically extinguished on termination of that estate.

REFORMING THE LAW OF PROFITS À PRENDRE

1.26 Our review of the law of profits, contained in Part 6, is limited in its scope. We are not considering profits in common or profits appendant in the course of this project. We are therefore concerned only with several profits, and profits stated to last for a term of years. Our general approach is that the law that applies to easements should apply to such profits except where there is good reason for this not to be the case.

1.27 We provisionally propose that such profits should in future only be created by express grant or reservation, and by statute, and that they should no longer be capable of creation by implication or by prescription. We provisionally propose that extinguishment of such profits should occur by express release, by termination of the estate to which the profit is attached, by statute, and by abandonment (but only where the profit is not entered on the register of title).

REFORMING THE LAW OF COVENANTS

1.28 For the reasons set out above, we believe that the law of positive and restrictive covenants affecting land is in urgent need of reform. Furthermore, we do not currently consider that this can be achieved by simple amendment of the current law. We believe that what is necessary is the creation of a new legal interest in land, the Land Obligation, which would take over the role and function of positive and restrictive covenants. In Parts 8 to 12 inclusive, we set out our detailed proposals concerning Land Obligations.

1.29 A Land Obligation would be an interest appurtenant to an estate in land, analogous to an easement. It could be restrictive (imposing a restriction on the doing of some act on the burdened land) or positive (for example creating obligations to carry out works or provide services). There would have to be a dominant and a servient tenement (that is, there should be separate benefited and burdened estates in the land), and the Land Obligation would have to be for the benefit of dominant land. The benefit of the Land Obligation would be appurtenant to the benefiting estate in the dominant land. The burden of the Land Obligation would attach to the burdened estate in the servient land**.** There would have to be separate title numbers for the benefited and burdened estates, but there would be no need for the benefited and burdened estates in the land to be owned and possessed by different persons**.**

1.30 Land Obligations could only be created expressly, and only where the relevant titles are registered. Their creation would require the execution of an instrument in prescribed form, containing a plan clearly identifying all benefited and burdened land. The creation of a Land Obligation capable of comprising a legal interest would have to be completed by registration of the interest in the register for the benefited land and entry of a notice of the interest entered in the register for the burdened land. A Land Obligation would not operate at law until these registration requirements were met**.** We proceed to consider how Land Obligations, if introduced, would operate in practice, including circumstances in which they might be varied or extinguished, their enforceability, and their relationship with the existing system of commonhold.

1.31 We provisionally propose that, subject to certain defined exceptions, following implementation of Land Obligations it would no longer be possible to create new covenants which run with the land where the title to that land is registered**.** We ask consultees whether this prohibition should also apply to new covenants running with the land where either the benefited or burdened estates or both are not registered.

1.32 Implementation of Land Obligations would give rise to the question of how to deal with existing restrictive covenants. This is in turn linked to the issue of obsolete restrictive covenants, and both of these issues are discussed in Part 13.

Discharge and modification

1.33 Section 84(1) of the Law of Property Act 1925 confers jurisdiction on the Lands Tribunal to discharge and modify restrictive covenants affecting freehold land. In Part 14, we review the scope and extent of this jurisdiction in light of the reforms we are proposing elsewhere in the paper. We specifically consider the grounds on which application may be made, the persons who may apply and the persons who should be served with notice of an application.

1.34 We provisionally propose that section 84 should be expanded so that application may be made to discharge and modify not only restrictive covenants but also easements, profits and Land Obligations.

1.35 We provisionally propose that the current grounds for discharge and modification are amended to take account of the practice that has developed in the Lands Tribunal, to make the basis upon which the jurisdiction is exercised more transparent and to ensure that the grounds are suitable for the wider range of rights.

Law Commission Consultation Paper No 186 (Summary)

28 March 2008