

**Law Commission**  
**Consultation Paper No 211**

**CONSERVATION COVENANTS**  
**A Consultation Paper**



# THE LAW COMMISSION – HOW WE CONSULT

**About the Law Commission:** The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are: The Rt Hon Lord Justice Lloyd Jones, *Chairman*, Professor Elizabeth Cooke, David Hertzell, Professor David Ormerod QC and Frances Patterson QC. The Chief Executive is Elaine Lorimer.

**Topic of this consultation:** This Consultation Paper examines the case for introducing “conservation covenants” into the law of England and Wales, and considers how a scheme of conservation covenants might be framed. A conservation covenant is a private agreement made by a landowner, for the purposes of conservation. We discuss the current law and set out a number of provisional proposals and options for reform on which we invite consultees’ views.

**Geographical scope:** The Consultation Paper applies to the law of England and Wales.

**Impact assessment:** In Chapter 9 of this Consultation Paper, consultees are asked also to comment on the likely costs and benefits of any changes provisionally proposed. Consultees’ responses will inform our final recommendations and a formal impact assessment document that will be published with our Report.

**Availability of materials:** This Consultation is available on our website at: <http://lawcommission.justice.gov.uk/consultations/conservation-covenants.htm>.

**Duration of the consultation:** We invite responses from 28 March 2013 to 21 June 2013.

## Comments may be sent:

**By email to:** [propertyandtrust@lawcommission.gsi.gov.uk](mailto:propertyandtrust@lawcommission.gsi.gov.uk) or

**By post to:** Luke Campbell, Law Commission, Steel House, 11 Tothill Street, London SW1H 9LJ  
Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could send them to us electronically as well (for example, on CD or by email to the above address, in any commonly used format).

**After the consultation:** In the light of the responses we receive, we will decide our final recommendations and present them to Government.

**Consultation Principles:** The Law Commission follows the Consultation Principles set out by the Cabinet Office, which provide guidance on type and scale of consultation, duration, timing, accessibility and transparency.

The Principles are available on the Cabinet Office website at: <https://update.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance>.

**Freedom of Information statement**

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000 and the Data Protection Act 1998 (DPA)).

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Law Commission.

The Law Commission will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

**THE LAW COMMISSION**  
**CONSERVATION COVENANTS:**  
**A CONSULTATION PAPER**

**CONTENTS**

	<i>Paragraph</i>	<i>Page</i>
<b>CHAPTER 1: INTRODUCTION</b>		<b>1</b>
Introduction	1.1	1
Background to the project	1.9	2
Wales	1.13	4
Structure of this Consultation Paper	1.15	5
Chapter 2	1.15	5
Chapter 3	1.16	5
Chapter 4	1.17	5
Chapter 5	1.18	6
Chapter 6	1.19	6
Chapter 7	1.20	6
Chapter 8	1.21	6
Chapter 9	1.22	6
Chapter 10	1.23	6
<b>CHAPTER 2: CURRENT LAW AND THE CASE FOR REFORM</b>		<b>7</b>
Introduction	2.1	7
What is a conservation covenant?	2.5	7
The parties	2.6	8
Made for conservation purposes	2.7	8
Running with the burdened land	2.8	8

	<i>Paragraph</i>	<i>Page</i>
No need for benefited land	2.10	8
Negative and positive obligations	2.13	9
Potential uses for conservation covenants	2.17	10
As an alternative to acquisition of land by public or voluntary sector bodies	2.18	11
As a safeguard where voluntary sector or public bodies dispose of their land	2.19	11
As a guarantee for individuals who sell their land	2.21	12
As an alternative to a financial donation	2.23	12
Payment for conservation action	2.24	12
Offsetting schemes	2.25	13
Further scenarios	2.29	14
The current law	2.31	14
Freehold covenants	2.32	15
Workarounds	2.36	15
Planning law and biodiversity offsetting	2.48	18
Designation of land	2.55	20
The case for reform	2.67	23
General provisional proposal	2.72	24
<b>CHAPTER 3: COMPARATIVE LAW</b>		<b>25</b>
Introduction	3.1	25
Scotland	3.7	26
Historical background	3.8	26
The legislative scheme	3.11	27
Use of conservation burdens in practice	3.15	28

	<i>Paragraph</i>	<i>Page</i>
USA	3.18	29
The Uniform Conservation Easement Act 1981 (“the UCEA”) and state laws based on it	3.19	29
Other state legislation	3.27	32
Use of conservation covenants in practice	3.31	33
Canada	3.35	34
Provincial legislation	3.36	34
Use of conservation covenants in practice	3.39	35
Australia	3.41	35
State and federal legislation	3.42	35
Use of conservation covenants in practice	3.46	36
Biodiversity offsetting in Australia	3.48	37
New Zealand	3.51	38
The legislative scheme	3.52	38
Use of conservation covenants in practice	3.56	39
Conclusion: Similarities and divergences	3.59	40
<b>CHAPTER 4: KEY FEATURES OF A STATUTORY SCHEME</b>		<b>42</b>
Introduction	4.1	42
Who should be able to create a conservation covenant?	4.3	42
Who should hold a conservation covenant?	4.9	43
The spectrum of covenant holders	4.9	43
Holders of conservation covenants in other jurisdictions	4.11	43
Holding a conservation covenant in England and Wales	4.18	46
What conservation objectives should be sufficient to justify the creation of a conservation covenant?	4.30	49
Public oversight of new conservation covenants	4.41	52

	<i>Paragraph</i>	<i>Page</i>
<b>CHAPTER 5: CREATION AND REGISTRATION</b>		<b>55</b>
Introduction	5.1	55
The nature of a conservation covenant	5.2	55
Formal requirements for validity	5.9	56
Duration	5.11	56
Terms	5.15	57
Standard terms	5.21	59
Registration	5.24	59
Priority	5.33	61
<b>CHAPTER 6: MANAGEMENT AND ENFORCEMENT</b>		<b>62</b>
Introduction	6.1	62
Managing obligations	6.5	62
What sort of management might be undertaken?	6.5	62
Statutory or agreed management obligations	6.11	64
Enforcement of the landowner's duties	6.16	65
Liability for a breach	6.18	66
Approaches to conservation covenant enforcement in other jurisdictions	6.21	66
Enforcement of conservation covenants in England and Wales	6.29	69
Enforcement of the responsible body's duties under a conservation covenant	6.60	75
<b>CHAPTER 7: MODIFICATION AND DISCHARGE</b>		<b>77</b>
Introduction	7.1	77
Action by the parties	7.5	78
Unilateral release by the responsible body	7.5	78
By agreement	7.12	79

	<i>Paragraph</i>	<i>Page</i>
The effect of merger	7.17	81
Adjudicated modification and discharge	7.21	81
Section 84(1) of the Law of Property Act 1925	7.22	82
Section 84(1) today	7.26	83
Our proposals in the Easements Report	7.40	87
The application of section 84(1) to statutory covenants	7.43	88
The Lands Chamber and conservation covenants	7.47	89
Declarations under section 84(2) of the Law of Property Act 1925	7.72	95
Modification under the planning system	7.75	95
<b>CHAPTER 8: EXISTING STATUTORY COVENANTS</b>		<b>97</b>
Introduction	8.1	97
Methods of modification and discharge	8.4	97
Statutory provisions which could be replaced by conservation covenants	8.5	98
Restrictive covenants made with the National Trust	8.6	98
Forestry dedication covenants	8.17	100
Other statutory covenants	8.26	103
<b>CHAPTER 9: THE POTENTIAL ECONOMIC IMPACT OF CONSERVATION COVENANTS</b>		<b>104</b>
Introduction	9.1	104
Likely costs and benefits	9.2	104
Scope and scale	9.2	104
Development and growth	9.8	105
Better and more effective conservation	9.12	106
Removing the need for existing workarounds	9.16	107
Changes to the value of land	9.21	108

	<i>Paragraph</i>	<i>Page</i>
Management and enforcement	9.24	109
Transitional impact	9.29	109
Modifying or discharging a conservation covenant	9.37	110
Increasing engagement	9.44	112
Further impacts	9.46	112
<b>CHAPTER 10: LIST OF PROVISIONAL PROPOSALS AND CONSULTATION QUESTIONS</b>		<b>113</b>
<b>APPENDIX A: STATUTORY COVENANTS IN ENGLAND AND WALES</b>		<b>124</b>
<b>APPENDIX B: STATUTORY PROVISIONS</b>		<b>145</b>

# CHAPTER 1

## INTRODUCTION

### INTRODUCTION

- 1.1 Green spaces and unique habitats, remarkable buildings, and historic places are valuable to us. They give us a sense of identity and community; they help us to be healthier; they broaden understanding of our social and cultural heritage; they provide opportunities for recreation and relaxation; and they contribute to our economy. Historically, protection of these places was undertaken by individuals, families, and later by voluntary organisations. More recently, though, the emphasis has shifted, and the state has taken on responsibility for them by creating regimes of special protection, such as Sites of Special Scientific Interest, and National Parks.
- 1.2 This project is about unlocking opportunities for individuals and conservation organisations to work together, using voluntary private agreements, to contribute to the cause of conservation. Our proposals therefore sit alongside, but are entirely different from, the mandatory public law mechanisms which already exist.<sup>1</sup>
- 1.3 How, then, can people make this contribution? At present, a number of complex and costly legal methods are available to protect land; they are not only inefficient, but have led to a piecemeal approach to private conservation of land in England and Wales. For reasons we explain in this Consultation Paper, the law does not currently provide the tools needed for people voluntarily to create long-lasting obligations to preserve and enhance the special features of land.
- 1.4 In other jurisdictions, though, conservation covenants<sup>2</sup> can be used. They involve landowners voluntarily agreeing to do, or not do, certain things in relation to their land, for the purposes of conservation. The agreement is made with a conservation organisation, or a public body, which ensures that the obligations are appropriate, achievable, and will protect or enhance the conservation value of the site. The agreement binds not only the landowner, but all future owners of that land as well, meaning that the long-term conservation of the land is assured. Legislation to enable this sort of arrangement exists in legal systems around the world, including Scotland, the USA, Australia, Canada and New Zealand.
- 1.5 Whilst consideration of how conservation covenants are utilised elsewhere is important, the more compelling question is how they could be used in England and Wales. We see a range of possibilities, which we explore further throughout the Consultation Paper. We highlight two scenarios here as examples:

<sup>1</sup> The Law Commission's Public Law team is currently considering reform of the statutory protections which exist in respect of wildlife: see *Wildlife Law (2012) Law Com Consultation Paper No 206*.

<sup>2</sup> Sometimes called "conservation easements", "conservation burdens", "conservation servitudes", "conservation agreements" or "heritage agreements".

- (1) Land used for farming includes a small plot covered in ancient woodland. The owner of the land is conservation-minded, and voluntarily agrees a conservation covenant with a conservation charity, to ensure that public access is allowed to the small plot, and that coppicing of the wood is undertaken at agreed times. This enables the resources of private individuals to be put to work in conjunction with the expertise, good judgement and oversight provided by a conservation charity or public body.
  - (2) Biodiversity offsetting is the practice of allowing development to proceed provided that the damage to the development site is compensated by an equivalent or greater contribution to conservation on another site. Conservation covenants can provide a secure legal method for ensuring that offsetting obligations are performed, even when the offset site changes hands.
- 1.6 A key feature of conservation covenants is that they arise out of the desire to achieve a long-term conservation objective on land; individuals can use private rights to benefit the public interest. Conservation covenants therefore enable “the enthusiasm, initiative and resources of a wider range of individuals and organisations [to] be harnessed to achieve long-term conservation objectives”.<sup>3</sup>
- 1.7 It may be said that this is not the time for another conservation initiative; that the pressing need for housing and growth should take precedence. There are two answers to that argument. First, despite the state-run measures which exist, there is a need for better protection; our environment and built heritage are not in the healthy state in which we would like them to be. A large proportion of land in England and Wales is left unprotected: National Parks only cover 9.3% of land in England and 19.9% in Wales.<sup>4</sup> Furthermore our natural environment is in a delicate state; despite a range of efforts, biodiversity continues to decline.<sup>5</sup>
- 1.8 Second, conservation covenants do not work to the exclusion of development, or sustainable resource management. The proposals set out in this Consultation Paper are crafted with the need for these activities in mind, in the context of a wider growth agenda. In fact, conservation covenants may facilitate responsible development; the use of conservation covenants in biodiversity offsetting is an example of this. And ensuring that there are appropriate methods for the modification and discharge of conservation covenants means that conservation covenants work flexibly and can adapt to changing circumstances.

## **BACKGROUND TO THE PROJECT**

- 1.9 This project emerged from the Property, Family and Trust Law team’s

<sup>3</sup> C Reid, “The Privatisation of Biodiversity? Possible New Approaches to Nature Conservation Law in the UK” (2011) 23(2) *Journal of Environmental Law* 203, 211.

<sup>4</sup> See National Parks, <http://www.nationalparks.gov.uk/learningabout/whatisanationalpark/factsandfigures.htm>.

<sup>5</sup> Department for Environment, Food and Rural Affairs, *Biodiversity 2020: A strategy for England’s wildlife and ecosystem services* (2011) p 13.

consultation on reform of the law of easements, covenants and profits à prendre.<sup>6</sup> It was suggested to us in the course of consultation, by the National Trust, that we should consider the case for recognising the special status of covenants imposed to protect natural or cultural heritage.

1.10 The need for landowners to be able to create binding obligations for the purposes of conservation has also received increasing academic attention, particularly as interest in private (rather than state-run) conservation measures grows.<sup>7</sup> This, combined with their widespread use in other jurisdictions, indicated that the case for a new legal mechanism should be considered. With the support of the Department for Environment, Food and Rural Affairs (“Defra”), the project was included in the Law Commission’s Eleventh Programme of law reform as approved by the Lord Chancellor and laid before Parliament.

1.11 The Eleventh Programme said:

Our recent work on the general law of easements, covenants and profits à prendre considered whether it should continue to be the case that a restrictive obligation burdening land must benefit other nearby land. We concluded that it should.

However, there are circumstances where this limitation may not be appropriate. One is where a conservation objective would be met if an obligation to use, or not use, land in a particular way is enforceable against an owner of land despite the benefiting party having no neighbouring land. This project will investigate the case for a new statutory interest in land – a conservation covenant – that would enable such interests to be enforced by a particular body, or class of bodies, rather than by a neighbour.

The project will consider which bodies should be able to enforce conservation covenants in the event that they were introduced; we expect these to include Government and public bodies, local authorities and conservation charities. We will also investigate what conservation objectives would be of sufficient importance to bind land. For example, conservation covenants could require the renovation and maintenance of a monument, protect a rare habitat or provide public access to a stately home.<sup>8</sup>

1.12 Our discussions with a range of organisations, including from the agricultural sector, public bodies and conservation charities, confirm the need for a new legal

<sup>6</sup> Easements, Covenants and Profits à Prendre (2008) Law Com No 186; Making Land Work: Easements, Covenants and Profits à Prendre (2011) Law Com No 327.

<sup>7</sup> See for example I Hodge, R Castle and J Dwyer, *Covenants as a Conservation Mechanism* (Department of Land Economy, University of Cambridge, Land Economy Monograph 26, 1993); The National Trust, *The Potential of Conservation Covenants – A report by Green Balance to the National Trust* (2008); W J Sutherland and others, “The identification of priority policy options for UK Nature Conservation” (2010) 47 *Journal of Applied Ecology* 955; C Reid, “The Privatisation of Biodiversity? Possible New Approaches to Nature Conservation Law in the UK” (2011) 23(2) *Journal of Environmental Law* 203.

<sup>8</sup> Eleventh Programme of Law Reform (2011) Law Com No 330, p 10.

tool for private conservation.<sup>9</sup> They have told us:

- (1) current workarounds and statutory covenants are inefficient, expensive and uncertain;
- (2) charities and public bodies are looking for better ways to protect land in concert with landowners – they wish to secure its conservation value without needing to acquire freehold ownership; and
- (3) new approaches to conservation such as biodiversity offsetting could be better facilitated by conservation covenants.

## WALES

1.13 We take the view that the creation of a statutory scheme for conservation covenants is a devolved matter.<sup>10</sup> To that end, we have worked with Welsh Government officials (along with our sponsor department Defra) in considering the case for conservation covenants. We are particularly mindful of the Welsh Government’s new environment framework “A Living Wales”,<sup>11</sup> which was first consulted on in 2010. There are two main strands to this framework.

- (1) A new strategy for the management and regulation of the environment in Wales, in particular adopting an ecosystem approach. This will involve looking at the environment as a whole rather than dealing with individual aspects separately; considering its intrinsic value alongside other priorities such as food production and the need for development.<sup>12</sup>

<sup>9</sup> We are particularly grateful to the Wildlife and Countryside Alliance and Heritage Link for conducting a joint survey relating to the use of conservation covenants, which has informed our preliminary research.

<sup>10</sup> Although formally any scheme would concern land law, the relevant test in section 108(7) of the Government of Wales Act 2006 is the purpose of the provision in question (having regard to its effect). Reform would be aimed at providing better legal tools for achieving nature and heritage conservation goals, so potentially relevant fields include paras 1 (agriculture, forestry, animals, plants and rural development); 2 (ancient monuments and historic buildings); 6 (environment); and 18 (town and country planning): see Schedule 7, Part 1.

<sup>11</sup> *Living Wales*,  
<http://wales.gov.uk/topics/environmentcountryside/consmanagement/nef/?lang=en>.

<sup>12</sup> *Sustaining a Living Wales*,  
<http://wales.gov.uk/docs/desh/consultation/120210nefgreenpaperen.pdf>.

- (2) Merging the existing functions of the Countryside Council for Wales,<sup>13</sup> the Environment Agency Wales,<sup>14</sup> and the Forestry Commission Wales,<sup>15</sup> into a single environment body for Wales. In July 2012 the Welsh Government made an order establishing the legal framework for the establishment and workings of the new body,<sup>16</sup> and it has since announced that the new body will be known as “Natural Resources Wales”.<sup>17</sup> The proposals are intended to simplify the governance framework and ensure a more joined-up approach in practice.<sup>18</sup>
- 1.14 In addition to engaging with officials in the Welsh Government in developing our proposals, we are keen to ensure that the views of Welsh stakeholders are strongly represented in this consultation.

## **STRUCTURE OF THIS CONSULTATION PAPER**

### **Chapter 2**

- 1.15 This Chapter considers what is meant by “conservation covenants”, drawing out their core features. It also examines the law surrounding freehold covenants and other legal mechanisms which attempt to achieve the same aim, and explains why these are inadequate.

### **Chapter 3**

- 1.16 Here we consider the law and use in practice of conservation covenants in Scotland, the USA, Canada, Australia and New Zealand.

### **Chapter 4**

- 1.17 In Chapter 4 we set out the key elements of a statutory scheme for conservation covenants.
- (1) Who should be able to create a conservation covenant? Here we consider the types of interests in land which should allow the creation of binding obligations over it.

<sup>13</sup> Established by the Environmental Protection Act 1990, s 128.

<sup>14</sup> The Environment Agency (established by the Environment Act 1995, s 1) covers England and Wales but has a Wales office that is funded by and reports to the Welsh Government in respect of the exercise of its devolved functions.

<sup>15</sup> A Great Britain-wide body (established by the Forestry Act 1967, s 1) with a Welsh subdivision that is funded by and reports to the Welsh Government in respect of the exercise of its devolved functions.

<sup>16</sup> Natural Resources Body for Wales (Establishment) Order 2012, SI 2012 No 1930 (W 230). See the Explanatory Memorandum at <http://www.senedd.assemblywales.org/documents/s8832/Explanatory%20Memorandum.pdf>.

<sup>17</sup> See <http://wales.gov.uk/publications/accessinfo/dnnewhomepage/dr2012/octdec/enviro/jg3263/?lang=en>.

<sup>18</sup> Welsh Government, *Natural Resources Wales: Proposed Arrangements for Establishing and Directing a New Body for the Management of Wales' Natural Resources* (February 2012) section 2.2.

- (2) Who should be permitted to hold the benefit of a conservation covenant? This examines who should be responsible for managing and if necessary enforcing obligations under a conservation covenant.
- (3) How should we define the purposes for which a conservation covenant can be made? The scope of a scheme for conservation covenants is considered, and particularly the types of obligations which should qualify land for a conservation covenant.

### **Chapter 5**

- 1.18 A number of further aspects of a statutory scheme are considered, including the legal nature of a conservation covenant, and the requirements for its creation and registration.

### **Chapter 6**

- 1.19 The question of how a statutory scheme might address management of ongoing obligations is considered here. We also look at how a breach of obligations under a conservation covenant may be remedied.

### **Chapter 7**

- 1.20 We noted above the need for appropriate flexibility; this Chapter considers the circumstances in which a conservation covenant might need to be modified or discharged, and how that should be achieved. In particular, we consider the role of the Lands Chamber of the Upper Tribunal in adjudicating disputes.

### **Chapter 8**

- 1.21 A number of statutory covenants exist, many of which relate to conservation. We examine two of these in Chapter 8, considering whether they could usefully be replaced by a broader statutory scheme for conservation covenants. Other statutory covenants we have considered are set out in Appendix A.

### **Chapter 9**

- 1.22 As always, we are keen to consider the impact of our proposals as they develop. In the case of conservation covenants this is a challenging task, because they are currently unknown to the law of England and Wales. We set out initial views here, but welcome input from consultees to develop our thinking.

### **Chapter 10**

- 1.23 Chapter 10 concludes the Consultation Paper by listing all of our provisional proposals and questions for consultees.

# CHAPTER 2

## CURRENT LAW AND THE CASE FOR REFORM

### INTRODUCTION

2.1 To understand whether conservation covenants are needed, we must first consider what they are, and when they could be used. In this Chapter we explain what is generally meant by “conservation covenants” by beginning with a discussion of their core features, namely:

- (1) who may enter into a voluntary agreement of this nature;
- (2) how the agreement will achieve a conservation objective;
- (3) the timescale of the obligations;
- (4) the absence of adjacent benefited land; and
- (5) the nature of the obligations which may be included in the agreement, and in particular, whether both restrictive and positive obligations should be allowed.

2.2 Next, we examine some possible uses of conservation covenants. In identifying these examples we have drawn from feedback given to us by a range of organisations.

2.3 Finally, we look at mechanisms used for environment and heritage protection in the current law; where appropriate, we note their deficiencies. This section includes:

- (1) the law surrounding freehold covenants (and its difficulties in respect of binding obligations for conservation purposes);
- (2) other legal mechanisms currently used for conservation purposes (such as leasehold covenants);
- (3) mechanisms available for biodiversity offsetting, and how conservation covenants can assist; and
- (4) designation of land (to illustrate the public law approach to conservation, against which we contrast conservation covenants as a private and voluntary mechanism).

2.4 We conclude with a short assessment of the case for reform, which subsequent Chapters then build upon.

### WHAT IS A CONSERVATION COVENANT?

2.5 In Chapter 1 we outlined briefly the concept of a conservation covenant; here we describe in more detail its core features. Whether or not they are described as such, conservation covenants are conceptually similar wherever they are found and so we draw on the key features of similar legal arrangements found in other jurisdictions. These are described in more detail in Chapter 3.

### **The parties**

- 2.6 A conservation covenant is formed by agreement between a person who has an interest in land and an eligible “holder”. Three points follow from this.
- (1) The agreement is voluntary on both sides. This is an important feature which distinguishes conservation covenants from public law designations of land (which can be imposed without the landowner’s consent, and are outlined later in this Chapter).
  - (2) The person whose land will be subject to obligations must hold an interest in that land. It is clear that freeholders should qualify, but should this right also be extended to other interests, such as tenants under leases exceeding a certain minimum term? We discuss this question further in Chapter 4.
  - (3) The holder has to fall within a permitted category. The range of eligible holders is a significant issue in designing a legal framework for conservation covenants, and we consider it in Chapter 4.

### **Made for conservation purposes**

- 2.7 It is uncontroversial to suggest that a conservation covenant should be an agreement which is made for a conservation purpose. But the mechanism for achieving this policy aim is less clear. On one hand, legislation could set out such a requirement; for example, requiring that to be valid, a conservation covenant must be for the preservation of flora and fauna, or the protection of sites of cultural or historic significance. But an alternative way is to allow only organisations bound by conservation objectives to qualify as holders. We discuss in Chapter 4 whether, and if so how, the purposes of conservation covenants and their holders should be defined in legislation.

### **Running with the burdened land**

- 2.8 Under current law it is possible for any person with an interest in land (to whom we refer for convenience as a “landowner”) to make a contract with any other person that specifies obligations (whether relating to conservation or otherwise) in relation to the land. However, the current law only allows such obligations to bind subsequent owners of that land in limited circumstances. The usefulness of these obligations is limited once the original landowner has disposed of the land.
- 2.9 A conservation covenant, on the other hand, “runs with” the burdened land by binding the landowner’s successors in title after he or she has disposed of the land. In practical terms, it gives the holder a guarantee that the conservation obligations in question will continue to be performed after any change of ownership, which is particularly important for conservation given the long-term nature of much of the work involved. We discuss below some potential practical uses for conservation covenants, many of which require such a guarantee in order to be feasible.

### **No need for benefited land**

- 2.10 A restrictive covenant, under current law, will not run with the burdened land unless another person owns neighbouring land which benefits in some way from

it.<sup>1</sup> We discussed in our Report *Making Land Work: Easements, Covenants and Profits à Prendre* (“the Easements Report”),<sup>2</sup> whether this rule should be retained in the context of land obligations, which we recommended should replace restrictive covenants. Our conclusion was that it should remain in place, principally to avoid overburdening land with obligations that are not limited by the needs of neighbouring benefited plots.<sup>3</sup>

2.11 It is possible to identify examples of conservation work that do in fact benefit neighbouring land. For instance, a prohibition on industrial development of grassland might spare nearby residents from the effects of pollution. However, often this will not be the case; instead, the benefit derived from conservation is a wider, public one. An important question for this project is therefore whether conservation represents a sufficiently important objective to justify an exception to the general approach.

2.12 We take the view that it does. Society generally views the natural environment and our built heritage as intrinsically valuable and worthy of preservation.<sup>4</sup> Moreover, there is a growing body of evidence as to their economic value. In its 2010 White Paper *The Natural Choice*, the Government identified a need for better measurement of the contributions provided by “natural capital”,<sup>5</sup> with a view to its integration in economic planning.<sup>6</sup> With that in mind, we explore below some scenarios that illustrate the potential uses for conservation covenants that exist “in gross” (that is, without benefited land nearby).

### **Negative and positive obligations**

2.13 Interests in land may impose negative or positive obligations. An obligation is negative if it requires a person to refrain from doing something. Conversely, it is positive if it requires them to do something (including paying money). The test is one of substance rather than form. For example, a stipulation “not to allow the buildings on the land to fall into disrepair”, though phrased negatively, is in fact positive because it obliges the landowner to take steps to maintain the buildings.

2.14 Under the current law covenants cannot impose positive obligations on the

<sup>1</sup> Strictly speaking, the land does not itself “benefit” from the performance of the obligations that the restrictive covenant imposes; rather, the requirement is that the current owner derives some additional use or amenity value from their ownership of the land.

<sup>2</sup> *Making Land Work: Easements, Covenants and Profits à Prendre* (2011) Law Com No 327.

<sup>3</sup> *Easements Report*, paras 2.41 to 2.43 and 6.15 to 6.17.

<sup>4</sup> See for example YouGov, *John Muir Trust Survey* (September 2012) p 1; YouGov, *Best Things About Britain Today* (May 2012) p 1; Ipsos Mori, *Coastal Access in England* (April – May 2006) pp 27- 31.

<sup>5</sup> Defined as “... the stock of our physical natural assets (such as soil, forests, water and biodiversity) which provide flows of services that benefit people (such as pollinating crops, natural hazard protection, climate regulation or the mental health benefits of a walk in the park)”: *The Natural Choice: securing the value of nature* (2011) Cm 8082, p 11.

<sup>6</sup> *The Natural Choice: securing the value of nature* (2011) Cm 8082, ch 3. See also J Lawton, *Making Space for Nature: A Review of England’s Wildlife Sites and Ecological Network* (2010) p 2.

burdened landowner so as to run with the land.<sup>7</sup> In the Easements Report we recommended that land obligations, which would replace restrictive covenants, should be able to do this. Positive obligations can facilitate arrangements between neighbours, for example the upkeep of boundary fences; and the widespread use of other “workarounds” in the law for achieving these objectives demonstrated that there was already significant demand for them. We also considered that the concerns raised by positive obligations could be overcome, provided that sufficient safeguards were put in place.<sup>8</sup>

- 2.15 Conservation covenants raise a distinct but overlapping set of issues about positive obligations. Their primary aim is not to facilitate practical arrangements between neighbours, but rather to protect or enhance certain conservation values on land. There is clearly scope for positive obligations in this context: much conservation activity goes beyond a promise not to develop land, requiring active maintenance or improvement of conservation interests on it as well. Obvious examples include the renovation of a neglected heritage building,<sup>9</sup> or the restoration of woodland which is in a poor state. But even keeping undeveloped land in its present state can require positive action. Virtually all land in England and Wales that is thought of as “natural” is in fact “semi-natural”, having been altered over the centuries by human activity; many species-rich habitats therefore have to be actively managed to preserve their interest.<sup>10</sup>
- 2.16 Objections may be raised to the inclusion of positive obligations in a legislative scheme for conservation covenants. Chief among these is the fear that land will become unmarketable through the imposition of onerous and expensive duties, particularly if, as would be the case for conservation covenants, they are not restricted by a need to benefit other neighbouring land. In our view, a properly designed regime for modifying or discharging conservation covenants would prevent accumulations of unduly burdensome or inappropriate obligations. We discuss modification and discharge in Chapter 7. A separate concern about positive obligations is the need to identify clearly who is burdened by them and who can enforce them. We make provisional proposals in Chapter 5 about registration of conservation covenants, which we believe meet this problem.

## **POTENTIAL USES FOR CONSERVATION COVENANTS**

- 2.17 Consideration of the case for reform requires us to identify practical ways in which conservation covenants could be used. From initial discussions with a range of organisations we have identified a number of situations in which there is a need for conservation covenants; no doubt there will be others.

<sup>7</sup> For a discussion about the background to this rule and arguments for and against it, see the Easements Report, paras 5.11 to 5.62.

<sup>8</sup> Easements Report, para 5.21 and following.

<sup>9</sup> The National Trust, *The Potential of Conservation Covenants – A report by Green Balance to the National Trust* (2008) p 23.

<sup>10</sup> J Lawton, *Making Space for Nature: A Review of England’s Wildlife Sites and Ecological Network* (2010) pp 6 to 7 and 45 to 46.

### **As an alternative to acquisition of land by public or voluntary sector bodies**

A wildlife charity identifies a plot of land as containing the habitat of a native bird species. It makes an offer to the landowner in return for the land being maintained as a habitat; the landowner agrees.

- 2.18 Many public and voluntary sector conservation bodies seek to acquire land that has conservation value and is currently in private ownership. Their aim may be to preserve the land in its present state, to carry out improvement work or to ensure that a part of a site is protected from development. Outright acquisition of the freehold or a long leasehold is sometimes the only workable way of achieving their objectives. However, this can often be an “over-investment”; it may be more cost-effective to negotiate a conservation covenant, allowing the landowner to retain ownership and a degree of use of the land.<sup>11</sup> If ownership is thought of as a “bundle of rights” in land, then it is generally more efficient to transfer to the conservation organisation only those rights that it actually needs for its purposes.<sup>12</sup>

### **As a safeguard where voluntary sector or public bodies dispose of their land**

A heritage group has invested funds in buying and restoring a Victorian house. The organisation wishes to sell the land, but ensure that the work it has undertaken, and the heritage value of the property, is preserved.

- 2.19 A converse situation is where a public or voluntary sector organisation owns land with conservation value but wishes to sell it to a private purchaser. For example, a conservation organisation might wish to acquire a property on a temporary basis for renovation, then return it to private ownership. Similarly, a geological or archaeological organisation may carry out work on a site to examine and secure certain geological or fossil features, before selling the land for further use. This sort of transaction helps the organisation to achieve its conservation aims whilst providing a source of funding for future conservation work.
- 2.20 The difficulty here is in finding a way to ensure that the purchaser and future owners maintain the conservation work already undertaken. The imposition of a conservation covenant as part of the sale would secure the commitment of future landowners, and preserve the conservation value of the site. It therefore protects the investment of public or charitable funds in heritage or environmental resources.

<sup>11</sup> I Hodge, R Castle and J Dwyer, *Covenants as a Conservation Mechanism* (Department of Land Economy, University of Cambridge, Land Economy Monograph 26, 1993) p 13; G Korngold, “Globalizing Conservation Easements: Private Law Approaches for International Environment Protection” [2011] *Wisconsin International Law Journal* 585, 598 to 601.

<sup>12</sup> I Hodge, R Castle and J Dwyer, *Covenants as a Conservation Mechanism* (Department of Land Economy, University of Cambridge, Land Economy Monograph 26, 1993) p 9.

### **As a guarantee for individuals who sell their land**

A landowner has inherited an extensive family estate. Much of the land is forested and used by the public for hiking. The landowner intends to leave the land to her heir, but wants to ensure that the forest is maintained, and members of the public continue to have access.

- 2.21 Individuals who sell their land may want to ensure its conservation value is preserved. But they may be concerned that steps they take to protect the site will not last, particularly if there is a chance that a subsequent owner will want to develop the land. In some cases an owner who wishes to see the land's conservation value preserved may simply refuse to sell. Conservation covenants would enable landowners to negotiate a sale subject to controls on the type of development that can take place, and monitored by a conservation organisation.
- 2.22 Similarly freehold owners of land may want their property to remain within their family after their death, but at the same time ensure that their heirs will protect and maintain its special features. They face a dilemma between leaving the freehold to their heirs or to a conservation organisation; the latter option would deprive the heirs of the land. A compromise would be for the testator to bequeath the freehold to his or her heirs, subject to a conservation covenant held by a third party conservation organisation. For the organisation in question, this arrangement may also be more attractive than taking on the costs and responsibilities associated with freehold ownership.

### **As an alternative to a financial donation**

A large environmental charity is looking for new ideas on how to engage supporters and further its charitable purposes in the context of falling financial contributions.

- 2.23 The ability to create a conservation covenant may also be regarded by landowners as a way to make a contribution to conservation, either during their lifetime or via a bequest. This is particularly true for landowners who are asset rich, but cash poor. Instead of making a financial donation to a conservation charity, they may approach the charity with a view to creating a conservation covenant in relation to their land. The treatment of conservation covenants as a form of charitable giving (with attendant tax relief) is widespread in the USA; although we do not advocate a similar approach here (as we do not intend to stray into the realms of taxation policy), we suggest conservation covenants may well be promoted by conservation organisations as a means of contributing to the cause of conservation.

### **Payment for conservation action**

An agency discovers that a farmer's use of chemical pesticides on crops is damaging an adjacent meadow and river. After negotiations, the farmer agrees to use more environmentally-friendly pesticides in return for a yearly payment from the agency.

- 2.24 Stakeholders have told us that in some cases private landowners may be paid, either on a one-off basis or regularly for a period of time, to undertake conservation activity on their land. For example, a conservation organisation or

funding body might agree to provide financial support to a landowner in exchange for conservation activity. The conservation covenant would provide certainty that both the landowner and future landowners would continue to meet their obligations. Similarly, agricultural landowners might wish to enter into arrangements in respect of farm land, in exchange for funding. This might include limiting the use of pesticides to preserve water and air quality, or preserving a part of the land as woodland rather than for agricultural use.

### **Offsetting schemes**

- 2.25 Offsetting is the practice of compensating for harm to the conservation interest of a site by providing an equivalent gain to the conservation interest of another site.<sup>13</sup> It already has some recognition in European Union environmental law. For example, the Environmental Liability Directive<sup>14</sup> and its implementing legislation in England and Wales<sup>15</sup> require operators whose occupational activities damage water, land or protected habitats or species to provide “primary remediation” by restoring the damaged natural resources or impaired services to their baseline condition. To the extent that this cannot be fully achieved, the operator must undertake “complementary remediation” to provide a similar level of natural resources or services, which can be done on a different site.
- 2.26 Offsetting is also relevant to the protection of biodiversity through the planning system. English and Welsh national planning policies (the two have separate systems) require local planning authorities to follow the “mitigation hierarchy” when determining applications for planning permission for development which is likely to cause significant harm to biodiversity. This means that developers must, in the following order of priority:
- (1) avoid the harm by locating on an alternative site with less harmful impacts;
  - (2) adequately mitigate the harm; or
  - (3) as a last resort, compensate for the harm.<sup>16</sup>
- 2.27 Biodiversity offsetting is one way of providing compensation. If the developer can secure an appropriate offsetting measure on the same or a different site, this will enable the local planning authority to grant planning permission for the development. However, its use is patchy and there is no national framework governing it.<sup>17</sup> In April 2012 the Department for Environment, Food and Rural

<sup>13</sup> C Reid, “The Privatisation of Biodiversity? Possible New Approaches to Nature Conservation Law in the UK” (2011) 23(2) *Journal of Environmental Law* 203, 214 to 215.

<sup>14</sup> Directive on environmental liability with regard to the prevention and remedying of environmental damage 2004/35/EC, Official Journal L 143 of 30.04.2004, p 56.

<sup>15</sup> Environmental Damage (Prevention and Remediation) Regulations 2009, SI 2009 No 153; Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009, SI 2009 No 995.

<sup>16</sup> Department for Communities and Local Government, *National Planning Policy Framework* (March 2012) para 118; Welsh Government, *Planning Policy Wales* (Edition 5, November 2012) para 5.2.8.

<sup>17</sup> Department for Environment, Food and Rural Affairs, *Biodiversity offsetting – Background* (July 2011) para 11.

Affairs (“Defra”) therefore began local two-year pilot schemes to assess the potential of biodiversity offsetting for the English planning system. The pilots aim to test:

- (1) the “metric” for measuring and comparing biodiversity values on different sites;
- (2) the potential costs and benefits of using biodiversity offsetting nationally; and
- (3) whether current law provides suitable mechanisms for implementing biodiversity offsetting schemes.<sup>18</sup>

2.28 Conservation covenants would make it possible to ensure that the offsetting measure is maintained should the offset site change ownership.<sup>19</sup> We discuss at paragraph 2.48 and following below how conservation covenants can provide greater security for those involved in biodiversity offsetting.

### **Further scenarios**

2.29 Our initial research has shown us that there are many situations in which a conservation covenant would be a useful voluntary tool for conservation. Whilst we have highlighted above some of the more obvious examples, we hope that consultees will give us information about other ways in which they could use conservation covenants, within the broad structure outlined in this Chapter and throughout the Consultation Paper. We would also be interested to hear from consultees who have experience of the scenarios outlined above, to seek their feedback on how conservation covenants could help achieve the outcomes discussed.

**2.30 We invite views from consultees on ways in which they could use conservation covenants to conserve land for environment or heritage purposes.**

### **THE CURRENT LAW**

2.31 Landowners and conservation organisations who wish to implement the types of arrangement described above might consider using a range of mechanisms that the current law makes available. We now consider each in turn, focussing on their suitability for achieving those goals. The mechanisms are:

- (1) freehold covenants;
- (2) “workarounds” for the limitations that current law places on covenants;
- (3) planning law (particularly in relation to biodiversity offsetting); and

<sup>18</sup> Department for Environment, Food and Rural Affairs, *Biodiversity offsetting – Background* (July 2011) para 55; Department for Environment, Food and Rural Affairs, *Biodiversity Offsetting Pilots – Information Note for Local Authorities* (March 2012) para 24.

<sup>19</sup> The expectation is that, since the biodiversity loss on the development site is likely to be permanent, the offsetting measure should be designed to last in perpetuity rather than for a fixed term: Department for Environment, Food and Rural Affairs, *Biodiversity offsetting – Background* (July 2011) para 18.

- (4) designation of land.

### **Freehold covenants**

2.32 At its most simple, a covenant is a promise by one person (“the covenantor”) to another (“the covenantee”) to do or not to do something. The covenantor has the burden of performing the promise, and the covenantee has the benefit of being able to enforce it. Where the covenantor is a landowner and the covenant relates to the use of land, the burden of the covenant can run with that land, allowing the covenantee to enforce it against the covenantor’s successors in title, if certain conditions are met.<sup>20</sup> However, there are two major limitations on this:

- (1) only negative obligations can run with the burdened land – positive obligations cannot; and
- (2) the covenantee must own neighbouring land, and those negative obligations must “touch and concern” it by enhancing its usefulness or amenity.

2.33 These two limitations have important practical implications for the use of covenants for conservation purposes. First, the inability of positive obligations to run with the land means that many activities which arise in a conservation context, involving taking active steps to maintain or improve the land’s conservation interest, are ruled out. This makes it impossible to impose obligations such as:

- (1) requiring a landowner to allow public access to the site;
- (2) ensuring that important repair or rebuilding work is undertaken; and
- (3) securing further development of the site in accordance with established conservation practice.

2.34 Second, the need for the covenantee to own neighbouring land effectively excludes most conservation organisations, public bodies and local authorities from the opportunity to use restrictive covenants for conservation purposes. Many of them do not own any land at all, preferring to put their resources into work on other people’s land. Even if they do, it may not be located next to the sites over which covenants are required.

2.35 Third, a lot of conservation work does not “touch and concern” other land. For example, the creation of a pond might not enhance the amenity value of neighbouring sites. As discussed at paragraph 2.12 above, the benefits of conservation tend to accrue to society as a whole rather than specific landowners.

### **Workarounds**

2.36 Positive freehold covenants cannot run with the land; restrictive obligations cannot run if there is no neighbouring land to be benefited. However, there are a

<sup>20</sup> *Tulk v Moxhay* (1848) 2 Ph 774. If the covenant is made between a landlord and tenant and relates to the use of the leased premises, it constitutes a “leasehold covenant” and is governed by different rules: see further paras 2.37 to 2.39 below.

number of indirect ways in which long-lasting positive obligations can be created for conservation purposes. We set out below some of the methods currently used, and identify their difficulties.

### **Leasehold covenants**

- 2.37 Leasehold covenants bind future tenants under the same lease, and may consist of positive or restrictive obligations. For these reasons, they can be used for conservation purposes in the form of a sale and lease back. So, for example, X (a freeholder) who wants to preserve land for conservation, transfers the freehold to Y (a conservation organisation), which immediately grants a long lease back to X.<sup>21</sup> The lease includes positive covenants relating to conservation activity on the land. This is seen, for example, in the Conservation Land Trust system set up by the Woodland Trust.<sup>22</sup>
- 2.38 Equally, a lease and sub-lease may be used:<sup>23</sup> X, the freeholder, grants a long lease to Y conservation organisation, which then grants a slightly shorter sub-lease back to X. Alternatively these arrangements can be used to facilitate a sale: X grants a 299-year lease to Y, whilst selling the freehold to Z. Y then grants a shorter sub-lease to new owner Z. In either scenario the sub-lease sets out covenants in relation to property which will ensure that conservation objectives are achieved.
- 2.39 All of these arrangements are complicated, and costly to set up. In the first scenario, X may not wish to sell or give the freehold and enter into a landlord and tenant relationship purely to achieve a conservation objective on the land. Both scenarios will require significant legal advice and drafting work for the parties involved, with associated costs.<sup>24</sup>

### **Chains of covenants**

- 2.40 A freeholder X may make a covenant with Y conservation organisation, imposing positive duties relating to X's land. As a personal obligation it can be enforced against X; but it will not bind X's successors in title. There are two possible ways of making further personal covenants to ensure that the original obligations continue to be enforceable when X sells the land.

#### **INDEMNITY CHAINS**

- 2.41 When X sells the land he or she will still be bound by the covenant. Y can sue X if the purchaser does not perform the duties in that covenant. However, this risk to X can be minimised if the purchaser agrees to indemnify him or her against

<sup>21</sup> In practice, this may be up to 299 years because of the potential for section 153 of the Law of Property Act 1925 to convert longer leases to freeholds.

<sup>22</sup> *Conservation Land Trust Information Sheet Two: Conservation covenants explained*. <http://frontpage.woodland-trust.org.uk/clt/images/conservationcovenants.pdf>.

<sup>23</sup> *Conservation Land Trust Information Sheet Two: Conservation covenants explained*, <http://frontpage.woodland-trust.org.uk/clt/images/conservationcovenants.pdf>.

<sup>24</sup> There may be other disadvantages in relying on leasehold covenants. For example, the requirement to perform conservation work under a lease (such as a farm business tenancy) may prevent a tenant farmer from being eligible to obtain agri-environmental grants: see Natural England, *Entry Level Stewardship: Environmental Stewardship Handbook* (Fourth Edition 2013) para 5.4.17.

losses incurred under the covenant. The process can be repeated each time the land is sold, creating a chain of indemnity covenants.

- 2.42 However, once the land is sold this arrangement only allows Y to extract damages from X for a breach; a court will not issue an injunction requiring X to perform duties on land which he or she no longer owns. Furthermore, a chain is only as strong as its weakest link. Subsequent purchasers may not want to make an indemnity covenant with the seller. Even if they do enter a covenant, there is a risk that when called upon to pay the indemnity they will be unable or unwilling to do so. The result will be that an innocent intermediary in the chain, who may have sold the land long ago, is forced to bear the loss. And the more times the land changes hands, the greater the chance that the owner who has actually caused the breach will escape liability, leaving X (or another intermediary in the chain) to suffer the loss.<sup>25</sup>

#### COMPULSORILY RENEWED COVENANTS

- 2.43 As the freeholder, X can agree with Y by contract that future purchasers of X's land must enter a covenant directly with Y. This covenant will include the same duties as the original and a further obligation to require the next purchaser to enter an equivalent covenant with Y. For registered land, this can be reinforced by a restriction on the title which prevents disposal of the land without confirmation of compliance.<sup>26</sup>
- 2.44 This sort of arrangement is commonly used, particularly in the agricultural sector. Y can seek an injunction directly against the current landowner; but again a single weak link in the chain will make it ineffective. Purchasers may refuse to enter such a covenant or to require subsequent purchasers to do so when they in turn sell the land. And a failure to register the restriction will also mean that the obligations are only enforceable between the original parties.

#### ***Estate rentcharges coupled with a right of re-entry***

- 2.45 A rentcharge is a requirement that a landowner pay a periodical sum of money to another person. Since 1977 there has been a general prohibition on creating new rentcharges, but one exception is for "estate rentcharges", created for the purpose of enforcing positive obligations.<sup>27</sup>
- 2.46 These may be useful in the conservation context, but they are complicated and cumbersome arrangements which do not provide a direct method of enforcement. Y's only choice is to exercise the right of re-entry (that is, to reclaim the land) in the event of a breach by X or a subsequent owner.<sup>28</sup>
- 2.47 We would be interested to hear from consultees about legal mechanisms they have used to secure conservation covenants. We invite consultees to tell us:**

<sup>25</sup> Easements Report, para 5.24.

<sup>26</sup> Easements Report, para 5.24 n 33.

<sup>27</sup> Rentcharges Act 1977, s 2.

<sup>28</sup> Easements Report, para 5.25.

- (1) whether they have used any of the “workarounds” we describe, and the benefits and disadvantages of those approaches; and
- (2) whether there are other ways in which they have attempted to create binding obligations in respect of land for a conservation purpose (and how successful those measures have been).

### Planning law and biodiversity offsetting

2.48 There are a number of planning law mechanisms which can be used to impose obligations on land (for conservation purposes or otherwise). We noted earlier the likely growth of biodiversity offsetting as a tool for conservation, particularly in light of Defra’s current pilot programme;<sup>29</sup> we consider here the legal tools available to implement biodiversity offsetting schemes.

2.49 Defra’s publications envisage that local authorities will have considerable freedom in how they set up their offsetting schemes; it will be up to the local authority to decide what legal mechanisms are appropriate in each case.<sup>30</sup> The local authority, following national planning guidance and its own policies in the usual way, needs to be satisfied that the proposed measure will provide adequate compensation for biodiversity loss on the development site. Only then will it grant planning permission.<sup>31</sup>

2.50 The success of biodiversity offsetting involves two elements: a means of requiring a developer to contribute to a biodiversity offsetting scheme (“the planning side”), and a way of securing permanent obligations on an offset site (“the offset side”). We are concerned here with the mechanisms available on the offset side. Our initial assessment suggests that the tools currently available are imperfect; conservation covenants would provide a better way to ensure offset obligations are created and adhered to when the offset site changes hands.

2.51 On the planning side, there appear to be three planning law mechanisms which could be used to require developers to engage in biodiversity offsetting.<sup>32</sup>

- (1) Planning conditions imposed by a local authority in determining an application for planning permission.<sup>33</sup> It is Government policy that, if there is a choice between imposing conditions and entering into a planning obligation, the imposition of a suitable condition is preferable.<sup>34</sup>

<sup>29</sup> See generally Department for Environment, Food and Rural Affairs, *Biodiversity offsetting – Background* (July 2011); Department for Environment, Food and Rural Affairs, *Biodiversity Offsetting Pilots – Information Note for Local Authorities* (March 2012).

<sup>30</sup> Department for Environment, Food and Rural Affairs, *Biodiversity offsetting – Information Note for Local Authorities* (March 2012) paras 23 to 43.

<sup>31</sup> Department for Environment, Food and Rural Affairs, *Biodiversity offsetting – Information Note for Local Authorities* (March 2012) paras 21 to 22.

<sup>32</sup> These are the three means envisaged by Defra in its guidance to local authorities on the biodiversity offsetting pilots: Department for Environment, Food and Rural Affairs, *Biodiversity offsetting – Information Note for Local Authorities* (March 2012) para 24.

<sup>33</sup> Town and Country Planning Act 1990, ss 70 and 72.

<sup>34</sup> Department for Environment, Food and Rural Affairs, *Biodiversity offsetting – Information Note for Local Authorities* (March 2012) para 29.

- (2) Planning obligations made by agreement<sup>35</sup> between a developer and a local authority.<sup>36</sup> Such an agreement binds successors in title to the person who entered into the obligation.<sup>37</sup>
  - (3) The Community Infrastructure Levy, which allows local authorities to impose a charge relating to development within its area,<sup>38</sup> as a means to obtain additional investment for infrastructure. If a local authority decides to impose the levy, its proposed rates must be set out in a schedule,<sup>39</sup> and the levy is set by reference to pounds per square metre.<sup>40</sup>
- 2.52 On the offset side, there needs to be a way to ensure the offset provider carries out agreed offset actions (such as creating a woodland habitat), and also that these obligations are adhered to even if ownership of the site changes hands. Offsetting measures should endure in the long-term; in fact, they should usually be designed to last in perpetuity.<sup>41</sup> However, we think it may be difficult to achieve this using the methods currently available. Biodiversity offsetting pilots are currently in the early stages, and we invite views from consultees below on the role that conservation covenants might play in securing long-term offsetting obligations.
- 2.53 The current legal tools most likely to be used to achieve offsetting arrangements are the “workaround” methods discussed above. As we have explained, workarounds are complex, and highly uncertain; a chain of covenants, for example, will fail if subsequent purchasers refuse to enter into the covenant or to require subsequent purchasers to do so. A failure to register the restriction will mean the obligations can only be enforced between the original parties. We think planning obligations under section 106 may also be an option; this would involve the owner of the offset site agreeing a section 106 planning obligation with the relevant local authority. This would bind the land despite changes of ownership. But the obligation would fall to be enforced by a local authority; it may or may not be the local authority which obtained the offset funding from the developer. Conservation covenants would be monitored and enforced by a responsible body which could be a local authority (if it chose to take on this role) but could equally – and would more usually – be a statutory body or conservation charity with the

<sup>35</sup> Or, where the Secretary of State upholds a developer’s appeal against a local planning authority’s decision, by the developer’s unilateral undertaking to the Secretary of State which is enforceable by the local planning authority: V Moore and M Purdue, *A Practical Approach to Planning Law* (12th ed 2012) paras 18.17, 18.18 and 18.22.

<sup>36</sup> Town and Country Planning Act 1990, s 106. Section 106 has been prospectively repealed, and new provisions substituted, by the Planning and Compulsory Purchase Act 2004, but the repeal and substitution are not yet in force.

<sup>37</sup> Town and Country Planning Act 1990, s 106(3)(b).

<sup>38</sup> See Planning Act 2008, s 205 and Community Infrastructure Levy Regulations 2010, SI 2010 No 948 as amended.

<sup>39</sup> See Planning Act 2008, s 211.

<sup>40</sup> Department for Communities and Local Government, *Community Infrastructure Levy: Guidance* (December 2012) para 5.

<sup>41</sup> Department for Environment, Food and Rural Affairs, *Technical Paper: the metric for biodiversity offsetting* (March 2012) para 71.

resources and experience needed for the task.<sup>42</sup>

#### **2.54 We invite views from consultees on:**

- (1) how long-term biodiversity offsetting activity can currently be secured on an offset site;**
- (2) whether existing methods for securing biodiversity offsetting activity are satisfactory;**
- (3) whether conservation covenants would be a useful addition to the methods available to deliver biodiversity offsetting activity; and**
- (4) what advantages conservation covenants might offer relative to existing methods.**

#### **Designation of land**

2.55 In broad terms, designation of land is a publicly-imposed requirement placed on a landowner to behave in a certain way in relation to their land. England and Wales operate a system that allows public bodies to place such designations over land. A designation might be imposed for a range of different purposes: for nature or heritage reasons,<sup>43</sup> to ensure public access, or to allow recreational activities to take place on the land.<sup>44</sup>

2.56 The system of land designation operates on a statutory and non-statutory basis. Statutory designations of land are so named because they have a legislative basis; National Parks are a form of statutory designation.<sup>45</sup> Non-statutory designations, such as local sites or local listings, are not based on legislation. Furthermore, their lack of statutory basis means that there is no need for registration,<sup>46</sup> and no legal obligations are created. We examine in general terms how both methods of designation (which are public law methods) operate, to contrast them against the private and voluntary nature of conservation covenants. To do so we take the particular example of Sites of Special Scientific Interest (“SSSIs”).

#### ***The process of land designation***

2.57 The process taken to subject land to a designation varies depending on what form of designation is applied. The typical model requires a precondition to be fulfilled. In practice organisations like Natural England or English Heritage will select sites that fulfil the relevant precondition; land in Wales is most likely to be selected by either the Countryside Council for Wales or Cadw. In the case of an

<sup>42</sup> See our proposals in respect of “responsible bodies” who would hold conservation covenants at Chapter 4.

<sup>43</sup> For example National Parks and Sites of Special Scientific Interest (“SSSIs”) or listed buildings and scheduled monuments.

<sup>44</sup> For example open spaces or country parks.

<sup>45</sup> See the National Parks and Access to the Countryside Act 1949, as amended by the Environment Act 1995.

<sup>46</sup> Although in most cases the relevant authorities will maintain a central list of the areas that have been designated.

SSSI,<sup>47</sup> Natural England and the Countryside Council for Wales are responsible for designation. A site is selected by reason of any of its flora, fauna, or geological or physiographical features.<sup>48</sup>

- 2.58 Once a site has been selected a confirmation process is completed. This varies depending on the type of designation being applied. For example, in the case of SSSIs a notice is given to the site's owner and occupiers, the local planning authority and the Secretary of State.<sup>49</sup> The notice specifies the features of special interest, operations that are likely to damage those features and Natural England's or the Countryside Council for Wales' views on the site's management, conservation and enhancement.<sup>50</sup> The notice is then followed by a nine-month period in which to consider any objections raised and confirm or withdraw the notice.<sup>51</sup>
- 2.59 After confirmation some designations are registered, but a failure to register will not affect enforceability against subsequent owners, because this is a public designation of land and not an agreement with a specific landowner. This is the case for SSSIs which are registrable as a local land charge;<sup>52</sup> their enforceability is unaffected by a failure to register.<sup>53</sup> However, other forms of designation such as National Parks and Areas of Outstanding Natural Beauty are not recorded on any register of land.

#### ***The effect of land designation***

- 2.60 The effect of land designations is varied; some are more restrictive and onerous. For example, if a property is a listed building it is subject to a stricter regime of controls than a property that is locally listed. However, designations generally use a combination of the following mechanisms to protect the land or building for the desired purpose:
- (1) the planning system – through special statutory tests, stricter policy guidance and/or withdrawal of permitted development rights;
  - (2) additional consent regimes for activities that may damage conservation values;
  - (3) criminal sanctions for interference; and
  - (4) requirements for landowners and/or powers for public authorities to carry out improvement and/or remediation works.
- 2.61 The special features identified on an SSSI are protected through a number of

<sup>47</sup> The provision for SSSIs was created by the National Parks and Access to the Countryside Act 1949. SSSIs are now provided for in the Wildlife and Countryside Act 1981 as amended by the Countryside and Rights of Way Act 2000.

<sup>48</sup> Wildlife and Countryside Act 1981, s 28(1).

<sup>49</sup> Wildlife and Countryside Act 1981, ss 28(1)(a) to 28(1)(c).

<sup>50</sup> Wildlife and Countryside Act 1981, ss 28(3) to 28(4).

<sup>51</sup> Wildlife and Countryside Act 1981, s 28(5).

<sup>52</sup> Wildlife and Countryside Act 1981, s 28(9).

<sup>53</sup> Local Land Charges Act 1975, s 10.

different mechanisms. For example, the planning system is used to restrict certain activities. Public bodies cannot approve an operation that is likely to damage an SSSI's special features without first notifying Natural England or the Countryside Council for Wales and take into account any advice issued.<sup>54</sup> This duty also applies if the public body or statutory undertaker<sup>55</sup> carries out such an operation itself, with the addition that, if Natural England or the Countryside Council for Wales advises against this, there is a duty to:

- (1) carry out the operations in such a way as to give rise to as little damage to the special features as is reasonably practicable in all the circumstances; and
- (2) restore the site to its former condition, so far as reasonably practicable.<sup>56</sup>

2.62 These restrictions are reflected in national planning policy guidance. For England, development is only permissible if its benefits clearly outweigh the impacts that it is likely to have on the site's special features and any broader impacts on the national network of SSSIs. Welsh guidance states that there is a presumption against harmful development.<sup>57</sup> In addition, all public bodies are placed under a further general duty to take reasonable steps, consistent with the proper exercise of their functions, to further the conservation and enhancement of the SSSI.<sup>58</sup>

2.63 Designation as an SSSI also imposes additional consent regimes on the landowner and occupiers. It is mandatory for a landowner or occupier to seek the written consent of Natural England or the Countryside Council for Wales before carrying out or causing or permitting to be carried out an operation that is likely to damage the site's special features.<sup>59</sup> A criminal sanction is also available if a landowner or occupier intentionally or recklessly damages or destroys an SSSI's special features.<sup>60</sup>

2.64 Finally, Natural England and the Countryside Council for Wales enjoy a number of additional powers in respect of SSSIs. In particular, they:

- (1) may make byelaws for the site;<sup>61</sup>
- (2) can formulate and enforce, by right of entry, a management scheme;<sup>62</sup>

<sup>54</sup> Wildlife and Countryside Act 1981, s 28H(1).

<sup>55</sup> "Statutory undertaker" is a private body that is responsible for certain infrastructure services; for example Network Rail.

<sup>56</sup> Wildlife and Countryside Act 1981, ss 28H and 28I.

<sup>57</sup> Department for Communities and Local Government, *National Planning Policy Framework* (March 2012) para 118; Welsh Government, *Planning Policy Wales* (Edition 5, November 2012) para 5.5.8.

<sup>58</sup> Wildlife and Countryside Act 1981, s 28G.

<sup>59</sup> Wildlife and Countryside Act 1981, ss 28E and 28F.

<sup>60</sup> Wildlife and Countryside Act 1981, s 28P(6) and (6A).

<sup>61</sup> Wildlife and Countryside Act 1981, s 28R.

<sup>62</sup> Wildlife and Countryside Act 1981, ss 28J and 28K.

- (3) possess a power of compulsory purchase that can be exercised if a management agreement cannot be reached or has been breached;<sup>63</sup>
- (4) can appoint a person with powers to enter any land (except a dwelling), with 24 hours' notice;<sup>64</sup> and
- (5) may make agreements concerning areas of special scientific interest.<sup>65</sup>

### ***Designation of land – the current picture***

2.65 Despite the vast quantity of land designations that are available, a large proportion of land in England and Wales is not subject to any kind of land designation. Currently National Parks only cover 9.3% of land in England and 19.9% in Wales.<sup>66</sup> A wider picture can be found in the Campaign to Protect Rural England's 2012 report on the potential impact of the draft National Planning Policy Framework for England.<sup>67</sup> Its research found that 33% of England's landmass has one or more "nationally recognised designations".<sup>68</sup>

### ***Designation of land and conservation covenants***

2.66 Conservation covenants will provide landowners, public bodies, and conservation organisations with a system which is distinctly different from land designation. Crucially, a conservation covenant is a private agreement; its creation and the scope of its obligations depend entirely on the agreement of both parties. Land designation, on the other hand, is a public scheme. With this in mind we envisage that conservation covenants could complement the existing system of land designation, by providing a means of privately protecting land which has conservation value, but which does not fall within the system of land designation.

## **THE CASE FOR REFORM**

2.67 The core elements of a conservation covenant are as follows.

- (1) It is a voluntary, private agreement made between a person who has an interest in land, and an eligible holder. We explore in more detail the nature of parties to the agreement in Chapter 4.
- (2) It should be made for the purposes of conservation (for example, the protection of special environmental or historic features of land). The manner of achieving this objective in legislation is examined in Chapter 4.

<sup>63</sup> Wildlife and Countryside Act 1981, s 28N.

<sup>64</sup> Wildlife and Countryside Act 1981, s 51.

<sup>65</sup> Countryside Act 1968, s 15.

<sup>66</sup> *National Parks Facts and Figures*, <http://www.nationalparks.gov.uk/learningabout/whatisanationalpark/factsandfigures.htm>.

<sup>67</sup> Campaign to Protect Rural England, *Protecting the wider countryside: Mapping the potential impact of the National Planning Policy Framework* (February 2012).

<sup>68</sup> "Nationally recognised designation" was defined as covering Ancient Woodland, Areas of Outstanding Natural Beauty, Heritage Coasts, Local Nature Reserves, National Nature Reserves, National Parks, Ramsar Sites, Registered Battlefields, Scheduled Ancient Monuments, SSSI, Special Areas of Conservation and Special Protection Areas: Campaign to Protect Rural England, *Protecting the wider countryside: Mapping the potential impact of the National Planning Policy Framework* (February 2012) p 10.

- (3) It will “run with the land”, and in doing so, will bind successors in title to the holder of the original interest.
  - (4) Unlike a traditional covenant, there is no need for benefited land; that is, the covenant will exist “in gross”.
  - (5) The obligations set out in the covenant may be positive or restrictive in nature.
- 2.68 There is an appetite for preservation of our natural environment and historical and cultural heritage, shared by the public and the Government alike. In addition, conservation covenants are used successfully in a number of other jurisdictions; these arrangements are set out in Chapter 3.
- 2.69 Several different legal mechanisms are already used in England and Wales to achieve conservation aims on private land. These include the undesirable options of a landowner giving up the freehold and having it leased back, or entering into lease/sub-lease arrangements. The arrangements we outlined are legally complex and potentially costly, and their ability to create long-lasting obligations is highly uncertain. We also considered biodiversity offsetting schemes; conservation covenants would provide a tool for the creation of secure and long-lasting offsetting agreements.
- 2.70 We are aware of the need to balance the protection of our physical and cultural heritage with the demand for responsible development and sustainable resource management. In our view, the system of conservation covenants we propose throughout this Consultation Paper corresponds with that aim. It may in many cases enable development, in particular by its use in biodiversity offsetting. The cause of conservation is enhanced by enabling reliable and long-lasting offsetting measures.
- 2.71 The introduction of conservation covenants need not result in unjustified restrictions on development. Finding the right balance can be achieved by creating a statutory framework which builds upon lessons learned from the use of conservation covenants in other jurisdictions. To that end, later Chapters of this Consultation Paper will consider eligible holders, permitted objectives, modification/discharge and oversight of conservation covenants. Our provisional proposals will outline the key elements of a system which meets the needs of modern conservation whilst acknowledging the importance of responsible development and sustainable resource management.

#### **General provisional proposal**

- 2.72 **We provisionally propose the introduction of conservation covenants into the law of England and Wales. This scheme of conservation covenants should include:**
- (1) no requirement for there to be benefited land;**
  - (2) the ability to impose positive as well as negative obligations; and**
  - (3) provision for those obligations to bind successors in title.**

**Do consultees agree?**

# CHAPTER 3

## COMPARATIVE LAW

### INTRODUCTION

- 3.1 In this Chapter we consider how conservation covenants are created and used outside England and Wales. Our comparative research was undertaken with two particular aims: to understand how conservation covenants have been introduced successfully elsewhere, and to illustrate the responses that those jurisdictions have taken to the policy issues we face. We focus on:
- (1) the purposes for which a conservation covenant can be made;
  - (2) who can hold the benefit;
  - (3) how the conservation covenant can be modified or discharged; and
  - (4) how conservation covenants are used in practice.
- 3.2 This Chapter examines arrangements for conservation covenants in Scotland, the USA, Canada, Australia and New Zealand.<sup>1</sup> In three of these, the federal system of Government means that the relevant legislation is made at a sub-national level and there are a large number of separate jurisdictions to consider. Most have their roots in English common law. This shared heritage is particularly relevant in the context of land law, the basic concepts and principles of which do not differ greatly between common law systems. Meaningful comparisons can therefore be made between those jurisdictions and the English land law framework in which conservation covenants would be introduced. However, Scotland, Quebec and some American states have mixed civil and common law origins, with some Roman influence on their land law.
- 3.3 The terminology that is used in other jurisdictions varies widely.<sup>2</sup> These differences are not simply cosmetic; they can reflect the fact that the relevant legal mechanisms are based on something other than a freehold covenant. However, in general, we use the term “conservation covenant” throughout this Consultation Paper to mean any legal interest that is made specifically for conservation purposes and is capable of binding land without the need to benefit other land.
- 3.4 Comparative study has provided us with extremely useful insights into how a system of conservation covenants could work in England and Wales. Some limitations should be acknowledged; there are differences between legal systems, and the social, economic and geographical contexts in which those systems operate. For example, the scope and intensity of the state’s involvement in conservation may differ from that of England and Wales. In the USA most states’ development and land use planning systems are not as comprehensive or

<sup>1</sup> Northern Ireland and the Republic of Ireland, which we have also looked at, do not have provision for conservation covenants.

<sup>2</sup> Examples include “conservation burden” (Scotland), “conservation easement” (USA and Canada), “conservation servitude” (USA and Canada), “conservation agreement” (USA, Canada and Australia) and “heritage agreement” (Canada and Australia).

restrictive as here, and public designations with regulatory force (such as the listing of heritage buildings) are less commonly used.<sup>3</sup> The role of private conservation activity may need to be cast differently in light of the state and its relationship with landowners in England and Wales.

- 3.5 Economic incentives play a role in some jurisdictions' arrangements for agreeing conservation covenants. The USA, Canada, Australia and New Zealand offer landowners financial benefits, in the form of tax breaks, public subsidies and council tax relief, in order to encourage the donation of conservation covenants to eligible bodies. In England and Wales there is no direct equivalent of these schemes;<sup>4</sup> whilst this Consultation Paper notes other jurisdictions' use of financial incentives, its purpose is not to consider the possibility of these for England and Wales.
- 3.6 Geographical and historical factors should also be borne in mind. Virtually every other jurisdiction considered here has a lower population density than England and Wales.<sup>5</sup> There is a relative abundance of historic buildings here (compared with North America, Australia and New Zealand) which may also affect the nature of conservation activity; and variances in climate and geography of different regions can bear on the types of conservation protection needed. Our consideration of other jurisdictions takes these differences into account; but overall, the success of schemes elsewhere provides a good starting point to consider how conservation covenants could work in England and Wales.

## **SCOTLAND**

- 3.7 Scotland provides an example of the introduction of conservation covenants close to home. The Scottish legal system is a hybrid of common and civil law.

### **Historical background**

- 3.8 Until 2000, the feudal nature of Scottish land law enabled the "superior" owner of a piece of land to enforce obligations, known as real burdens, against the "vassal" owner in possession of the land. The benefited estate was the superior owner's interest in the land (and so of course there was no question of benefiting any other physical plot of land).<sup>6</sup>

<sup>3</sup> See M Haklay and C Harrison, *Public Participation GIS in the UK and the USA: towards a cross cultural analysis* (2002) pp 3 to 6, at <http://discovery.ucl.ac.uk/16785/1/16785.pdf>; Australian Productivity Commission, *Conservation of Australia's Historic Heritage Places* (2006) p 391.

<sup>4</sup> However we note that in the UK, tax law guidance provides for an exemption from inheritance tax for land which contains buildings of outstanding historical or architectural value, natural beauty or views, or is of scientific interest. Advice is sought from key organisations like English Heritage and Natural England as to whether the property is appropriate for the exemption. See <http://www.hmrc.gov.uk/heritage/index.htm>.

<sup>5</sup> In 2011, England had a population density of 407 people per square kilometre; in Wales the figure was 148: Office for National Statistics, *Statistical bulletin: 2011 Census – Population and Household Estimates for England and Wales, March 2011* (July 2012) p 23. The USA, in comparison, has 87.4 people per square mile (33.7 per square kilometre): US Department of Commerce, *USA Quickfacts*, <http://quickfacts.census.gov/qfd/states/00000.html>.

<sup>6</sup> Report on the Abolition of the Feudal System (1999) Scot Law Com No 168, paras 4.9 to 4.12.

- 3.9 The Abolition of Feudal Tenure etc (Scotland) Act 2000, which was based on recommendations of the Scottish Law Commission, swept away the old feudal structure and with it the feudal burdens. However, savings were made for those feudal real burdens that existed for conservation purposes.<sup>7</sup> Following publication of the Scottish Law Commission's Discussion Paper,<sup>8</sup> heritage bodies such as the National Trust for Scotland, who were the superior owners of these feudal real burdens, argued that these mechanisms still served a useful purpose.<sup>9</sup> The 2000 Act therefore converted them into "conservation burdens".
- 3.10 The system of conservation burdens was extended by the enactment of the Title Conditions (Scotland) Act 2003, another result of Scottish Law Commission work.<sup>10</sup> This allowed the creation of new conservation burdens for the public benefit, and made provision for the maintenance, alteration and removal of conservation burdens in certain circumstances.

### **The legislative scheme**

- 3.11 Conservation burdens can be made for the purpose of preserving or protecting, for the benefit of the public:
- (1) the architectural or historical characteristics of any land; or
  - (2) any other special characteristics of any land (including a special characteristic derived from the flora, fauna or general appearance of the land).<sup>11</sup>
- 3.12 An important feature of the Scottish system is its balancing of these relatively general conservation purposes with considerable restriction in relation to potential benefit holders. To that end, the scheme provides that the holder of a conservation burden must be the Scottish Ministers or a conservation body prescribed by them.<sup>12</sup> A conservation body is an entity whose objects or functions are to preserve or protect for the benefit of the public the characteristics set out above. To date, all Scottish local authorities and some 26 nature and heritage conservation groups have been prescribed under this power.<sup>13</sup>
- 3.13 In this way, regulation of conservation burdens occurs implicitly, through the expectation that Ministers and conservation bodies will behave responsibly, and

<sup>7</sup> Abolition of Feudal Tenure (Scotland) Act 2000, ss 26 to 32. For the relevant recommendations, see Report on the Abolition of the Feudal System (1999) Scot Law Com No 168, paras 4.52 to 4.61.

<sup>8</sup> Property Law: Abolition of the Feudal System (1991) Scottish Law Commission Discussion Paper No 93.

<sup>9</sup> Report on the Abolition of the Feudal System (1999) Scot Law Com No 168, paras 4.52 to 4.53.

<sup>10</sup> Report on Real Burdens (2000) Scot Law Com No 181, paras 9.10 to 9.25.

<sup>11</sup> Title Conditions (Scotland) Act 2003, s 38(1).

<sup>12</sup> Title Conditions (Scotland) Act 2003, s 38(1) and (4).

<sup>13</sup> Title Conditions (Scotland) Act 2003 (Conservation Bodies) Order 2003, SSI 2003 No 453 (as amended).

in full view of the public.<sup>14</sup> This focus on public visibility is also evident in the requirement that conservation burdens (along with other real burdens) must be registered.<sup>15</sup>

3.14 The Lands Tribunal for Scotland has jurisdiction to modify or discharge any real burden, including a conservation burden (though the parties may agree to exclude this jurisdiction for the first five years of the covenant's life).<sup>16</sup> The sole ground is that the modification or discharge is reasonable, having regard to the following factors:

- (1) any change in circumstances since the conservation burden was created (including, without prejudice to that generality, any change in the character of the burdened property or of the neighbourhood of the property);
- (2) the extent to which the conservation burden confers benefit on the public;
- (3) the extent to which the conservation burden impedes enjoyment of the burdened property;
- (4) if the conservation burden is an obligation to do something, how practicable or costly it is to comply with;
- (5) the length of time which has elapsed since the conservation burden was created;
- (6) the purpose of the conservation burden;
- (7) whether in relation to the burdened property there is the consent, or deemed consent, of a planning authority, or the consent of some other regulatory authority, for a use which the conservation burden prevents;
- (8) whether the owner of the burdened property is willing to pay compensation;
- (9) if the application is to renew or vary a conservation burden affected by a proposal to register a conveyance for which notice has been given under section 107(4) of the 2003 Act, the purpose for which the land is being acquired by the person proposing to register the conveyance; and
- (10) any other factor which the Lands Tribunal for Scotland considers to be material.<sup>17</sup>

### **Use of conservation burdens in practice**

3.15 Relatively little evidence is available about how widely conservation burdens have been used, though we note that since 2004 Historic Scotland (the Scottish

<sup>14</sup> C Reid, "Conservation Covenants" [2013] *The Conveyancer and Property Lawyer* – forthcoming publication.

<sup>15</sup> Title Conditions (Scotland) Act 2003, s 4.

<sup>16</sup> Title Conditions (Scotland) Act 2003, ss 90 to 92.

<sup>17</sup> Title Conditions (Scotland) Act 2003, ss 98 and 100.

Government executive agency for safeguarding the historic environment) has held approximately 310.

3.16 We noted above that the change from feudal land law allowed conservation bodies and the Scottish Ministers to register as conservation burdens any existing feudal real burdens that were for conservation purposes.<sup>18</sup> In addition, any other holder of a feudal real burden for conservation purposes could register it as a conservation burden, and nominate either the Scottish Ministers or a conservation body as the holder.<sup>19</sup> A total of 263 conservation burdens were registered by the Scottish Ministers or conservation bodies, and a further eight were registered by the nomination of Scottish Ministers or a conservation body.<sup>20</sup>

**3.17 We invite feedback from consultees who have used the Scottish system, on:**

- (1) the types of land protected by conservation burdens;**
- (2) the number of new conservation burdens created; and**
- (3) their experience of the Scottish system of conservation burdens generally.**

## **USA**

3.18 The USA has a federal system of Government under which competence to enact enabling legislation for conservation covenants rests at state level. The first such statute was passed in the 1950s, giving legislative recognition to a practice that had already existed for decades but was of dubious legality because of common law limitations similar to those that still exist in English law.<sup>21</sup> Every state except North Dakota has now adopted legislation for conservation covenants.<sup>22</sup>

### **The Uniform Conservation Easement Act 1981 (“the UCEA”) and state laws based on it**

3.19 Twenty-eight states base their statutes on the UCEA, a piece of model legislation drafted by the Uniform Law Commission and intended simply to remove common law restrictions on the use of easements for conservation purposes.<sup>23</sup> On many issues it is silent or refers to the rules governing easements generally. Most adopting states have therefore modified or embellished the UCEA to suit their own policy objectives; only four have made materially exact copies.

3.20 The UCEA provides for 14 distinct conservation objectives covering a very wide

<sup>18</sup> Under the Abolition of Feudal Tenure (Scotland) Act 2000, s 27.

<sup>19</sup> Under the Abolition of Feudal Tenure (Scotland) Act 2000, s 27A.

<sup>20</sup> These figures have been provided by Registers of Scotland.

<sup>21</sup> Z Bray, “Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements” (2010) 34(1) *Harvard Environmental Law Review* 119, 127.

<sup>22</sup> Land Trust Alliance, *A Guided Tour of the Conservation Easement Enabling Statutes* (2010) pp 7 to 8.

<sup>23</sup> For an explanation of the formal nature of conservation covenants see National Conference of Commissioners on Uniform State Laws, *Prefatory Note to the Uniform Conservation Easement Act* (1981, amended 2007) pp 1 to 2.

range of activities. No adopting state has removed items from this list, but some have added to it.<sup>24</sup> The list contains five groups:

- (1) protecting the natural, scenic, or open-space values of land;
- (2) assuring the land's availability for agricultural, forest, recreational or open-space use;
- (3) protecting natural resources;
- (4) maintaining or enhancing air or water quality; and
- (5) preserving the historical, architectural, archaeological, or cultural aspects of land.<sup>25</sup>

3.21 While the UCEA provides for perpetuity as the default duration,<sup>26</sup> only one adopting state makes this mandatory. Two others prohibit fixed terms under 25 years.<sup>27</sup>

3.22 Eligible holders are defined as all Government bodies, plus any charitable corporation, association or trust the purposes or powers of which include one or more of the 14 objectives set out above.<sup>28</sup> There is no need for holders to be approved by a public authority. Adopting states have adhered closely to this policy, though in Oregon Governmental approval is required for the creation of individual conservation covenants.<sup>29</sup> The UCEA also allows the parties to nominate a third-party enforcer.<sup>30</sup>

3.23 Modification and discharge of conservation covenants is a controversial issue in the USA. The UCEA states that modification and discharge can be effected "in the same manner as other easements".<sup>31</sup> This brings into play common law doctrines, the content of which varies between states but which can be summarised as:

- (1) abandonment by the holder (where beneficiaries have given up their right to enforce a covenant);
- (2) merger (acquisition of the burdened land by the holder);
- (3) estoppel (a detrimental change of position by the landowner in reliance on the holder's communicated intention not to enforce the covenant);

<sup>24</sup> Land Trust Alliance, *A Guided Tour of the Conservation Easement Enabling Statutes* (2010) pp 8 to 9 and Appendix A.

<sup>25</sup> UCEA §1(1).

<sup>26</sup> UCEA §2(c).

<sup>27</sup> Land Trust Alliance, *A Guided Tour of the Conservation Easement Enabling Statutes* (2010) p 11.

<sup>28</sup> UCEA §1(2).

<sup>29</sup> Land Trust Alliance, *A Guided Tour of the Conservation Easement Enabling Statutes* (2010) p 12.

<sup>30</sup> UCEA §§ 1(3) and 4(2).

<sup>31</sup> UCEA § 2(a).

- (4) prescription (a breach which is maintained for a certain period without the holder's complaint); and
- (5) changed conditions leading to impracticability of the original purpose (allowing modification) or impossibility of accomplishing any conservation purpose (allowing discharge).<sup>32</sup>

3.24 However, the UCEA also provides that nothing in it limits any court power to vary or terminate a conservation covenant "in accordance with the principles of law and equity". Given that conservation generally constitutes a charitable purpose in American law, this provision suggests that each conservation covenant should be viewed as a charitable trust which, like any other such trust, is subject to rules preventing deviation from its original purpose. If that is correct,<sup>33</sup> two key consequences follow:

- (1) the common law doctrines set out at paragraph 3.23 above are overridden to the extent that they allow modification or discharge in a way that conflicts with charitable trust law; and
- (2) the parties are restricted in their freedom to agree a modification or discharge. In most states, charitable trust law requires them to seek a court order under *cy-près* principles,<sup>34</sup> and the Attorney General has standing to intervene against an unlawful agreement.<sup>35</sup>

3.25 Most adopting states replicate the UCEA's provisions, leaving this issue open, but some are more specific. In three UCEA states the court is required to take into account public policy or public interest considerations when asked to vary or terminate a conservation covenant.<sup>36</sup> However, if conservation covenants are to be treated as charitable trusts, these state rules do not appear to add much to the protection that such status affords.

3.26 The example of Maine warrants consideration here. In 2007 the existing UCEA-based statute was replaced by a Reform Law,<sup>37</sup> intended to clarify the overall conservation covenants framework for the future.<sup>38</sup> Under the Reform Law, parties must seek a court order for any discharge, and any modification that would materially detract from the protected conservation values; the judgement as to what is a material detraction is left to the holder. Where the matter is referred to the court, it must apply a public interest test and award compensation

<sup>32</sup> American Law Institute, *Restatement of the Law (Third): Property (Servitudes)* (2000) §§ 7.4 to 7.11.

<sup>33</sup> This remains a subject of debate; for a summary of the issues, see Land Trust Alliance, *A Guided Tour of the Conservation Easement Enabling Statutes* (2010) pp 17 to 20.

<sup>34</sup> Where a charitable gift might fail because its purposes cannot be achieved, the law may substitute other purposes "*cy-près*" (as close as possible to the testator's original mode).

<sup>35</sup> See further N McLaughlin and B Machlis, "Amending and Terminating Perpetual Conservation Easements" (2009) *Jul/Aug Probate & Property* 52, 52 to 53.

<sup>36</sup> Arizona, Pennsylvania and West Virginia: see *Ariz. Rev. Stat. Ann.* § 33-273; *32 Pa. Stat. Ann.* § 5055; *W. Va. Code* § 20-12-5.

<sup>37</sup> *Me. Rev. Stat. Ann. Tit. 33, §§ 476-479-C* (Supp. 2010).

<sup>38</sup> J Pidot, "Conservation Easement Reform: As Maine Goes Should the Nation Follow?" (2011) *74(4) Law and Contemporary Problems* 1, 7.

to the holder.<sup>39</sup> The state appears to be closely involved in these processes; advice may be sought from the Attorney General's office on the material detraction issue, and the Attorney General must be joined as a party to all applications to modify or discharge.<sup>40</sup>

### **Other state legislation**

- 3.27 The 21 state enabling laws that are not based on the UCEA were mostly enacted before it was drafted. Unsurprisingly, they exhibit greater variation than the UCEA-based state laws. Most have a wide-ranging list of permissible conservation objectives similar to that in the UCEA. A few are briefer and more general, for example "open space purposes" in Washington.<sup>41</sup> Twelve of them appear to permit only negative obligations – they have no express provision for positive obligations. Perpetuity is usually the default duration in the absence of an express choice by the parties, but two states make this mandatory and another stipulates a 15-year minimum term.
- 3.28 All non-UCEA states allow both Government bodies and private organisations to hold conservation covenants, subject to restrictions. Private organisations must usually be non-profit bodies with conservation as one of their purposes (or in some cases their primary purpose), though three states also allow for-profit organisations if they have conservation objectives.<sup>42</sup>
- 3.29 Most statutes leave the rules on modification and discharge to be determined by the general law, either through legislative silence or, as in the UCEA, reference to the general rules governing the interest in land on which the state legislation is based. In these states, the same issues described at paragraphs 3.23 to 3.25 above arise in relation to common law doctrines and charitable trust principles.
- 3.30 However, five states set their own express limits on the parties' freedom to modify or discharge a conservation covenant by agreement. Authorisation must be sought from a court or Government body, which is usually required to apply a form of public interest or necessity test.<sup>43</sup> In Massachusetts, for example, amendment or discharge must be sanctioned by the state Government, and in cases where the covenant is privately held, by the relevant local Government as well.<sup>44</sup> These requirements apply equally to the creation of new conservation

<sup>39</sup> Land Trust Alliance, *A Guided Tour of the Conservation Easement Enabling Statutes* (2010) pp 20 to 26.

<sup>40</sup> J Pidot, "Conservation Easement Reform: As Maine Goes Should the Nation Follow?" (2011) 74(4) *Law and Contemporary Problems* 1, 17.

<sup>41</sup> For a general discussion of non-UCEA statutes, see Land Trust Alliance, *A Guided Tour of the Conservation Easement Enabling Statutes* (2010) pp 8 to 11.

<sup>42</sup> North Carolina, New Hampshire and Rhode Island: see N.C. Gen. Stat. § 121-35; N.H. Rev. Stat. Ann. § 477-46; R.I. Gen. Laws § 34-39-3.

<sup>43</sup> Land Trust Alliance, *A Guided Tour of the Conservation Easement Enabling Statutes* (2010) pp 21 to 28.

<sup>44</sup> Z Bray, "Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements" (2010) 34(1) *Harvard Environmental Law Review* 119, 155 and 169 to 170.

covenants,<sup>45</sup> making this one of the most formalised state conservation covenant schemes.

### **Use of conservation covenants in practice**

- 3.31 Of all the jurisdictions discussed in this Chapter, the USA has the oldest and most well-established system of conservation covenants. Nationwide there are over 1,700 “land trusts” – voluntary groups for the protection of scenic or environmentally important land.<sup>46</sup> Local and state-level land trusts hold conservation covenants over 8.8 million acres of land.<sup>47</sup> The Nature Conservancy, a global conservation organisation based in the USA, protects a further 3.2 million acres through conservation covenants.<sup>48</sup> Public bodies also make extensive use of these tools. In New York state, for example, it is estimated that conservation covenants held by the state account for more than 80% of the total area covered by conservation covenants.<sup>49</sup> Similarly, in Utah the state as holder accounts for nearly 70% of all land covered by conservation covenants.<sup>50</sup>
- 3.32 The proliferation of conservation covenants in recent years has led to calls for greater availability of information, as well as a more centralised approach to their recording. As a result, in 2009 the US Endowment for Forestry and Communities worked with a group of conservation bodies to formulate a national online register, known as the National Conservation Easements Database. Information has been gathered from land trusts as well as public agencies, with the aim of “creat[ing] a single, up-to-date, sustainable nationwide system for managing and accessing data about conservation easements”.<sup>51</sup>
- 3.33 A large amount of data has been registered since the database began, and the site allows users to search by type of holder as well as by state. Current estimates give the reader a sense of the scale of conservation covenants in the USA; the site estimates that there are some 95,448 conservation covenants in place, covering 18,072,520 acres.<sup>52</sup>

<sup>45</sup> Z Bray, “Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements” (2010) 34(1) *Harvard Environmental Law Review* 119, 155 and 169 to 170.

<sup>46</sup> See <http://www.landtrustalliance.org/land-trusts/>.

<sup>47</sup> Land Trust Alliance, *2010 National Land Trust Census Report* (2011) p 5.

<sup>48</sup> The Nature Conservancy, *Fast Facts About Conservation Easements* (2011), at <http://www.nature.org/aboutus/privatelandsconservation/conservationeasements/fast-facts-about-conservation-easements.xml>. For comparison, the area of Wales is 5.1 million acres and the area of the USA is 2.3 billion acres.

<sup>49</sup> *National Conservation Easement Database*, [http://nced.conservationregistry.org/reports/easements?report\\_state=New%20York&report\\_type=All](http://nced.conservationregistry.org/reports/easements?report_state=New%20York&report_type=All).

<sup>50</sup> *National Conservation Easement Database* [http://nced.conservationregistry.org/reports/easements?report\\_state=Utah&report\\_type=All](http://nced.conservationregistry.org/reports/easements?report_state=Utah&report_type=All).

<sup>51</sup> *National Conservation Easement Database General Information Flyer*, [http://nced.conservationregistry.org/pdf/NCED\\_Flyer\\_Public\\_AA\\_9\\_23\\_10.pdf](http://nced.conservationregistry.org/pdf/NCED_Flyer_Public_AA_9_23_10.pdf).

<sup>52</sup> *National Conservation Easement Database*, <http://nced.conservationregistry.org/reports/easements> and <http://nced.conservationregistry.org/>.

- 3.34 It is worth noting that the widespread popularity of conservation covenants in the USA may be linked to the generous financial benefits available. Federal and state tax incentives have helped both to encourage the donation of conservation covenants by private landowners and to discourage their abandonment once made. For example, donors can claim income tax relief subject to strictly defined limits, including that the covenant can only be discharged in accordance with cy-près principles and that when it is donated the possibility of it being defeated is negligible.<sup>53</sup> In the 2009 tax year, donations of environmental conservation covenants that were eligible for tax relief totalled \$973 million. Donated “façade easements” (a type of heritage conservation covenant) were worth \$45 million.<sup>54</sup>

## CANADA

- 3.35 Like the USA, Canada is a federal country, but it is divided into provinces and territories (we use “province” to cover both). Eleven of the 13 provinces have, since the 1970s, enacted enabling legislation for conservation covenants. Some have more than one such statute, making for 17 Acts in total. Most have also removed a number of common law restrictions on easements, covenants and servitudes generally, but these reforms were not enacted specifically for conservation purposes.<sup>55</sup>

### Provincial legislation

- 3.36 The purposes for which a conservation covenant can be made are framed with varying degrees of specificity. Only one statute, for heritage conservation covenants in Newfoundland and Labrador, leaves these purposes completely undefined.<sup>56</sup> The rest are a mixture of general statements of purpose, for example “the preservation or restoration of any land or building”,<sup>57</sup> and more detailed lists enumerating particular aims.<sup>58</sup> All but two of the statutes enable positive obligations to run with the burdened land.
- 3.37 All 17 enabling statutes permit the provincial Government to hold conservation covenants; most allow local and federal Government bodies as well. Private organisations are recognised in 14 statutes, most of which permit any non-profit body with conservation as its primary purpose to be a holder. A minority require prior approval by a public authority.<sup>59</sup> Ontario opens up this right to any charity regardless of its objectives.<sup>60</sup>
- 3.38 Modification and discharge by agreement is generally unrestricted, save for two statutes that require the provincial Government’s approval if it would be contrary

<sup>53</sup> Inland Revenue Code, § 170(h); Code of Federal Regulations, Title 26, §1.170A-14.

<sup>54</sup> P Liddell and J Wilson, “Individual Noncash Contributions, 2009” (2012) (Spring) *Statistics of Income Bulletin* 62, 63, at <http://www.irs.gov/pub/irs-soi/12insprbulnoncash.pdf>.

<sup>55</sup> See North American Wetlands Conservation Council (Canada), *Conservation Easements, Covenants and Servitudes in Canada: A Legal Review* (2004) part 2.

<sup>56</sup> Historic Resources Act, RSNL 1990 c. H-4 (Newfoundland and Labrador), s 30.

<sup>57</sup> Historical Resources Act, RSA 2000 c. H-9 (Alberta), s 29.

<sup>58</sup> For example Conservation Easements Act, RSNB 1998 c. C-16.3 (New Brunswick), s 3.

<sup>59</sup> Compare, for example, Land Stewardship Act, SA 2009 C.A-26.8 (Alberta), s 28(c); Historic Resources Act, RSNL 1990 c. H-4 (Newfoundland and Labrador), s 30(1).

<sup>60</sup> Conservation Land Act, RSO 1990 c. C.28 (Ontario), s 3(1).

to the covenant's purposes.<sup>61</sup> Seven statutes establish a judicial or administrative process for modification and discharge. The grounds for court orders are generally narrow, being limited to disappearance of the conservation interest or the holder. Governmental powers, on the other hand, tend to be based on a broad public interest test.<sup>62</sup>

### **Use of conservation covenants in practice**

- 3.39 There is no central record of conservation covenants, but a recent survey of Canadian charities and public bodies that held environmental conservation covenants estimated that between 351,000 and 383,000 acres of land were covered.<sup>63</sup> This represents a small fraction of land coverage compared with, for example, the USA, especially considering Canada's larger area and lower population density. Forty-five percent of covenants in the survey had been donated by landowners; such gifts are encouraged by the federal Government's "Ecological Gifts Programme", which has since 1995 offered tax incentives to donors.<sup>64</sup>
- 3.40 Heritage conservation covenants appear to be less widely used. One exception is Ontario, where the Ontario Heritage Trust, an arm of the provincial Government, holds over 200 heritage conservation covenants with private owners. Some municipal authorities in the province also accept covenants.<sup>65</sup>

### **AUSTRALIA**

- 3.41 Australia has a federal constitution and consists of six states and two territories (we use "state" to cover both). All states have, since 1970, enacted enabling legislation for conservation covenants – more than one in most cases. In addition, federal legislation enables the federal Government to accept conservation covenants from private landowners.

### **State and federal legislation**

- 3.42 Every state has separate Acts for heritage and environmental conservation covenants. The former are quite restrictive in their scope – six of the eight states require there to be a pre-existing public designation of the land as a heritage site.<sup>66</sup> This is not the case for environmental conservation covenants, the purposes of which tend to be set out in legislation as a general list of acceptable aims. For example, they can be made in the Northern Territory "for the protection and conservation of wildlife and natural features of land".<sup>67</sup> Federal legislation, which covers both types of conservation, requires an anticipated net benefit to

<sup>61</sup> Conservation Land Act, RSO 1990 c. C.28 (Ontario), s 3(4.2) and (4.3); Natural Heritage Conservation Act, RSQ c. C-61.01 (Quebec), s 61.

<sup>62</sup> Compare, for example, Conservation Agreements Act, CCSM c. C173 (Manitoba), s 9; Historical Resources Act, RSA 2000 c. H-9 (Alberta), s 29(5).

<sup>63</sup> Agriculture and Agri-Food Canada, *Summary of Canadian experience with conservation easements and their potential application to agri-environmental policy* (2011).

<sup>64</sup> See <http://www.ec.gc.ca/pde-egp/default.asp?lang=En&n=FCD2A728-1>.

<sup>65</sup> See <http://www.heritagetrust.on.ca/Conservation/Conservation-easements.aspx>.

<sup>66</sup> For example, Heritage Act 1977 (New South Wales), s 39.

<sup>67</sup> Territory Parks and Wildlife Act 1974 (Northern Territory), s 74(1).

heritage values, biodiversity or other environmental aims.<sup>68</sup>

- 3.43 Australia is different from Scotland, the USA and Canada, in that only public authorities can hold the benefit of conservation covenants. These authorities tend to be the relevant state Minister and certain other approved Governmental bodies.<sup>69</sup> In some states this power is devolved to an independent statutory body, for example the state branch of the National Trust of Australia.<sup>70</sup>
- 3.44 In Tasmania, the parties to an environmental conservation covenant over a private nature reserve cannot modify or discharge it by agreement if this would threaten the land's natural or cultural values.<sup>71</sup> Elsewhere, their freedom is unrestricted – and in some cases the holder can do this unilaterally.<sup>72</sup>
- 3.45 Six states give the court jurisdiction to modify or terminate freehold covenants on grounds that are either identical or similar to those in section 84(1) of the Law of Property Act 1925 in England and Wales.<sup>73</sup> However, none of the enabling legislation for conservation covenants refers to the applicability of these powers. The Victorian Law Reform Commission takes the view that all types of covenant, including statutory covenants, are subject to these powers; but it notes that they are poorly-suited to the special purposes for which such covenants are made.<sup>74</sup> Moreover, the court powers in most states only apply to restrictive obligations.

#### **Use of conservation covenants in practice**

- 3.46 Conservation covenants appear to be widely used in Australia for protecting the environment. Only 10% of the country is covered by public law environmental designations; this leaves a significant role for private agreements.<sup>75</sup> There is no central source of information on the use of conservation covenants, but a notable example is the “heritage agreement” scheme in South Australia, which has been used since 1980 to protect native vegetation. The state Government has made over 1,400 such agreements covering 1.48 million acres of land.<sup>76</sup> The take-up of environmental conservation covenants has been assisted by a federal tax incentive scheme that is similar to the Canadian Government's programme.<sup>77</sup>

<sup>68</sup> Environment Protection and Biodiversity Conservation Act 1999 (Australia), s 305.

<sup>69</sup> For example Historic Cultural Heritage Act 1995 (Tasmania), s 47(1).

<sup>70</sup> Victorian Conservation Trust Act 1972 (Victoria), s 3A(1).

<sup>71</sup> Nature Conservation Act 2002 (Tasmania), s 35(3).

<sup>72</sup> For example Nature Conservation Act 1992 (Queensland), s 47(2)(a)(i).

<sup>73</sup> Property Law Act 1974 (Queensland), s 181; Law of Property Act 2000 (Northern Territory), s 177; Property Law Act 1958 (Victoria), s 84(1); Conveyancing and Law of Property Act 1884 (Tasmania), s 84C; Conveyancing Act 1919 (New South Wales), s 89; Transfer of Land Act 1893 (Western Australia), s 129C. See also our discussion of the s 84 power in Chapter 7.

<sup>74</sup> Victorian Law Reform Commission, *Easements and Covenants: Final Report* (2011) paras 6.19 to 6.31.

<sup>75</sup> P Figgis, *Conservation on Private Lands: the Australian Experience* (2004) p 1.

<sup>76</sup> See Native Vegetation Act 1991 (South Australia), s 23(4); and <http://www.environment.sa.gov.au/files/73787f03-234e-48e1-83e6-9e6100a831bf/con-nv-brochure-heritageagreementscheme.pdf>.

<sup>77</sup> See <http://www.environment.gov.au/biodiversity/incentives/approved-programs.html>.

- 3.47 For heritage conservation, however, the picture is very different. Conservation covenants specifically for heritage purposes are little used and, being generally limited to land that is already publicly designated as a heritage site, play a minor role in comparison to state and local regulatory regimes.<sup>78</sup>

### **Biodiversity offsetting in Australia**

- 3.48 Biodiversity offsetting schemes are in place in some parts of Australia.<sup>79</sup> For example in New South Wales landowners can voluntarily create a “biobanking agreement”, which is held by the Minister for Environment and Heritage,<sup>80</sup> and enforceable against all future landowners.<sup>81</sup> The New South Wales Government provides two examples of scenarios where biobanking agreements could be used:

Suppose a landowner lives on 200 hectares of land at Picton that includes 150 hectares of Cumberland Plain Woodland of high conservation significance. The landowner could enter into a biobanking agreement whereby the 150 hectares becomes a biobank site. Actions by the landowner to control grazing, weeds and foxes for the protection of habitats and breeding of rare mammals and birds would generate ‘biodiversity credits’ that the landowner can sell.

Suppose also that a developer is proposing a new residential development near Liverpool, but the building of houses will impact on a small area of Cumberland Plain Woodland. Using the prescribed methodology, the developer would work out the number of credits needed to offset the impact of the development and apply for a biobanking statement which sets out the number and class of credits required. The developer could then purchase the credits from the Picton landowner.<sup>82</sup>

- 3.49 The biobanking agreement sets out management actions that are required to be undertaken on the land,<sup>83</sup> in order for the landowner to obtain biodiversity credit,<sup>84</sup> the size of the credit is determined in accordance with a Biobanking Assessment

<sup>78</sup> Australian Productivity Commission, *Conservation of Australia’s Historic Heritage Places* (2006) pp 71 to 72.

<sup>79</sup> For information about offsetting at federal level, see <http://www.environment.gov.au/epbc/publications/environmental-offsets-policy.html>. At state level, see for example the native vegetation credit scheme, outlined at <http://www.dse.vic.gov.au/land-management/land/native-vegetation-home/native-vegetation-credit-register>.

<sup>80</sup> Threatened Species Conservation Act 1995 (New South Wales), s 126ZH.

<sup>81</sup> Threatened Species Conservation Act 1995 (New South Wales), s 126ZJ.

<sup>82</sup> Office of Environment and Heritage New South Wales, *Questions and Answers about the Biodiversity Banking and Offsets Scheme*, at <http://www.environment.nsw.gov.au/biobanking/biobankingqa.htm>.

<sup>83</sup> Threatened Species Conservation Act 1995 (New South Wales), s 126ZH.

<sup>84</sup> Threatened Species Conservation Act 1995 (New South Wales), s 127W.

Methodology.<sup>85</sup> Where the obligations are not performed, the credit may be cancelled.<sup>86</sup> A landowner receives annual payments from a Trust Fund, to assist them in achieving the agreed obligations.<sup>87</sup> All biobank sites are centrally registered, accompanied by a copy of the relevant biobank agreements.<sup>88</sup>

- 3.50 The New South Wales Government is currently undertaking a review of the biobanking system. It notes that since the scheme commenced nine biobanking agreements have been approved (relating to more than 450 hectares), with applications covering a further 1,500 hectares currently being considered.<sup>89</sup>

## **NEW ZEALAND**

- 3.51 This jurisdiction has a unitary system of Government, so relevant legislation is made at the national level. Since 1977 three Acts of Parliament have been passed to enable conservation covenants.

### **The legislative scheme**

- 3.52 Like Australia, New Zealand only allows public bodies to hold the benefit of conservation covenants. This group covers central and local Government, along with two independent statutory authorities: the Queen Elizabeth the Second National Trust (for the protection of natural and cultural features on private land through “open space covenants”), and Ngā Whenua Rāhui (a fund for the conservation of Maori land).<sup>90</sup>

- 3.53 The three relevant Acts each provide for differently defined conservation objectives:

- (1) the establishment or maintenance of land as open space, including free public access to it;<sup>91</sup>
- (2) the management of land to preserve its landscape amenity, wildlife, freshwater life, marine life habitat, historical value or (for Maori land) the spiritual or cultural values which Maoris associate with it;<sup>92</sup> and

<sup>85</sup> Department of Environment and Climate Change New South Wales, *BioBanking Assessment Methodology* (2008), at <http://www.environment.nsw.gov.au/resources/biobanking/08385bbassessmethod.pdf>.

<sup>86</sup> Threatened Species Conservation Act 1995 (New South Wales), s 127ZD(1).

<sup>87</sup> Office of Environment and Heritage New South Wales, *BioBanking review: Discussion paper* (2012) p 2, at <http://www.environment.nsw.gov.au/resources/biobanking/20120062bbrevdp.pdf>.

<sup>88</sup> Threatened Species Conservation Act 1995 (New South Wales), s 127ZZB.

<sup>89</sup> Office of Environment and Heritage New South Wales, *BioBanking review: Discussion paper* (2012) p 2, at <http://www.environment.nsw.gov.au/resources/biobanking/20120062bbrevdp.pdf>.

<sup>90</sup> See <http://www.openspace.org.nz/> and <http://www.doc.govt.nz/getting-involved/volunteer-join-or-start-a-project/start-or-fund-a-project/nga-whenua-rahui/nga-whenua-rahui-fund/>.

<sup>91</sup> Queen Elizabeth the Second National Trust Act 1977 (New Zealand), ss 22(1) and (4), 33 and 34(2).

<sup>92</sup> Reserves Act 1977 (New Zealand), ss 77(1) and 77A(1).

- (3) the preservation and protection of natural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public, and safeguarding the options of future generations (or, for Maori land, safeguarding the spiritual or cultural values which Maoris associate with it).<sup>93</sup>
- 3.54 Open space covenants made with the Queen Elizabeth the Second National Trust can be modified provided the modification is not contrary to the purposes and objectives of the covenant, and the modification is with the agreement of the Trust's Board.<sup>94</sup> The other two types can be modified or discharged by agreement.<sup>95</sup>
- 3.55 There is a general court power to modify or discharge freehold covenants.<sup>96</sup> As in Australia, the Acts which provide for conservation covenants make no reference to this power. It would therefore appear that the court's jurisdiction does apply to them but is ill-suited because it does not extend to positive obligations and was not designed for covenants that do not benefit other land.

### **Use of conservation covenants in practice**

- 3.56 A recent assessment found that New Zealand had the highest proportion (33.4%) amongst OECD countries<sup>97</sup> of land legally protected for conservation purposes.<sup>98</sup> This figure includes both public designations and private agreements such as conservation covenants. Nearly all protected land is managed by central or local Government. Some local authorities also hold conservation covenants for heritage purposes; Christchurch City Council is one example.<sup>99</sup> Local authorities also offer incentives to landowners to create covenants; Auckland City Council, for example, offers rate (council tax) remissions in respect of land which is subject to certain covenants.<sup>100</sup>
- 3.57 Of land which is protected for conservation, the vast majority is public; a further 2.7% is private land managed by the Queen Elizabeth the Second National Trust

<sup>93</sup> Conservation Act 1987 (New Zealand), ss 2(1), 27(1)(a) and 27A(1)(a).

<sup>94</sup> Queen Elizabeth the Second National Trust Act 1977 (New Zealand), s 22A(1).

<sup>95</sup> Modification and discharge of these covenants is discussed further at Chapter Seven, para 1.13.

<sup>96</sup> This is on similar grounds to those that existed in England and Wales under section 84(1) of the Law of Property Act 1925 before reform in 1969. See Property Law Act 2007 (New Zealand), s 317.

<sup>97</sup> Organisation for Economic Co-operation and Development; there are currently 34 members.

<sup>98</sup> Ministry for the Environment New Zealand, *Legally Protected Conservation Land in New Zealand* (2010) p 7, at <http://www.mfe.govt.nz/environmental-reporting/report-cards/biodiversity/2010/>.

<sup>99</sup> See the City Council's information leaflet at <http://resources.ccc.govt.nz/files/ConservationCovenants-docs.pdf>.

<sup>100</sup> See <http://www.aucklandcouncil.govt.nz/EN/ratesbuildingproperty/ratesvaluations/billingpayments/financialassistance/Pages/ratesremissions.aspx>.

or Ngā Whenua Rāhui.<sup>101</sup> The Trust has been very active and since inception has acquired nearly 3,700 covenants protecting just under 100,000 hectares (approximately 247,000 acres) of land.<sup>102</sup> The Trust also undertakes monitoring work; between 2011 and 2012, of approximately 1700 covenants it monitored, some 95% of these were found to be compliant with the covenant requirements.<sup>103</sup> A further 150,000 hectares (approximately 370,000 acres) are protected by Ngā Whenua Rāhui covenants.<sup>104</sup>

- 3.58 In general, however, there appears to have been little scholarly examination of the role of conservation covenants in New Zealand, and there is relatively little information available on their use.<sup>105</sup> We note, however, that the courts appear to have used conservation covenants as a means of ensuring that biodiversity offsetting measures are undertaken in determining applications for planning approval.<sup>106</sup>

### **CONCLUSION: SIMILARITIES AND DIVERGENCES**

- 3.59 Our review of these jurisdictions shows that conservation covenants are widely used by landowners as a private and voluntary mechanism for the conservation of land. Whilst the policy underlying conservation covenants is similar wherever they are found, the spread of their use worldwide has not led to uniformity in how the policy is delivered. The ways in which acceptable conservation objectives are defined vary from a detailed list of specific aims (for example in the Uniform Conservation Easement Act) to a very general statement of purpose (such as for “open space covenants” made with the Queen Elizabeth the Second National Trust in New Zealand). Moreover, there is no clear pattern in this regard; the North American jurisdictions diverge as much from each other as they do from Scotland, Australia and New Zealand.
- 3.60 The policy choices made in relation to eligible holders of conservation covenants also vary widely, but here it is possible to group the jurisdictions as follows.

<sup>101</sup> Ministry for the Environment New Zealand, *Legally Protected Conservation Land in New Zealand* (2010) p 1, <http://www.mfe.govt.nz/environmental-reporting/report-cards/biodiversity/2010/>.

<sup>102</sup> Queen Elizabeth the Second National Trust, *Annual Report 2012* (2012) p 10.

<sup>103</sup> Queen Elizabeth the Second National Trust, *Annual Report 2012* (2012) p 11.

<sup>104</sup> A-GE Ausseil, JR Dymond, and ES Weeks, “Provision of Natural Habitat for Biodiversity: Quantifying Recent Trends in New Zealand” in O Grillo (ed), *Biodiversity loss in a Changing Planet* (2011) p 215, at <http://www.intechopen.com/books/biodiversity-loss-in-a-changing-planet>.

<sup>105</sup> One exception is DL Donahue “The Law and Practice of Open Space Covenants” (2003) 7 *New Zealand Journal of Environmental Law* 113.

<sup>106</sup> DA Norton, “Biodiversity Offsets: Two New Zealand Case Studies and an Assessment Framework” (2008) 11 *Environmental Management* 18; and A Gillespie, *A Missing Piece of the Conservation Puzzle: Biodiversity Offsets* (Prepared for the New Zealand Department of Conservation 29 March 2012) p 15, at <http://www.doc.govt.nz/Documents/conservation/missing-piece-of-the-conservation-puzzle.pdf>.

- (1) At the liberal end of the scale, most North American states and provinces give this right to all non-profit conservation bodies. Some go even further by allowing for-profit groups; but it is notable that there is no instance of individuals being permitted to hold the benefit.
- (2) In the middle are Scotland and a small number of Canadian provinces, where non-profit conservation bodies must first be approved by a public authority.
- (3) The most restrictive are New Zealand and the Australian states, which only allow public bodies to hold conservation covenants.

3.61 When we consider the routes to modification and discharge, distinct categories can again be identified. However, it is difficult to categorise New Zealand and the Australian states because it is unclear how, if at all, conservation covenants are subject to general powers to modify covenants (akin to section 84(1) of the Law of Property Act 1925).

- (1) Many American states actually limit the parties' freedom to agree on these matters between themselves, either through an express statutory requirement to seek authorisation from a court or public authority, or (possibly) through the application of charitable trust principles.
- (2) Most Canadian provinces do not impose such restrictions. A few also establish section 84(1)-type procedures enabling one party to seek modification or discharge against the other's wishes, but generally on narrow grounds.
- (3) Scotland provides flexibility by enabling one party to apply for modification or discharge if, having regard to a wide range of considerations, that would be reasonable.

3.62 Some parallels can be drawn between policy choices as to eligible holders and the ease with which conservation covenants can be modified or discharged. In the USA, not only can they be held by a very wide range of bodies but it is also difficult to modify or discharge them. Scotland, on the other hand, requires holders to be authorised and makes it much easier to defeat a conservation covenant. This divergence may be explained by the greater emphasis placed on private conservation activity in the USA; in Scotland, as in the UK generally, it is viewed more as the state's role.

# CHAPTER 4

## KEY FEATURES OF A STATUTORY SCHEME

### INTRODUCTION

- 4.1 In this Chapter we set out provisional proposals for a statutory scheme of conservation covenants. We address three particular issues.
- (1) Who should be able to create a conservation covenant?
  - (2) Who should be permitted to hold the benefit of a conservation covenant?
  - (3) How should we define the purposes for which a conservation covenant can be made?
- 4.2 These issues are the building blocks of any system of conservation covenants. They are considered in turn below, but are highly interdependent. Our aim is to achieve a system which balances the public interest against the private and voluntary nature of conservation covenants; the proposals we make in respect of these central questions are crafted with that in mind.

### WHO SHOULD BE ABLE TO CREATE A CONSERVATION COVENANT?

- 4.3 A conservation covenant is an obligation voluntarily placed on land, in a way that will endure when the land changes hands.<sup>1</sup> It therefore arises from the choice of the landowner, who will also need the agreement of the person with whom he or she proposes to make the covenant.<sup>2</sup>
- 4.4 Because the law of England and Wales allows for multiple interests in land, we have to unpack the term “landowner”. Obviously a freeholder must be able to create conservation covenants, which will bind successive freehold owners as well as interests derived from the freehold at a later date. Normally the freeholder would be the appropriate creator.
- 4.5 But there will be instances where a leaseholder, with a substantial term,<sup>3</sup> would be in a position to negotiate a conservation covenant with a responsible body, with the intention of binding successors in title under that lease. The duration of the covenant would be limited to the term of the lease. A covenant created by a leaseholder would, of course, affect the leasehold land only, and so this arrangement would be appropriate either where the lease is of such a length, and on such terms, that the conservation objectives could be achieved within the term of the lease, or in a situation where both leaseholder and freeholder gave a covenant.
- 4.6 The objective of conservation covenants is to achieve what a simple contractual arrangement cannot do, namely to bind successors in title. For that reason there

<sup>1</sup> See our discussion of enduring burdens in Chapter 2 at paras 2.8 to 2.9. See also Chapter 5 where we discuss at paras 5.2 to 5.8 whether a conservation covenant should be a conventional property right or, as we prefer, a statutory burden.

<sup>2</sup> See further para 4.18 below.

<sup>3</sup> Some leases are for very long periods, even hundreds of years.

is no point in enabling their creation by periodic tenants, nor by those under particularly short leases. We suggest that leaseholders whose term has at least seven years to run should be able to create conservation covenants. That said, we anticipate that it would be unusual for conservation covenants to be created for so short a duration and would expect that a term of fifteen or twenty years would be a more usual starting point.

- 4.7 We provisionally propose that the holder of a freehold estate in land, or of a leasehold term with at least seven years left to run, should be able to create a conservation covenant that would bind their successors in title and those with interests derived from their own.**

**Do consultees agree?**

- 4.8 Throughout this Consultation Paper we refer to this person as a “landowner”, though of course they may be a freeholder or leaseholder. Our proposal here is of course subject to what we say later about the possibility of conservation covenants being modified or discharged.<sup>4</sup>

**WHO SHOULD HOLD A CONSERVATION COVENANT?**

**The spectrum of covenant holders**

- 4.9 A key feature which distinguishes conservation covenants from traditional restrictive covenants is that they exist “in gross”; the benefit need not be held by a neighbour. Generally, instead, conservation covenants are held by a defined class of organisations. This is the basis on which we examine who may hold a conservation covenant. In doing so we are departing from the policy for the general law made in *Making Land Work: Easements, Covenants and Profits à Prendre* (“Easements Report”). In that Report we recommended that obligations which burden land should only take effect as legal interests appurtenant to a neighbouring estate in land.<sup>5</sup> Whilst we continue to take the view that covenants in gross are not generally appropriate, a departure is justified in the case of conservation covenants. The experience in other jurisdictions suggests that a system can be designed which is sufficiently robust so as to avoid the obvious dangers.
- 4.10 Our review of other jurisdictions indicates that the policy options available fall along a spectrum, from the highly permissive to the highly restrictive. At the most permissive end, any legal or natural person would be able to hold a conservation covenant; none of the jurisdictions we have considered favours this approach. At the most restrictive end, only the Government may hold a conservation covenant; this model is used in parts of Australia and in New Zealand. We examine these different approaches below.

**Holders of conservation covenants in other jurisdictions**

- 4.11 Australia takes a restrictive approach to defining those who may hold the benefit of a conservation covenant, and places significant emphasis on the role of Government in doing so. At federal level, only a Commonwealth Minister may

<sup>4</sup> See Chapter 7.

<sup>5</sup> (2011) Law Com No 327 (“Easements Report”) paras 5.63 to 5.69 and 6.14 to 6.17.

make such an agreement.<sup>6</sup> Interestingly the role of the Minister in creating the agreement is then linked to the nature of the agreement; the Minister must be satisfied that the agreement will result in a net benefit for conservation.<sup>7</sup> The Australian states also take a confined approach to the holding of a conservation covenant. In the Australian Capital Territory and South Australia, for example, only a Minister may enter into a conservation covenant for heritage purposes.<sup>8</sup> Other states allow certain Government entities. The widest range of holders is in Queensland, where different types of conservation covenants may be held by:

- (1) the state Government, an entity representing it, or a local Government;<sup>9</sup>
- (2) a state Minister;<sup>10</sup> and
- (3) the chief executive of the environment ministry.<sup>11</sup>

4.12 New Zealand also adopts a restrictive stance. Open space covenants, for example, may only be held by the Queen Elizabeth the Second National Trust,<sup>12</sup> and likewise covenants made under the Conservation Act 1987 may only be held by the Minister.<sup>13</sup> On the other hand, conservation covenants agreed under the Reserves Act 1977 may be held by the Minister, a local authority or another body approved by the Minister, but there do not appear to be any other bodies so approved.<sup>14</sup>

4.13 At the other end of the spectrum, the USA and Canada generally favour a liberal approach. The Uniform Conservation Easement Act (“UCEA”), a model statute drafted by the Uniform Law Commission,<sup>15</sup> defines eligible holders as Governmental bodies empowered under state or federal law to hold interests in real property, and charitable corporations, associations and trusts whose purposes or powers include any of the fourteen purposes set out in the UCEA.<sup>16</sup> The benefit may also be assigned to any other eligible body.<sup>17</sup>

4.14 Of the states which have adopted the UCEA, all allow Government bodies at

<sup>6</sup> Environment Protection and Biodiversity Conservation Act 1999 (Australia), Part 14.

<sup>7</sup> Environment Protection and Biodiversity Conservation Act 1999 (Australia), s 305.

<sup>8</sup> Heritage Act 2004 (Australian Capital Territory), s 99; Heritage Places Act 1993 (South Australia), s 32.

<sup>9</sup> For conservation covenants created under the Land Title Act 1994 (Queensland).

<sup>10</sup> For conservation covenants created under the Nature Conservation Act 1992 (Queensland).

<sup>11</sup> For conservation covenants created under the Queensland Heritage Act 1992 (Queensland).

<sup>12</sup> Queen Elizabeth the Second National Trust Act 1977 (New Zealand), s 22.

<sup>13</sup> Conservation Act 1987 (New Zealand), s 27(1)(a).

<sup>14</sup> See for example the Department of Conservation website, which indicates “you can enter into a covenant with the Department of Conservation, Queen Elizabeth II National Trust or local authorities”, at <http://www.doc.govt.nz/publications/conservation/protecting-and-restoring-our-natural-heritage-a-practical-guide/legal-protection/>.

<sup>15</sup> See Chapter 3 for a more detailed discussion.

<sup>16</sup> Uniform Conservation Easement Act (“UCEA”) § 1(2).

<sup>17</sup> UCEA § 4(2).

every level, and charitable bodies whose purposes include conservation, to be party to a conservation covenant. Wyoming stipulates that conservation must be the “primary” purpose of a private body holding the benefit of a conservation covenant, while Alaska requires such a body to be a registered charity under the federal tax code.<sup>18</sup> Pennsylvania and Virginia provide for a “backup” benefit holder to ensure continuity if the original holder ceases to exist.<sup>19</sup> In such a case the conservation covenant must be transferred to a willing successor, and if none can be found the legislation specifies a holder of last resort. In Pennsylvania this is the local municipality; in Virginia, the Virginia Outdoors Foundation.<sup>20</sup>

- 4.15 In non-UCEA states, all allow at least some Government bodies to hold a conservation covenant; usually these can be at any level from municipal to federal. Private organisations are universally permitted, but with restrictions. The usual condition is that they must be charities or non-profit associations whose purposes include conservation (in some cases this must be their primary purpose). But three states have no purpose-based qualification for non-profit bodies. North Carolina is the most permissive state, expressly allowing any for-profit business whose purposes include conservation to hold the benefit, while New Hampshire and Rhode Island’s statutes appear to do the same by referring to “other entit[ies] whose purposes include conservation”.<sup>21</sup>
- 4.16 A similarly broad approach is taken in many Canadian provinces. Virtually all types of conservation covenant can be made in favour of the provincial Government, and most can also be held by local Government bodies and/or the federal Government.<sup>22</sup> There is generally a wide scope for private parties to hold the benefit of conservation covenants. Only three of the 17 statutes prevent this completely, but one of these exists specifically for a quasi-public organisation that is similar to the National Trust.<sup>23</sup> Of the other 14 statutes, most permit any non-profit organisation that has conservation as its primary purpose to hold the benefit (though in some cases the state Government must approve each conservation covenant individually, or first make the covenant itself and then assign the benefit).<sup>24</sup> A small number require the holder to be on a Government-approved list.<sup>25</sup> The most permissive regime is found in an Ontario statute which permits any charity (regardless of its objectives), as well as any body or individual approved by the state Government, to hold the covenant.<sup>26</sup>

<sup>18</sup> Alaska Stat. § 34.17.060.

<sup>19</sup> 32 Pa. Stat. Ann. § 5054(d); Va. Code Ann. § 10.1-1015.

<sup>20</sup> Land Trust Alliance, *A Guided Tour of the Conservation Easement Enabling Statutes* (2010) p 36.

<sup>21</sup> N.C. Gen. Stat. § 121-35; N.H. Rev. Stat. Ann. § 477-46; R.I. Gen. Laws § 34-39-3.

<sup>22</sup> For example Conservation Easements Act, SNS 2001 c. 28 (Nova Scotia), s 8.

<sup>23</sup> Heritage Property Act, RSNS 1989 c. 199 (Nova Scotia), s 20(1); Agricultural Research Institute of Ontario Act, RSO 1990 c. A.B.13 (Ontario), s 3(f)(i); Ontario Heritage Act 1990, RSO 1990 c. O.18 (Ontario), ss 10(1)(c) and 37(1).

<sup>24</sup> For example Land Stewardship Act, SA 2009 C.A-26.8 (Alberta), s 28(c); Wildlife Conservation Act, RSPEI 1988 c. W-4.1 (Prince Edward Island), s 18.

<sup>25</sup> For example Historic Resources Act, RSNL 1990 c. H-4 (Newfoundland and Labrador), s 30(1).

<sup>26</sup> Conservation Land Act, RSO 1990 c. C.28 (Ontario), s 3(1).

- 4.17 Closer to home, the Scottish legislation falls somewhere in between the relatively permissive North American approach, and the more restricted models found in Australia and New Zealand. The statutory scheme allows Scottish Ministers to prescribe “conservation bodies”, which are then capable of holding conservation burdens. All 32 local authorities and a number of other bodies are prescribed.<sup>27</sup> Organisations apply for inclusion as a conservation body, and the Scottish Government assesses these on a case-by-case basis. A conservation body may only be prescribed if its object or purpose is to preserve or protect, for the public benefit, certain characteristics of land set out in the statute.<sup>28</sup> Conservation burdens are therefore “available only to a limited range of parties who can be expected to act responsibly and maintain appropriate records”.<sup>29</sup> Scottish Ministers also have the power to remove a body from the prescribed list.<sup>30</sup> A conservation burden may be assigned to another conservation body, or the Scottish Ministers;<sup>31</sup> and if a conservation body ceases to exist, the conservation burden is extinguished (unless, presumably, it has previously been assigned).<sup>32</sup>

### **Holding a conservation covenant in England and Wales**

- 4.18 We have said that a departure from the traditional approach to covenants is warranted in the case of conservation, but we have concerns with adopting a too-liberal stance. Allowing a very wide range of holders could lead to land which is of doubtful conservation value being tied up indefinitely because there are too few limitations on holders’ behaviour, particularly if conservation covenants are too easily created. This detracts from the key purpose of conservation covenants, which is the benefit of the public. It is also important to ensure that covenant holders are sufficiently large and well-resourced to be able to negotiate appropriate conservation covenants, and perhaps more importantly, be responsible for their ongoing supervision.
- 4.19 A key concern expressed by US land trusts in respect of conservation covenants is that they will be unable to perform the duties with which they have been entrusted.<sup>33</sup> We are aware that there are a number of large and well-established conservation charities and public bodies which carry out this sort of work already: these include the National Trust, Natural England, Cadw, English Heritage, the Woodland Trust, and the Canal and River Trust, as well as the new Natural Resources Wales (which will merge the functions of Countryside Council for Wales, the Environment Agency Wales, and the Forestry Commission Wales).<sup>34</sup> These are the sorts of organisations we imagine would be appropriate holders.

<sup>27</sup> The Title Conditions (Scotland) Act 2003 (Conservation Bodies) Order 2003, SSI 2003 No 453 (as amended).

<sup>28</sup> Title Conditions (Scotland) Act 2003, s 38(5).

<sup>29</sup> C Reid, “The Privatisation of Biodiversity? Possible New Approaches to Nature Conservation Law in the UK” (2011) 23(2) *Journal of Environmental Law* 203, 213.

<sup>30</sup> Title Conditions (Scotland) Act 2003, s 38(7).

<sup>31</sup> Title Conditions (Scotland) Act 2003, s 39.

<sup>32</sup> Title Conditions (Scotland) Act 2003, s 42.

<sup>33</sup> J Pidot, “Conservation Easement Reform: As Maine Goes Should the Nation Follow?” (2011) 74(1) *Law and Contemporary Problems* 1, 5.

<sup>34</sup> See <http://wales.gov.uk/topics/environmentcountryside/consmanagement/seb/?lang=en>.

4.20 We are attracted to the Scottish approach, which balances a potentially large number of holders with a strong element of Government oversight, particularly as Scottish Ministers are responsible for the selection of conservation bodies. With that in mind, we suggest that any Secretary of State should have the ability to hold conservation covenants, and a single Secretary of State should be responsible for the selection of other holders, who we refer to hereafter as “responsible bodies”. In Wales, the Welsh Ministers should be able to hold conservation covenants and be responsible for the selection of responsible bodies.<sup>35</sup> Secretaries of State and the Welsh Ministers are responsible to Parliament or the Welsh Assembly respectively – and would be further accountable if the selection of holders was effected by statutory instrument. His or her decisions are also subject to judicial review, and open to Freedom of Information Act 2000 (“FOI”) requests.<sup>36</sup> These requirements provide an appropriately formalised and reliable system of public scrutiny for decisions about which bodies may hold conservation covenants.

4.21 There are three categories of holders who are sufficiently open to scrutiny that their inclusion is warranted as responsible bodies (by nomination of the Secretary of State or the Welsh Ministers).

- (1) Public bodies whose objects include conservation purposes. These are entities whose functions are set out in, and confined by statute; like the Secretary of State and the Welsh Ministers, they are ultimately accountable (through their responsible Minister) to Parliament or the Welsh Assembly, and are also open to judicial review and FOI scrutiny.<sup>37</sup>
- (2) Registered charities whose objects include conservation purposes; we examine these purposes further at paragraph 4.30 and following below. These charities are subject to regulation by the Charity Commission.<sup>38</sup>
- (3) Local authorities. Their functions are also limited by statute,<sup>39</sup> and their decisions are subject to judicial review; as public authorities they are also required to respond to FOI requests.<sup>40</sup>

**4.22 We provisionally propose that conservation covenants should be capable of being held by any Secretary of State (for England) or the Welsh Ministers (in Wales). We further propose that in England, a single Secretary of State should have the power to nominate or exclude responsible bodies. The Welsh Ministers should have the same power in Wales. Responsible bodies should be:**

- (1) a public body whose objects include some or all of the purposes set out at paragraph 4.40;**

<sup>35</sup> Under the Government of Wales Act 2006, functions are conferred or imposed on the Welsh Ministers collectively: see section 57.

<sup>36</sup> Freedom of Information Act 2000, Sch 1, Part I, para 1.

<sup>37</sup> See for example Freedom of Information Act 2000, Sch 1, Part VI.

<sup>38</sup> Charities Act 2011.

<sup>39</sup> Particularly the Local Government Act 1972.

<sup>40</sup> Freedom of Information Act 2000, Sch 1, Part II.

- (2) a registered charity whose objects include some or all of the purposes set out at paragraph 4.40; or
- (3) a local authority.

#### **Do consultees agree?**

4.23 There are also for-profit entities whose objectives relate to conservation. For example, the Environment Bank is a private company established to provide a brokerage and advice service for developers, local authorities and landowners who intend to undertake biodiversity offsetting work.<sup>41</sup> There may be a case for such bodies to be eligible for nomination as a responsible body. However, we are concerned that such a proposal loses some of the safeguards which exist in relation to Government, public bodies and charities. In addition, the position could be complicated where a for-profit company ceases to exist (though our proposals below in respect of transfers prior to the cessation of business could equally apply). Nonetheless, we would be pleased to hear from consultees, particularly those who may be involved in organisations of this nature, of any reasons for extending the range of responsible bodies wider than that proposed above.

**4.24 We invite views from consultees on whether there is a case for giving the Secretary of State and the Welsh Ministers the power to include for-profit companies whose objects include some or all of the purposes set out at paragraph 4.40 as responsible bodies.**

4.25 A final concern is to ensure that there can be continuity of conservation covenants if a holder ceases to exist. The Scottish system provides a sensible solution to this dilemma, by allowing conservation covenants to be transferred to another approved holder.<sup>42</sup> This feature would also be useful if an approved holder decides that it no longer has the capacity to administer existing conservation covenants.

**4.26 We provisionally propose that a conservation covenant should be capable of being transferred from one responsible body to another.**

#### **Do consultees agree?**

4.27 If, however, an approved holder ceases to exist, or is removed as a holder, what is the status of the conservation covenants which it holds? As the Scottish Law Commission noted in its examination of real burdens, the absence of benefited land produces special challenges requiring legislative provision.<sup>43</sup> The Scottish legislation provides that where an approved holder ceases to be an approved body (either because of its removal from the approved list, or because it no longer exists), the conservation burden is extinguished.<sup>44</sup>

4.28 This is a difficult issue, because it goes to the question of how conservation

<sup>41</sup> Environment Bank Ltd, *Profile* (2006), at [http://www.environmentbank.com/docs/The\\_Environment\\_Bank.pdf](http://www.environmentbank.com/docs/The_Environment_Bank.pdf).

<sup>42</sup> Title Conditions (Scotland) Act 2003, s 39.

<sup>43</sup> Report on Real Burdens (2000) Scot Law Com No 181, para 9.17.

<sup>44</sup> Title Conditions (Scotland) Act 2003, s 42.

covenants protect the public interest. It does not seem feasible to compel responsible bodies to transfer a conservation covenant; it would be impossible to enforce if the responsible body had ceased to exist. Moreover, it might involve requiring another responsible body to take on a conservation covenant it was unwilling or unable to manage. Nonetheless, the failure of a conservation covenant because a responsible body ceases to exist (or to be a responsible body) seems unsatisfactory, because it fails to deliver the public benefit provided by the conservation covenant. One possibility would be for a statutory scheme to include a “holder of last resort”. If a responsible body ceased to exist, or was removed from the list of responsible bodies (and its conservation covenants had not been transferred to another responsible body), existing conservation covenants could be automatically transferred to a holder of last resort. That holder could then take steps to find a suitable responsible body willing to take over the conservation covenants.

**4.29 We invite consultees’ views on what should happen to a conservation covenant where the responsible body which holds it ceases to exist, or ceases to be a responsible body. In particular:**

- (1) should there be a holder of last resort?**
- (2) if so, who should take on this responsibility?**

**WHAT CONSERVATION OBJECTIVES SHOULD BE SUFFICIENT TO JUSTIFY THE CREATION OF A CONSERVATION COVENANT?**

4.30 We explained earlier that we regard the issues addressed in this Chapter as interrelated. Ensuring that conservation covenants are created for appropriate purposes both encourages their use and provides an important safeguard against inappropriate proliferation. But defining the range of activities which fall within the concept of conservation is a challenging task, not least because different definitions of conservation exist. In examining this issue we have reviewed the purposes for which conservation covenants or their equivalents are created in other jurisdictions. This reveals a surprising diversity in the purposes for which conservation covenants may be created.

4.31 A small number of jurisdictions place little or no limitation on the purposes for which a conservation covenant may be created. For example, the Canadian province of Newfoundland and Labrador does not include purposes in its conservation covenants legislation.<sup>45</sup> In the USA, Maryland legislation does not set out conservation purposes, but simply includes a list of restrictions which may be included in the agreement (such as a restriction on the removal or destruction of trees).<sup>46</sup> We are not inclined to take this approach for England and Wales; we regard the definition of conservation purposes as an important safeguard against the unnecessary proliferation of obligations in relation to land.

4.32 On the other hand, some jurisdictions are prescriptive in setting out the purposes for which a conservation covenant can be agreed. Federal-level conservation covenants in Australia are subject to a detailed and relatively extensive list of

<sup>45</sup> Historic Resources Act, RSNL1990 c. H-4 (Newfoundland and Labrador), s 30.

<sup>46</sup> Md. Code. Ann., Real Property § 2-118.

purposes.<sup>47</sup> Tightly-defined purposes are also used when a conservation covenants system is generally intended to be limited, and operates in conjunction with other systems. New Zealand open space covenants may only be made for the establishment or maintenance of land as open space,<sup>48</sup> but these sit alongside other (broader) types of conservation covenant. Even in the more liberal American schemes, there are lengthy descriptions of the purposes for which a conservation covenant can be made; the UCEA includes 14 permissible aims, split into five groups.<sup>49</sup>

- 4.33 Whilst this approach has its advantages in providing certainty, it fails to address the diversity of aims which fall under the general concept of “conservation”. We are also conscious that conservation is an evolving aspiration, particularly as it often depends on scientific discovery; efforts to ameliorate climate change and the focus on biodiversity are two relatively recent developments; a prescriptive set of conservation purposes might not accommodate future developments.
- 4.34 Ultimately we favour a middle-ground approach. This, in our view, sits well with the proposals we make in relation to benefit holders, where we suggest some limitations, but are not unduly prescriptive. How then to define this middle-ground? Our review of other jurisdictions reveals some core principles which capture the range of purposes we wish to include. This is also informed by our discussions with conservation organisations, who have explained the range of conservation activities they currently undertake.
- 4.35 Our starting point is that a conservation covenant should create an obligation to do or not do something in relation to land; this captures the positive and restrictive obligations we referred to in Chapter 2. Next, a conservation covenant should be for the public benefit. This is a requirement of the Scottish legislation which creates conservation burdens,<sup>50</sup> and in our view provides a way to balance the interests of the public against the private and voluntary nature of these agreements. More importantly, it reflects the general proposition that conservation is for all.
- 4.36 The idea of preserving and protecting certain characteristics of land features across a number of jurisdictions’ legislation, and is one which we agree is appropriate for England and Wales. But conservation organisations have also told us that their work often involves renovating or rejuvenating buildings or habitats. Restoration is also a feature of the Welsh Government’s approach to the governance of environmental resources as part of its “Living Wales” strategy.<sup>51</sup> We would like to ensure that activities which restore the natural environment or built heritage to its former state are included.
- 4.37 We have also found that a number of jurisdictions allow conservation covenants

<sup>47</sup> Environment Protection and Biodiversity Conservation Act 1999 (Australia), s 305.

<sup>48</sup> Queen Elizabeth the Second National Trust Act 1977 (New Zealand), s 22(1) and (4).

<sup>49</sup> UCEA § 1(1).

<sup>50</sup> Title Conditions (Scotland) Act 2003, s 38(1).

<sup>51</sup> Welsh Assembly Government, *A Living Wales – Progress Report February 2011 – Statement of Next Steps and Principles* (2011) pp 2 and 5.

for the purposes of “propagation” or “enhancement” of flora or fauna.<sup>52</sup> This arguably goes beyond preservation or protection, and allows conservation covenants to be created in order to improve the land. It could be particularly useful where derelict land is bought, perhaps as part of a biodiversity offsetting scheme, with the intention of improving its environmental value. For this reason we are minded to include a reference to “enhancement” in the way in which conservation covenant purposes are described.

4.38 The final step is to set out what it is that should be preserved, protected, restored or enhanced. We are particularly influenced here by the Scottish legislation, which takes a straightforward approach. It seems clear that reference should be made, in some form, to the natural environment; this would include woodland sites, species habitats and forestry. Natural resources also warrant inclusion; discussions with stakeholders reveal that this is a developing concern, and one which would likely be the subject of a conservation covenant (such as the conservation of water, or the protection of geological features). We note also that conservation of finite land and water resources was a key element of the Welsh Assembly Government’s recent consultation on its Natural Environment Framework.<sup>53</sup> Whilst there is debate over the reasons for which natural resources should be conserved,<sup>54</sup> in our view the conservation of natural resources falls squarely within the scope of any scheme of conservation covenants.

4.39 Furthermore, we regard it as essential to include reference to the cultural or built heritage of land. By this we mean to include sites of archaeological significance, and land which has special architectural features or is a place of historic importance. We note in this regard that the protection of historic buildings featured significantly in responses to the Scottish Law Commission’s consultation on feudal burdens, which resulted in the creation of conservation burdens legislation.<sup>55</sup>

**4.40 We provisionally propose that the purposes for which a conservation covenant may be created are an obligation to do or not do something on land for the public benefit, to preserve, protect, restore or enhance in relation to that land:**

- (1) its natural environment, including its flora and fauna;**
- (2) its natural resources; or**
- (3) any cultural, historic or built heritage features of that land.**

<sup>52</sup> See for example National Parks and Wildlife Act 1974 (New South Wales), s 69C; Native Vegetation Act 1991 (South Australia), s 23; Conservation Agreements Act, CCSM c. C173 (Manitoba), s 2(2).

<sup>53</sup> Welsh Assembly Government, *Consultation Document: A Living Wales – a new framework for our environment, our countryside and our seas* (2010) p 4.

<sup>54</sup> See for example the debate about water use noted at C Reid, “The Privatisation of Biodiversity? Possible New Approaches to Nature Conservation Law in the UK” (2011) 23(2) *Journal of Environmental Law* 203, 229 to 230.

<sup>55</sup> See Abolition of the Feudal System (1991) Scottish Law Commission Discussion Paper No 93 and Report on the Abolition of the Feudal System (1999) Scot Law Com No 168 Feudal Report, para 4.54.

## Do consultees agree?

### Public oversight of new conservation covenants

- 4.41 The decision to create a conservation covenant lies firmly with the parties; it is, after all a private and voluntary agreement. However, its purpose is ultimately to serve the public interest. This public aspect is reflected in different ways in the other jurisdictions we have considered; through the use of public money to finance the purchase of conservation covenants by public bodies and charities, the mandatory registration of covenants, or access to courts or tribunals for disputes. In the USA, for example, it is estimated that the combination of local, state and federal funding, investment and incentives costs some billions of dollars in public funding.<sup>56</sup>
- 4.42 A further way to ensure the public interest is represented is through the inclusion of a public oversight test. The public may in fact subsidise conservation covenants to a considerable extent; even if financial incentives are not available, public subsidy occurs in the involvement of the Government and public bodies as holders, tax relief for the charitable organisations which hold conservation covenants or purchase land intended to be bound, as well as the courts and tribunals which adjudicate disputes.<sup>57</sup> The opportunity for public oversight in some form may provide an important check on the public's investment in conservation covenants.
- 4.43 At its simplest a public oversight system requires the creation of a conservation covenant to be overseen by a person or entity other than the parties to the agreement. This might be a conservation organisation, a regulatory/advisory body or a Government department. Within this general framework, a statutory system can provide differing levels of oversight, some arguably more regulatory than others. One possibility is to require Government approval of all new conservation covenants in order for them to be valid. This is the approach taken in Massachusetts, where the creation of any new conservation covenant must be approved by the state environment authority; this is the case regardless of the identity of the holder.<sup>58</sup> The authority's decision to approve a conservation covenant must be based on a determination of the public interest and consistency with any conservation or development plan in force for the locality.<sup>59</sup>
- 4.44 Oversight may also take the form of public participation. One author suggests publishing proposed conservation covenants on the website of a public agency, with a facility for the agency and the parties to receive comments from the

<sup>56</sup> AW Morris and AR Rissman, "Public Access to Information on Private Land Conservation: Tracking Conservation Easements" (2009) *Wisconsin Law Review* 1237, 1245.

<sup>57</sup> J Olmsted, "The Invisible Forest: Conservation Easement Databases and the End of the Clandestine Conservation of National Lands" (2011) 74(1) *Law and Contemporary Problems* 51, 53.

<sup>58</sup> Mass. Gen. Laws ch 184 § 32 (2010). Section 32 provides for the approval to be granted by different bodies depending on the nature of the easement. For example, easements held by the city, town, a commission or authority must be approved by the Secretary of Environmental Affairs. Alternatively if the easement relates to conservation it must be approved by the commissioner of food and agriculture.

<sup>59</sup> Mass. Gen. Laws ch 184 § 32 (2010).

public.<sup>60</sup> Alternatively, a statutory system might involve an advisory body either reviewing conservation covenants which have been created, or providing a consultation service for potential parties prior to creating a conservation covenant. This approach to oversight is taken in Montana where the local planning authority performs an advisory review of the creation of conservation easements.<sup>61</sup>

- 4.45 However, it is important to note that public oversight is not particularly common, even in the USA; in addition to Massachusetts and Montana, only three other states require some form of statutory oversight during the creation process.<sup>62</sup> It is not surprising that mandatory public oversight has developed in the USA, where the extensive public investment in conservation covenants warrants a greater level of scrutiny of those agreements.
- 4.46 Interestingly, the public oversight requirement does not necessarily hamper the creation of conservation covenants. In Massachusetts, for example, a highly regulated system for conservation covenants has not prevented the state from having one of the largest number of conservation covenants throughout the USA, as well as an extensive land trust network.<sup>63</sup> The Massachusetts model is supported by the state's land trusts, because "it helps to ensure the public benefit of each easement on an individualised basis, achieve a measure of public transparency, and insulate easements from subsequent IRS scrutiny".<sup>64</sup>
- 4.47 The American examples suggest that mandatory statutory oversight is best-suited to systems which provide significant public investment in conservation covenants; in such systems there is a need to ensure that conservation covenants are not entered into in an attempt to exploit the incentives available. It is also important to view this public oversight requirement in the context of the generally wider range of holders who may agree a conservation covenant in the USA.
- 4.48 We are not convinced that a statutory oversight element is necessary in England and Wales. Our proposals for a limited range of responsible bodies, and the objectives for which conservation covenants may be made, protect the public interest in a way which is more appropriate for this jurisdiction. Holders are likely to be the state itself (whether Westminster, Welsh or local Government, or a public body), or trusted and regulated charities. And a statutory oversight requirement would add an additional level of regulation, with added costs for all involved, to what is ultimately a private, voluntary agreement. However, we would be grateful for consultees' views on this issue.

<sup>60</sup> J Pidot, "Reinventing Conservation Easements: A Critical Examination and Ideas for Reform", *Policy Focus Report Code PF013* (2005) p 17. See [https://www.lincolnst.edu/pubs/dl/1051\\_Cons%20Easements%20PFR013.pdf](https://www.lincolnst.edu/pubs/dl/1051_Cons%20Easements%20PFR013.pdf).

<sup>61</sup> Mont. Code Ann. § 76-6-206 (2009).

<sup>62</sup> The states are Nebraska (Neb. Rev. St § 76-2-112), Oregon (Or. Rev. § 271. 735) and Virginia (Va. Code Ann. § 10.1 – 1010 (2010)).

<sup>63</sup> Z Bray, "Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements" (2010) 34(1) *Harvard Environmental Law Review* 119, 155.

<sup>64</sup> Z Bray, "Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements" (2010) 34(1) *Harvard Environmental Law Review* 119, 155 to 156.

**4.49 We invite views from consultees as to whether a scheme of conservation covenants for England and Wales should include any form of public oversight for the creation of new conservation covenants.**

# CHAPTER 5

## CREATION AND REGISTRATION

### INTRODUCTION

- 5.1 We have explained the essentials of a conservation covenant;<sup>1</sup> we must now consider what further elements are needed for a statutory scheme. In this Chapter we examine the nature of a conservation covenant, and explain why we do not propose to create a new interest in land. We consider how a conservation covenant might be created. We examine whether a conservation covenant should provide for obligations to be perpetual or of fixed duration, and consider other terms which ought to be addressed in a statutory scheme. The importance of registering a conservation covenant as a local land charge is also considered, along with the effect of failure to register. Finally, we consider the position of conservation covenants alongside mandatory designations of land, and which will take priority in the event of a conflict.

### THE NATURE OF A CONSERVATION COVENANT

- 5.2 We have said before that we envisage a conservation covenant as a creature of statute. Although the scheme we propose adopts some of the key features of interests in land, in particular the ability to bind successive landowners, it is very much a statutory scheme, and its limits will be set out in statute, without recourse to the common law.
- 5.3 Under our proposed statutory scheme, conservation covenants would be rather different from most interests in land, in that they are not interests “appurtenant to” land. In other words, there is no need for a benefited estate.<sup>2</sup> That in itself would not prevent their being interests in land.<sup>3</sup> Nevertheless we prefer conservation covenants to be statutory obligations rather than to be fitted into the traditional mechanism of land law. We are particularly keen not to replicate the world of easements, which can be legal or equitable depending upon their manner of creation and upon registration, require different forms of registration depending on whether they burden registered or unregistered land, and have different rules of enforceability depending on their status as legal or equitable interests. These are layers of complexity which would be unnecessary and unwelcome in the context of a straightforward legal tool.
- 5.4 Moreover, conservation covenants do not correspond to any existing interest in land; they are not freehold restrictive covenants, nor easements, nor the land obligations that we recommended in our Report *Making Land Work: Easements, Covenants and Profits à Prendre* (“Easements Report”).<sup>4</sup> A new species of interest in land would have to be created, and that would add unwelcome

<sup>1</sup> See Chapter 4.

<sup>2</sup> See Chapter 2 paras 2.10 to 2.12}.

<sup>3</sup> A profit à prendre – the right to take something from another’s land – is an interest in land that can exist “in gross”, that is, without benefited land; profits are registered with their own title at HM Land Registry.

<sup>4</sup> See *Making Land Work: Easements, Covenants and Profits à Prendre* (2011) Law Com No 327 (“Easements Report”), paras 2.41 to 2.43 and 6.15 to 6.17

complexity to the land registration and land charges registration systems.

- 5.5 Conservation covenants do not need to be property in the hands of the covenantee. The covenantee is going to be a responsible body whose role is to oversee (and if necessary enforce) the covenant; there is no sense in which the conservation covenant is an item of property for the responsible body, in the sense of being heritable or assignable for value. Conservation covenants are “property” only in the metaphorical and non-legal sense of being a valuable public heritage.
- 5.6 So we have explicitly stepped away from land law principles; likewise we eschew use of the law relating to contracts in our conservation covenants scheme. Contractual rules were designed for commercial situations; the circumstances of a conservation covenant may or may not involve a commercial party, but are in any event for the public benefit. Although there are aspects of conservation covenants which reflect principles of contract (in particular our emphasis that it is a private and voluntary agreement), we say clearly at this juncture that the only contractual principles which would apply to conservation covenants are those which we have explicitly referred to in this Consultation Paper. To do otherwise would tip the balance too far in favour of commerciality.
- 5.7 So our preference for conservation covenants being statutory burdens is a vote for simplicity. This approach also allows us to consider the specific needs of a scheme which combines private initiative with the public interest, and to tailor it accordingly. A conservation covenant will be an agreement whose characteristics are explicitly set out in statute, and do not depend on common law concepts.
- 5.8 We provisionally propose that conservation covenants shall be statutory burdens on land, rather than proprietary interests or contractual agreements.**

**Do consultees agree?**

#### **FORMAL REQUIREMENTS FOR VALIDITY**

- 5.9 We do not think it would be appropriate to take too prescriptive an approach to the drawing up of a conservation covenant. We want to ensure that there are as few obstacles as possible to their use, and we are conscious that requiring highly formal means of creation will only add costs. At a minimum, however, we think that conservation covenants should be made in writing and signed by the parties, for the sake of certainty and of having a clear record of the covenant. The involvement of a responsible body will add an important element of regulation to the process.
- 5.10 We provisionally propose that a conservation covenant must be created in writing and signed by the parties.**

**Do consultees agree?**

#### **DURATION**

- 5.11 How long should a conservation covenant last? Historically the law has approached the creation of perpetual land obligations with caution, because of

concerns about “dead-hand” control (that is, allowing a landowner to determine the use of land into the future, well after his or her death). It is argued that landowners should have the freedom to make their own decisions about the use of their land; and that land is better controlled by the living because they can adapt its use to the most efficient means for that point in time.<sup>5</sup>

5.12 Conservation covenants present a challenge to this traditional view. Conservation covenants are intended in any event to be long-term obligations, lasting beyond the current ownership of the land; that is why simple contracts are insufficient. For some, the essence of a conservation covenant is its perpetual nature.<sup>6</sup> This is because effective conservation may require a long-term view to be taken to achieve particular outcomes on land. Creating perpetual obligations also acknowledges that it is in the public interest for some sites (such as historic buildings) to be preserved forever. Donors, particularly those who are motivated by a desire to protect land after their death, may be unwilling to participate unless they can be sure that their objectives will be achieved in the future. For these reasons, conservation covenants are frequently drafted so as to be perpetual. In the USA, for example, the Uniform Conservation Easement Act (“UCEA”) provides for conservation covenants to be perpetual unless the parties agree a fixed-term.<sup>7</sup> Most (though not all) UCEA and non-UCEA states take a similar approach.<sup>8</sup>

5.13 Our aim is to design an appropriately flexible scheme, allowing the parties to determine the most appropriate term for their circumstances. This means allowing the creation of both fixed-term and perpetual conservation covenants. Fixed term covenants may be appropriate where, for example, a landowner holds a lease and cannot bind the land beyond the end of that lease.<sup>9</sup> Making perpetuity the default approach means that there is no uncertainty about the length of the agreement if nothing is stipulated by the parties.

**5.14 We provisionally propose that a conservation covenant should bind land in perpetuity, unless a shorter period is expressed in the conservation covenant.**

**Do consultees agree?**

## **TERMS**

5.15 In Chapter 4 we proposed that a conservation covenant should be made for

<sup>5</sup> J Owley, “Changing Property in a Changing World: A Call for the End of Perpetual Conservation Easements” (2011) 30 *Stanford Environmental Law Journal* 121, 144, referring to the view put forward by L Simes, *Public Policy and the Dead Hand* (1955).

<sup>6</sup> I Hodge, R Castle and J Dwyer, *Covenants as a Conservation Mechanism* (Department of Land Economy, University of Cambridge, Land Economy Monograph 26, 1993) Appendix 5 p 1.

<sup>7</sup> UCEA, § 2(c).

<sup>8</sup> However, in the USA the Internal Revenue Code (amongst other things) requires that conservation covenants must be perpetual in order to be eligible for tax deductions: see J Owley, “Changing Property in a Changing World: A Call for the End of Perpetual Conservation Easements” (2011) 30 *Stanford Environmental Law Journal* 121, 140. This is not a consideration that is relevant to our proposals.

<sup>9</sup> See Chapter 4, paras 4.5 to 4.7.

specific purposes;<sup>10</sup> to qualify as a conservation covenant an agreement must first be for an appropriate purpose. We have also considered whether there are any terms which should be prohibited by statute. Our view is that the parties should have freedom to include terms on any matters they regard as appropriate; we are not inclined to limit their ability to contract as they see fit. Whilst in some jurisdictions legislation provides that a conservation covenant may include specific terms,<sup>11</sup> we do not consider there to be any advantage in including a provision to this effect.

- 5.16 We provisionally propose that, subject to two exceptions, a statutory scheme for conservation covenants should not limit the obligations which parties may include in a conservation covenant, provided they do not go beyond the purposes for which such a covenant can be created.**

**Do consultees agree?**

- 5.17 The two exceptions are as follows. First, we proposed in Chapter 4 that the holder of a leasehold term with at least seven years left to run should be able to create a conservation covenant in respect of the leasehold land. This raises the possibility that the terms of a conservation covenant agreed by a leaseholder might be in conflict with the provisions of his or her lease. A leaseholder should not be able to override the provisions of a lease by agreeing a conservation covenant.

- 5.18 We provisionally propose that any provisions of a conservation covenant made by a leaseholder which conflict with the provisions of his or her lease should be void.**

**Do consultees agree?**

- 5.19 We have also considered the possibility that obligations might be agreed on the part of a landowner whose land is later subdivided. We are concerned that if the statutory scheme does not provide for this scenario, there may be real confusion about whose responsibility the obligations are. So, for example, if the original block of land contains a small cottage in one corner which is the subject of obligations under a conservation covenant, and the block is later subdivided into two, a new landowner may not have any part of the cottage on their property. It would be unclear in this situation whether both landowners were liable for the obligations, or only the owner whose land housed the cottage. In our view, unless an alternative arrangement has been provided for in the conservation covenant, the obligations should fall to all of the owners of the subdivided land to be performed. They would then be able to modify or discharge the conservation covenant if necessary, in accordance with the proposals we outline in Chapter 7.

- 5.20 We provisionally propose that if land which is the subject of a conservation covenant is subdivided, the owners of the subdivided land should be jointly and severally liable for the conservation covenant obligations, unless the conservation covenant has provided otherwise (or it is modified or discharged).**

**Do consultees agree?**

<sup>10</sup> See Chapter 4, paras 4.30 to 4.40.

<sup>11</sup> See for example the Heritage Act 2004 (Australian Capital Territory), s 100.

## STANDARD TERMS

- 5.21 A common thread in discussions about other statutory schemes is the need for guidance for those involved in creating and performing obligations under conservation covenants.<sup>12</sup> The need for such material is supported by our examination of the schemes in different jurisdictions, and our consideration of existing statutory covenants such as those created under the National Trust Act 1937.<sup>13</sup> Such guidance (which we see as non-statutory, to sit alongside a statutory scheme) could include a template containing standard terms (covering the key issues of parties, specific obligations of each, duration, and procedures for management and enforcement). We anticipate such guidance could also usefully set out an explanation of the rationale behind the statutory scheme, refer to further resources (including overseas models), and make suggestions for the publication of information about conservation covenants. More than one body might issue guidance, which could be specific to different forms of conservation.
- 5.22 **We provisionally propose that a statutory scheme for conservation covenants should be accompanied by non-statutory guidance for those who create and hold conservation covenants. This guidance should include model terms.**

**Do consultees agree?**

- 5.23 **We invite consultees' views on who should formulate non-statutory guidance (for example, Government departments, advisory bodies, or conservation organisations).**

## REGISTRATION

- 5.24 We have said that we do not wish conservation covenants to be interests in land, and so they cannot automatically bind successors in title. A statutory scheme should provide that a conservation covenant is enforceable not only against the landowner who created it but against his or her successors in title, and anyone holding an interest in the land derived from that of the landowner.<sup>14</sup>
- 5.25 If that is to be the case then there must also be provision for purchasers of the land to be made aware of them. The solution, we think, is the local land charges register kept by each local authority.<sup>15</sup>
- 5.26 Local land charges are, in general, obligations with a public flavour.<sup>16</sup> Tree preservation orders, planning conditions, building preservation notices and light obstruction notices are familiar examples. The local land charges register is always searched as part of the pre-contract enquiries by a purchaser of land and so will bring obligations to the attention of a prospective purchaser at an early stage.

<sup>12</sup> See for example NA McLaughlin and B Machlis "Amending and Terminating Perpetual Conservation Easements" (2009) 23 *Probate and Property* 52, 56.

<sup>13</sup> See Chapter 8.

<sup>14</sup> See our provisional proposals in Chapter 2 (para 2.72) and Chapter 4 (para 4.7).

<sup>15</sup> Local Land Charges Act 1975.

<sup>16</sup> C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8th ed 2012) para 8.108.

- 5.27 The registration of a local land charge does not affect its validity; nor does it affect its enforceability. Typically the matters that are registered as local land charges take effect against the land by virtue of the statutory provision by which they are created. So, in addition to our proposal that a conservation covenant should bind a landowner's successors in title, we are further proposing that that be made conditional upon registration as a local land charge.<sup>17</sup>
- 5.28 A further advantage of registration is that it enables the public availability of information about conservation covenants. Because any member of the public can search the registers of local land charges,<sup>18</sup> registration ensures that there is openness and transparency about the existence of conservation covenants. It has been suggested to us that this carries risks; public access to information about the existence of rare flora, fauna or minerals on land may lead to vandalism or theft. We think that this potential disadvantage is clearly outweighed by the importance of ensuring that anyone, whether landowner or member of the public, may determine whether land is subject to a conservation covenant. We note also that a requirement for publicly available information is a common feature in other jurisdictions' schemes for conservation covenants. This is an important aspect of protecting the public interest in conservation covenants.
- 5.29 In fact, in other jurisdictions there is increasing interest in more widespread and centralised recording of conservation covenants.<sup>19</sup> This provides opportunities for the public to obtain information on conservation covenants generally (rather than searching against specific properties), and allows government and interested groups to monitor trends in their creation. In the USA, for example, three states have public list requirements.<sup>20</sup> In Australia a publicly-available list of federal conservation covenants must be maintained by the Minister,<sup>21</sup> and most but not all state conservation covenants systems also provide for public lists. A small number of statutes go further and require the list of conservation covenants to be made available free of charge.<sup>22</sup>
- 5.30 We do not, however, propose to require central recording of conservation covenants. Although we see its value, we are conscious that this would be a significant burden for any Government department or conservation organisation whose responsibility it was. Moreover, we have not proposed financial incentives for the creation of conservation covenants; this is a key justification for central recording systems in other jurisdictions where they exist. Instead, we envisage that non-statutory guidance could encourage responsible bodies to keep public

<sup>17</sup> We note here the helpful precedent of section 4 of the Access to Neighbouring Land Act 1992.

<sup>18</sup> Local Land Charges Act 1975, s 8.

<sup>19</sup> See for example AW Morris and AR Rissman, "Public Access to Information on Private Land Conservation: Tracking Conservation Easements" (2009) *Wisconsin Law Review* 1237; J Olmsted, "The Invisible Forest: Conservation Easement Databases and the End of the Clandestine Conservation of Natural Lands" (74) 1 *Law and Contemporary Problems* 51.

<sup>20</sup> Land Trust Alliance, *A Guided Tour of the Conservation Easement Enabling Statutes* (2010) pp 13 to 14.

<sup>21</sup> Environment Protection and Biodiversity Conservation Act 1999 (Australia), s 310.

<sup>22</sup> See for example the register of heritage agreements under the Heritage of Western Australia Act 1990 (Western Australia), s 32(3) and (4).

lists of conservation covenants they hold (with or without details of the nature of the land or the obligations).

- 5.31 We provisionally propose that a conservation covenant should be registrable as a local land charge, and that from the date when a conservation covenant is so registered it will be enforceable against successors in title to the original covenantor.**

**Do consultees agree?**

- 5.32 We provisionally propose that there should not be a statutory requirement for central recording of conservation covenants; but that responsible bodies should be encouraged to publish this information voluntarily, with the agreement of the relevant landowner.**

**Do consultees agree?**

### **PRIORITY**

- 5.33** Land which is the subject of a conservation covenant will by necessity have special environmental or heritage features (or the potential to have those features); this is a consequence of the proposed purposes set out in Chapter 4. It may be possible that such land, once a conservation covenant is created, subsequently becomes the subject of a mandatory public law designation (such as listing, or as a Site of Special Scientific Interest). We do not think that in practice this would be problematic; we have provided for the modification and discharge of conservation covenants, and in any event we imagine that conservation measures under a conservation covenant would not necessarily conflict with designation requirements.

- 5.34 Do consultees foresee difficulties with the interaction of statutory designations for conservation purposes and conservation covenants?**

# CHAPTER 6

## MANAGEMENT AND ENFORCEMENT

### INTRODUCTION

- 6.1 We have explained how conservation covenants could be validly created and made to endure. But the creation of a conservation covenant is merely the beginning of the work, rather than the end. Landowners will have a range of ongoing responsibilities; responsible bodies may need to monitor these activities, and more generally to ensure that the conservation objectives for which the covenant was created are being upheld.
- 6.2 One of the benefits of our proposed scheme is that, because positive obligations can be included, the parties may agree in advance how management of the agreement will work. By “management” we mean how the parties will ensure that their ongoing obligations are being met. This might include visits to the property by the responsible body, or the provision of advice by that body to a landowner. On rare occasions, a breach of these obligations may need to be addressed; this is what we mean by “enforcement”. But the responsibilities and rights of the parties to manage and enforce these agreements will be as diverse as the range of conservation objectives for which they may be made. How then can management and enforcement be incorporated into a statutory scheme?
- 6.3 Our proposals here are linked to our proposal that holders of conservation covenants should be limited to a list of responsible bodies.<sup>1</sup> Our proposals are also dependent on the notion that a conservation covenant is a voluntary agreement, and that therefore the original parties to it may agree whatever terms they regard as appropriate. That said, we are also conscious of the difficulties of saying too little; the Uniform Conservation Easements Act (“UCEA”) in the USA has been criticised for its silence on enforcement.<sup>2</sup>
- 6.4 In this Chapter, we explore how the management of conservation covenants might be undertaken, and consider whether specific provision should be included in any statutory scheme. We then consider enforcement of the parties’ obligations; first, how a landowner’s duties might be enforced, and second, how the responsible body’s duties under the agreement could be enforced.

### MANAGING OBLIGATIONS

#### What sort of management might be undertaken?

- 6.5 Irrespective of whether they are provided for in a statutory scheme or simply agreed by the parties, it is likely that ongoing obligations for management of a conservation covenant will be needed. For example, the responsible body may wish to inspect the property. In New Zealand, the Queen Elizabeth the Second National Trust standard template for open space covenants includes a right for the Trust to enter the covenanted property to check its condition, ascertain

<sup>1</sup> See Chapter 4, para 4.22.

<sup>2</sup> MA King and SK Fairfax, “Public Accountability and Conservation Easements: Learning from the Uniform Conservation Easement Act Debates” (2006) 46 *Natural Resources Journal* 65, 96 to 98.

compliance by the landowner, and in some cases carry out remedying work.<sup>3</sup> In practice, the Trust tends to carry out a monitoring visit to covenanted properties every two years.<sup>4</sup> The need for visits, albeit infrequent ones, has also been highlighted by the conservation organisations with whom we have spoken.

6.6 We also envisage that in many cases a responsible body would provide advice to landowners on the performance of their obligations. In particular, responsible bodies will have conservation expertise, or access to it. Support of this nature may be otherwise unavailable to landowners, and would greatly assist them in fulfilling their obligations under a conservation covenant.

6.7 The role of smaller conservation organisations should be mentioned here. We propose limiting those who can hold a conservation covenant to a list of statutory bodies, local authorities and major conservation organisations. However, much of the conservation work undertaken in England and Wales is carried out by smaller conservation charities. We are keen to ensure that the expertise and enthusiasm of these organisations can be utilised. We suggest that although conservation covenants should be held by a responsible body, in practice (and by agreement between the parties) the management of the conservation covenant may be carried out by a smaller organisation.

6.8 In some cases, relatively complex obligations may need to be agreed between a landowner and a responsible body. One assessment of conservation covenants for certain natural habitats gave the following examples of conservation activity which might be necessary on different types of land.

(1) Ancient woodlands may need to be managed traditionally (via methods such as coppicing), or through natural regeneration. Restrictions on the planting of new species could also be needed, as well as a general prohibition on development.

(2) Grasslands require complex management. This could include restricting re-seeding and the type of fertilisation used, but might also need agreement on the timing and regularity of grazing and mowing by the landowner.

(3) The management of lowland heathland may require a combination of restrictive measures aimed at preventing habitat change, and also positive steps such as requiring grazing and burning off.<sup>5</sup>

6.9 Organisations with whom we have spoken say that obligations could range from the very simple to the highly complex. In these latter cases, a conservation covenant might not set out the full range of each party's obligations. Instead, it may be appropriate for a conservation covenant to contain the core objectives, underpinned by a contractual management agreement (which would apply only to

<sup>3</sup> Queen Elizabeth the Second National Trust, *Standard Open Space Covenant Template*, clause 10, at <http://www.openspace.org.nz/includes/download.aspx?ID=120340>.

<sup>4</sup> Queen Elizabeth the Second National Trust, *FAQs about open space covenants* (2011), at <http://www.openspace.org.nz/includes/download.aspx?ID=116878>.

<sup>5</sup> I Hodge, R Castle and J Dwyer, *Covenants as a Conservation Mechanism* (Department of Land Economy, University of Cambridge, Land Economy Monograph 26, 1993) pp 63 to 64.

the parties signatory to it) setting out more detailed actions. This would be an agreement between the responsible body and the landowner for the time being, setting out the agreed detail of how to satisfy the covenant obligations for a defined period, to be reviewed at intervals. These could be varied relatively easily by agreement between the parties.

**6.10 We invite consultees' views on how obligations under a conservation covenant should be managed, and in particular:**

- (1) what sort of management action is likely to be needed; and**
- (2) whether in some cases it would be useful for a management agreement to be used in addition to a conservation covenant.**

**Statutory or agreed management obligations**

- 6.11 The next question is whether management obligations should be enshrined in legislation, or simply a matter of agreement between the parties. A review of other jurisdictions suggests that management powers are generally not included in statutory schemes. The Scottish legislation, for example, is silent on this issue. Further afield, in Quebec the statute allows the holder of a conservation covenant to inspect any non-residential building or land for compliance monitoring,<sup>6</sup> but this is the only statutory provision for management in any Canadian province. Likewise, the UCEA is silent on management powers, though in ten states there is a power for the holder to enter the land in a reasonable manner.<sup>7</sup> Maine's revised legislation is unique: a holder must inspect the land at least every three years, and must maintain records of monitoring reports (though there is no sanction for failure to do so).<sup>8</sup>
- 6.12 In Australia the various state and federal acts are usually silent on management powers; where there is provision for management the legislation often specifies that the parties may agree terms which relate to management, but does not provide for powers in the statute itself.<sup>9</sup> In a small number of cases there is a power of entry by a government-appointed official.<sup>10</sup>
- 6.13 Organisations with whom we have spoken have presented us with a range of views on this issue. On the one hand, there will usually be a need for ongoing management, so that both the responsible body and the landowner can be sure that the agreement is being upheld, and does not need to be modified. But we

<sup>6</sup> Natural Heritage Conservation Act, RSQ c. C-61.01 (Quebec), s 66.

<sup>7</sup> Land Trust Alliance, *A Guided Tour of the Conservation Easement Enabling Statutes* (2010) pp 40 and 42 and Appendix A.

<sup>8</sup> J Pidot, "Conservation Easement Reform: As Maine Goes Should the Nation Follow?" (2011) 74(4) *Law and Contemporary Problems* 1, 12.

<sup>9</sup> For example, in New South Wales the National Parks and Wildlife Act 1974 does not provide a default regime for management, but it allows the parties to agree terms which require the landowner to permit access to the area by specified persons and repay money paid under the agreement if a specified breach occurs. See National Parks and Wildlife Act 1974 (New South Wales), s 69C(2)(d) to (g).

<sup>10</sup> For example, under the Native Vegetation Act 1991 (South Australia), s 33B(2) provides a power for certain authorised officials to inspect non-residential land for compliance monitoring.

are not convinced that mandatory management powers are the answer. The range of different activities which would be encompassed by conservation covenants is far too broad to be able to design an appropriate scheme for all situations. And whilst inspection by a responsible body is likely to be needed in almost all cases, some sites may require only occasional visits, whereas others may need frequent inspections and hands-on support. A responsible body's approach to management will also vary according to its size, resources and priorities.

- 6.14 Instead, we prefer to leave it to the parties to determine what management methods are needed for the particular site, and the particular aims of the conservation covenant. We are also wary of providing for a mandatory power of entry to land. This would be a significant step, particularly in the context of an entirely voluntary scheme, where landowners may be unaware of statutory provisions. It may also be off-putting to potential donors of conservation covenants. Instead, we suggest that when the conservation covenant is created, it should be a matter for the landowner and the responsible body to agree whatever management actions are appropriate for the site.<sup>11</sup> If those actions become too onerous over time, or if alternatives are needed, the parties will be able to modify the agreement in accordance with our proposals in Chapter 7. They will also be able to create underlying contractual arrangements to set out any detailed management actions required.
- 6.15 We provisionally propose that the parties should be free to agree management actions as part of a conservation covenant, but that no management powers should be provided for in the statute.**

**Do consultees agree?**

#### **ENFORCEMENT OF THE LANDOWNER'S DUTIES**

- 6.16 For most conservation covenants, there will be no need to consider enforcement of the parties' obligations. Statistics from overseas suggest that in only a small number of cases is compliance action necessary. A 1999 USA-wide survey of 7,400 conservation covenants found that breaches had occurred in under 7%; of 498 breaches, only 115 were considered major, with 94 of those resolved without litigation.<sup>12</sup> Likewise, in New Zealand the Queen Elizabeth the Second National Trust estimates that of the 1723 open space covenants it monitored between 2011 and 2012, 95.1% were in compliance.<sup>13</sup>
- 6.17 However, a landowner's failure to uphold obligations under a conservation covenant may have serious and possibly irreparable consequences. Designing a robust system to address such behaviour will ensure that the system itself can be relied on, and landowners and responsible bodies can have faith that their conservation aims will be upheld. In the following section we consider first how liability for a breach should be framed, and then look at the steps which should be

<sup>11</sup> Non-statutory guidance and model terms could be of assistance to the parties on this issue: see our provisional proposal at Chapter 5, para 5.22.

<sup>12</sup> E Byers and K Marchetti Ponte, *The Conservation Easement Handbook* (2nd 2005) p 158.

<sup>13</sup> Queen Elizabeth the Second National Trust, "Statistics", *Open Space Magazine* (2012) 83, 23, at <http://www.openspace.org.nz/includes/download.aspx?ID=125376>.

open to a responsible body and also a landowner in the event of a breach.

### **Liability for a breach**

- 6.18 When is a wrong committed under a conservation covenant? In *Making Land Work: Easements, Covenants and Profits à Prendre* (“Easements Report”) we considered the circumstances in which liability might arise for failure to adhere to a land obligation, whether restrictive or positive.<sup>14</sup> A failure to perform restrictive obligations may arise when the landowner carries out an activity in breach of the restriction, or when another person does so at the landowner’s behest or with his or her approval.<sup>15</sup> Liability for positive obligations was more simply dealt with, as a failure to act will clearly be attributable to the person or persons who were supposed to carry out the activity.
- 6.19 This approach was supported by consultees, and we see no reason to depart from it here. So, for example, a landowner who constructs a building on a woodland site in contravention of a restriction on development, or allows a developer to do so, will be liable. Where a landowner is required to take a positive step such as using certain fertiliser on grazing land, failure to do so will also be regarded as a breach.
- 6.20 We provisionally propose that, under the terms of a conservation covenant, a person who is bound by a restrictive obligation breaches it by doing something which it prohibits, or by permitting or suffering someone else to do so; and a person who is bound by a positive obligation breaches it if the obligation is not performed.**

### **Do consultees agree?**

### **Approaches to conservation covenant enforcement in other jurisdictions**

- 6.21 Some jurisdictions criminalise behaviour which is contrary to a conservation covenant. In Quebec, and Newfoundland and Labrador, it is a criminal offence to breach the terms of a conservation covenant.<sup>16</sup> Several Australian states also provide for criminal sanctions. In Tasmania, for example, it is an offence to breach a conservation covenant, punishable by a fine. The person found guilty can be ordered to pay further sums based on the restitution of payments previously made to them under the covenant, compensatory damages for the state and the stripping of any profits made from the breach.<sup>17</sup>
- 6.22 We are not inclined to take that approach here. Although breaches of obligations should be taken seriously to preserve the integrity of the scheme, we conceive of a conservation covenant as a private and voluntary agreement. That ethos would

<sup>14</sup> *Making Land Work: Easements, Covenants and Profits à Prendre* (2011) Law Com No 327 (“Easements Report”), paras 6.150 to 6.153.

<sup>15</sup> Easements Report, para 6.154.

<sup>16</sup> Historic Resources Act, RSNL 1990 c. H-4 (Newfoundland and Labrador), s 35; Natural Heritage Conservation Act, RSQ c. C-61.01 (Quebec), s 70.

<sup>17</sup> Nature Conservation Act 2002 (Tasmania), s 46.

be lost if a landowner's failure to uphold their obligations was criminalised.<sup>18</sup> Moreover, we are conscious of the proposals we made in the Criminal Liability in Regulatory Contexts project, which aimed to limit the proliferation of new criminal offences (and have been implemented by Government<sup>19</sup>).<sup>20</sup> We do not think there is a sufficiently good argument for the creation of a new criminal offence here.

- 6.23 In other jurisdictions we have found a mixed approach to the inclusion of enforcement provisions in conservation covenant legislation. Where conservation covenants exist, remedies are generally confined to injunctions and/or damages (though some Australian states take a more creative approach). But in a number of jurisdictions, the absence of specific legislative provision on enforcement means that the responsible body or holder's ability to enforce is unclear. Scotland is a notable exception. When conservation burdens were created as part of wider reforms to land law, existing remedies such as interdict (injunction), damages and implement (a requirement to perform a positive obligation) were regarded as sufficient and retained for all real burdens (including conservation burdens).<sup>21</sup>
- 6.24 In Canada, most statutes are silent on methods of enforcement; this silence probably means that the relevant remedies are determined by the general law of the province in question. However, four statutes provide for court orders requiring the burdened landowner to restore or remedy harm caused by the breach;<sup>22</sup> three of these also allow injunctions against activities that are contrary to the covenant's purposes.<sup>23</sup>
- 6.25 Likewise in the USA, the UCEA is silent on remedies. Of the states which have adopted the UCEA, most also refrain from addressing remedies; but silence will usually be interpreted as allowing both damages and injunctions to be obtained (these are available in most states for breaches of easements and covenants generally).<sup>24</sup> Injunctions and damages are also available in non-UCEA states. This is either provided expressly in the statute (with Illinois notably providing for punitive damages), or legislative silence is taken to mean that injunctions and

<sup>18</sup> Instead, we have proposed a system of exemplary damages to address serious breaches – see paras 6.42 to 6.51 below.

<sup>19</sup> See the Ministry of Justice Criminal Offences Gateway guidance at <http://www.justice.gov.uk/legislation/criminal-offences-gateway>.

<sup>20</sup> Criminal Liability in Regulatory Contexts (2010) Law Commission Consultation Paper No 195.

<sup>21</sup> Report on Real Burdens (2000) Scot Law Com No 181, paras 4.68 to 4.70. For completeness, we note however that the remedy of irritancy was abolished: see Title Conditions (Scotland) Act 2003, s 67, and Report on Real Burdens (2000) Scot Law Com No 181, paras 4.71 to 4.73.

<sup>22</sup> Heritage Resources Act, CCSM c. H39.1 (Manitoba), s 21(4); Conservation Easements Act, RSNB 1998 c. C-16.3 (New Brunswick), s 11; Conservation Easements Act, SNS 2001 c. 28 (Nova Scotia), s 15; Conservation Easements Act, RSS 1996 c. C-27.01 (Saskatchewan), s 11(3).

<sup>23</sup> Conservation Easements Act, RSNB 1998 c. C-16.3 (New Brunswick), s 11; Conservation Easements Act, SNS 2001 c. 28 (Nova Scotia), s 15; Conservation Easements Act, RSS 1996 c. C-27.01 (Saskatchewan), s 11(3).

<sup>24</sup> Land Trust Alliance, *A Guided Tour of the Conservation Easement Enabling Statutes* (2010) pp 40 to 41.

damages are available.<sup>25</sup>

6.26 In Australia, the general law provides remedies for the breach of a restrictive covenant, rooted in English equitable remedies. Generally speaking the beneficiary can seek an injunction to restrain or make good a breach but the court has a discretion, based on equitable principles, to award damages instead of or in addition to an injunction.<sup>26</sup> Some conservation covenants also have special statutory remedies, administered by a particular court. It is not always clear whether these remedies supplement the general remedies or replace them. At federal level, for example, enforcement can take effect through injunctions issued by the Federal Court, including an order to take steps to repair damage to the environment.<sup>27</sup> But it is not stated whether these remedies are additional to the general remedies available.

6.27 In the Australian states, remedies are more tailored to conservation and the effect of a breach. For heritage conservation covenants there is usually provision for whatever order may be necessary to secure compliance and make good the damage.<sup>28</sup> Remedies for breach of a nature conservation covenant are more varied and can include:

- (1) injunctions to secure compliance and make good the breach;<sup>29</sup>
- (2) damages with exemplary and profit-stripping elements;<sup>30</sup>
- (3) a form of self-help whereby the covenantee can enter the land and perform the covenantor's duties itself,<sup>31</sup> and
- (4) limiting damages available to cases of a reckless or intentional breach, whilst providing that other types of remedy are nonetheless available.<sup>32</sup>

6.28 The position in New Zealand is less clear. The legislation which provides for open space covenants, for example, is silent on enforcement. One author concludes that the court nonetheless has equitable jurisdiction in respect of these covenants, on application by the Queen Elizabeth the Second National Trust,<sup>33</sup>

<sup>25</sup> Land Trust Alliance, *A Guided Tour of the Conservation Easement Enabling Statutes* (2010) pp 40 to 41.

<sup>26</sup> See, for example, Law Reform Commission of Western Australia, *Project No 91: Restrictive Covenants – Report* (1997) paras 2.24 to 2.31; Victorian Law Reform Commission, *Easements and Covenants: Consultation Paper* (2010) para 10.12.

<sup>27</sup> Environment Protection and Biodiversity Conservation Act 1999 (Australia), ss 476 to 480.

<sup>28</sup> For example Queensland Heritage Act 1992 (Queensland), s 82.

<sup>29</sup> Native Vegetation Act 1991 (South Australia), s 31A(6)(c) and (d).

<sup>30</sup> Native Vegetation Act 1991 (South Australia), s 31A(6)(e).

<sup>31</sup> Soil and Land Conservation Act 1945 (Western Australia), ss 30C(2) and 35(3).

<sup>32</sup> National Parks and Wildlife Act 1974 (New South Wales), s 69G; Nature Conservation Trust 2001 (New South Wales), s 38.

<sup>33</sup> DL Donahue, "The Law and Practice of Open Space Covenants" (2003) 7 *New Zealand Journal of Environmental Law* 119, 157 and 160.

but in any event, this has rarely been resorted to.<sup>34</sup>

## **Enforcement of conservation covenants in England and Wales**

### ***Enforcement by the responsible body***

- 6.29 The hybrid nature of a conservation covenant is thrown into sharp relief when considering remedies which may be sought by a responsible body. Seeking a remedy constitutes enforcement of the rights of the responsible body as a party to the conservation covenant; but those rights are sought to be enforced for the greater public good. To that end, we have considered a range of potential remedies for breach of a conservation covenant, guided by practice in other jurisdictions. The result is a mix of remedies found in contract, tort and equity, reflecting the complex nature and purposes of a conservation covenant. It is possible, though, that consultees may wish to suggest alternative remedies more tailored to conservation, or to the organisations which will seek those remedies.
- 6.30 There are risks for a responsible body in pursuing enforcement action against a landowner; our sense is that action will not be undertaken lightly. A range of concerns, including the likelihood of success, reputation and resources will limit the circumstances in which court action is taken. We also emphasise that nothing in a statutory scheme should prevent the parties from agreeing further enforcement provisions within a conservation covenant. For example, the parties may agree that on the notification of a breach by the responsible body, the landowner will be given a defined period within which to remedy it; or they may agree that a failure to perform certain obligations will result in payment being stopped.

### **INJUNCTIONS**

- 6.31 The ability to obtain an injunction is likely to be the main remedy sought by a responsible body in respect of a landowner's breach of a conservation covenant; it is a remedy targeted at action or inaction on the part of a landowner (rather than loss suffered by a responsible body). We envisage that a system of conservation covenants would make available all forms of injunctive relief;<sup>35</sup> the most appropriate will vary according to the specifics of the case and the type of conservation covenant being enforced. It is likely the following will be needed:
- (1) where the obligation is restrictive, a prohibitory injunction, requiring the defendant to refrain from or cease doing something;
  - (2) where the obligation is positive, a mandatory injunction, which can require the defendant to do something; and
  - (3) where the responsible body seeks the correction of damage caused by a breach of a conservation covenant, a mandatory injunction to require the defendant to undo something which has been done.

<sup>34</sup> DL Donahue, "The Law and Practice of Open Space Covenants" (2003) 7 *New Zealand Journal of Environmental Law* 119, 155.

<sup>35</sup> As an equitable remedy injunctive relief is either granted or refused at the discretion of the court.

- 6.32 Due to the nature of conservation covenants (in particular the speed at which a conservation interest can be irreversibly damaged) we would expect injunctive relief to be available at both an interim and final stage.<sup>36</sup>

#### *Final injunctions*

- 6.33 A final injunction can be awarded at the conclusion of a trial. In the case of conservation covenants these are likely to be either prohibitory (for example, requiring the landowner not to use a certain pesticide) or mandatory (for example, requiring a landowner to permit public access, to take down a structure that is prohibited, or rebuild a plantation they have removed). The duration of the order is likely to be case-specific, depending upon the duration of the conservation covenant and the nature of the obligation concerned.
- 6.34 Whilst the grant of a final injunction remains a discretionary remedy it has become an established rule, so far as the interference with an easement or a breach of a restrictive covenant are concerned, that once a claimant has established his or her legal right, he or she is *prima facie* entitled to an injunction.<sup>37</sup> The exceptions to this general rule include instances where damages would be an adequate remedy, where the injunction would be ineffective because the breach has ceased and where the claimant had disentitled him or herself from equitable relief by his or her conduct.<sup>38</sup>
- 6.35 Furthermore, caution should be exercised by the parties when drafting a conservation covenant. This is because the courts will not enforce an obligation by injunctive relief if that obligation is uncertain; it must be clear from the conservation covenant what is expected of the defendant.<sup>39</sup> The court will be equally reluctant to enforce an obligation that would require constant supervision.<sup>40</sup>

#### *Interim injunctions*

- 6.36 An interim injunction is sought to protect a right before trial and is intended to preserve the status quo until a court can give the parties a full hearing.<sup>41</sup>

<sup>36</sup> In some exceptional cases a responsible body may wish to apply for a *quia timet* injunction. *Quia timet* translates as “because he or she fears”. The court’s jurisdiction to grant a final *quia timet* injunction will only be exercised where (1) there is proof of imminent danger, and (2) there is proof that the apprehended damage will, if it comes, be very substantial: *Fletcher v Bealey* (1885) 28 Ch D 688, 698 by Pearson J.

<sup>37</sup> *Prima facie* translates as “at first glance”. The *prima facie* entitlement to an injunction is illustrated in a number of cases, for example *Imperial Gas Light Co v Broadbent* (1859) 7 HLC 600; *Fullwood v Fullwood* (1879) 9 CH D 176; *Cowper v Laidler* [1903] 2 Ch 337; *Midtown Limited v City of London Real Property Company Limited* [2005] EWHC 33 (Ch).

<sup>38</sup> For more information on the court’s jurisdiction to grant or withhold a final injunction, see J McGhee (ed), *Snell’s Equity* (32 ed 2010) ch 18.

<sup>39</sup> *Co-operative Insurance v Argyll Stores Ltd* [1998] AC 1.

<sup>40</sup> *Co-operative Insurance v Argyll Stores Ltd* [1998] AC 1.

<sup>41</sup> The jurisdiction to grant an interim injunction comes from s 37(1) of the Senior Courts Act 1981.

Generally, an interim injunction will be prohibitory in nature<sup>42</sup> and almost always sought when the factual and legal bases for the claim are uncertain.<sup>43</sup> In the case of conservation covenants a prohibitory interim injunction might be sought by a responsible body when time is of the essence. For example, in an agricultural setting the landowner might be using a specific pesticide that is prohibited by the conservation covenant because of irreversible damage it can cause to protected grassland; it would be essential that the use of the pesticide immediately ceases.

6.37 The principles governing when an interim injunction may be granted are set out in *American Cyanamid Co v Ethicon Limited (No 1)*.<sup>44</sup> In this judgment Lord Diplock laid down a set of questions that judges should consider, which are as follows:

- (1) Is there a serious question to be tried? If the answer is “yes”, two further questions arise.
- (2) Would damages be an adequate remedy for a party injured by the court’s grant of, or its failure to grant, an injunction?
- (3) If not, where does the “balance of convenience” lie?<sup>45</sup>

6.38 In considering the second question the court should consider whether, if the claimant (here, a responsible body) is successful at trial, he or she would be adequately compensated by damages for loss caused by the refusal to grant an interim injunction.<sup>46</sup> Again, the damage to a responsible body itself may be minimal. A court looking solely at a responsible body’s loss (as opposed to the loss of conservation value, in the public interest) may not be inclined to grant an interim injunction, as damages would likely be an adequate remedy in respect of the responsible body’s loss. This is an unsatisfactory outcome.

6.39 However, the *American Cyanamid* principles may be weighed against other considerations, including the public interest.<sup>47</sup> Conservation covenants are one instance in which the court should consider the public interest in general (and the loss to conservation if injunctive relief is not granted). To that end, the court should be required to consider the public interest when determining an application for an interim injunction.

**6.40 We provisionally propose that, on proof of a breach of a conservation covenant, the court should have the power to issue a final injunction.**

<sup>42</sup> The grant of a mandatory interim injunction is an exceptional form of relief, since it will usually impose a disproportionate burden on the defendant. See the judgment of Lord Diplock in *American Cyanamid Co v Ethicon Ltd (No 1)* [1975] AC 396, 408.

<sup>43</sup> MA Jones and A Dugdale (eds), *Clerk & Lindsell on Torts* (20th ed 2010) para 29-17.

<sup>44</sup> [1975] AC 396.

<sup>45</sup> “It is where there is doubt as to the adequacy of the respective remedies in damages that the question of balance of convenience arises.” As expressed by Lord Diplock in *American Cyanamid Co v Ethicon Ltd (No 1)* [1975] AC 396 at 408.

<sup>46</sup> *American Cyanamid Co v Ethicon Ltd (No 1)* [1975] AC 396, 408, as cited by Browne LJ in *Fellows & Son v Fisher* [1976] 1 QB 122,137.

<sup>47</sup> MA Jones and A Dugdale (eds), *Clerk & Lindsell on Torts* (20th ed 2010) paras 29-19 and 29-21.

## Do consultees agree?

- 6.41 We provisionally propose that the court should have the power to issue an interim injunction in respect of a breach of a conservation covenant. In determining whether an interim injunction should be issued, the court should be required to consider the public interest.

## Do consultees agree?

### DAMAGES

#### *Compensatory and exemplary damages*

- 6.42 We have emphasised that a conservation covenant is a private, voluntary agreement between a landowner and a responsible body. To that end, our starting point for a consideration of when damages should be available is the law of contract, which provides for compensatory damages on proof of a breach. What then is the court's aim in considering a claim for breach of a conservation covenant? In this case we suggest that, following the approach set out in *Livingstone v Rawyards Coal Co*,<sup>48</sup> the court should aim to put the responsible body in the position it would have been in (so far as money can do so) had the contract been performed.<sup>49</sup> Such an approach means that contractual rules of remoteness will also apply.
- 6.43 However, in many cases compensatory damages will be an insufficient remedy. The loss suffered by the responsible body may be minimal. It will usually not own neighbouring land, and the impact on it of a landowner allowing development, or failing to implement conservation methods, will be negligible. It is the loss to conservation in the public interest which is more significant.
- 6.44 Moreover, the consequences of environmental and architectural damage may be irreparable. The wilful destruction of ancient woodland or an historic home may not be able to be remedied by an order for compensatory damages. Such actions are an affront to conservation values. Our scheme must also ensure that a landowner cannot get out of conservation obligations cheaply by destroying the property in question.
- 6.45 To that end we have considered the potential for a court to impose a more significant remedy, such as exemplary damages designed to punish rather than to compensate, in certain cases. Concerns have been raised about the use of such a remedy in essentially private, civil matters, and whether exemplary damages should ever be available:

<sup>48</sup> (1880) 5 App Cas 25.

<sup>49</sup> H McGregor, *McGregor on Damages* (18th ed 2009) para 1.023.

Whether a modern legal system should recognise exemplary damages at all has been much debated, but it is thought that, all in all, the case for dispensing with them is made out. The central argument against them is that they are anomalous in the civil sphere, confusing the civil and criminal functions of the law; in particular, it is anomalous that money exacted from a defendant by way of punishment should come as a windfall to a claimant rather than go to the State. On the other side, a major justification of exemplary damages is that their existence provides a suitable means for the punishment of minor criminal acts which are in practice ignored by police too caught up in the pursuit of serious crime.<sup>50</sup>

6.46 Conservation covenants are ultimately for the public benefit, and so the availability of exemplary damages may be appropriate in certain cases.

6.47 It is now thought that there are three grounds on which exemplary damages may be claimed:

- (1) where there has been oppressive, arbitrary or unconstitutional action taken by servants of the government;
- (2) where a defendant's conduct is intended to make a profit which may exceed the compensation payable to the plaintiff; and
- (3) where an award of exemplary damages would be expressly authorised by statute.<sup>51</sup>

6.48 These principles were set out in *Rookes v Barnard*; Lord Devlin's description of the second case is striking in its relevance to egregious breaches of conservation obligations:

[Where a defendant] with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not confined to money making in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object – perhaps some property which he covets – which he either could not obtain at all or not obtain except at a price greater than he wants to put down.<sup>52</sup>

6.49 This description calls to mind the (rare) example of a landowner who intentionally destroys a heritage building with a view to constructing a large, profit-making development on that site. Such cases directly challenge the purposes of a statutory scheme for conservation covenants, and should arguably open a landowner to a serious penalty.

6.50 But the use of this remedy in respect of conservation covenants is not without

<sup>50</sup> H McGregor, *McGregor on Damages* (18th ed 2009) para 11-001.

<sup>51</sup> *Rookes v Barnard* [1964] AC 1129, 1226 to 1227.

<sup>52</sup> *Rookes v Barnard* [1964] AC 1129, 1227.

difficulty. Following *Rookes v Barnard*, the courts may be reluctant to award exemplary damages unless specifically directed to the circumstances in which they were appropriate. Nonetheless, the public nature of these agreements warrants the inclusion of a remedy which punishes flagrant breaches of obligations, reflecting the types of behaviour referred to by Lord Devlin in *Rookes v Barnard*.

**6.51 We provisionally propose that, on proof of a breach of a conservation covenant by a landowner, the court should have the power to order:**

- (1) the payment of compensatory damages to the responsible body; and**
- (2) the payment of exemplary damages to the responsible body. We invite consultees' views on the way this remedy should be framed in a statutory scheme, and the circumstances in which such an award should be made.**

**Do consultees agree?**

*Damages in substitution of an injunction*

6.52 Where the court has jurisdiction to grant injunctive relief it may choose to award damages instead. This jurisdiction comes from section 50 of the Senior Courts Act 1981, which provides:

Where the Court of Appeal or the High Court has the jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance.<sup>53</sup>

6.53 There is substantial jurisprudence in this area; in particular *Shelfer v City of London Electric Light Company*<sup>54</sup> provides criteria for judges to consider when deciding whether to award damages in substitution of an injunction.<sup>55</sup> However, damages in substitution for an injunction are calculated on the basis of what the liable party might have paid by way of consideration for a negotiated release. To have damages available on this basis is inappropriate for conservation covenants, where it is not acceptable for the landowner simply to buy his or her way out.

6.54 We take the view that there would be few if any occasions when it would be useful for the court to substitute damages for an injunction to enforce a conservation covenant. The remedy most likely to be useful to a responsible body is the ability to seek an injunction, to prevent activity or require something to be done. We have also proposed that damages should be available, to address those cases where the loss to a responsible body requires a remedy, or where

<sup>53</sup> The county courts have an identical power by virtue of section 38 of the County Courts Act 1984.

<sup>54</sup> [1895] 1 Ch 287.

<sup>55</sup> For more information on the criteria considered when deciding whether to substitute and injunction with damages see the judgment of AL Smith LJ in *Shelfer v City of London Electric Light Company* [1895] 1 Ch 287.

the nature of the landowner's breach is so serious as to warrant exemplary damages. Beyond these remedies, we cannot foresee any need for a court to award damages in substitution for an injunction.

- 6.55 We provisionally propose that a statutory scheme for conservation covenants should not include an ability for the court to award damages in substitution for an injunction.**

**Do consultees agree?**

***Enforcement by third parties***

- 6.56 In other jurisdictions certain persons are given the power to enforce a conservation covenant despite not being a party to it. This is seen, for example, in the USA, where it is argued in some states that the Attorney General has power to enforce. The majority of US states replicate the UCEA's general provision for enforcement by any "person authorised by other law". The Attorney General's standing will therefore be determined by each state's rules on his or her powers and duties. In most states he or she is charged with ensuring that charities – and in some cases all non-profit associations – do not put their property to a use that is outside the scope of their purposes. This power would enable an Attorney General to enforce the conservation covenant, either directly against the landowner or indirectly by requiring the benefit holder to take enforcement action.
- 6.57 On the other hand, some US legislation directly addresses this question. Four states omit the "person authorised by other law" provision and require any form of third party enforcement (this would include the Attorney General) to be expressly provided for in the conservation covenant. In contrast, Mississippi and Virginia's statutes confer an unfettered discretion on the Attorney General to initiate enforcement proceedings. Arizona and Maine limit this power to situations where the benefit holder has ceased to exist, become incapable or unreasonably refused to take action against the landowner in respect of a breach.<sup>56</sup>
- 6.58 There is an argument to be made that, as conservation covenants are ultimately for the public benefit, it is appropriate for enforcement action to be available to Government or a statutory conservation body. However, at this stage we are not convinced that there is a case for this means of enforcement to be included in a statutory scheme. To give enforcement power to a third party would detract from the private nature of conservation covenants.
- 6.59 We invite consultees' views on whether Government or a statutory conservation body should have the power to enforce conservation covenants where a holder has failed or is unable to do so.**

**ENFORCEMENT OF THE RESPONSIBLE BODY'S DUTIES UNDER A CONSERVATION COVENANT**

- 6.60 In some cases, a responsible body will have obligations under a conservation covenant. These obligations might include, for example, the payment of money to

<sup>56</sup> Land Trust Alliance, *A Guided Tour of the Conservation Easement Enabling Statutes* (2010) pp 29 to 33.

a landowner in exchange for the carrying out of certain activities. In limiting the entities which may hold conservation covenants, we hope to ensure that it is rarely (if ever) necessary for a landowner or another individual to take action to enforce the obligations of a responsible body. In the unlikely event that such action is necessary, we propose that the law of contract should govern the remedies available; this will include damages, injunctions and specific performance. Depending on the nature of the responsible body, other remedies may be available as well. For example, if the organisation is a statutory or government body, it may be possible to bring an application for judicial review. Alternatively, in the case of registered charities, a landowner may raise a complaint with the Charity Commission in respect of the responsible body's behaviour.

**6.61 We provisionally propose that, on proof of the breach of a responsible body's obligations under a conservation covenant, the court should have the power to order remedies in accordance with general principles of contract law.**

**Do consultees agree?**

# CHAPTER 7

## MODIFICATION AND DISCHARGE

### INTRODUCTION

- 7.1 The means by which a conservation covenant may be modified or discharged are central to any statutory scheme. They are also highly challenging to design, balancing the advantages of long-lasting obligations against the need for flexibility so as not to sterilise the land. It has been suggested that:

[t]he current generation must find a workable way to dictate conservation policy into the indefinite future. This will require conservation [covenants] to be flexible, while also maintaining their conservation purposes into the future.<sup>1</sup>

- 7.2 The need to modify or discharge may arise because of inevitable changes to a site, damage (whether man-made or environmental), the arrival of new learning about conservation techniques, or even the effects of climate change. It must also be acknowledged that a set of obligations may, after a period of time, no longer be in the public interest. Land which is close to growth areas may not be needed for housing when a conservation covenant is created, but as development moves outward the position may change.<sup>2</sup>

- 7.3 In other jurisdictions, a common theme is the need for a permanent but sufficiently flexible approach. It must not be too easy for conservation covenants to be altered, otherwise their value as a tool for conservation in the public interest is diminished. But stakeholders have also told us that conservation covenants need to be flexible; to take account of the diverse and changing needs of conservation work, and to acknowledge the important role of responsible development. Flexibility may also make it more likely that a landowner will enter into a conservation covenant.<sup>3</sup>

- 7.4 With these goals in mind, we consider three forms of modification and discharge.

- (1) Action by the parties. The ability of a responsible body to discharge a conservation covenant is considered, along with the parties' ability to agree between themselves that the conservation covenant should be modified.
- (2) Adjudicated modification and discharge. Here we consider the role of an external adjudicator in determining disputes about modification and discharge of conservation covenants, and we examine in particular the Lands Chamber of the Upper Tribunal.

<sup>1</sup> B Gentry, JD Oppenheimer and RA Strobo, "Optimizing Private Land Conservation and Public Land Use Planning/Regulation: Report of the 2010 Berkley Workshop" (2011) *Yale School of Forestry & Environmental Studies Report Number 27*, p 77.

<sup>2</sup> B Gentry, JD Oppenheimer and RA Strobo, "Optimizing Private Land Conservation and Public Land Use Planning/Regulation: Report of the 2010 Berkley Workshop" (2011) *Yale School of Forestry & Environmental Studies Report Number 27*, p 76.

<sup>3</sup> I Hodge, R Castle and J Dwyer, *Covenants as a Conservation Mechanism* (Department of Land Economy, University of Cambridge, Land Economy Monograph 26, 1993) p 34.

- (3) By operation of the planning system, and in particular through section 237 of the Town and Country Planning Act 1990.

## **ACTION BY THE PARTIES**

### **Unilateral release by the responsible body**

- 7.5 We proposed in Chapter 4 that it should be possible for a responsible body to transfer a conservation covenant to another responsible body; we also sought views on what should happen where a responsible body ceases to exist.<sup>4</sup> We now consider whether a responsible body should be able to discharge a conservation covenant unilaterally (akin to the common law principle of express release). This would include situations where the discharge was with the agreement of the landowner, but would also enable the responsible body to discharge the agreement without reference to the landowner.
- 7.6 When would such a power be needed? A landowner and responsible body may agree that obligations should be discharged where, for example, the species protected has migrated elsewhere, or catastrophic damage has occurred to a site rendering the conservation covenant ineffective. A conservation covenant may also need to be discharged if the land becomes subject to a mandatory regime which overrides the conservation covenant, such as designation as a Site of Special Scientific Interest.<sup>5</sup> And there may be cases where the cost of continuing the conservation covenant significantly outweighs the overall public benefit; a responsible body may decide that its funds are better spent on other conservation work. Equally, it may agree with the landowner that the outlay required for him or her to carry on the conservation activity required by the covenant has become disproportionately expensive compared with the public benefit it confers.
- 7.7 The ability of a responsible body to discharge a conservation covenant is found in other conservation covenant systems. For example, some Australian states allow a conservation covenant to be modified unilaterally by the covenantee if it has become unnecessary or its purposes can no longer be achieved on the land (though in general the holder will be a Minister or Government body).<sup>6</sup> Similarly in Scotland, a conservation burden can be discharged simply if the holder (in our terms, the responsible body) registers a deed of discharge against the burdened property.<sup>7</sup>
- 7.8 On the other hand, the public interest may be poorly served if the responsible body can discharge an agreement it has previously promised to uphold. This not only departs from the original intention of the parties, but may conflict with the landowner's wishes. Whilst it may be appropriate for the beneficiary of a freehold restrictive covenant to decide it no longer requires obligations to be met, there is a broader public interest in the benefits provided by a conservation covenant. In addition, there may be an alternative to release; under our proposals set out in Chapter 4, the conservation covenant could be transferred to another body.

<sup>4</sup> See Chapter 4, paras 4.25 to 4.29.

<sup>5</sup> For a discussion of Sites of Special Scientific Interest, see Appendix A of this Consultation Paper; see also our discussion about priorities at Chapter 5, paras 5.33 to 5.34.

<sup>6</sup> For example Nature Conservation Act 1992 (Queensland), s 47(2)(a).

<sup>7</sup> Title Conditions (Scotland) Act 2003, s 48.

7.9 However, we have proposed limiting responsible bodies to those which are trustworthy and accountable. The Secretary of State and the Welsh Ministers will control their inclusion on the lists of responsible bodies; this is an important form of oversight. More generally, there are others forms of accountability. As we noted in Chapter 4, responsible bodies will be subject to judicial review and freedom of information requests, accountable to Parliament or the Welsh Assembly, or regulated by the Charity Commission. In addition, these organisations will have access to scientific and other expertise which enables them to judge whether a conservation covenant is still needed. This is an issue on which the arguments are finely balanced, but we are inclined to favour giving responsible bodies the power to discharge a conservation covenant, with or without the agreement of the landowner. We would be grateful for consultees' views on whether this should be limited to particular circumstances.

**7.10 We provisionally propose that unless a conservation covenant expressly provides otherwise, its responsible body may unilaterally discharge the obligations contained in it.**

**Do consultees agree?**

**7.11 We invite consultees' views on whether the responsible body's ability to discharge should be limited to certain circumstances, and, if so, what circumstances would be appropriate.**

**By agreement**

7.12 We have proposed that a responsible body should be able to discharge a conservation covenant (with or without the agreement of the relevant landowner). A further question is whether the parties themselves (that is, the parties to the conservation covenant at any given time) should be able to agree to modify its terms.<sup>8</sup> It is important to recall that this is a private, voluntary agreement; just as the parties may agree to define obligations in a conservation covenant, arguably it should also be possible for them to change those obligations. But a conservation covenant is ultimately for the benefit of the public; is the public interest served if the parties can agree to modify it without some form of public oversight?

7.13 In answering this question it is useful to consider the approach taken elsewhere. In fact, although many systems allow the parties to agree to modify, there is no uniformity to this issue. In Australia, for example, nearly all state legislation for conservation covenants either expressly allows variation by agreement or pursuant to a term in the covenant, or does not rule out these methods.<sup>9</sup> The sole restriction on the parties' freedom is found in Tasmania: if land is classified as a "private nature reserve" a nature conservation covenant can only be varied insofar as it does not threaten the land's natural or cultural values.<sup>10</sup> On the other hand, the position remains unclear in respect of New Zealand open space

<sup>8</sup> It would not be appropriate to allow a responsible body to alter obligations under a conservation covenant unilaterally; this could impose significant and unreasonable burdens on a landowner.

<sup>9</sup> For example, the Queensland Heritage Act 1992 (Queensland), s 80(3).

<sup>10</sup> Nature Conservation Act 2002 (Tasmania), s 35(3).

covenants. It appears they can be modified with the agreement of the covenantor and the Board of the Queen Elizabeth the Second National Trust, though only in a way that is not contrary to the covenant's purposes or objectives;<sup>11</sup> but it has been argued that this power was only intended to be used for minor amendments.<sup>12</sup>

- 7.14 In the USA, some state legislation sets limits on the ability to modify conservation covenants. It is not always clear whether and to what extent this displaces general common law methods. In Montana, diversion of land from open space use must be in the public interest, permitted by the covenant's terms and substituted as far as is feasible on other land.<sup>13</sup> Massachusetts and New Jersey require a public hearing and approval by the local or state government.<sup>14</sup> Nebraska has a dual system: where the holder wants to release a conservation covenant the state government determines the matter, but if the burdened landowner seeks modification or discharge they must go to court.<sup>15</sup> Maine and Rhode Island's recently reformed statutes demonstrate the greatest public oversight: court approval is required for any modification that materially detracts from the conservation values intended for protection. The court must join the Attorney General as a party and consider the public interest and original purposes of the conservation covenant.<sup>16</sup>
- 7.15 Our proposed scheme relies on having a limited number of organisations able to hold a conservation covenant. These organisations would all be subject to a degree of oversight, and their functions are confined by statute or by charitable purposes. We are aware of the criticisms which exist, particularly in the USA, of giving discretion to charitable organisations in the absence of additional public oversight.<sup>17</sup> However, the problems which arose in the USA occurred in the context of significant tax incentives available to landowners (which led to a dramatic increase in the use of conservation covenants<sup>18</sup>). Giving the Secretary of State and the Welsh Ministers control over the lists of responsible bodies also ensures that prompt action could be taken if abuse comes to light.
- 7.16 We provisionally propose that the parties to a conservation covenant for the time being may agree to modify it.**

#### **Do consultees agree?**

<sup>11</sup> Queen Elizabeth the Second National Trust Act 1977 (New Zealand), s 22A.

<sup>12</sup> DL Donahue "The Law and Practice of Open Space Covenants" (2003) 7 *New Zealand Journal of Environmental Law* 119, 129 and 142.

<sup>13</sup> However, there is no procedure for enforcing this limit: Mont. Code Ann. § 76-6-107.

<sup>14</sup> Mass. Gen. Laws ch. 184 § 32; N.J. Rev. Stat. §§ 13:8B-5 and 13:8B-6.

<sup>15</sup> Neb. Rev. Stat. §§ 76-2,113 and 76-2,114.

<sup>16</sup> Me. Rev. Stat. Ann. tit. 33 § 477A(2); R.I. Gen. Laws § 34-39-5(c).

<sup>17</sup> MA King and SK Fairfax, "Public Accountability and Conservation Easements: Learning from the Uniform Conservation Easement Act Debates" (2006) 46 *Natural Resources Journal* 65, 86 and 91 to 93.

<sup>18</sup> MA King and SK Fairfax, "Public Accountability and Conservation Easements: Learning from the Uniform Conservation Easement Act Debates" (2006) 46 *Natural Resources Journal* 65, 115; N McLaughlin, "Conservation Easements – A Troubled Adolescence" (2005-2006) 26 *Journal of Land Resources and Environmental Law* 47, 50.

### **The effect of merger**

- 7.17 Merger is a common law principle, governing situations when the freeholds of benefited and burdened land are held by the same person, with no lesser interests capable of burdening or benefiting from the other plot of land. In those circumstances, a restrictive covenant comes to an end. If the plots later return to separate freehold ownership, the restrictive covenant is not revived.<sup>19</sup>
- 7.18 Although the question of neighbouring land does not arise here, we must consider the outcome of a responsible body purchasing land over which it already holds a conservation covenant. In the USA, for example, the principle of merger applies to servitudes.<sup>20</sup> Whilst Colorado and Utah expressly provide for the doctrine of merger to apply to conservation covenants, it is excluded directly in Mississippi and Montana, and by implication in New York and Rhode Island through the disapplication of all doctrines of general property law.<sup>21</sup>
- 7.19 Here, we take the view that if a responsible body acquires land over which it holds a conservation covenant, there is simply no need for the covenant to continue. The responsible body may retain the land, in which case it will continue to take responsibility for its conservation. Or it will transfer the land to another person, in which case it can make an assessment (and reach agreement with the purchaser) as to whether a conservation covenant could be imposed on the land at that point.
- 7.20 We provisionally propose that where a responsible body in respect of a conservation covenant acquires land which is subject to that covenant, the conservation covenant should cease.**

### **Do consultees agree?**

### **ADJUDICATED MODIFICATION AND DISCHARGE**

- 7.21 It is uncontroversial that a statutory scheme for conservation covenants should provide for a means of external adjudication if the parties cannot agree about modification or discharge. Two considerations flow from this: where should the parties go to resolve the dispute, and upon what grounds should it be decided? We turn our attention to the existing power of the Lands Chamber of the Upper Tribunal to modify or discharge a freehold restrictive covenant (as well as some statutory covenants) under section 84 of the Law of Property Act 1925. In doing so, we consider both its current power and the proposed extension set out in our Report *Making Land Work: Easements, Covenants and Profits à Prendre*

<sup>19</sup> A Francis, *Restrictive Covenants and Freehold Land: A Practitioner's Guide* (3rd ed 2009) paras 13.25 to 13.28. This is subject to an exception relating to "schemes of development": see further A Francis, *Restrictive Covenants and Freehold Land: A Practitioner's Guide* (3rd ed 2009) para 8.60 and following.

<sup>20</sup> American Law Institute, *Restatement of the Law (Third): Property (Servitudes)* (2000) § 7.5. The term "servitudes" includes what we would call easements and restrictive covenants, and the various forms of conservation covenant existing in each state.

<sup>21</sup> Colo. Rev. Stat. § 38-30.5-107; Utah Code Ann. § 57-18-5; Miss. Code Ann. § 89-19-5(5); Mont. Code Ann. § 70-17-111(2); N.Y. Envtl. Conserv. Law § 49-0305(5); R.I. Gen. Laws § 34-39-3(a).

("Easements Report").<sup>22</sup>

### **Section 84(1) of the Law of Property Act 1925**

- 7.22 Section 84(1) of the Law of Property Act 1925 concerns the judicial modification and discharge of restrictions, whether arising from a covenant or otherwise, that affect land.<sup>23</sup> This power is given to the Lands Chamber of the Upper Tribunal ("the Lands Chamber"), on application by any person interested<sup>24</sup> in the affected land, and is based on one of four alternative conditions. It may often be the only available means of securing the release of a restrictive covenant.
- 7.23 Before section 84(1) was enacted, there was no regime enabling the modification or discharge of restrictive covenants (unless the parties agreed, or a common law doctrine such as express or implied release applied). It introduced a power for the Official Arbitrator (later the Lands Tribunal and now the Lands Chamber) to modify or discharge them on the application of any person interested in the burdened freehold land.<sup>25</sup> In the nineteenth century restrictive covenants were the principal means of regulating urban development. The special equitable rules that arose for covenants imposed as part of a "scheme of development" are an example of this.<sup>26</sup>
- 7.24 However, during the twentieth century the growth of state control over land use and development, especially through the planning system, had major implications for restrictive covenants, which were essentially a private mechanism. This trend came to be reflected in the Official Arbitrator's decisions under section 84(1). In many cases during the 1920s and 30s the Official Arbitrator cited an existing grant of planning permission as the reason for modifying or discharging a covenant that prevented the development from proceeding.<sup>27</sup> The deference which was shown towards local planning authorities has been described as "a departure from (and even an abuse of) the statutory provisions of section 84(1) as legislated".<sup>28</sup>
- 7.25 There were also two particular statutory interventions. First, section 22 of the Town and Country Planning Act 1944 enabled the overriding (without court intervention) of restrictive covenants on land that a local authority had acquired or appropriated for planning purposes. This provision, now contained in section 237

<sup>22</sup> Making Land Work: Easements, Covenants and Profits à Prendre (2011) Law Com No 327 ("Easements Report").

<sup>23</sup> That is, freehold land, or leaseholds granted for a term of over 40 years of which 25 or more have expired: s 84(12).

<sup>24</sup> This covers a person with any type of interest, including mortgagees, option holders and purchasers under uncompleted or conditional contracts: A Francis, *Restrictive Covenants and Freehold Land: A Practitioner's Guide* (3rd ed 2009) paras 16.43 to 16.48.

<sup>25</sup> Or leaseholds created for more than 70 years, of which 50 or more had expired: s 84(12), as originally enacted.

<sup>26</sup> D Sabey and A Everton, *The Restrictive Covenant in the Control of Land Use* (1999) pp 20 to 24, 28 to 31 and 35 to 39.

<sup>27</sup> D Sabey and A Everton, *The Restrictive Covenant in the Control of Land Use* (1999) pp 92 to 94 and 101 to 108.

<sup>28</sup> D Sabey and A Everton, *The Restrictive Covenant in the Control of Land Use* (1999) p 116.

of the Town and Country Planning Act 1990, is discussed at paragraph 7.75 and following below. Secondly, the Law of Property Act 1969 made several changes to section 84(1) of the Law of Property Act 1925. These reforms, which were based on Law Commission recommendations,<sup>29</sup> were intended to enable the Lands Tribunal to exercise its power in a wider range of cases.

### **Section 84(1) today**

- 7.26 The grounds for modification or discharge under section 84(1) are commonly referred to following their lettering in the statute.<sup>30</sup> We explain below how the courts have interpreted grounds (a), (aa) and (c),<sup>31</sup> with a particular focus on restrictive covenants that involve conservation objectives.

#### **Ground (a)**

*Changes in the character of the property or the neighbourhood or other circumstances of the case mean that the restriction ought to be deemed obsolete.*

- 7.27 A restriction will be obsolete under ground (a) if it can no longer fulfil its original purpose. This purpose may be evident in the document creating it, or from the overall nature of a scheme of development of which it forms part. The changes that may cause the purpose to become impossible or impracticable can generally be described as social or environmental.
- 7.28 Restrictive covenants often prevent “infilling” (building on the open spaces around houses) in residential developments; in these cases the focus is on changes in the “character of the neighbourhood”. In *Re Briarwood Estates Ltd* extensive infilling had occurred in the area surrounding the land over which the covenant had been imposed; the restriction was therefore obsolete.<sup>32</sup> By contrast, in *Re North* subsequent development had been limited and the neighbourhood had retained its semi-rural character, meaning that the covenant’s purpose could still be achieved.<sup>33</sup> Similarly, in *Re Gossip* a prohibition on building more than one house on each plot of land was not obsolete because it had been followed across the residential estate.<sup>34</sup>
- 7.29 However, changes in the character of the neighbourhood, even if they are extensive, will not necessarily render a restriction obsolete. In *Re Davies* a ban on building around a single house had been imposed so that the land would be used for agriculture.<sup>35</sup> This purpose was still capable of being fulfilled even though the rest of the locality had since become a residential neighbourhood. On the other hand, in *Re Kennet Properties* the building prohibition existed to

<sup>29</sup> Transfer of Land: Report on Restrictive Covenants (1967) Law Com No 11, p 21.

<sup>30</sup> See the full text of section 84(1) at Appendix B of this Consultation Paper.

<sup>31</sup> We do not consider ground (b), which relates to explicit or implied agreement of the benefited landowner, because it is unnecessary, in light of our proposals in respect of agreed modification and discharge by the parties – see paras 7.5 to 7.16 above.

<sup>32</sup> *Re Briarwood Clare Estates Limited* (1987) 55 P&CR 126.

<sup>33</sup> (1997) 75 P&CR 117.

<sup>34</sup> (1972) 25 P&CR 215.

<sup>35</sup> (1971) 25 P&CR 115.

preserve the view from a residential development.<sup>36</sup> Construction on the surrounding land had already blocked most of the view, rendering the covenant obsolete.

**Ground (aa)**

*The continued existence of the restriction would impede a reasonable use of the land for public or private purposes.*

- 7.30 Ground (aa) has several elements. The first part of ground (aa) is not particularly hard to fulfill. The existence of planning permission for the intended development is usually enough for the use to be considered reasonable.<sup>37</sup>

*The restriction does not achieve any practical benefits of substantial value or advantage to the beneficiary.*

- 7.31 The second part of ground (aa) has two alternative limbs, the first of which requires a beneficiary to show that the practical benefit (a) is secured by the restriction and not anything else,<sup>38</sup> and (b) serves the covenant's original purpose rather than being an "incidental and uncovenanted benefit".<sup>39</sup> Examples of practical benefits have included a view,<sup>40</sup> natural light,<sup>41</sup> the avoidance of high-density development,<sup>42</sup> the preservation of a housing estate's identity,<sup>43</sup> freedom from traffic<sup>44</sup> and the prevention of ugly new buildings.<sup>45</sup>

- 7.32 The requirement that the benefit is of substantial value or advantage does not mean it has to be measurable in monetary terms.<sup>46</sup> Sometimes a body that holds the benefit of a restriction represents a wider public interest. Where the restriction does not secure a practical benefit to the organisation itself as a corporate entity, the question arises whether it can argue instead that there is a practical benefit to the public functions which it performs. This is a different issue from whether the restriction is actually contrary to the public interest.

- 7.33 The courts have held that such an argument is indeed possible. For example, local housing authorities have an interest in regulating land use and development on their residential estates. In four Lands Tribunal decisions where the applicant argued ground (aa) of section 84(1), the question of whether the restriction secured a practical benefit to the local housing authority required consideration of

<sup>36</sup> (1991) 72 P&CR 353.

<sup>37</sup> See, for example, *Re Bass Ltd* (1973) 26 P&CR 156.

<sup>38</sup> *Re O'Reilly* (1993) 66 P&CR 485.

<sup>39</sup> *Shephard v Turner* [2006] EWCA Civ 8, [2006] 2 P&CR 28 at [41].

<sup>40</sup> *Gilbert v Spoor* [1983] Ch 27.

<sup>41</sup> *Re North* (1997) 75 P&CR 117.

<sup>42</sup> *Re Martin's Application* (1988) 57 P&CR 119.

<sup>43</sup> *Re Collins and Others* (1974) 30 P&CR 527.

<sup>44</sup> *Re Bass Ltd* (1973) 26 P&CR 156.

<sup>45</sup> *Re Livingstone* (1982) 47 P&CR 462.

<sup>46</sup> A Francis, *Restrictive Covenants and Freehold Land: A Practitioner's Guide* (3rd ed 2009) paras 16.125 to 16.126.

its status as “custodian of the public interest”, and not just its interests as a neighbouring landowner.<sup>47</sup> A similar approach was taken in *Re Zenios* towards a private organisation that had responsibility for managing restrictive covenants over Hampstead Garden Suburb.<sup>48</sup>

*Or it is contrary to the public interest.*

- 7.34 The alternative limb of the second part is that the restriction is contrary to the public interest. Applicants often use a grant of planning permission as evidence when arguing this ground, but the more recent judicial approach has been that the planning system and private restrictive covenants are two distinct regimes with different functions. Planning considerations should be taken into account under section 84(1B) but it is not necessary to follow the views of local planning authorities.<sup>49</sup> Generally the argument only succeeds where a pressing local need can be shown, such as for housing<sup>50</sup> or a care home for psychiatric patients.<sup>51</sup> The Lands Tribunal has also held that it is important to consider whether the need could reasonably be met on other land.<sup>52</sup>

*And money will be an adequate compensation for any loss or disadvantage suffered by the beneficiary as a result of the discharge or modification.*

- 7.35 The third and final part of ground (aa) is that money will be an adequate compensation for the loss or disadvantage (if any) which the person(s) entitled to the benefit of the restriction will suffer from the discharge or modification. The compensation in question is that which is within the power of the Lands Chamber to award; this is discussed at paragraphs 7.64 to 7.68 below.
- 7.36 As we noted above, there are cases where a body that holds the benefit of a restriction represents a wider public interest. The relevant question in this case is whether money is an adequate compensation for the loss or disadvantage which will, as a result of the discharge or modification sought, occur to the organisation in its public capacity. *Re Martin's Application* concerned a covenant with a local authority to preserve land as a private open space.<sup>53</sup> The Court of Appeal held that:

<sup>47</sup> *Re Beech's Application* (1990) 59 P&CR 502, 504 to 505; *Re Love's and Love's Application* (1994) 67 P&CR 101, 107; *Re Wards Construction (Medway) Ltd's Application* (1994) 67 P&CR 379, 390 to 391; *Re Willis's Application* (1998) 76 P&CR 97, 110 to 111. These cases concerned restrictive covenants made with local housing authorities under section 609 of the Housing Act 1985.

<sup>48</sup> [2011] EWCA Civ 1645.

<sup>49</sup> See for example *Re Martin's Application* (1988) 57 P&CR 119 and *Re Zenios* [2011] EWCA Civ 1645.

<sup>50</sup> *Re SJC Construction Company Ltd* (1974) 28 P&CR 200.

<sup>51</sup> *Re Lloyd and Lloyd* (1993) 66 P&CR 112.

<sup>52</sup> *Re Mansfield District Council's Application* (1976) 33 P&CR 141.

<sup>53</sup> (1988) 57 P&CR 119.

If the covenant is of value to the corporation for the protection of the public interest in the preservation of the amenities, it is difficult to see how a money payment could be adequate compensation. Money compensation seems wholly inappropriate.<sup>54</sup>

- 7.37 The Lands Tribunal applied this approach in *Re Beech's Application*;<sup>55</sup> a covenant with a local authority against the use of a house for commercial purposes was upheld because the environmental effects of such use could not adequately be compensated in money. On the other hand, the Lands Chamber held in the third of the "Ockwells Manor" line of cases that the adequacy of compensation was a question of fact for each case, not a legal principle.<sup>56</sup> However, the Court of Appeal followed *Re Martin's Application* only a few months later in *Re Zenios* without considering the "Ockwells Manor" decision.<sup>57</sup>

### **Ground (c)**

*Discharge or modification will not injure a beneficiary of the restriction.*

- 7.38 This ground requires that the proposed discharge or modification (not just the development which it impedes)<sup>58</sup> will not injure the person(s) entitled to the benefit of the restriction. It can often raise similar factual issues to the "practical benefit" part of ground (aa), as the "Ockwells Manor" line of cases illustrates.<sup>59</sup> Categories of cases where it has succeeded include:

- (1) vexatious or frivolous objections to an application for modification or discharge,<sup>60</sup>
- (2) where the covenant was used simply to extract a "ransom value" from developers,<sup>61</sup> and
- (3) where the covenant was one of many used to preserve the character of a residential estate, and the proposed modification or discharge risked setting a precedent for further developments which would destroy that character (the "thin end of the wedge" argument).<sup>62</sup>

- 7.39 As noted above,<sup>63</sup> the body that holds the restrictive covenant may do so for a

<sup>54</sup> (1988) 57 P&CR 119, 126.

<sup>55</sup> (1990) 59 P&CR 502.

<sup>56</sup> *Re Thames Valley Holdings Ltd* [2011] UKUT 325 (LC).

<sup>57</sup> [2011] EWCA Civ 1645.

<sup>58</sup> A Francis, *Restrictive Covenants and Freehold Land: A Practitioner's Guide* (3rd ed 2009) para 16.264(3).

<sup>59</sup> *Re Bovis Southern Homes Ltd* LP/21/1979 (20 February 1981) (unreported); *Re Thames Valley Holdings Ltd* LP/12/1991 (26 October 1992) (unreported); *Re Thames Valley Holdings Ltd* [2011] UKUT 325 (LC).

<sup>60</sup> See *Ridley v Taylor* [1965] 1 WLR 611 and *Re Pearson* (1978) 36 P&CR 285.

<sup>61</sup> See *Re Bennett and Tamarin Ltd* (1987) 54 P&CR 378.

<sup>62</sup> See *Re Beech's Application* (1990) 59 P&CR 502 and *Re Zenios* [2011] EWCA Civ 1645.

<sup>63</sup> See paras 7.32 to 7.33 and 7.36 to 7.37 above.

wider public benefit. In such cases it has been accepted that when considering whether ground (c) has been fulfilled the Lands Chamber is right to consider how the discharge or modification would injure the body in its “capacity as a custodian of a public interest”.<sup>64</sup>

### **Our proposals in the Easements Report**

- 7.40 In our Easements Report, we recommended that the Lands Chamber’s jurisdiction under section 84(1) should be extended in a number of ways. For the purposes of this Consultation Paper we assume these recommendations will be accepted. First, we recommended an extension to the types of interests which may be considered by the Lands Chamber.<sup>65</sup> This included giving it the power to modify and discharge “land obligations”; a new type of interest which we recommended should replace existing restrictive and positive covenants in the future.<sup>66</sup> We also recommended that the current power to modify or discharge interests in leasehold land should be extended from leases of 40 years where at least 25 years have expired, to leases of any term.<sup>67</sup>
- 7.41 Second, we considered section 84(2), which gives the court the power to make declarations as to whether land is burdened by “a restriction imposed by any instrument”, and on the construction of that instrument. We recommended that section 84(2) should in future apply to land obligations (both restrictive and positive obligations), and should be exercisable by the Lands Chamber as well as the court.<sup>68</sup>
- 7.42 Finally, we made a number of recommendations as to the grounds for modification or discharge of a covenant (or in future, a land obligation). Whilst recommending that the existing section 84 grounds be retained, we also recommended that new grounds should be added in respect of positive land obligations.<sup>69</sup> We recommended that the Lands Chamber should have the power to modify a land obligation by adding new provisions to the interest which is the subject of the application.<sup>70</sup> However, we did not recommend any change to the grounds for modification and discharge of restrictive covenants.<sup>71</sup> Neither did we make any recommendation in relation to the assessment of compensation. We had asked for consultees’ views in the Consultation Paper,<sup>72</sup> but the diametrically opposed responses made it inappropriate to make a recommendation.<sup>73</sup>

<sup>64</sup> *Re Martin’s Application* (1989) 57 P&CR 119, 126.

<sup>65</sup> See generally Easements Report, paras 7.27 to 7.38.

<sup>66</sup> Easements Report, paras 5.69 to 5.70.

<sup>67</sup> Easements Report, paras 7.35 to 7.38.

<sup>68</sup> Easements Report, paras 7.39 to 7.51.

<sup>69</sup> Easements Report, paras 7.61 to 7.72.

<sup>70</sup> Easements Report, paras 7.77 to 7.81.

<sup>71</sup> Easements Report, para 7.14.

<sup>72</sup> Easements, Covenants and Profits à Prendre (2008) Law Com No 186, para 14.15.

<sup>73</sup> Easements Report, paras 7.15 to 7.21.

### **The application of section 84(1) to statutory covenants**

7.43 As we explain in Chapter 8 and Appendix A, there is a range of covenants that, by virtue of statute, can be made in favour of certain bodies (nearly all of which are public authorities) and run with the burdened land without the need for any benefited land. In relation to section 84(1) they can be divided into:

- (1) those that expressly exclude its application;
- (2) those that are silent on its applicability and can only contain restrictive obligations; and
- (3) those that are silent on its applicability and can contain restrictive and positive obligations.

7.44 We examine modification and discharge of each type of statutory covenant in Chapter 8 and Appendix A. However, it is worth noting here that there are a number of statutory covenants which allow the creation of positive obligations, but are silent on the application of section 84(1) (for example, management agreements made under section 39 of the Wildlife and Countryside Act 1981, and management agreements made with Natural England<sup>74</sup>).

7.45 These covenants do not expressly exclude the application of section 84(1) to any restrictions that they impose, but section 84(1) does not extend to positive obligations. The position may be further complicated in practice where restrictive and positive obligations are mixed together in one clause of a covenant. The only case law on this point that we are aware of concerns covenants made with local planning authorities for non-planning purposes. In *Bedwell Park Quarry Co v Hertfordshire County Council* the Court of Appeal upheld the Lands Tribunal's decision to reject an application to modify under section 84(1) a covenant that had been agreed under section 33 of the Local Government (Miscellaneous Provisions) Act 1982.<sup>75</sup> This was on the basis that, properly interpreted, the obligations concerned were positive in substance.

7.46 The Court of Appeal also referred to the issue of positive and negative obligations that are intermixed in a single clause, holding that "where the negative obligations can be identified and separated, those obligations are susceptible to relief under section 84".<sup>76</sup> However, the issue of positive and negative obligations that are "inextricably intertwined" had not been addressed in case law and did not arise in this case either.<sup>77</sup> The principle set out in *Bedwell Park Quarry Co* – that only the negative obligations of a covenant which also contains positive obligations are subject to section 84(1) – should apply by analogy to the other statutory covenants in this category. Nothing in the judgment suggests that its scope should be limited to the particular type which it considered.

<sup>74</sup> Natural Environment and Rural Communities Act 2006, s 7.

<sup>75</sup> [1993] JPL 349.

<sup>76</sup> [1993] JPL 349.

<sup>77</sup> [1993] JPL 349.

## The Lands Chamber and conservation covenants

### *Forum*

7.47 In the light of its current jurisdiction to modify and discharge restrictive covenants, the Lands Chamber seems the obvious venue for applications to modify or discharge conservation covenants. Even if no provision were made within a statutory scheme, the Lands Chamber's jurisdiction to consider "any restriction arising under any covenant" would allow it to consider applications in respect of restrictive obligations in conservation covenants. Respondents to the consultation that preceded our Easements Report expressed strong support for the extension of the Lands Chamber's jurisdiction.<sup>78</sup> The proposals we set out below are made on the basis that our Easements Report recommendations are accepted.

**7.48 We provisionally propose that the Lands Chamber of the Upper Tribunal should have the power to determine applications for the modification and discharge of statutory conservation covenants.**

### **Do consultees agree?**

### *Factors to be considered*

7.49 We do not think that the grounds on which applications can be made under section 84(1) are suited for a scheme of conservation covenants. Conservation covenants require consideration of private rights in the context of the public benefit; this latter factor should be given more prominence than the current section 84(1) grounds provide. In addition, the variation in circumstances for which conservation covenants will be used is considerable, and this is not accounted for under the current grounds. A better approach would be to require the Lands Chamber, in applications relating to conservation covenants, to look at the application in totality, and consider it against a number of equally important factors which balance the applicant's private rights against the public benefit served by the conservation covenant. The Title Conditions (Scotland) Act 2003, which gives power to the Lands Tribunal for Scotland to determine applications for variation or discharge of, among other things, conservation burdens,<sup>79</sup> provides a useful model.

7.50 In Scotland, judicial modification and discharge of real burdens and servitudes was originally introduced by section 1 of the Conveyancing and Feudal Reform (Scotland) Act 1970. There were three alternative grounds:

- (1) by reason of changes in the character of the land affected by the obligation or of the neighbourhood thereof or other circumstances which the Tribunal may deem material, the obligation is or has become unreasonable or inappropriate;
- (2) the obligation is unduly burdensome compared with any benefit resulting or which would result from its performance; or

<sup>78</sup> Easements Report, para 7.12.

<sup>79</sup> Title Conditions (Scotland) Act 2003, s 98.

- (3) the existence of the obligation impedes some reasonable use of the land (unless due to exceptional circumstances related to amenity or otherwise, money would not be an adequate compensation for any loss or disadvantage which a benefited proprietor would suffer from the variation or discharge).<sup>80</sup>

7.51 At first sight, these are worded similarly to the three grounds contained in the original version of section 84(1), but they are in fact much wider. Scottish law has always allowed real burdens to impose positive obligations including monetary payments,<sup>81</sup> which may explain this divergence. However, the provisions for compensation were exactly the same as for section 84(1) in England and Wales.<sup>82</sup>

7.52 The Scottish Law Commission's 2000 Real Burdens Report recommended reform to these grounds as part of a broader scheme for "title conditions", a term encompassing real burdens and servitudes. Its main reasons were the difficulties of applying existing legislation: each ground was self-contained and had to be argued separately, yet they often overlapped in practice.<sup>83</sup> It recommended a single ground: that in all the circumstances the discharge or modification would be reasonable. This was to be supplemented by a list of relevant factors.<sup>84</sup>

7.53 This recommendation was implemented by sections 98 and 100 of the Title Conditions (Scotland) Act 2003.<sup>85</sup> Commenting on the reforms, the Lands Tribunal for Scotland has said:

Section 100 does not require consideration, under each head, of whether the application succeeds or fails under it. Rather, as we see it at this stage, the task is to look at evidence about the various factors and then weigh them up as a whole judging, not, as it were, the result under each factor but rather the relative strength and weakness, in the overall issue of reasonableness in the circumstances of the case, of the various items of evidence in relation to the factors set out in the section.<sup>86</sup>

7.54 The new regime applies to conservation burdens (as well as other real

<sup>80</sup> Conveyancing and Feudal Reform (Scotland) Act 1970, s 1(3) and (4).

<sup>81</sup> Report on Real Burdens (2000) Scot Law Com No 181, para 2.1.

<sup>82</sup> Conveyancing and Feudal Reform (Scotland) Act 1970, s 1(4).

<sup>83</sup> Report on Real Burdens (2000) Scot Law Com No 181, paras 6.64 to 6.66.

<sup>84</sup> Report on Real Burdens (2000) Scot Law Com No 181, para 6.84 (recommendation 41).

<sup>85</sup> See Appendix B. A few changes were made, such as the inclusion of the title condition's purpose and whether the burdened owner is willing to pay compensation as relevant factors. Furthermore, provision was included for the parties creating a burden to exclude the jurisdiction of the Lands Tribunal for Scotland for the first five years of its life: see Title Conditions (Scotland) Act 2003, s 92.

<sup>86</sup> *George Wimpey East Scotland Ltd v Fleming* 2006 SLT (Lands Tr) 2.

burdens).<sup>87</sup> Hence, under the 2003 Act, the Lands Tribunal for Scotland must grant an application only if it is satisfied that it is reasonable to do so, having regard to the factors set out in section 100. In framing a statutory scheme for conservation covenants, we are attracted to the idea of requiring the Lands Chamber to consider a range of factors. However, neither the Scottish legislation nor the current grounds under section 84(1) are tailored for conservation.

- 7.55 This is a criticism raised in respect of some Australian states. Modification and discharge of covenants is undertaken on grounds similar to section 84(1),<sup>88</sup> and it appears that conservation covenants are subject to these powers. The Victorian Law Commission argues that such powers are ill-suited to the issues raised by covenants that are not made for the benefit of other land.<sup>89</sup> It is only in Tasmania, Queensland and the Northern Territory that the public interest is considered,<sup>90</sup> and even then the applicant must show that the covenant itself is contrary to the public interest (rather than that the change would be in the public interest).<sup>91</sup> Furthermore, only two jurisdictions – New South Wales and the Northern Territory – have extended their equivalent of section 84(1) to cover positive obligations.<sup>92</sup>
- 7.56 We are persuaded by these arguments, and see value in tailoring our proposed factors specifically for the purposes of conservation covenants. With that in mind, we suggest below factors which ought to be considered by the Lands Chamber in determining whether to modify or discharge a conservation covenant.

#### CHANGE OF CIRCUMSTANCES

- 7.57 A change of circumstances since the conservation covenant was created is a likely catalyst for an application to modify or discharge it. Although we do not wish to confine the Lands Chamber's consideration of "the circumstances" unduly it is worth including as specific examples grounds relating to changes in the character of the property or the neighbourhood.<sup>93</sup> This would allow the Lands Chamber to

<sup>87</sup> However, there are additional provisions for "community burdens", which are similar to restrictive covenants created as part of a building development scheme in English law. The precise definition is where real burdens are imposed under a common scheme on four or more units, and each of those units is, in relation to some or all of those burdens, both a benefited property and a burdened property: Title Conditions (Scotland) Act 2000, s 25.

<sup>88</sup> The Property Law Act 1974 (Queensland), s 181 and Law of Property Act 2000 (Northern Territory), s 177 follow the pattern of s 84(1). Other provisions reflect s 84(1) as it was before the reforms of the Law of Property Act 1969: Property Law Act 1958 (Victoria), s 84(1); Conveyancing and Law of Property Act 1884 (Tasmania), s 84C; Conveyancing Act 1919 (New South Wales), s 89; and Transfer of Land Act 1893 (Western Australia), s 129C. For a further discussion of these two types of modification provisions, see Victorian Law Reform Commission, *Easements and Covenants: Consultation Paper* (2010) paras 16.66 to 16.78.

<sup>89</sup> Victorian Law Reform Commission, *Easements and Covenants: Final Report* (2011) paras 6.19 to 6.31.

<sup>90</sup> Conveyancing and Law of Property Act 1884 (Tasmania), s 84C; Property Law Act 1974 (Queensland), s 181; Law of Property Act (Northern Territory), s 177.

<sup>91</sup> AJ Bradbrook, SV McCallum, AP Moore and S Grattan, *Australian Real Property Law* (2011) 18.320.

<sup>92</sup> Conveyancing Act 1919 (New South Wales), s 89; Law of Property Act (NT), ss 167 and 177.

<sup>93</sup> These are found in s 84(1)(a) of the Law of Property Act 1925: see the discussion at paras 7.27 to 7.29 above.

consider those issues without confining it to them.

#### PUBLIC BENEFIT AND THE PURPOSE OF A CONSERVATION COVENANT

7.58 We set out in Chapter 4 the purposes for which a conservation covenant could be created, namely an obligation to do or not do something on land for the public benefit; to preserve, protect, restore or enhance in relation to that land:

- (1) its natural environment, including its flora and fauna;
- (2) its natural resources; or
- (3) any cultural, historic or built heritage features of that land.

7.59 With that in mind, the Lands Chamber should be required to consider the extent to which the conservation covenant is for the benefit of the public; this is a necessary precondition to creating a conservation covenant, and must be a factor when considering its discharge or modification. It also follows that it would be appropriate for the Lands Chamber to consider whether the conservation covenant continues to meet the purposes for which it was created, or any other purposes for which a conservation covenant may be created.

#### THE LANDOWNER'S USE OF THE LAND

7.60 To ensure that the balance between private rights and the public benefit is maintained it is important that factors relating to the landowner's rights are included. With this in mind, we propose directing the Lands Chamber to consider the landowner's right to enjoyment of the land. The landowner's continuing ability to comply with the conservation covenant, and in particular whether it is practicable or affordable for that landowner and future landowners to do so, should also be considered. This means the Lands Chamber can take into account a situation where, for example, a landowner would face genuine hardship if required to continue with obligations under a conservation covenant.

7.61 There is also an argument to be made for allowing the Lands Chamber to discharge a conservation covenant where the circumstances support a "no net loss" approach to conservation. A landowner with significant landholdings may wish to apply for discharge where the conservation purposes for which the covenant was created could be achieved by an alternative scheme on a different site which he or she owns. However, the public benefit in conservation covenants must not be lost; this ground should only be available where it is possible to create a new conservation covenant on another property to an equivalent extent and within the same period of time, to make up for the covenant to be discharged. We anticipate this test could be met in a small number of cases; we see it as a tool which protects the principle of conservation covenants whilst acknowledging that changes in land use over time may lead to the need to discharge existing conservation covenants.

#### APPLICATIONS IN RESPECT OF CONSERVATION COVENANTS

7.62 Our provisional proposal reflects the factors discussed above, and directs the

Lands Chamber to consider them amongst all the circumstances of the case.<sup>94</sup> This allows the expertise of the Lands Chamber in deciding applications of this nature to be utilised. It also gives the Lands Chamber flexibility to decide applications which may relate to unusual or complex conservation activity.

**7.63 We provisionally propose that on the application of a landowner, the Lands Chamber of the Upper Tribunal may modify or discharge a conservation covenant where it is reasonable to do so, having regard to all of the circumstances and in particular the following matters (where relevant):**

- (1) any change in circumstances since the conservation covenant was created (including changes in the character of the property or the neighbourhood);<sup>95</sup>**
- (2) the extent to which the conservation covenant confers a benefit on the public;**
- (3) the extent to which the purposes for which the conservation covenant was created, or any other purposes for which a conservation covenant may be created, are served by the conservation covenant;**
- (4) the extent to which the conservation covenant prevents the landowner's enjoyment of the land;**
- (5) the extent to which is it practicable or affordable for both the landowner and future landowners to comply with the conservation covenant; and**
- (6) whether the purposes for which the covenant was created could be achieved to an equivalent extent and within the same period of time by an alternative scheme on a different site which the landowner owns, and it is possible to create a new conservation covenant on that site in substitution for the covenant to be discharged.**

**Do consultees agree?**

***Compensation for modification or discharge***

**7.64** At present, if the Lands Chamber orders discharge or modification, it can award a just sum as compensation to any person entitled to the benefit of a restriction. It can make such an award under two alternative heads:

- (1) a sum to make up for any loss or disadvantage suffered by that person as a result of the modification or discharge; or**

<sup>94</sup> We note in this regard s 100(j) of the Title Conditions (Scotland) Act 2003, which is a "catch-all" provision directing the Lands Tribunal to take into account any other matter it regards as material to the application.

<sup>95</sup> This does not include the additional wording of s 84(1)(a), which allows the Lands Chamber to deem the restriction obsolete. We do not wish to limit this ground to obsolescence, and prefer the broader "change of circumstances".

- (2) a sum to make up for any effect which the restriction had, at the time it was imposed, in reducing the consideration then received for the land affected by it.<sup>96</sup>
- 7.65 The first head covers diminutions in the amenity or use value of the land and temporary disruptions caused by development work, but it does not give the beneficiary an unfettered right to extract a “ransom value”. Furthermore, given the narrowness of the grounds of section 84(1), in many cases little or no compensation will be awarded under the first head.<sup>97</sup>
- 7.66 The second head may be relevant where the beneficiary of the restriction (or his or her predecessor in title) used to own the burdened land and sold it subject to the restriction. It should be noted that a covenant may not always decrease the value of the burdened land.<sup>98</sup>
- 7.67 We think it likely that compensation will not often be awarded to a responsible body (or an award would be minimal), because the circumstances of conservation covenants will differ from those envisaged in the grounds set out above. We invite views from consultees on whether this is problematic.
- 7.68 Do consultees envisage any situations in which compensation should be payable to a responsible body for modification or discharge of a conservation covenant by the Lands Chamber of the Upper Tribunal?**

***On the application of the responsible body***

- 7.69 In our Easements Report we considered the position of a benefit-holder as an applicant to modify or discharge (in relation to restrictive covenants and land obligations). We concluded that the grounds for modification or discharge of obligations under section 84 were designed to fit applications by the burdened party; and an entirely new set of grounds would be needed to enable the benefited owner to apply for modification or discharge. Allowing applications by a benefited owner would also be an unfair burden on the other parties involved. For that reason we concluded that the benefited owner should not be able to bring an application for modification or discharge.<sup>99</sup>
- 7.70 The same concerns about burdening landowners arise here. If a responsible body wishes to modify a conservation covenant it must agree revised terms with the landowner. Alternatively, it may discharge the covenant or transfer to another responsible body (as we proposed above and in Chapter 4). This is on the basis that holders will be a trusted group of organisations (see Chapter 4), subject to approval by the Secretary of State or the Welsh Ministers. So it is unnecessary to make specific provision for a responsible body to apply to the Lands Chamber to modify or discharge a conservation covenant.

<sup>96</sup> Law of Property Act 1925, s 84(1)(i) and (ii).

<sup>97</sup> A Francis, *Restrictive Covenants and Freehold Land: A Practitioner's Guide* (3rd ed 2009) paras 16.325 to 16.332.

<sup>98</sup> A Francis, *Restrictive Covenants and Freehold Land: A Practitioner's Guide* (3rd ed 2009) para 16.324.

<sup>99</sup> Easements Report, paras 7.22 to 7.23.

- 7.71 We provisionally propose that it should not be possible for a responsible body to apply to the Lands Chamber of the Upper Tribunal for modification or discharge of a conservation covenant.**

**Do consultees agree?**

#### **Declarations under section 84(2) of the Law of Property Act 1925**

- 7.72 This provision gives the court the power to declare whether freehold land<sup>100</sup> is burdened by a restrictive covenant or would be in any given event. It can also rule on the construction and actual or potential enforceability of instruments purporting to impose restrictions. Any person interested in the land or the covenant may apply for such a declaration, which is binding on the whole world (not just the parties to the application). This power is generally used to “clear off” unenforceable covenants and to discover in advance whether certain development would be permissible.<sup>101</sup>
- 7.73 In our Easements Report we proposed that this jurisdiction should be extended to our land obligations scheme, and also that this power should be exercisable by the Lands Chamber.<sup>102</sup> Assuming those recommendations are accepted, it seems logical to extend the court’s and the Land Chamber’s ability to determine such applications to conservation covenants, rather than proposing an alternative way for such issues to be decided.
- 7.74 We provisionally propose that the existing jurisdiction of the court under section 84(2) of the Law of Property Act 1925, and the proposed jurisdiction of the Lands Chamber of the Upper Tribunal, should be extended to include conservation covenants.**

**Do consultees agree?**

#### **MODIFICATION UNDER THE PLANNING SYSTEM**

- 7.75 Section 237 of the Town and Country Planning Act 1990 creates an administrative process for local authorities to override restrictive covenants and other rights that affect land that the local authority holds. It enables, in certain circumstances:
- (1) the breach of a restriction as to the user of land arising by virtue of a contract; and
  - (2) interference with any easement, liberty, privilege, right or advantage annexed to land and adversely affecting other land, including any natural right to support.<sup>103</sup>

- 7.76 Section 237 permits the breach or interference if it results from the erection,

<sup>100</sup> Or leaseholds granted for a term of over 40 years of which 25 or more have expired: s 84(12).

<sup>101</sup> A Francis, *Restrictive Covenants and Freehold Land: A Practitioner’s Guide* (3rd ed 2009) para 15.10.

<sup>102</sup> Easements Report paras 7.39 to 7.51.

<sup>103</sup> Town and Country Planning Act 1990, s 237(1) and (2).

construction or carrying out or maintenance of any building by a local authority or its successor in title, provided that:

- (1) the land was acquired or appropriated by the local authority for planning purposes; and
- (2) the work is in accordance with planning permission.

In England but not in Wales, section 237 is wider, applying to any use of land that causes such a breach or interference.<sup>104</sup> The breadth of the section's wording permits the overriding of covenants over land acquired or appropriated<sup>105</sup> by a local authority for development unless the statute provided otherwise.

7.77 Local authorities are vulnerable to judicial review if they do not exercise this power properly. In particular, the relevant works or use must be related to the planning purposes for which the local authority originally acquired or appropriated the land. It must also be necessary to invoke section 237 to allow the works or use to proceed.<sup>106</sup> Compensation is payable to the holder of any right that is interfered with or breached under section 237. It is assessed on the basis of injurious affection (essentially the decrease in the value of the right holder's land that results from the breach or interference).<sup>107</sup>

7.78 Is it appropriate to allow a local authority to override a conservation covenant on land that it holds or has acquired? In asking this question we have to bear in mind the fact that in some cases local authorities have been willing to acquire land from a developer in order to use the section 237 powers, before transferring or leasing it back; so the powers are not limited to cases where development is to be carried out by the local authority itself. In a scheme intended to encourage the creation of obligations to support conservation, it may seem surprising to consider allowing those obligations to be overridden for the purposes of development.

7.79 However, whilst our aim is to encourage land use in a way which supports conservation, we cannot be blind to the pressing need for urban development. We intend to design a statutory scheme which protects and preserves the conservation values of, but does not sterilise, land in England and Wales. Extending section 237 to include an ability to override conservation covenants in the limited circumstances prescribed in the statute goes some way to achieving this goal. Local authorities are subject to scrutiny and to judicial review in the exercise of their powers, and we think that it would be anomalous to exclude conservation covenants from the ambit of section 237.

**7.80 We provisionally propose that section 237 of the Town and Country Planning Act 1990 should enable the overriding of conservation covenants.**

#### **Do consultees agree?**

<sup>104</sup> Town and Country Planning Act 1990, s 237(1A).

<sup>105</sup> This means that the local authority designates for development land that it already holds.

<sup>106</sup> *R v City of London Corporation and Royal London Mutual Insurance Society, ex parte Mystery of the Barbers' Company of London* (1997) 73 P&CR 59.

<sup>107</sup> Town and Country Planning Act 1990, s 237(4) and (5).

# CHAPTER 8

## EXISTING STATUTORY COVENANTS

### INTRODUCTION

- 8.1 There are a number of existing statutory powers in England and Wales that allow certain persons who hold interests in land (“covenantors”) to agree covenants concerning that land with certain bodies (“covenantees”). Some but not all concern heritage or nature conservation, and some can only impose restrictive obligations. However, their two defining features are that they can run with the burdened land without needing to benefit other land, and that only specified bodies or classes of bodies – nearly all of which are public authorities – can hold the benefit.
- 8.2 We have reviewed these covenants to inform our understanding of statutory covenant schemes involving public bodies; and in some cases we considered whether any of these existing powers could usefully be repealed, and replaced by a more general system of conservation covenants. To that end this Chapter reviews two statutory provisions which we think might be replaced by conservation covenants; section 8 of the National Trust Act 1937 and section 5 of the Forestry Act 1967. Appendix A sets out other statutory provisions we have considered but do not propose to replace.
- 8.3 Both of these powers suffer from defects which make them less effective than they might be. For example, the National Trust’s provision only allows restrictive obligations to be imposed; so there is no scope, for example, for obligations such as allowing public access to a stately home, or requiring the maintenance of a certain feature. There is also a case for a clearer scheme for modification and discharge; this is beneficial for the parties, because it ensures they understand from the start how the agreement can subsequently be altered if the need arises.

### Methods of modification and discharge

- 8.4 Section 84(1) of the Law of Property Act 1925 enables the Lands Chamber of the Upper Tribunal (“the Lands Chamber”) to modify or discharge any restriction affecting freehold land, whether arising under a covenant or otherwise.<sup>1</sup> Some of the covenants discussed below and at Appendix A are expressly excluded from this jurisdiction. Where the relevant legislation is silent, it must be assumed that they are subject to the Lands Chamber’s power insofar as they impose restrictions on the use of land. Case law confirms that section 84(1) does not extend to positive obligations affecting land.<sup>2</sup> Most of the legislation we consider here and in Appendix A, even if it excludes the section 84(1) jurisdiction, does not deal with other methods of modification or discharge. Where the legislation is silent, we take the view that it is open to the parties who for the time being have the benefit and burden of the covenant to modify or discharge it by agreement or pursuant to a term in the covenant itself.

<sup>1</sup> See our discussion of this power at Chapter 7, paras 7.26 to 7.39.

<sup>2</sup> *Westminster City Council v Duke of Westminster* [1991] 4 All ER 136.

## STATUTORY PROVISIONS WHICH COULD BE REPLACED BY CONSERVATION COVENANTS

8.5 Here we consider:

- (1) restrictive covenants made with the National Trust; and
- (2) forestry dedication covenants made with the Forestry Commission.

### **Restrictive covenants made with the National Trust**

8.6 The National Trust was established and given powers by a series of private Acts known collectively as the National Trust Acts. One of these powers, under section 8 of the National Trust Act 1937, is to agree and enforce restrictive covenants that do not benefit any of the Trust's land. The National Trust holds covenants on nearly 37,000 hectares of land;<sup>3</sup> 89% protect land or buildings from inappropriate development, and most of the remainder control the appearance and scale of development that is already going ahead.<sup>4</sup> Research into use of the statutory power found that:

The clauses of these covenants generally restrict major land-use changes on a site such as development, woodland clearance, the ploughing of permanent pastures, draining of wetlands or uplands, improvement of moorland, filling in of ponds or watercourses or the removal of hedgebanks or walls. The vast majority of these covenants (an estimated 70 per cent by number) have been given to the Trust by the landowner during his or her lifetime.<sup>5</sup>

8.7 The Trust actively manages its covenants; most of its regions receive 10 to 20 applications from landowners for variation each year, but the figure is much higher in the south of England, where the South West and London and South East regions both have a dedicated Covenants Officer.<sup>6</sup> These covenants can be made in favour of the National Trust by "any person ... so far as his interest in the land enables him to bind it";<sup>7</sup> this would appear to leave the question of eligibility to be determined by common law rules for "traditional" restrictive covenants. There is no qualifying requirement for the characteristics of the land itself. The National Trust may agree a covenant if it thinks fit; the terms can contain "conditions restricting the planning development or use [of the land] in any

<sup>3</sup> J Mirzoeff, "A Special and Privileged Power: Covenants – protecting and preserving heritage and landscape" (2012) *Aug Arts, Buildings and Collections Bulletin* 5, at <http://www.nationaltrust.org.uk/document-1355771462698/>.

<sup>4</sup> J Mirzoeff, "A Special and Privileged Power: Covenants – protecting and preserving heritage and landscape" (2012) *Aug Arts Buildings and Collections Bulletin* 5, at <http://www.nationaltrust.org.uk/document-1355771462698/>.

<sup>5</sup> J Dwyer and I Hodge, *Countryside in Trust: Land Management by Conservation, Recreation and Amenity Organisations* (1996) pp 75 to 76.

<sup>6</sup> J Mirzoeff, "A Special and Privileged Power: Covenants – protecting and preserving heritage and landscape" (2012) *Aug Arts Buildings and Collections Bulletin* 5, at <http://www.nationaltrust.org.uk/document-1355771462698/>.

<sup>7</sup> National Trust Act 1937, s 8.

manner”.<sup>8</sup> Positive obligations are by implication excluded.

- 8.8 The case of *National Trust for Places of Historic Interest or Natural Beauty v Midlands Electricity Board and Another* concerned a restrictive covenant that the National Trust did not hold under its special statutory power, but the decision is equally relevant to section 8 restrictive covenants.<sup>9</sup> The High Court held that an obligation “not to injure ... the natural aspect and condition of the land” was void for uncertainty. Vaisey J described the term as “so vague that it is really impossible of apprehension or construction, and ... wholly unenforceable”.<sup>10</sup>
- 8.9 It is expressly provided in the statute that the covenant can be perpetual or fixed-term. The statute is silent on modification and discharge, but case law has confirmed that National Trust covenants are subject to section 84(1) of the Law of Property Act 1925.<sup>11</sup> However, section 27 of the National Trust Act 1971 excludes the Lands Chamber’s power in relation to restrictive covenants that provide certain benefits to National Trust land. The statute’s silence on other methods of modification and discharge suggests that it is open to the parties who for the time being have the benefit and burden of the covenant to modify or discharge it by agreement or pursuant to a term in the covenant itself.
- 8.10 The National Trust Acts do not give the National Trust any special statutory powers to monitor or enforce these covenants. The Trust is also unable to include terms governing these matters in the covenant itself, because it can only impose restrictive obligations. Section 8 of the National Trust Act 1937 enables these covenants to run with the land by analogy to a “traditional” restrictive covenant:

... [the National Trust] shall have power to enforce such agreement or covenant against persons deriving title under [the covenantor] in the like manner and to the like extent as if the National Trust were possessed of or entitled to or interested in adjacent land and as if the agreement or covenant had been and had been expressed to be entered into for the benefit of that adjacent land.

- 8.11 In *Gee v National Trust for Places of Historic Interest or Natural Beauty* Lord Denning MR considered the interpretation of this provision, holding that:

We do not know the area or extent of that adjacent land, nor where it would be situated. In these circumstances I am inclined to think that we do not have to deem any particular land to be in the ownership of the National Trust. Section 8 is simply machinery to give the National Trust a standing to enforce the restriction where they would have no standing at common law.<sup>12</sup>

- 8.12 Lord Denning MR therefore disagreed with the original ruling by the Lands

<sup>8</sup> National Trust Act 1937, s 8.

<sup>9</sup> [1952] Ch 380.

<sup>10</sup> [1952] Ch 380, 385.

<sup>11</sup> For example, *Gee v National Trust for Places of Historic Interest or Natural Beauty* [1966] 1 WLR 170.

<sup>12</sup> [1966] 1 WLR 170, 174.

Tribunal (now the Lands Chamber) that the National Trust must be treated for all purposes as if it did own adjacent land. This had led the Lands Tribunal to decide that, since the view from nearby land would not be affected by the proposed construction of a house over the land in question, modifying the National Trust's restrictive covenant over the land (so as to allow the house to be built) would not injure the National Trust. Lord Denning MR thought instead that its interest in enforcing the covenant derived from its position as "custodians of our country's natural beauty".<sup>13</sup>

- 8.13 However, the Lands Tribunal in fact refused to modify the covenant, arguing that allowing the project to proceed would set a precedent for future development which *would* injure the National Trust. Accordingly, the decision of the Lands Chamber is not authoritative on the section 8 question. It was on this point that the Court of Appeal overturned the Lands Tribunal's decision.
- 8.14 A statutory system of conservation covenants would provide a more effective scheme for the National Trust to enter into binding conservation agreements with landowners. In particular, conservation covenants could enable the imposition of positive obligations. These could include, for example, requirements for public access to the property, or for the maintenance of gardens or the care of woodland. Perhaps more importantly, the inclusion of positive obligations would mean that a conservation covenant could include powers for the Trust to monitor and if necessary enforce the agreement. In addition, a statutory scheme for conservation covenants would provide clarity on modifying or discharging the agreement.
- 8.15 Accordingly it is hard to see why section 8 covenants should have any continuing role to play if conservation covenants were introduced. However, we are aware of the special role that the National Trust plays in conservation in England and Wales. We would be interested to hear whether there are features of these covenants that are not reflected in the proposals that we have made for conservation covenants.
- 8.16 We invite consultees to tell us whether covenants made under section 8 of the National Trust Act 1937 present any advantages for the National Trust or for the public that are not replicated in our provisional proposals for a statutory conservation covenants scheme.**

#### **Forestry dedication covenants**

- 8.17 Forestry dedication covenants were introduced by section 2 of the Forestry Act 1947 and are now governed by section 5 of the Forestry Act 1967; this section enables the Forestry Commission to agree a forestry dedication covenant over any land in England and Wales. However, these covenants were tied to dedication schemes which are no longer in use; we understand that no new covenants are currently being created.<sup>14</sup>
- 8.18 The statute does not explicitly state who can be a covenantor, but it appears from the references to common law restrictive covenants that these agreements are

<sup>13</sup> [1966] 1 WLR 170, 175.

<sup>14</sup> The Forestry Commission has advised us of this policy.

open to anyone who could make such a restrictive covenant over land. There is also provision for covenants with certain types of statutory limited ownership.<sup>15</sup> In respect of the purposes for which the covenant is made, the only relevant provision is that the covenant must be:

... to the effect that the land shall not, except with the previous consent in writing of the Commissioners or, in the case of dispute, under direction of the Minister ... be used otherwise than for the growing of timber or other forest products in accordance with the rules or practice of good forestry or for purposes connected therewith.<sup>16</sup>

8.19 It is not clear whether the substance of such obligations is purely restrictive (not to use the land for non-forestry purposes), or whether they can positively require that the land is used for forestry (as opposed to being left untouched).<sup>17</sup> The statute excludes the application of section 84(1) of the Law of Property Act 1925 to forestry dedication covenants.<sup>18</sup> It is otherwise silent on their duration and methods of modification and discharge. This suggests to us that the parties may modify or discharge these covenants by agreement or pursuant to the terms of the covenant.

8.20 A forestry dedication covenant does not of itself trigger any special monitoring powers (unless these are expressly included in its terms). However, the Forestry Commission has a general power to appoint persons to enter on and survey any land:

- (1) to ascertain whether it is suitable for afforestation;
- (2) to inspect any timber on it; or
- (3) for any other purpose in connection with the exercise of the Commission's powers and performance of its duties under the Forestry Act 1967 or the Plant Health Act 1967.<sup>19</sup>

8.21 The Forestry Commission also has a general power to make byelaws for any land which is under its management or control and to which the public may be permitted to have access. This definition might apply to land that is subject to a forestry dedication covenant, depending on its terms. Such byelaws can provide, as necessary, for:

- (1) the preservation of any trees or timber on the land, or of any property of the Commissioners;
- (2) prohibiting or regulating any act or thing tending to injury or disfigurement of the land or its amenities; and

<sup>15</sup> Forestry Act 1967, s 5(4) and sch 2.

<sup>16</sup> Forestry Act 1967, s 5(1).

<sup>17</sup> Hodge, Castle and Dwyer take the former view. See I Hodge, R Castle and J Dwyer, *Covenants as a conservation mechanism* (1993) para 2.6.

<sup>18</sup> Forestry Act 1967, s 5(2)(b).

<sup>19</sup> Forestry Act 1956, s 48(1).

- (3) without prejudice to the generality of (1) and (2), for regulating the reasonable use of the land by the public for the purposes of exercise and recreation.<sup>20</sup>

8.22 However, they cannot take away or injuriously affect any estate, interest, right of common or other right of a profitable or beneficial nature in, over or affecting any land, except with the consent of the person entitled to it.<sup>21</sup> The Forestry Commission has a general power of compulsory purchase of land which is suitable for afforestation or purposes connected with forestry. However, where a forestry dedication covenant is in force, this power can only be exercised if the land is not being used and managed in accordance with a plan of operations approved by the Forestry Commission.<sup>22</sup>

8.23 The statute provides that, if no intention is expressed contrary to section 79 of the Law of Property Act 1925 (under which covenants relating to land are, unless the contrary is expressed, deemed to be made on behalf of the covenantor, their successors in title and persons deriving title under them), then:

... the Commissioners shall, as respects the enforcement of the covenant against persons other than the covenantor, have the like rights as if they had at all material times been the absolute owners in possession of ascertained land adjacent to the land subject to the covenant and capable of being benefited by the covenant, and the covenant had been expressed to be for the benefit of that adjacent land.

This “benefited neighbouring land” analogy appears to allow positive obligations to run with the land, insofar as they can be included at all in a forestry dedication covenant.

8.24 As we noted above, these covenants have fallen into disuse, and are no longer being created. Conservation covenants could offer a new way for the Forestry Commission to enter into agreements for the protection of forestry land, whilst retaining its byelaw-making powers in relation to the land.<sup>23</sup> The lack of provision for modification and discharge in respect of the current power would be remedied by the use of a conservation covenant (see our provisional proposals at Chapter 7). More importantly, conservation covenants would allow both positive and restrictive obligations to be agreed, resolving the uncertainty which surrounds the existing power.

## **8.25 We provisionally propose that section 5 of the Forestry Act 1967 should be**

<sup>20</sup> Forestry Act 1967, s 46.

<sup>21</sup> Forestry Act 1967, s 46.

<sup>22</sup> Forestry Act 1967, ss 39 and 40. The covenantor first must be notified and given reasonable time to remedy the breach. Any dispute over the existence of a breach is to be settled by an arbitrator appointed by the President of the Royal Institution of Chartered Surveyors: s 40(3)(a) and (b).

<sup>23</sup> The Independent Panel on Forestry recently made a range of recommendations about the future of forestry in England: see Independent Panel on Forestry, *Final Report* (2012). The Government’s Forestry and Woodlands Policy Statement notes the potential uses for conservation covenants: see Defra, *Government Forestry and Woodlands Policy Statement* (2013) p 17.

**replaced by a statutory conservation covenants scheme.**

**Do consultees agree?**

#### **OTHER STATUTORY COVENANTS**

- 8.26 We set out in Appendix A a number of other statutory covenants which currently exist. These cover a diverse range of purposes and parties. An examination of these covenants has helped us to develop our own proposals in respect of conservation covenants. For example, the lack of provision in many cases about how the covenant can be modified or discharged has highlighted the need for this to be included in any statutory scheme for conservation covenants.
- 8.27 In reviewing these statutes we have also considered whether they could be usefully replaced by conservation covenants. Whilst some of the covenants we reviewed relate to conservation, many do not. Of the provisions which relate broadly to conservation, we do not believe a case can be made for their replacement by conservation covenants, because their provisions are broader than our proposed statutory scheme would provide. So, for example, Natural England's power to make management agreements relates to purposes which are wider than those which we propose for conservation covenants; and Natural England has a power to compulsorily acquire land where a management agreement is needed but cannot be agreed with a landowner.<sup>24</sup> Likewise, although the protection of ancient monuments would be within the scope of conservation covenants proposals, covenants made under section 17 of the Ancient Monuments and Archaeological Areas Act 1979 rely on relatively specific terms which would not be reproduced in a scheme for conservation covenants.
- 8.28 Do consultees agree that the statutory covenants set out in Appendix A should not be replaced by a statutory scheme for conservation covenants?**

<sup>24</sup> Countryside Act 1968, s 15A.

# CHAPTER 9

## THE POTENTIAL ECONOMIC IMPACT OF CONSERVATION COVENANTS

### INTRODUCTION

- 9.1 Although conservation covenants are widely used in other jurisdictions, they do not currently exist in England and Wales. Our project involves considering whether there is a case for a change to the law, and thus a need for a new statutory scheme. Assessing the economic impact of such a scheme is a challenge. An understanding of its likely costs and benefits depends on inexact comparisons with other jurisdictions, existing statutory mechanisms and workarounds, and freehold covenants. This Consultation Paper seeks views and evidence from consultees about the likely impact of conservation covenants, to build on our own investigation and assessment so far. Throughout this Chapter we examine aspects of our proposals which may lead to costs or benefits. We would be pleased to hear from consultees of any other issues which might contribute to the costs or benefits of our proposals.

### LIKELY COSTS AND BENEFITS

#### Scope and scale

##### *What type of land will be affected?*

- 9.2 Conservation covenants are for the protection of the environment (and its resources) and built heritage; we assume then that they will be used in both urban and rural areas (by “rural” we mean both agricultural and open or wooded land). However, we also assume that they will be more often used in relation to rural land.

- 9.3 **Do consultees agree that conservation covenants will be more widely used in rural areas than on urban land?**

##### *How widely will conservation covenants be used?*

- 9.4 Existing statutory mechanisms may provide an indicator of how many conservation covenants are likely to be created. A 1993 report studied the use of statutory mechanisms to bind land (such as section 106 planning obligations). The researchers surveyed 20 district/borough councils, 10 county councils and 11 national parks. On average, the area of land subject to a covenant held by a council was 50 hectares; in the case of national parks it was 2,500 hectares.<sup>1</sup> The researchers also investigated the use of tenancies to restrain land for conservation purposes. From 16 respondents (councils and water companies), the researchers discovered some 640 agreements in use, covering 85,000 hectares of land. More recently, a 2008 report for the National Trust indicated that

<sup>1</sup> I Hodge, R Castle and J Dwyer, *Covenants as a Conservation Mechanism* (Department of Land Economy, University of Cambridge, Land Economy Monograph 26, 1993) p 23.

National Trust restrictive covenants were held over 36,000 hectares of land.<sup>2</sup>

- 9.5 We have also examined conservation covenants in other jurisdictions. In the USA, a recent estimate shows 95,448 in existence, covering over 18 million acres.<sup>3</sup> In New Zealand, the Queen Elizabeth the Second National Trust holds nearly 3,700 conservation covenants covering approximately 247,000 acres of land,<sup>4</sup> whilst 370,000 acres are protected by Ngā Whenua Rāhui covenants.<sup>5</sup> However, these jurisdictions provide financial incentives for the landowner to enter into a conservation covenant, and they may also use statutory designations differently. In the absence of similar incentives, it is unlikely that conservation covenants will be created on a similar scale in England and Wales.
- 9.6 Scotland, which does not provide financial incentives for the creation of conservation burdens, may provide a more realistic picture, though only limited information is available. As one example, since 2004 Historic Scotland (the Scottish Government executive agency for safeguarding the historic environment) has held approximately 310 conservation burdens. The changes to the feudal land law system in 2000<sup>6</sup> allowed conservation bodies and the Scottish Ministers to register as conservation burdens any existing feudal real burdens that were for conservation purposes.<sup>7</sup> Any other holder of an existing feudal real burden that was for conservation purposes could register it as a conservation burden, nominating the Scottish Ministers or a conservation body as the holder.<sup>8</sup> A total of 263 conservation burdens were registered by the Scottish Ministers or conservation bodies, and a further eight were registered by the nomination of Scottish Ministers or a conservation body.<sup>9</sup> It is not known what area of land existing or new conservation burdens cover.<sup>10</sup>
- 9.7 We invite consultees to indicate how widely used conservation covenants would be in England and Wales, or how frequently they might use covenants in the course of their work.**

### **Development and growth**

- 9.8 Conservation covenants can help deliver opportunities for development and

<sup>2</sup> National Trust, *The Potential of Conservation Covenants – A report by Green Balance to the National Trust* (2008) p 6.

<sup>3</sup> See <http://nced.conservationsregistry.org/>. The total area of the USA is approximately 2,428,224,274 acres.

<sup>4</sup> Queen Elizabeth the Second National Trust, *Annual Report 2012* (2012) p 10. The total area of New Zealand is 66,124,370 acres.

<sup>5</sup> A-G E Ausseil, JR Dymond, ES Weeks “Provision of Natural Habitat for Biodiversity: Quantifying Recent Trends in New Zealand”, in O Grillo (ed), *Biodiversity loss in a Changing Planet* (2011) p 215, at: <http://www.intechopen.com/books/biodiversity-loss-in-a-changing-planet>.

<sup>6</sup> See Chapter 3 paras 3.8 to 3.10 for a discussion of this change.

<sup>7</sup> Under the Abolition of Feudal Tenure (Scotland) Act 2000, s 27.

<sup>8</sup> Under the Abolition of Feudal Tenure (Scotland) Act 2000, s 27A.

<sup>9</sup> These figures have been provided by the Scottish Government.

<sup>10</sup> C Reid, “Conservation Covenants” [2013] *The Conveyancer and Property Lawyer* – forthcoming publication; National Trust, *The Potential of Conservation Covenants – A report by Green Balance to the National Trust* (2008) p 648.

sustainable resource management. The existence of a conservation covenant will encourage landowners (whether private or Governmental) to release land in the confidence that its conservation value is protected. Hence land may be available for urban development, but also for the sustainable use of natural resources. We expect a small increase in opportunities for development and other land use on land which is currently unavailable for those purposes.

- 9.9 More importantly, we expect that the introduction of conservation covenants will also increase opportunities for developers and local authorities to engage in biodiversity offsetting. This will also facilitate development. From initial discussions we gather that biodiversity offsetting schemes are currently not widely used. Conservation covenants will help to increase this by providing a more effective way of protecting and managing offset sites.
- 9.10 We also anticipate that this will have a direct benefit for local authorities, developers and farmers. First, we envisage that local authorities will need to spend less time and money to safeguard biodiversity offsetting sites by using conservation covenants rather than complex workarounds. Second, we expect farmers to benefit from wider finance opportunities available under offsetting. Finally, developers will have greater opportunities to undertake biodiversity offsetting schemes, making it more likely that their proposed developments will be able to proceed.
- 9.11 Do consultees agree that conservation covenants will lead to an increase in the opportunities for development and resource management, whether through encouraging the release of land or facilitating development via biodiversity offsetting? What would the financial benefit of such an increase be (for example to developers or those working in the biodiversity sector)?**

#### **Better and more effective conservation**

- 9.12 The introduction of conservation covenant presents an opportunity for better and more widespread conservation across England and Wales. A number of ongoing benefits can result from this. For example, conservation covenants present an opportunity to increase, and further protect our natural capital and eco-services.<sup>11</sup> Conservation covenants can also facilitate and provide a long-lasting framework for the regeneration of historic environments. This work has been found to lead to increases in economic benefits for areas in which regeneration takes place, and also intangible social, cultural and environmental benefits.<sup>12</sup>
- 9.13 The creation of biodiversity offsetting schemes may also carry conservation benefits: development on poor quality land is allowed to go ahead whilst funds are contributed to be spent on land which is entirely devoted to wildlife and can be funded by a number of contributions.<sup>13</sup> As we explain in Chapter 2, conservation covenants provide a way to ensure biodiversity offsetting activity is

<sup>11</sup> For further information on the economic value of natural capital and eco-services please see the UNEP-WCMC, *The UK National Ecosystem Assessment* (2011).

<sup>12</sup> English Heritage, *Impact of Historic Environment Regeneration: Final Report* (2010).

<sup>13</sup> For an explanation of scenarios in which biodiversity offsetting produces environmental gains, see Environment Bank, *Biodiversity Offsetting: A General Guide* (2012) pp 9 to 11.

carried out and maintained even if land changes hands.

9.14 There is also a potential for benefit to the economy. At present, the United Kingdom's heritage tourism sector contributes £12.4 billion per year to the economy and supports a total of 466,000 jobs.<sup>14</sup> However, the value of the natural environment and built heritage is wider than this. For example, greater public access to green spaces and places of cultural significance can lead to more opportunity for the public to engage in recreational activities, as well as potential health and wellbeing benefits.<sup>15</sup> They also help to foster a sense of local belonging.<sup>16</sup> In recent years a focus has been placed on recognising this value in the form of natural capital and eco-services,<sup>17</sup> ensuring the benefits of the environment and built heritage are acknowledged for their full worth. To ensure that the natural environment and built heritage continue to make this essential contribution they must be kept in a good state, protected and enhanced. Conservation covenants have a part to play in realising this benefit.

**9.15 Do consultees agree that the introduction of conservation covenants will have a positive impact on conservation, leading to benefits such as the protection of natural capital, and enhancement of a green economy and better availability of recreational activity for the public? We would welcome information consultees are able to provide on monetisation of these benefits.**

#### **Removing the need for existing workarounds**

9.16 The current law sometimes leaves conservation organisations with little choice but to purchase the site they wish to protect. Equally, conservation-minded landowners are often left with no alternative but to sell their land in order to protect it. This can have significant financial implications for conservation organisations. Information provided by the Woodland Trust shows that an organisation faces significant associated costs when purchasing a site for protection. The acquisition of a site of 50 hectares or less costs approximately £2,000 in staffing and £2,000 to £2,500 in legal fees when the site's title is registered. Legal fees can escalate if the site is more complicated or the title is unregistered. In such cases it may be necessary to pay up to £20,000 in legal fees for the acquisition of a single site. On those figures a conservation body could accrue associated costs of between £4,000 and £22,000 plus the purchase price for the land.

9.17 A system of conservation covenants would remove the need to purchase or sell land in order to protect it. Whilst the creation of a conservation covenant will bring associated costs, such as legal advice and registration, the cost will be

<sup>14</sup> Heritage Lottery Fund, *Investing in success – Heritage and the UK tourism economy* (2010) p 8. "Heritage tourism" includes our built heritage, museums, and natural heritage.

<sup>15</sup> See for example UNEP-WCMC, *The UK national Ecosystem Assessment* (2011); RSPB, *Wellbeing through the wildlife* (date unknown), at [http://www.rspb.org.uk/Images/wellbeing\\_tcm9-132872.pdf](http://www.rspb.org.uk/Images/wellbeing_tcm9-132872.pdf).

<sup>16</sup> English Heritage, *Heritage Counts 2009* (2009) p 4.

<sup>17</sup> See for example UNEP-WCMC, *The UK National Ecosystem Assessment* (2011). A synthesis of findings from the assessment is available at <http://uknea.unep-wcmc.org/Resources/tabid/82/Default.aspx>.

significantly less than those currently accrued when purchasing land.<sup>18</sup>

**9.18 Do consultees agree that removing the need for a conservation organisation to purchase land, and for landowners to sell land, will reduce the costs involved in protecting it? We invite consultees to provide us with details of specific costs they have incurred in using this workaround.**

9.19 Landowners and conservation organisations are also using lease back arrangements to achieve conservation outcomes on land. This has a cost which might be avoided if a conservation covenant was available. For example, Woodland Trust guidance to landowners sets out the costs of entering into a leaseback agreement. A basic fee of either £1,500 or £2,500 is payable, with a further reviewable £100 per annum as ground rent. The landowner must also reimburse the Trust's legal costs.<sup>19</sup> In addition we assume a landowner would need to seek independent legal advice. We estimate that between one and six hours of legal advice would be required. When charged at the average hourly rate of £111 an additional cost of between £111 and £666 is created. On these calculations a landowner can expect to make an initial expenditure of between £2,611 and £3,166 plus the responsible body's legal costs and an annual cost of £100. We expect conservation covenants will cost less because they provide a simpler, more certain tool that will require less legal advice and limit the need for drafting.

**9.20 Do consultees agree that removing the need for lease back arrangements will reduce the costs involved in protecting land? We invite consultees to provide us with details of specific costs they have incurred in using this workaround.**

#### **Changes to the value of land**

9.21 Conservation covenants have the potential to enhance or reduce the value of land. A restriction on the use of land or a positive obligation may devalue it. But in some cases there is no loss of value because of the terms of the covenant (for example, agricultural owners may receive payment in exchange for fulfilling obligations).

9.22 Conservation covenants also have the potential to increase the value of the site itself, and surrounding land. For example, it has been argued that land adjacent to parks carries a 5% to 7% premium.<sup>20</sup> There is also a potential that formal acknowledgement of a conservation merit will increase the value of the land; this

<sup>18</sup> We have provisionally proposed that a conservation covenant will be registered as a local land charge. Section 13A of the Local Land Charge Act 1975 allows registering authorities in England to specify the fees that are payable; the fee may not exceed the cost of the service provided. To that end the registration fees attached to a conservation covenant will be on a cost-recovery basis only.

<sup>19</sup> Woodland Trust, *Information sheet 5: Costs of Service*, at <http://frontpage.woodland-trust.org.uk/clt/images/costs.pdf>.

<sup>20</sup> Commission for Architecture and the Built Environment, *Does Money Grow on Trees* (2004) p 78.

has been the case in other jurisdictions which use conservation covenants.<sup>21</sup>

- 9.23 We invite consultees to provide details of how a conservation covenant could affect the value of land (whether the site itself, or neighbouring properties).**

#### **Management and enforcement**

- 9.24 With the introduction of conservation covenants there will be associated costs of management, which will primarily fall on responsible bodies. Management action might include, for example, visits to the property, or the ongoing provision of advice to landowners. The cost of managing a conservation covenant is difficult to estimate; it will depend on the nature of the site and the obligations required under the conservation covenant (which we expect to be diverse). As this is a voluntary scheme, responsible bodies will be able to decide when creating a conservation covenant whether such expenditure is an effective use of their resources.

- 9.25 We invite consultees to provide details of the likely costs of managing a conservation covenant, particularly where this can be drawn from existing management actions that they undertake or are aware of.**

- 9.26 In rare cases, enforcement action will also be needed. This might include, for example, seeking an injunction or damages for a breach of a conservation covenant. But overseas examples suggest that compliance with conservation covenants is high, and enforcement action is rarely needed. A USA-wide survey of 7,400 easements in 1999 found that breaches had occurred in 498 cases (less than 7%). Of these only 115 were major breaches, and the vast majority of these were resolved without litigation.<sup>22</sup> In New Zealand, the Queen Elizabeth the Second National Trust found a 95.1% adherence rate among the 1,723 conservation covenants monitored in 2011 to 2012.<sup>23</sup> However, a report conducted by the Land Trust Alliance in the USA suggests that the probability of breach increases when land changes hands.<sup>24</sup> We would therefore expect to see a slight increase in the need for enforcement action in the long-term.

- 9.27 We invite views from consultees as to the likelihood of enforcement action being needed for conservation covenants in England and Wales.**

- 9.28 We invite consultees to provide details of the likely costs of enforcement action such as seeking damages or an injunction.**

#### **Transitional impact**

- 9.29 The introduction of a system of conservation covenants would represent a relatively small-scale reform to land law. Members of the legal profession will

<sup>21</sup> National Trust, *The Potential of Conservation Covenants – A report by Green Balance to the National Trust* (2008) p 27.

<sup>22</sup> E Byers and K Marchetti Ponte, *The Conservation Easement Handbook* (2nd 2005) p 158.

<sup>23</sup> Queen Elizabeth the Second National Trust, *Annual Report* (2012) p 11.

<sup>24</sup> E Byers and K Marchetti Ponte, *The Conservation Easement Handbook* (2nd 2005) p 158.

need to ensure that they understand how the reforms operate; this will require training. However, we expect that the cost of training will be absorbed through the requirements for professional development. We therefore estimate training costs for legal professionals to be nil. We also expect this to be the case with the judiciary. The proposed reform will be small enough to require only an update by way of a regular newsletter without incurring additional costs. Furthermore, the nature of these reforms means that litigation is more likely to occur some years into the future and any additional cost of training can be phased over time.

**9.30 Do consultees agree that the cost of training for legal professionals and the judiciary will be absorbed by existing training and professional development?**

9.31 The introduction of conservation covenants will have an impact on local land charges offices when registration begins. We envisage that local authorities may need to offer training to their officers. We also expect that local authorities might need to modify their information technology systems to allow for registration. We expect the associated costs will be minimal and recoverable through the fees charged for the registration of a conservation covenant.

**9.32 Do consultees agree that the transitional impact on local authorities of registering new conservation covenants would be minimal and in any event absorbed by the fee payable?**

9.33 Responsible bodies will incur some transitional costs, through the need to train staff and adapt information technology systems and internal policies. We anticipate this could be achieved with relatively low cost, as these organisations already undertake work of this nature (for example using existing workarounds and statutory covenants).

**9.34 Do consultees agree that the transitional impact on responsible bodies would be minimal?**

9.35 We anticipate there to be a small transitional cost to the Lands Chamber, because of the need to create new forms and guidance, and modifications to the Lands Chamber's systems. In our Impact Assessment for our Easements, Covenants and Profits à Prendre Report we estimated the cost of such a change at between £5,000 and £10,000, with a best estimate of £7,500.<sup>25</sup> We would expect a similar cost to introduce conservation covenants.

**9.36 Do consultees agree that the transitional impact on the Lands Chamber of the Upper Tribunal would be in the region of £7,500?**

**Modifying or discharging a conservation covenant**

9.37 The existence of a conservation covenant may in some cases result in costs to landowners. These costs would arise if a landowner makes an application to the Lands Chamber of the Upper Tribunal for modification or discharge. The costs of such an application will fall into two categories: Lands Chamber fees and professional fees. The Lands Chamber charges a standard fee for each stage of

<sup>25</sup> Impact Assessment of the Law of Property Bill 2011 (2011) Law Commission Impact Assessment No LAWCOM0008, p 34.

an application:

Table 1: Lands Chamber fees<sup>26</sup>

Process	Fee
Lodging an application	£800
Preliminary hearing (if one is necessary to determine whether or not an objector is entitled to object)	£500
Interlocutory hearing	£100
Final hearing	£1,000
Engrossing a final order (only payable where proceedings do not proceed to a final hearing)	£450

9.38 The fees payable to the Lands Chamber if an application proceeds to a final hearing are therefore between £1,250 and £2,400.<sup>27</sup>

9.39 Professional costs are more difficult to assess, because of the range of circumstances which may lead to an application. Some cases may be relatively confined: for example, a very old conservation covenant whose purpose is rendered redundant because of unforeseen changes to a site. Other cases may involve proposed changes of use to the site, requiring consideration of expert evidence on both the environment and the local need for development.

**9.40 We invite views from consultees as to the range of likely costs of an application to modify or discharge a conservation covenant.**

9.41 During the period 2009/10 the Lands Chamber received 45 applications to modify or discharge a restrictive covenant.<sup>28</sup> We would expect there to be no applications to the Lands Chamber to modify or discharge a conservation covenant in the first five years of a statutory scheme. This is because we expect that original landowners are unlikely to want to modify or discharge.

9.42 After five years, and up to twenty years, we anticipate applications relating to conservation covenants would lead to a very small increase; in the vicinity of 5% more applications lodged with the Lands Chamber than at present. For the period twenty years after the commencement of a statutory scheme onwards, we anticipate a constant figure of 10% more applications under section 84(1) than are currently lodged would relate to conservation covenants.

<sup>26</sup> Upper Tribunal (Lands Chamber) Fees Order (SI 2009 No 1114) as amended by the Upper Tribunal (Lands Chamber) Fees (Amendment) Order 2010 (SI 2010 No 2601).

<sup>27</sup> The lower figure of £1,250 is based upon proceedings which involve an application fee (£800) and engrossed order without final hearing (£450). The higher figure of £2,400 is based upon proceedings which involve an application fee (£800), a preliminary hearing (£500), one interlocutory application (£100) and a final hearing (£1,000).

<sup>28</sup> During the period 2008/09 the Lands Chamber received 57 applications and during the period 2007/09, 80 applications.

- 9.43 We invite views from consultees as to the likely increase in applications to the Lands Chamber of the Upper Tribunal following the introduction of a statutory scheme for conservation covenants.**

#### **Increasing engagement**

- 9.44 Finally, it is worth noting the potential benefits which may broadly be classed as opportunities for increasing engagement by individuals and communities. The agreement of obligations by landowners and responsible bodies ensures those obligations can be tailor-made to the site and its surrounds. This achieves more appropriate, realistic and long-lasting protection of land than a one-size-fits-all regulatory system.<sup>29</sup> In addition, the creation of conservation covenants has been found to be motivated by a sense of attachment to one's land.<sup>30</sup> Allowing individual landowners to take part in conservation efforts may help individuals to foster a sense of place and community; it also allows civil society organisations to use their conservation expertise (as opposed to state-imposed regulatory systems).<sup>31</sup> These outcomes arguably produce non-financial benefits.

- 9.45 Do consultees agree that conservation covenants provide benefits in terms of opportunities for increased engagement on the part of individuals and communities?**

#### **Further impacts**

- 9.46 Although there are workarounds and statutory covenants currently being used for conservation, we are proposing an entirely new statutory scheme, and there may be areas of impact we have not yet anticipated. In addition to considering the specific points we have raised above, we would welcome views from consultees on any further areas of our proposals which would result in costs or benefits.
- 9.47 We invite consultees to advise us of areas which constitute likely costs or benefits of a statutory scheme for conservation covenants.**

<sup>29</sup> J Owley, "Changing Property in a Changing World: Call for the End of Perpetual Conservation Easements" (2011) 30 *Stanford Environmental Law Journal* 121, 138.

<sup>30</sup> JR Farmer and others, "Motivations Influencing the Adoption of Conservation Easements" (2011) 25(4) *Conservation Biology* 827, 832.

<sup>31</sup> J Owley, "Changing Property in a Changing World: Call for the End of Perpetual Conservation Easements" (2011) 30 *Stanford Environmental Law Journal* 121, 138.

## **CHAPTER 10**

# **LIST OF PROVISIONAL PROPOSALS AND CONSULTATION QUESTIONS**

- 10.1 In this Chapter we set out our provisional proposals and consultation questions on which we invite the views of consultees. We would also be grateful for consultees' comments on any aspects of the Consultation Paper not covered below.
- 10.2 It would assist us if, when responding, consultees could indicate the paragraph of this list to which their response relates, or the paragraph(s) of the Consultation Paper most relevant to the point.

### **CURRENT LAW AND THE CASE FOR REFORM**

- 10.3 We invite views from consultees on ways in which they could use conservation covenants to conserve land for environment or heritage purposes.

**[paragraph 2.30]**

- 10.4 We would be interested to hear from consultees about legal mechanisms they have used to secure conservation covenants. We invite consultees to tell us:

- (1) whether they have used any of the “workarounds” we describe, and the benefits and disadvantages of those approaches; and
- (2) whether there are other ways in which they have attempted to create binding obligations in respect of land for a conservation purpose (and how successful those measures have been).

**[paragraph 2.47]**

- 10.5 We invite views from consultees on:

- (1) how long-term biodiversity offsetting activity can currently be secured on an offset site;
- (2) whether existing methods for securing biodiversity offsetting activity are satisfactory;
- (3) whether conservation covenants would be a useful addition to the methods available to deliver biodiversity offsetting activity; and
- (4) what advantages conservation covenants might offer relative to existing methods.

**[paragraph 2.54]**

- 10.6 We provisionally propose the introduction of conservation covenants into the law of England and Wales. This scheme of conservation covenants should include:

- (1) no requirement for there to be benefited land;

- (2) the ability to impose positive as well as negative obligations; and
- (3) provision for those obligations to bind successors in title.

Do consultees agree?

**[paragraph 2.72]**

### **COMPARATIVE LAW**

10.7 We invite feedback from consultees who have used the Scottish system, on:

- (1) the types of land protected by conservation burdens;
- (2) the number of new conservation burdens created; and
- (3) their experience of the Scottish system of conservation burdens generally.

**[paragraph 3.17]**

### **KEY FEATURES OF A STATUTORY SCHEME**

10.8 We provisionally propose that the holder of a freehold estate in land, or of a leasehold term with at least seven years left to run, should be able to create a conservation covenant that would bind their successors in title and those with interests derived from their own.

Do consultees agree?

**[paragraph 4.7]**

10.9 We provisionally propose that conservation covenants should be capable of being held by any Secretary of State (for England) or the Welsh Ministers (in Wales). We further propose that in England, a single Secretary of State should have the power to nominate or exclude responsible bodies. The Welsh Ministers should have the same power in Wales. Responsible bodies should be:

- (1) a public body whose objects include some or all of the purposes set out at paragraph 4.40;
- (2) a registered charity whose objects include some or all of the purposes set out at paragraph 4.40; or
- (3) a local authority.

Do consultees agree?

**[paragraph 4.22]**

10.10 We invite views from consultees on whether there is a case for giving the Secretary of State and the Welsh Ministers the power to include for-profit companies whose objects include some or all of the purposes set out at paragraph 4.40 as responsible bodies.

**[paragraph 4.24]**

10.11 We provisionally propose that a conservation covenant should be capable of being transferred from one responsible body to another.

Do consultees agree?

**[paragraph 4.26]**

10.12 We invite consultees' views on what should happen to a conservation covenant where the responsible body which holds it ceases to exist, or ceases to be a responsible body. In particular:

- (1) should there be a holder of last resort?
- (2) if so, who should take on this responsibility?

**[paragraph 4.29]**

10.13 We provisionally propose that the purposes for which a conservation covenant may be created are an obligation to do or not do something on land for the public benefit, to preserve, protect, restore or enhance in relation to that land:

- (1) its natural environment, including its flora and fauna;
- (2) its natural resources; or
- (3) any cultural, historic or built heritage features of that land.

Do consultees agree?

**[paragraph 4.40]**

10.14 We invite views from consultees as to whether a scheme of conservation covenants for England and Wales should include any form of public oversight for the creation of new conservation covenants.

**[paragraph 4.49]**

#### **CREATION AND REGISTRATION**

10.15 We provisionally propose that conservation covenants shall be statutory burdens on land, rather than proprietary interests or contractual agreements.

Do consultees agree?

**[paragraph 5.8]**

10.16 We provisionally propose that a conservation covenant must be created in writing and signed by the parties.

Do consultees agree?

**[paragraph 5.10]**

10.17 We provisionally propose that a conservation covenant should bind land in perpetuity, unless a shorter period is expressed in the conservation covenant.

Do consultees agree?

**[paragraph 5.14]**

10.18 We provisionally propose that, subject to two exceptions, a statutory scheme for conservation covenants should not limit the obligations which parties may include in a conservation covenant, provided they do not go beyond the purposes for which such a covenant can be created.

Do consultees agree?

**[paragraph 5.16]**

10.19 We provisionally propose that any provisions of a conservation covenant made by a leaseholder which conflict with the provisions of his or her lease should be void.

Do consultees agree?

**[paragraph 5.18]**

10.20 We provisionally propose that if land which is the subject of a conservation covenant is subdivided, the owners of the subdivided land should be jointly and severally liable for the conservation covenant obligations, unless the conservation covenant has provided otherwise (or it is modified or discharged).

Do consultees agree?

**[paragraph 5.20]**

10.21 We provisionally propose that a statutory scheme for conservation covenants should be accompanied by non-statutory guidance for those who create and hold conservation covenants. This guidance should include model terms.

Do consultees agree?

**[paragraph 5.22]**

10.22 We invite consultees' views on who should formulate non-statutory guidance (for example, Government departments, advisory bodies, or conservation organisations).

**[paragraph 5.23]**

- 10.23 We provisionally propose that a conservation covenant should be registrable as a local land charge, and that from the date when a conservation covenant is so registered it will be enforceable against successors in title to the original covenantor.

Do consultees agree?

**[paragraph 5.31]**

- 10.24 We provisionally propose that there should not be a statutory requirement for central recording of conservation covenants; but that responsible bodies should be encouraged to publish this information voluntarily, with the agreement of the relevant landowner.

Do consultees agree?

**[paragraph 5.32]**

- 10.25 Do consultees foresee difficulties with the interaction of statutory designations for conservation purposes and conservation covenants?

**[paragraph 5.34]**

#### **MANAGEMENT AND ENFORCEMENT**

- 10.26 We invite consultees' views on how obligations under a conservation covenant should be managed, and in particular:

- (1) what sort of management action is likely to be needed; and
- (2) whether in some cases it would be useful for a management agreement to be used in addition to a conservation covenant.

**[paragraph 6.10]**

- 10.27 We provisionally propose that the parties should be free to agree management actions as part of a conservation covenant, but that no management powers should be provided for in the statute.

Do consultees agree?

**[paragraph 6.15]**

- 10.28 We provisionally propose that, under the terms of a conservation covenant, a person who is bound by a restrictive obligation breaches it by doing something which it prohibits, or by permitting or suffering someone else to do so; and a person who is bound by a positive obligation breaches it if the obligation is not performed.

Do consultees agree?

**[paragraph 6.20]**

10.29 We provisionally propose that, on proof of a breach of a conservation covenant, the court should have the power to issue a final injunction.

Do consultees agree?

**[paragraph 6.40]**

10.30 We provisionally propose that the court should have the power to issue an interim injunction in respect of a breach of a conservation covenant. In determining whether an interim injunction should be issued, the court should be required to consider the public interest.

Do consultees agree?

**[paragraph 6.41]**

10.31 We provisionally propose that, on proof of a breach of a conservation covenant by a landowner, the court should have the power to order:

- (1) the payment of compensatory damages to the responsible body; and
- (2) the payment of exemplary damages to the responsible body. We invite consultees' views on the way this remedy should be framed in a statutory scheme, and the circumstances in which such an award should be made.

Do consultees agree?

**[paragraph 6.51]**

10.32 We provisionally propose that a statutory scheme for conservation covenants should not include an ability for the court to award damages in substitution for an injunction.

Do consultees agree?

**[paragraph 6.55]**

10.33 We invite consultees' views on whether Government or a statutory conservation body should have the power to enforce conservation covenants where a holder has failed or is unable to do so.

**[paragraph 6.59]**

10.34 We provisionally propose that, on proof of the breach of a responsible body's obligations under a conservation covenant, the court should have the power to order remedies in accordance with general principles of contract law.

Do consultees agree?

**[paragraph 6.61]**

10.35 We provisionally propose that unless a conservation covenant expressly provides otherwise, its responsible body may unilaterally discharge the obligations contained in it.

Do consultees agree?

**[paragraph 7.10]**

10.36 We invite consultees' views on whether the responsible body's ability to discharge should be limited to certain circumstances, and, if so, what circumstances would be appropriate.

**[paragraph 7.11]**

10.37 We provisionally propose that the parties to a conservation covenant for the time being may agree to modify it.

Do consultees agree?

**[paragraph 7.16]**

10.38 We provisionally propose that where a responsible body in respect of a conservation covenant acquires land which is subject to that covenant, the conservation covenant should cease.

Do consultees agree?

**[paragraph 7.20]**

10.39 We provisionally propose that the Lands Chamber of the Upper Tribunal should have the power to determine applications for the modification and discharge of statutory conservation covenants.

Do consultees agree?

**[paragraph 7.48]**

10.40 We provisionally propose that on the application of a landowner, the Lands Chamber of the Upper Tribunal may modify or discharge a conservation covenant where it is reasonable to do so, having regard to all of the circumstances and in particular the following matters (where relevant):

- (1) any change in circumstances since the conservation covenant was created (including changes in the character of the property or the neighbourhood);
- (2) the extent to which the conservation covenant confers a benefit on the public;
- (3) the extent to which the purposes for which the conservation covenant was created, or any other purposes for which a conservation covenant may be created, are served by the conservation covenant;

- (4) the extent to which the conservation covenant prevents the landowner's enjoyment of the land;
- (5) the extent to which is it practicable or affordable for both the landowner and future landowners to comply with the conservation covenant; and
- (6) whether the purposes for which the covenant was created could be achieved to an equivalent extent and within the same period of time by an alternative scheme on a different site which the landowner owns, and it is possible to create a new conservation covenant on that site in substitution for the covenant to be discharged.

Do consultees agree?

**[paragraph 7.63]**

- 10.41 Do consultees envisage any situations in which compensation should be payable to a responsible body for modification or discharge of a conservation covenant by the Lands Chamber of the Upper Tribunal?

**[paragraph 7.68]**

- 10.42 We provisionally propose that it should not be possible for a responsible body to apply to the Lands Chamber of the Upper Tribunal for modification or discharge of a conservation covenant.

Do consultees agree?

**[paragraph 7.71]**

- 10.43 We provisionally propose that the existing jurisdiction of the court under section 84(2) of the Law of Property Act 1925, and the proposed jurisdiction of the Lands Chamber of the Upper Tribunal, should be extended to include conservation covenants.

Do consultees agree?

**[paragraph 7.74]**

- 10.44 We provisionally propose that section 237 of the Town and Country Planning Act 1990 should enable the overriding of conservation covenants.

Do consultees agree?

**[paragraph 7.80]**

#### **EXISTING STATUTORY COVENANTS**

- 10.45 We invite consultees to tell us whether covenants made under section 8 of the National Trust Act 1937 present any advantages for the National Trust or for the public that are not replicated in our provisional proposals for a statutory conservation covenants scheme.

**[paragraph 8.16]**

10.46 We provisionally propose that section 5 of the Forestry Act 1967 should be replaced by a statutory conservation covenants scheme.

Do consultees agree?

**[paragraph 8.25]**

10.47 Do consultees agree that the statutory covenants set out in Appendix A should not be replaced by a statutory scheme for conservation covenants?

**[paragraph 8.28]**

### **THE POTENTIAL ECONOMIC IMPACT OF CONSERVATION COVENANTS**

10.48 Do consultees agree that conservation covenants will be more widely used in rural areas than on urban land?

**[paragraph 9.3]**

10.49 We invite consultees to indicate how widely used conservation covenants would be in England and Wales, or how frequently they might use covenants in the course of their work.

**[paragraph 9.7]**

10.50 Do consultees agree that conservation covenants will lead to an increase in the opportunities for development and resource management, whether through encouraging the release of land or facilitating development via biodiversity offsetting? What would the financial benefit of such an increase be (for example to developers or those working in the biodiversity sector)?

**[paragraph 9.11]**

10.51 Do consultees agree that the introduction of conservation covenants will have a positive impact on conservation, leading to benefits such as the protection of natural capital, and enhancement of a green economy and better availability of recreational activity for the public? We would welcome information consultees are able to provide on monetisation of these benefits.

**[paragraph 9.15]**

10.52 Do consultees agree that removing the need for a conservation organisation to purchase land, and for landowners to sell land, will reduce the costs involved in protecting it? We invite consultees to provide us with details of specific costs they have incurred in using this workaround.

**[paragraph 9.18]**

10.53 Do consultees agree that removing the need for lease-back arrangements will reduce the costs involved in protecting land? We invite consultees to provide us with details of specific costs they have incurred in using this workaround.

**[paragraph 9.20]**

10.54 We invite consultees to provide details of how a conservation covenant could affect the value of land (whether the site itself, or neighbouring properties).

**[paragraph 9.23]**

10.55 We invite consultees to provide details of the likely costs of managing a conservation covenant, particularly where this can be drawn from existing management actions that they undertake or are aware of.

**[paragraph 9.25]**

10.56 We invite views from consultees as to the likelihood of enforcement action being needed for conservation covenants in England and Wales.

**[paragraph 9.27]**

10.57 We invite consultees to provide details of the likely costs of enforcement action such as seeking damages or an injunction.

**[paragraph 9.28]**

10.58 Do consultees agree that the cost of training for legal professionals and the judiciary will be absorbed by existing training and professional development?

**[paragraph 9.30]**

10.59 Do consultees agree that the transitional impact on local authorities of registering new conservation covenants would be minimal and in any event absorbed by the fee payable?

**[paragraph 9.32]**

10.60 Do consultees agree that the transitional impact on responsible bodies would be minimal?

**[paragraph 9.34]**

10.61 Do consultees agree that the transitional impact on the Lands Chamber of the Upper Tribunal would be in the region of £7,500?

**[paragraph 9.36]**

10.62 We invite views from consultees as to the range of likely costs of an application to modify or discharge a conservation covenant.

**[paragraph 9.40]**

10.63 We invite views from consultees as to the likely increase in applications to the Lands Chamber of the Upper Tribunal following the introduction of a statutory scheme for conservation covenants.

**[paragraph 9.43]**

10.64 Do consultees agree that conservation covenants provide benefits in terms of

opportunities for increased engagement on the part of individuals and communities?

**[paragraph 9.45]**

10.65 We invite consultees to advise us of areas which constitute likely costs or benefits of a statutory scheme for conservation covenants.

**[paragraph 9.47]**

# APPENDIX A

## STATUTORY COVENANTS IN ENGLAND AND WALES

### Restrictive covenants made with local housing authorities

A.1 This power was first created by section 110 of the Housing Act 1925, and is now contained in section 609 of the Housing Act 1985. The only eligible covenantee is the local housing authority, which is usually the district or London borough council, or in Wales the county or county borough council.<sup>1</sup> There are two eligible categories of covenantor:

- (1) a person to whom the local housing authority has disposed of land that was previously held for the purposes of the Housing Act 1985; and
- (2) the owner of any other land, which is defined as:<sup>2</sup>
  - (a) a person (other than a mortgagee not in possession) who is for the time being entitled to dispose of the fee simple absolute in the premises, whether in possession or in reversion; or
  - (b) a person holding or entitled to the rents and profits of the premises under a lease of which the unexpired term exceeds three years.<sup>3</sup>

A.2 In case (1) above, no particular purpose is specified, but in (2) the covenant must be made for the purposes of any provision of the Housing Act 1985. As for the terms, the statute only provides that it must concern the land; it does not mention restrictive or positive obligations. However, in *Cantrell v Wycombe District Council*<sup>4</sup> the Court of Appeal ruled that it can only impose negative obligations, for the following three principal reasons based on Parliamentary intention.

- (1) Section 609 was designed to re-enact, as part of a consolidating statute, a provision that was generally thought to apply only to restrictive covenants.<sup>5</sup>
- (2) The Law Commission report that led to the consolidation assumed that it only applied to restrictive covenants.<sup>6</sup>

<sup>1</sup> Housing Act 1985, s 1.

<sup>2</sup> Housing Act 1985, s 609.

<sup>3</sup> Housing Act 1985, s 623.

<sup>4</sup> [2008] EWCA Civ 866, [2009] PTSR 96.

<sup>5</sup> [2008] EWCA Civ 866, [2009] PTSR 96 at [17] to [18], by Lewison LJ, referring to the Housing Act 1957, s 151.

<sup>6</sup> [2008] EWCA Civ 866, [2009] PTSR 96 at [16], by Lewison LJ, referring to Consolidation of the Housing Acts (1985) Law Com No 144; Scot Law Com No 94, recommendation 1(ii).

- (3) Section 609 uses the same “benefited adjacent landowner” analogy as that used in section 8 of the National Trust Act 1937, which expressly applies to restrictive covenants only. Lord Denning MR in the Court of Appeal had interpreted the latter as simply a mechanism to give the National Trust standing to enforce a restrictive covenant. Therefore, in the case of section 609, the analogy should be read only as circumventing the need for benefited adjacent land, and not as a departure from the general rule against positive obligations that run with the land.<sup>7</sup>
- A.3 The Court of Appeal also rejected the local housing authority’s argument that it would be absurd not to allow positive obligations to run with the land. Lord Justice Lewison referred to the fact that local authorities already enjoy a power under section 33 of the Local Government (Miscellaneous Provisions) Act 1982 to hold the benefit of binding positive covenants.
- A.4 The statute is silent on duration, modification and discharge.<sup>8</sup> It seems clear from four Lands Tribunal decisions that section 84(1) applies to restrictive covenants under section 609. In each of these cases the local housing authority did in fact own neighbouring land, so section 609 would not be strictly necessary for it to seek enforcement of the covenant. However, section 609 was relevant in that, where the applicant argued ground (aa) of section 84(1), the question of whether the restriction secured a practical benefit to the local housing authority required consideration of its status as “custodian of the public interest”, and not just its interests as a neighbouring landowner. This special standing to object to discharge or modification was held to be encapsulated by section 609.<sup>9</sup>
- A.5 The covenant does not itself give rise to special statutory monitoring or enforcement powers (though the local housing authority may enjoy these for separate reasons in respect of the land). Nor can they be included in the terms, because they require positive obligations. Section 609 provides that the covenant is enforceable against all persons deriving title under the original covenantor, on the basis of a legal fiction that the local housing authority owns land that is benefited by its terms. Case law has confirmed that the terms are not enforceable against an occupier of the land who is not a successor in title to the original covenantor.<sup>10</sup>

<sup>7</sup> [2008] EWCA Civ 866, [2009] PTSR 96 at [19] to [21], by Lewison LJ, referring to *Gee v National Trust for Places of Historic Interest or Natural Beauty* [1966] 1 WLR 170, 174G to 175A, by Lord Denning MR.

<sup>8</sup> Here and throughout this Appendix, where the relevant legislation is silent we assume that agreements are subject to the Lands Chamber’s power insofar as they impose restrictions on the use of land. Case law confirms that s 84(1) does not extend to positive obligations affecting land. Most of the legislation we consider here, even if it excludes the s 84(1) jurisdiction, does not deal with other methods of modification or discharge. Throughout this Appendix, where the legislation is silent, we take the view that it is open to the parties who for the time being have the benefit and burden of the covenant to modify or discharge it by agreement or pursuant to a term in the covenant itself.

<sup>9</sup> *Re Beech’s Application* (1990) 59 P&CR 502, 504 to 505; *Re Love’s and Love’s Application* (1994) 67 P&CR 101, 107; *Re Wards Construction (Medway) Ltd’s Application* (1994) 67 P&CR 379, 390 to 391; *Re Willis’s Application* (1998) 76 P&CR 97, 110 to 111.

<sup>10</sup> *Melville v Bruton* (1997) 29 HLR 319.

## Planning obligations

- A.6 We mentioned this statutory power in Chapter 2 in the context of biodiversity offsetting. Planning obligations were introduced by section 34 of the Town and Country Planning Act 1932, and are now governed by sections 106 to 106B of the Town and Country Planning Act 1990. Before 1991 they were known as “planning agreements”. They are often referred to as “section 106 agreements”; before 1990 they were “section 52 agreements” (the section of the Town and Country Planning Act 1972 which previously governed them).
- A.7 These agreements can be made between anyone with an interest in any type of land (this is not defined) and the local planning authority. Since 1991 it has also been possible for the interest holder to make a unilateral undertaking that is expressed to be enforceable by the local planning authority.<sup>11</sup> This provision is intended for situations where the Secretary of State or the Welsh Ministers (or in London, the Mayor) have upheld the interest holder’s appeal against a refusal of planning permission but determine that permission should be granted subject to certain planning obligations.<sup>12</sup>
- A.8 Planning obligations are intended for use in connection with an application for planning permission, and are normally agreed as part of the application process to help secure permission. However, they exist separately from the permission itself. They must in this respect be distinguished from planning conditions, which are imposed as an aspect of planning permission and can contain anything that the local planning authority thinks fit (though case law requires that they are fairly and reasonably related to the development).<sup>13</sup>
- A.9 The statute does not specify any particular purposes, but there is a large body of case law and policy guidance on this point. The latter states that planning obligations should only be used if they are necessary to make unacceptable development acceptable, and where planning conditions are not enough to do this.<sup>14</sup>
- A.10 The statute specifies the permitted content of a planning obligation:
- (1) restrictions on the development or use of the land in any specified way;
  - (2) requirements for specified operations or activities to be carried out in, on, under or over the land;
  - (3) requirements for the land to be used in any specified way; and

<sup>11</sup> Town and Country Planning Act 1990, s 106(1).

<sup>12</sup> V Moore and M Purdue, *A Practical Approach to Planning Law* (12th ed 2012) paras 18.17 to 18.18.

<sup>13</sup> V Moore and M Purdue, *A Practical Approach to Planning Law* (12th ed 2012) ch 15.

<sup>14</sup> Department for Communities and Local Government, *National Planning Policy Framework* (March 2012) para 203; Welsh Government, *Planning Policy Wales* (Edition 5, November 2012) para 3.7.10.

- (4) requirements for a sum or sums to be paid to the local planning authority on a specified date or dates or periodically.<sup>15</sup>
- A.11 Again, there is a large volume of case law and Government policy on the content of planning obligations. English guidance states that they should be directly related to the development, and fairly and reasonably related in scale and kind to it.<sup>16</sup> Welsh policy is similar, but adds by way of example that:
- Contributions from developers may be used to offset negative consequences of development, to help meet local needs, or to secure benefits which will make development more sustainable. It is essential that ... development plans provide guidance on the types of obligations which authorities may seek from developers.<sup>17</sup>
- A.12 The statute provides that the obligation can be fixed-term or perpetual and subject to any conditions.<sup>18</sup> It can be varied by agreement, but not under section 84(1) of the Law of Property Act 1925 (this was possible before 1991 and was widely viewed as inappropriate<sup>19</sup>).<sup>20</sup> However, after five years the person bound can apply to the local planning authority (with appeal to the Secretary of State or the Welsh Ministers) for discharge (if it no longer serves a useful purpose) or modification, if it serves a useful purpose but would do so equally well with the modification sought.<sup>21</sup>
- A.13 No monitoring powers are specified, but the local planning authority can seek an injunction to enforce a restrictive or negative planning obligation. Furthermore, where a duty to carry out operations is not performed, the authority can enter the land and carry them out, recovering reasonably incurred expenses.<sup>22</sup> Planning obligations are enforceable against all persons deriving title from the original covenantor, and can provide for non-enforceability against the original covenantor once they relinquish their interest in the land.<sup>23</sup>

### **Restrictive covenants over green belt land in London and the Home Counties**

- A.14 This power was created by section 22 of the Green Belt (London and the Home Counties) Act 1938. A covenant can be made by the owner of land – this covers

<sup>15</sup> Town and Country Planning Act 1990, s 106(1).

<sup>16</sup> Department for Communities and Local Government, *National Planning Policy Framework* (March 2012) para 204. This replaces more detailed guidance previously contained in *Circular 05/2005: Planning Obligations* (18 July 2005).

<sup>17</sup> Welsh Government, *Planning Policy Wales* (Edition 5, November 2012) para 3.7.1.

<sup>18</sup> Town and Country Planning Act 1990, s 106(2).

<sup>19</sup> V Moore and M Purdue, *A Practical Approach to Planning Law* (12th ed 2012) paras 18.19 to 18.20; D Sabey and A Everton, *The Restrictive Covenant in the Control of Land Use* (1999) pp 170 to 174.

<sup>20</sup> Town and Country Planning Act 1990, s 106A(1) and (10).

<sup>21</sup> Town and Country Planning Act 1990, ss 106A and 106B.

<sup>22</sup> Town and Country Planning Act 1990, s 106(5) and (6).

<sup>23</sup> Town and Country Planning Act 1990, s 106(3) and (4). Before 1991 this provision instead used the fiction that the covenant benefited neighbouring land owned by the local planning authority.

the holder of any legal estate except for a mortgagee not in possession and a lease with less than 21 years left to run – or a parish council. The covenantee can be any local authority, which includes county, district and London borough councils.<sup>24</sup> The land must form part of a green belt designated under the Act, which only covers Greater London and specified areas of neighbouring counties. Green belts in other areas of the country exist on a non-statutory basis as part of national planning policy, and there is no equivalent power for them.<sup>25</sup> The Act is silent on the purposes of the covenant, providing simply that the covenant can contain any restrictions on the use of the land.<sup>26</sup>

- A.15 These covenants are not subject to variation or termination under section 84(1) of the Law of Property Act 1925.<sup>27</sup> The statute is silent on other methods. The covenant does not itself give rise to any powers of monitoring or enforcement, and its limitation to restrictive obligations would prevent them from being included in the terms. However, the local authority may have other statutory powers depending on the circumstances. The statute uses a similar analogy to that in section 8 of the National Trust Act 1937, based on a legal fiction that the covenantee owns adjacent land that is intended to be and is in fact benefited by the covenant.

#### **Nature reserve agreements**

- A.16 These covenants are one of two ways (the other being a dedication by certain public bodies of their own land) in which land can be designated as a nature reserve. They are provided for by section 16 of the National Parks and Access to the Countryside Act 1949. Nature reserve agreements can be made by any owner, lessee or occupier of any type of land. There is also provision for covenantors with certain types of statutory limited ownership.<sup>28</sup>
- A.17 The eligible covenantees are the Countryside Council for Wales and any county or county borough council (having consulted the Countryside Council for Wales or Natural England).<sup>29</sup> Natural England's ability to make land into a nature reserve through a covenant is covered by its general power to make management agreements (discussed below). If it uses this power to make an agreement for the nature reserve purposes described below, then the same consequences apply as described below (except in relation to purposes and content).<sup>30</sup>
- A.18 The covenantee must believe it to be expedient in the national or local interest that the land should be managed as a nature reserve. This means management

<sup>24</sup> Green Belt (London and the Home Counties) Act 1938, ss 2(1) and 22(1).

<sup>25</sup> See Department for Communities and Local Government, *National Planning Policy Framework* (March 2012) para 79 and following; Welsh Government, *Planning Policy Wales* (Edition 5, November 2012) para 4.8 and following.

<sup>26</sup> Green Belt (London and the Home Counties) Act 1938, s 22(1).

<sup>27</sup> Green Belt (London and the Home Counties) Act 1938, s 22(2).

<sup>28</sup> National Parks and Access to the Countryside Act 1949, s 16(1) and (4) (applying the Forestry Act 1967, sch 2).

<sup>29</sup> National Parks and Access to the Countryside Act 1949, ss 16(1) and 21.

<sup>30</sup> National Parks and Access to the Countryside Act 1949, s 15A(2)(a).

solely for a conservation purpose, or for a recreational purpose as well if this does not compromise conservation. "Conservation purpose" is defined as:

- (1) providing, under suitable conditions and control, special opportunities for the study of, and research into, matters relating to the fauna and flora of Great Britain and the physical conditions in which they live, and for the study of geological and physiographical features of special interest in the area; or
- (2) preserving flora, fauna or geological or physiographical features of special interest in the area.

"Recreational purpose" is defined as "providing opportunities for the enjoyment of nature or for open-air recreation".<sup>31</sup>

A.19 The agreement can contain such restrictions as may be expedient for its purposes on the exercise of rights over the land by the persons who can be bound by it. It can also:

- (1) provide for the management of the land in such manner, the carrying out thereon of such work and the doing thereon of such other things as may be expedient for the purposes of the agreement;
- (2) provide for any of the matters in paragraph (1) being carried out, or for the cost thereof being defrayed, either by the owner or other persons, or by the covenantee, or partly in one way and partly in another; and
- (3) contain such other provisions as to the making of payments by the covenantee, and in particular for the payment by them of compensation for the effect of the restrictions imposed, as may be specified in the agreement.

However, as discussed below, it is not clear whether the positive obligations above can bind the covenantor's successors in title.<sup>32</sup>

<sup>31</sup> National Parks and Access to the Countryside Act 1949, ss 15 and 16(1).

<sup>32</sup> If the covenant is made over land which is already designated as a Site of Special Scientific Interest ("SSSI"), it can also (1) provide for any matter for which a management scheme relating to an SSSI could provide, and (2) constitute advance authorisation for potentially damaging operations specified in the SSSI notice (thereby exempting the covenantor from the need to obtain the national nature authority's prior consent to the operation) - see Wildlife and Countryside Act 1981, s 28E(3)(b).

- A.20 The statute provides that restrictions imposed by these covenants cannot be varied or terminated under section 84(1) of the Law of Property Act 1925 (positive obligations are not subject to this jurisdiction in any case<sup>33</sup>).<sup>34</sup> It does not deal with any other methods of modification or discharge.
- A.21 In the context of monitoring and enforcement, the national nature authorities can appoint wardens with the power to enter any land (except a dwelling) for a wide range of purposes and in relation to several types of designation. As respects nature reserves, the power must be exercised with 24 hours' notice and for certain defined purposes.<sup>35</sup> The covenantee of a nature reserve agreement can make byelaws for the nature reserve, which can contain anything relating to its protection; the statute contains a non-exhaustive list of matters which may be included in such byelaws. However, the byelaws cannot interfere with the rights of any owner, lessee or occupier of the land, or with any public right of way.<sup>36</sup>
- A.22 There are two compulsory acquisition powers relating to nature reserves:
- (1) if an eligible covenantee cannot reach an agreement on reasonable terms for the satisfactory management of the land as a nature reserve, it can compulsorily acquire the land;<sup>37</sup> and
  - (2) if a nature reserve agreement has been breached in a way that prevents or impairs the satisfactory management of the land as a nature reserve, the covenantee can compulsorily acquire the covenantor's interest in the land.<sup>38</sup>
- A.23 The statute's provision for how the covenant runs with the land is circuitous, and contains a crucial ambiguity as to whether positive obligations can bind the covenantor's successors in title. Section 16(4) states that, if section 79 of the Law of Property Act 1925 (which provides that unless a contrary intention is expressed the burden of a covenant runs with the land) applies, section 1(2) and (3) of the Forestry Act 1947<sup>39</sup> shall apply to restrictions imposed by the agreement as if those subsections referred to the Countryside Council for Wales

<sup>33</sup> *Westminster City Council v Duke of Westminster* [1991] 4 All ER 136.

<sup>34</sup> This exclusion takes effect in a very circuitous manner. S 16(4) provides that, if s 79 of the Law of Property Act 1925 (which provides that unless a contrary intention is expressed the burden of a covenant runs with the land) applies, s 1(2) and (3) of the Forestry Act 1947 shall apply to restrictions imposed by the agreement. S 1(3) of the 1947 Act excludes forestry dedication covenants made under it from the Land Chamber's jurisdiction. The 1947 Act was repealed by the Forestry Act 1967, sch 7 para 3, but with savings for ss 1 to 4 for the purposes of certain Acts including the National Parks and Access to the Countryside Act 1949.

<sup>35</sup> Wildlife and Countryside Act 1981, s 51.

<sup>36</sup> National Parks and Access to the Countryside Act 1949, s 20.

<sup>37</sup> National Parks and Access to the Countryside Act 1949, s 17.

<sup>38</sup> National Parks and Access to the Countryside Act 1949, s 18. The covenantor first be must be notified and given reasonable time to remedy the breach. Any dispute over the existence of a breach is to be settled by an arbitrator appointed by the Lord Chancellor: s 18(2) and (3).

<sup>39</sup> The Forestry Act 1947 was repealed by the Forestry Act 1967, sch 7 para 3, but with savings for ss 1 to 4 for the purposes of certain Acts including the National Parks and Access to the Countryside Act 1949.

(or the local authority) rather than the Forestry Commissioners. Section 1(2) of the Forestry Act 1947, which used to govern forestry dedication covenants, provides that:

the Commissioners shall have the like rights as if they had at all material times been the absolute owners in possession of ascertained land adjacent to the land in respect of which the covenant is sought to be enforced and capable of being benefited by the covenant, and the covenant had been expressed to be for the benefit of that adjacent land.

- A.24 Section 16(4) of the National Parks and Access to the Countryside Act 1949, in referring only to restrictions, appears to prevent positive obligations from running with the land. This sits uneasily with the overall scheme of nature reserve agreements, which clearly envisages active management duties. We would be interested to hear from consultees with experience of this scheme about the nature of obligations which are imposed in practice.

### **Access agreements**

- A.25 The National Parks and Access to the Countryside Act 1949 set up a system for designating “access land” that would be open to the public through agreements with landowners or orders by public bodies. Although it has largely been superseded by the Countryside and Rights of Way Act 2000 in relation to new designations of access land, access agreements and orders made under it remain in force and are still governed by its provisions.<sup>40</sup>

- A.26 The covenantor can be any person with an interest in the land; this is defined as including “any estate in land and any right over land, whether the right is exercisable by virtue of the ownership of an interest in land or by virtue of a licence or agreement”. There is also provision for covenantors with certain types of statutory limited ownership.<sup>41</sup> Local planning authorities are the only eligible covenantees.<sup>42</sup> The land must be “open country”, which is:

- (1) land consisting wholly or predominantly of mountain, moor, heath, down, cliff or foreshore (including any bank, barrier, dune, beach, flat or other land adjacent to the foreshore);
- (2) woodlands in the countryside; or
- (3) any river or canal in the countryside, including any expanse of water through which it runs and a strip of adjacent land on both sides that is of reasonable width.<sup>43</sup>

- A.27 However, land which is defined as “open country” or “registered common land” under the Countryside and Rights of Way Act 2000 cannot be the subject of an

<sup>40</sup> Countryside and Rights of Way Act 2000, s 15(1)(c).

<sup>41</sup> Conservation of Habitats and Species Regulations 2010, SI 2010 No 490, reg 16(5) (applying the Forestry Act 1967, sch 2).

<sup>42</sup> National Parks and Access to the Countryside Act 1949, s 64.

<sup>43</sup> National Parks and Access to the Countryside Act 1949, s 59; Countryside Act 1968, s 16.

agreement under the 1949 Act (hence the 2000 Act has largely superseded it for the purposes of creating new access land). Furthermore, there are various categories of “excepted land”, including agricultural land (unless it is for rough grazing only), nature reserves, land that is built on and parks, gardens or pleasure grounds.<sup>44</sup>

- A.28 An access agreement automatically turns the land into “access land”, which carries with it a standard set of public rights over the land and duties on the covenantor. The agreement can also provide for ensuring public access and payments for the covenantee.<sup>45</sup>
- A.29 These agreements can be made irrevocably or subject to any provisions for revocation or variation.<sup>46</sup> The statute is silent on the applicability of section 84(1) of the Law of Property Act 1925, which suggests that they may be modified or discharged by the Lands Chamber of the Upper Tribunal insofar as they impose restrictive obligations, but this has not been tested by case law. The application of section 84(1) to access agreements would also sit uncomfortably with the general scheme governing access land, which provides a standard set of public rights that flow from any agreement made under it.
- A.30 All access land under the 1949 Act, whether so designated by agreement or by order, is subject to powers of inspection, enforcement and byelaws to protect the public’s right of access. The local planning authority can also compulsorily acquire any interest in land that constitutes “open country” if it is expedient to do so, whether or not there is an access agreement or order over it.
- A.31 The only power that depends on the existence of an access agreement is that of compulsory designation. The local planning authority can by order designate land as access land if:
- (1) it is impracticable to secure the making of an access agreement; or
  - (2) there is an access agreement over the land but it does not adequately secure public access for open-air recreation.<sup>47</sup>
- A.32 The statute provides that the agreement “shall apply as respects the interests of the persons with whom the agreement is made, and shall continue so to apply notwithstanding any change in the persons entitled thereto”. However, any interest holder who is not party to the agreement shall not have their rights prejudiced by it.<sup>48</sup>

### **Agreements concerning cattle grids**

- A.33 This power is contained in section 87 of the Highways Act 1980, but was first introduced in section 9 of the Highways (Provision of Cattle-grids) Act 1950. The covenantor can be any person with an interest in the land (this is not defined).

<sup>44</sup> National Parks and Access to the Countryside Act 1949, s 60(5).

<sup>45</sup> National Parks and Access to the Countryside Act 1949, ss 64(2) and 67.

<sup>46</sup> National Parks and Access to the Countryside Act 1949, s 64(3).

<sup>47</sup> National Parks and Access to the Countryside Act 1949, s 65(2).

<sup>48</sup> National Parks and Access to the Countryside Act 1949, s 64(6).

There is also provision for covenants with certain types of statutory limited ownership. The highway authority for the area (usually the county council<sup>49</sup>) is the only eligible covenantee.<sup>50</sup> The agreement can concern any type of land, and must be made for the purpose of providing, altering or improving a cattle grid or a bypass to one (both are defined in section 82(6)). It can contain any terms relating to these purposes (this appears to encompass positive obligations), as well as rights over the land for the public and/or the highway authority and provision for payments to either party.<sup>51</sup>

- A.34 The statute is silent on duration, modification and discharge. The covenant itself does not create any special monitoring or enforcement powers for the highway authority (unless they are specifically included as terms), but the Highways Act 1980 gives it a range of powers as part of its general responsibility for maintaining highways and its specific duties relating to cattle grids.<sup>52</sup> The agreement is binding on the interest held by the covenantor (and any interest created out of it), notwithstanding any change in its ownership. However, its terms cannot otherwise prejudice the rights of non-parties.<sup>53</sup>

#### **Covenants made with London local authorities**

- A.35 Provision for these covenants is found in two Acts: section 33 of the City of London (Various Powers) Act 1960, and section 16 of the Greater London Council (General Powers) Act 1974. Apart from the eligible covenantees, their provisions are virtually identical. The 1974 Act repeals earlier local Acts that had empowered certain borough authorities to make similar covenants.<sup>54</sup> The covenantor can be the owner of any legal estate in any type of land. Eligible covenantees are the City of London Corporation, the Greater London Council, London borough councils and the London Residuary Body.<sup>55</sup>
- A.36 As to purposes, the statutes provide simply that the covenant must be an undertaking or agreement made “in connection with the land”. There is no guidance on the permitted terms or whether positive obligations can be included.<sup>56</sup> The legislation says nothing about duration, modification and discharge. The covenant does not trigger any special statutory monitoring or enforcement powers, though it may be possible to include similar powers in its terms. The statutes provide that the covenant is binding on the successors in title to the owner who made it.<sup>57</sup>

<sup>49</sup> Highways Act 1980, s 1.

<sup>50</sup> Highways Act 1980, s 87(1) and (4) to (6).

<sup>51</sup> Highways Act 1980, s 87(1) and (2).

<sup>52</sup> See Highways Act 1980, ss 82 to 88.

<sup>53</sup> Highways Act 1980, s 87(3).

<sup>54</sup> Greater London Council (General Powers) Act 1974, s 16(6) and schs 2 and 3.

<sup>55</sup> City of London (Various Powers) Act 1960, s 33(1); Greater London Council (General Powers) Act 1974, s 16(1).

<sup>56</sup> City of London (Various Powers) Act 1960, s 33(1); Greater London Council (General Powers) Act 1974, s 16(1).

<sup>57</sup> City of London (Various Powers) Act 1960, s 33(1); Greater London Council (General Powers) Act 1974, s 16(1).

### **Agreements concerning Areas of Special Scientific Interest (“AASSIs”)**

- A.37 The Countryside Act 1968 governs these covenants and replicates many of the provisions that apply to nature reserve agreements. AASSIs are made according to the same criteria as those by which land can be designated as a Site of Special Scientific Interest (“SSSI”). However, although this means that land subject to such an AASSI may be compulsorily acquired or designated as an SSSI, designation as an SSSI is not a precondition for agreeing one. The land must be of special interest by reason of its flora, fauna or geological or geographical features – this formula is exactly the same as that used for designating or compulsorily acquiring land as an SSSI. A covenant can also be made over land that is adjacent to a plot that meets this test.<sup>58</sup>
- A.38 The covenantor can be any owner, lessee or occupier of the land. There is also provision for covenantors with certain types of statutory limited ownership.<sup>59</sup> The only eligible covenantee in England and Wales is the Countryside Council for Wales.<sup>60</sup> The Countryside Council for Wales must believe that it is expedient to make an AASSI for the purpose of conserving the flora, fauna or geological or geographical features which give the land its special interest. The permitted terms are the same as those for nature reserve agreements, except that the reference to “the management of the land in such manner” is omitted.<sup>61</sup>
- A.39 If the covenant is made over land which is already designated as an SSSI, it can also:
- (1) provide for any matter for which a management scheme relating to an SSSI could provide;<sup>62</sup> and
  - (2) constitute advance authorisation for potentially damaging operations specified in the SSSI notice.<sup>63</sup>
- A.40 The statute provides that restrictions imposed by these covenants cannot be varied or terminated under section 84(1) of the Law of Property Act 1925 (positive obligations are not subject to this jurisdiction in any case<sup>64</sup>).<sup>65</sup> It does not deal with other methods of modification or discharge.
- A.41 The national nature authorities can appoint wardens with the power to enter any land (except a dwelling) for a wide range of purposes and in relation to several types of designation. As respects land that is or could be subject to an AASSI, the power must be exercised with 24 hours’ notice and for certain limited

<sup>58</sup> Countryside Act 1968, s 15(1).

<sup>59</sup> Countryside Act 1968, s 15(2) (applying the Forestry Act 1947, s 2).

<sup>60</sup> Countryside Act 1968, s 15(5). Natural England’s ability to make an AASSI is covered by its general power to make management agreements.

<sup>61</sup> Countryside Act 1968, s 15(2) and (3).

<sup>62</sup> Wildlife and Countryside Act 1981, s 28J(13).

<sup>63</sup> Wildlife and Countryside Act 1981, s 28E(3)(b).

<sup>64</sup> *Westminster City Council v Duke of Westminster* [1991] 4 All ER 136.

<sup>65</sup> Countryside Act 1968, s 15(4).

purposes.<sup>66</sup> The making of an AASSI over land does not in itself give rise to any byelaw-making powers, but if the land is also designated as an SSSI then the national nature authority can make byelaws for it concerning the same matters as for nature reserves.<sup>67</sup> The national nature authorities have a power to compulsorily purchase any interest in land which meets the criteria for making an AASSI if:

- (1) they cannot conclude on reasonable terms an AASSI over the land; or
- (2) an AASSI over the land has been breached in such a way that its flora, fauna, or geological or physiographical features of special interest are not being conserved satisfactorily.<sup>68</sup>

A.42 The same bodies can also designate the land as an SSSI. This power is independent of the existence of any AASSI, but is based on the same preconditions.<sup>69</sup>

A.43 It is unclear what obligations can run with the land. Section 15(4) provides that:

Where section 79 of the Law of Property Act 1925 (burden of covenant running with the land) applies to any such restrictions as are mentioned in subsection (2) of this section, the Council shall have the like rights as respects the enforcement of the restrictions as if the Council had at all material times been the absolute owner in possession of ascertained land adjacent to the land in respect of which the restriction is sought to be enforced, and capable of being benefited by the restriction, and the restriction had been expressed to be for the benefit of that adjacent land.

A.44 Although section 15(4) appears to exclude positive obligations, section 45 suggests that they can in fact bind future owners. It applies to any power conferred under the Countryside Act 1968 on the Countryside Council for Wales to make agreements with landowners and other persons with interests in land, and states that:

Where a landowner, or other person having an interest in the land, by the agreement grants or agrees to grant any right as respects the land, the grant or agreement shall be binding upon any person deriving title or otherwise claiming under the grantor to the same extent as it is binding upon the grantor notwithstanding that it would not have been binding upon that person apart from the provisions of this subsection.<sup>70</sup>

It is not entirely clear whether section 45 covers AASSIs, because it is not clear whether they grant a “right as respects the land”.

<sup>66</sup> Wildlife and Countryside Act 1981, s 51.

<sup>67</sup> Wildlife and Countryside Act 1981, s 28R.

<sup>68</sup> Countryside Act 1968, s 15A. Any dispute over the existence of a breach is to be settled by an arbitrator appointed by the Lord Chancellor: s 15A(3).

<sup>69</sup> Wildlife and Countryside Act 1981, s 28.

<sup>70</sup> Countryside Act 1968, s 45(3).

### **Agreements to establish walkways**

- A.45 This power is contained in section 35 of the Highways Act 1980, and was first created by section 18 of the Highways Act 1971. The covenantor can be any person with an interest in the land (this is not defined) that gives them the power to agree the permitted terms over it. Highway authorities and non-metropolitan district councils can be covenantees. The land must have an actual or proposed building on it.<sup>71</sup>
- A.46 The agreement must provide for a “walkway” over, through or under parts of the building or any attached structure, and for the walkway to be dedicated as a footpath. It can contain terms relating to:
- (1) the maintenance, cleansing and drainage of the walkway;
  - (2) lighting of the walkway and of that part of the building or structure which will be over or above it;
  - (3) the provision and maintenance of support for the walkway;
  - (4) the covenantee’s right to enter on any building or structure in which the walkway will be situated, and to execute any works necessary to secure the performance of any obligation under the agreement;
  - (5) the making of payments by covenantee to any person having an interest in the land or building affected by the agreement;
  - (6) the termination, in such manner and subject to such conditions as may be specified in the agreement, of the right of the public to use the walkway; and
  - (7) any incidental and consequential matters.<sup>72</sup>
- A.47 As stated above, the terms can contain provision for the termination of the public right of way, but the statute is otherwise silent on these matters. The covenantee is empowered to make byelaws regulating conduct on, opening times for, and the placing or retention of anything in, on or over the walkway.<sup>73</sup> Furthermore, the fact that the land becomes a footpath will bring into play the regime of powers that apply to the maintenance of highways, though in some instances their exercise over walkways requires the consent of the building’s occupiers and other affected persons.<sup>74</sup> All positive and restrictive covenants contained in the agreements are binding on persons deriving title under the covenantor.<sup>75</sup>

### **Covenants made with local authorities for non-planning purposes**

- A.48 This power was first created by section 126 of the Housing Act 1974 and is now contained in section 33 of the Local Government (Miscellaneous Provisions) Act

<sup>71</sup> Highways Act 1980, s 35(1) and (2).

<sup>72</sup> Highways Act 1980, s 35(2) and (3).

<sup>73</sup> Highways Act 1980, s 35(6).

<sup>74</sup> Highways Act 1980, ss 115A to 115E.

<sup>75</sup> Highways Act 1980, s 35(4).

1982. Before the Planning and Compensation Act 1991 amended section 106 of the Town and Country Planning Act 1990 (previously section 52 of the Town and Country Planning Act 1972) so as to allow planning obligations to contain positive duties – they had previously been limited to “restricting or regulating the development or use of land” – these covenants were frequently used as an alternative means of imposing positive duties in connection with a development. The 1991 reforms made this use obsolete and therefore excluded these covenants from any development-related subject matter.<sup>76</sup>

A.49 The covenant can be made between any person with an interest in the land (this is not defined) and the principal council of the area, which includes county, district and London borough councils as well as a range of other local statutory bodies set up for specific purposes such as policing and fire.<sup>77</sup> It can concern any type of land. The permitted purposes are to secure the carrying out of works on the land, to regulate its use or for anything else connected with the land. However, it cannot be made for facilitating or be connected with development (this is not defined, but it would probably be interpreted in the same way as it is for the planning regime). The terms can contain anything relating to the carrying out of works or the doing of any other thing on or in relation to the land.<sup>78</sup>

A.50 The Act states that these covenants are “enforceable (without any limit of time)”; it is not clear whether this means that they have to be perpetual or merely that they can be if the parties wish. It is otherwise silent on modification and discharge. If the covenant is breached, the covenantee has a statutory power to enter the land and carry out unperformed positive duties or remedy the breach of any restrictive duties. It can recover the expenses of doing so. This power does not prejudice any other remedies that would normally be available.<sup>79</sup> The statute provides that the covenant is enforceable against all persons deriving title from or under the original covenantor in respect of that person’s interest in land. However, this requires that the covenant expressly states that section 33 applies to it.

### **Agreements concerning ancient monuments**

A.51 These covenants are made under section 17 of the Ancient Monuments and Archaeological Areas Act 1979. They interact with the regulatory regime for protecting what are defined as ancient or scheduled monuments. The agreement must be made over an ancient monument or land that adjoins it or is in its vicinity; the meaning of “monument” is specified in the statute.<sup>80</sup> An “ancient” monument is one that is scheduled by the Secretary of State or the Welsh Ministers under section 1 of the Ancient Monuments and Archaeological Areas Act 1979, or is otherwise of public interest by reason of its historic, architectural, traditional, artistic or archaeological interest.<sup>81</sup> First priority is given to occupiers of the land (this is not defined) as eligible covenantors, but non-occupiers who hold an

<sup>76</sup> *Halsbury's Laws of England* (5th ed 2010), vol 81, para 335 n 7.

<sup>77</sup> Local Government (Miscellaneous Provisions) Act 1982, s 33(1) and (9)(a).

<sup>78</sup> Local Government (Miscellaneous Provisions) Act 1982, 33(1) and (2)(a).

<sup>79</sup> Local Government (Miscellaneous Provisions) Act 1982, s 33(3).

<sup>80</sup> Ancient Monuments and Archaeological Areas Act 1979, s 61(7).

<sup>81</sup> Ancient Monuments and Archaeological Areas Act 1979, s 61(12).

interest in it can also be party to an agreement (in addition to but not instead of the occupier). This latter category covers certain types of statutory limited ownership.<sup>82</sup> Covenantees to one of these agreements can be the Secretary of State or the Welsh Ministers, English Heritage (for land in England), and a local authority.<sup>83</sup>

A.52 The agreement can contain any terms relating to:

- (1) the maintenance and preservation of the monument and its amenities;
- (2) the carrying out of any such work, or the doing of any such other thing, in relation to the monument or land as specified;
- (3) public access to the monument or land and the provision of facilities and information or other services for the use of the public in that connection;
- (4) restrictions on the use of the monument or land;
- (5) prohibitions in relation to monument or land of the doing of any such thing as specified;
- (6) the making by the covenantee of such payments as specified (as consideration for the covenantor's obligations or a contribution to their costs); and
- (7) such incidental or consequential provisions as appear necessary or expedient.<sup>84</sup>

A.53 However, they cannot constitute advance consent from the Secretary of State or the Welsh Ministers, under the regulatory regime for scheduled monuments, to works affecting such monuments.<sup>85</sup> The statute excludes the application of section 84(1) of the Law of Property Act 1925 to agreements concerning ancient monuments. It is otherwise silent on their duration and methods of modification or discharge. No monitoring or enforcement powers arise directly from the making of one of these covenants (unless they are expressly included in its terms). Such powers derive instead from the general regime for protecting scheduled or ancient monuments.<sup>86</sup> Section 17(5) enables any "restriction, prohibition or obligation" in the agreement to bind the successors of any person who derives title to the land from or under a party to the agreement, as long as it expressly provides for this. This appears to cover positive obligations.

### **Management agreements under section 39 of the Wildlife and Countryside Act 1981**

A.54 This power is contained in section 39 of the Wildlife and Countryside Act 1981. The covenant can be entered into over any land, and can be made by any person

<sup>82</sup> Ancient Monuments and Archaeological Areas Act 1979, ss 17(1) to (3) and 18(2) to (4).

<sup>83</sup> Ancient Monuments and Archaeological Areas Act 1979, s 17(1), (1A) and (2).

<sup>84</sup> Ancient Monuments and Archaeological Areas Act 1979, s 17(4).

<sup>85</sup> Ancient Monuments and Archaeological Areas Act 1979, s 17(8).

<sup>86</sup> See Ancient Monuments and Archaeological Areas Act 1979, s 2, ss 5 to 6A, ss 10 to 17.

who holds an interest (not defined) in land in favour of:

- (1) the Broads Authority (for land within the Broads);
- (2) the Countryside Council for Wales (for land in Wales);
- (3) the conservation board for an area of outstanding natural beauty (for land designated as such under section 82 of the Countryside and Rights of Way Act 2000); and
- (4) the local planning authority (for any other land).<sup>87</sup>

A.55 This covenant used to be available to Natural England's predecessor, the Countryside Commission, but has been replaced by Natural England's own power to make general management agreements. These management agreements can be made for the purpose of conserving or enhancing the land's natural beauty or amenity, or promoting its enjoyment by the public. They can provide for anything relating to the management of the land, and may in particular:

- (1) impose on the covenantor restrictions as respects the method of cultivating the land, its use for agricultural purposes or the exercise of rights over the land;
- (2) impose obligations on the covenantor to carry out works or agricultural or forestry operations or do other things on the land;
- (3) confer on the covenantee power to carry out works for the purpose of performing their functions under the Natural Environment and Access to the Countryside Act 1949 and the Countryside Act 1968; and
- (4) contain such incidental and consequential provisions (including provisions for the making of payments by either party to the other) as appear to the covenantee to be necessary or expedient for the purposes of the agreement.<sup>88</sup>

A.56 It is expressly stated that the covenant can be perpetual or fixed-term. No provision is made as to modification or termination. The covenantee does not enjoy any special statutory powers to monitor or enforce one of these covenants (unless they are expressly included in its terms). The legislation states that, unless the agreement otherwise provides, the terms are binding on all persons deriving title from or under the original covenantor.

#### **Covenants made with the Church Commissioners or Diocesan Board of Finance of the Church of England**

A.57 This power is conferred by section 62 of the Pastoral Measure 1983, legislation passed by the General Synod of the Church of England. The Church Commissioners, or the diocesan board of finance for a diocese, can agree these covenants with any person to whom they sell, give or exchange any of their

<sup>87</sup> Wildlife and Countryside Act 1981, s 39(1) and (5).

<sup>88</sup> Wildlife and Countryside Act 1981, s 39(1) and (2).

land.<sup>89</sup> The covenant can contain such conditions and requirements as to the use of the land as necessary or expedient to secure its suitable use.<sup>90</sup>

- A.58 These covenants are not subject to section 84(1) of the Law of Property Act 1925.<sup>91</sup> The statute is silent on other methods of modification and discharge. The covenant does not trigger any special statutory monitoring or enforcement powers, but it may be possible to include these in its terms. We would be grateful to hear from consultees with experience of these covenants as to whether monitoring and enforcement powers are usually included. The statute uses the legal fiction that the covenantee owns adjacent land that is benefited by the covenant; and all positive covenants are to be treated in this respect as if they were negative.<sup>92</sup>

### **Management agreements concerning agricultural land in an environmentally sensitive area**

- A.59 The designation of an “environmentally sensitive area” (“ESA”) is governed by section 18 of the Agriculture Act 1986. This provision also enables covenants to be made in relation to an ESA. The land must be “agricultural land” wholly or partly within an ESA. “Agricultural” is defined as including:

horticulture, fruit growing, seed growing, dairy farming and livestock breeding and keeping, the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes.<sup>93</sup>

- A.60 The covenant can be made between the Minister and any person who has an interest in the land (this is not defined).<sup>94</sup> If that person is not the owner, they must first notify the owner of their intention to make a covenant (but need not obtain their consent).<sup>95</sup> There is also provision for covenants with certain types of statutory limited ownership.<sup>96</sup> The Minister must consider that the covenant is likely to facilitate one of the purposes for which an ESA may be designated, namely:

- (1) to conserve and enhance the natural beauty of the ESA;
- (2) to conserve the flora or fauna or geological or physiographical features of the ESA; or
- (3) to protect buildings or other objects of archaeological, architectural or historic interest in the ESA.

<sup>89</sup> Pastoral Measure 1983, s 62(1).

<sup>90</sup> Pastoral Measure 1983, s 62(1).

<sup>91</sup> Pastoral Measure 1983, s 62(3).

<sup>92</sup> Pastoral Measure 1983, s 62(1).

<sup>93</sup> Agriculture Act 1986, s 18(11) (applying the Agriculture Act 1947, s 109(3)).

<sup>94</sup> Agriculture Act 1986, s 18(3).

<sup>95</sup> Agriculture Act 1986, s 18(6).

<sup>96</sup> Agriculture Act 1986, s 18(9) (applying the Forestry Act 1967, sch 2).

- A.61 The covenant must consist of an agreement, in consideration of payments to be made by the Minister, to manage the land in accordance with its terms. It can contain such provisions as the Minister thinks fit, in particular those that are likely to facilitate the purposes described above.<sup>97</sup> However, the original order designating the ESA may contain requirements as to the terms that must be included in a management agreement made within the area.<sup>98</sup>
- A.62 The statute is completely silent on methods of modification or discharge. The covenant is, unless it states otherwise, binding on all persons deriving title from or under the original covenantor.<sup>99</sup>

### **Covenants concerning protected land held by an appointed company under the Water Industry Act 1991**

- A.63 The original provision for these covenants was section 157 of the Water Act 1989. They form part of the regulatory regime for private companies that supply water or sewerage services. The companies are appointed as “relevant undertakers” pursuant to part 2 of the Water Industry Act 1991, and the land that they hold for this purpose can have “protected” status. Section 156 requires the Secretary of State or the Welsh Ministers’ consent before a relevant undertaker disposes of any interest that it holds in protected land. It also enables the two parties to enter a covenant when such a disposal is proposed, if the protected land also has a particular nature conservation designation.
- A.64 The covenantor and covenantee are the relevant undertaker and the Secretary of State or the Welsh Ministers respectively. The land must be “protected” under the Water Industry Act 1991, and must also be in a national park, the Broads, an area of outstanding natural beauty or a site of special scientific interest.<sup>100</sup> The covenant may contain obligations on the covenantor with respect to public access or the use and management of the land.
- A.65 The statute does not set out means of modifying or discharging the covenant. The covenant does not itself trigger any statutory monitoring or enforcement powers, and it appears that the types of permitted terms do not include such powers. These derive instead from the general regulatory regime over suppliers of water or sewerage services. The statute provides that the covenant is binding on all persons deriving title from or under the original covenantor.<sup>101</sup>

### **Management agreements concerning European sites**

- A.66 Regulation 16 of the Conservation (Natural Habitats, &c) Regulations 1994 first made provision for management agreements concerning European sites.<sup>102</sup> For England and Wales, the power is now contained in regulation 16 of the

<sup>97</sup> Agriculture Act 1986, s 18(3) and (5).

<sup>98</sup> Agriculture Act 1986, s 18(4).

<sup>99</sup> Agriculture Act 1986, s 18(7).

<sup>100</sup> Water Industry Act 1991, s 156(4)(c), (6) and (8).

<sup>101</sup> Water Industry Act 1991, s 156(6).

<sup>102</sup> SI 1994 No 2716.

Conservation of Habitats and Species Regulations 2010.<sup>103</sup>

- A.67 The land must form part of or be adjacent to a European site. This means a special area of conservation (pursuant to the Wild Birds Directive<sup>104</sup>) or a proposed or actual area of special protection (pursuant to the Habitats Directive<sup>105</sup>). The agreement can be made between the national nature authority and any person who has an interest in the land.<sup>106</sup> The latter is defined as including “any estate in land and any right over land, whether the right is exercisable by virtue of the ownership of an interest in land or by virtue of a licence or agreement”.<sup>107</sup> There is also provision for covenants with certain types of statutory limited ownership.<sup>108</sup>
- A.68 The agreement can be made for the management, conservation, restoration or protection of the European site. Its terms can contain anything relating to the management or use of the land, in particular:
- (1) obligations regarding its use;
  - (2) restrictions on the exercise of rights over it;
  - (3) the carrying out of such work as may be expedient for the purposes of the agreement by any person;
  - (4) any matter for which a management scheme relating to a site of special scientific interest provides (or could provide);
  - (5) payments by either party to the other party or to any other person; and
  - (6) incidental or consequential provision.<sup>109</sup>
- A.69 A management agreement can constitute advance authorisation for potentially damaging operations that are specified in a nature conservation order relating to the European site. This means that, if a stop notice is made over the land, the person subject to it need not seek the express consent of the national nature authority.<sup>110</sup> The statute does not refer to any method of modification or discharge. It is worth noting that the previous Regulations governing European sites (which are still in force in Scotland) did expressly exclude the application of

<sup>103</sup> SI 2010 No 490.

<sup>104</sup> Directive on the conservation of wild birds (consolidated) 2009/147/EC, Official Journal L 20 of 26.01.2010, p 7. This consolidates the original Directive 79/409/EEC, as amended.

<sup>105</sup> Directive on the conservation of wild habitats and of natural flora and fauna 92/43/EEC, Official Journal L 206 of 22.07.1992, p 7.

<sup>106</sup> Conservation of Habitats and Species Regulations 2010, SI 2010 No 490, regs 5(3) and 16(1).

<sup>107</sup> Conservation of Habitats and Species Regulations 2010, SI 2010 No 490, reg 16(6)(a) (applying the National Parks and Access to the Countryside Act 1949, s 114(1)).

<sup>108</sup> Conservation of Habitats and Species Regulations 2010, SI 2010 No 490, reg 16(5) (applying the Forestry Act 1967, Sch 2).

<sup>109</sup> Conservation of Habitats and Species Regulations 2010, SI 2010 No 490, reg 16(2) and (3).

<sup>110</sup> Conservation of Habitats and Species Regulations 2010, SI 2010 No 490, reg 26(6).

section 84(1).<sup>111</sup> The covenant is binding on all persons deriving title from or under the original covenantor.<sup>112</sup>

- A.70 Status as a European site automatically triggers certain powers of inspection, enforcement and bylaw-making for the national nature authority. The only power that depends on the existence of a management agreement is that of compulsory acquisition of the land. This applies where the authority is unable to conclude a management agreement, or an existing agreement has been breached in a way that prevents or impairs the satisfactory management of the European site.<sup>113</sup>

### **General management agreements made with Natural England**

- A.71 This power is provided by section 7 of the Natural Environment and Rural Communities Act 2006. Natural England can make a management agreement over any land in England with anyone who holds an interest in it. "Interest" is defined as including "any estate in land and any right over land, whether the right is exercisable by virtue of the ownership of an interest in land or by virtue of a licence or agreement".<sup>114</sup> There is also provision for covenantors with certain types of statutory limited ownership.<sup>115</sup>

- A.72 Natural England's predecessor, the Countryside Commission, had the same statutory covenant powers as those that are still held by the Countryside Council for Wales.<sup>116</sup> The Natural Environment and Rural Communities Act 2006 merged the Countryside Agency with English Nature and the Rural Development Service to form Natural England. Section 7 of the 2006 Act superseded previous powers to make agreements, creating a new framework for Natural England to make general management agreements.

- A.73 Natural England must be satisfied that the agreement will further its general purpose, "to ensure that the natural environment is conserved, enhanced and managed for the benefit of present and future generations, thereby contributing to sustainable development".<sup>117</sup> The terms can contain anything relating to the management or use of the land. In particular, they can:

- (1) impose on the covenantor obligations in respect of the use of the land;
- (2) impose on the covenantor restrictions on the exercise of rights over the land;

<sup>111</sup> Conservation (Natural Habitats, &c) Regulations 1994, SI 1994 No 2716, reg 16(4).

<sup>112</sup> Conservation of Habitats and Species Regulations 2010, SI 2010 No 490, reg 16(4).

<sup>113</sup> Conservation of Habitats and Species Regulations 2010, SI 2010 No 490, reg 34. The covenantor first be must be notified and given reasonable time to remedy the breach. Any dispute over the existence of a breach is to be settled by an arbitrator appointed by the Lord Chancellor: reg 34(2) and (3).

<sup>114</sup> Natural Environment and Rural Communities Act 2006, s 7(6) (applying the National Parks and Access to the Countryside Act 1949, s 114(1)).

<sup>115</sup> Natural Environment and Rural Communities Act 2006, s 7(4) (applying the Forestry Act 1967, sch 2).

<sup>116</sup> Nature reserve agreements under the National Parks and Access to the Countryside Act 1949, agreements concerning areas of special scientific interest under the Countryside Act 1968 and management agreements under s 39 of the Wildlife and Countryside Act 1981.

<sup>117</sup> Natural Environment and Rural Communities Act 2006, ss 2(1) and 7(1).

- (3) provide for the carrying out of such work as may be expedient for the purposes of the agreement by any person or persons;
- (4) provide for any matter for which a management scheme relating to a site of special scientific interest provides (or could provide);
- (5) provide for the making of payments by either party to the other party or to any other person; and
- (6) contain incidental and consequential provision.<sup>118</sup>

A.74 The statute is silent as to duration, as well as modification and discharge. It states that, unless the agreement otherwise provides, the terms are binding on all persons deriving title from or under the original covenantor.<sup>119</sup> Natural England has no special powers to monitor or enforce the covenant (unless expressly included in its terms). However, if the terms provide for public access to the land, Natural England is empowered to make certain byelaws.<sup>120</sup> Moreover, where an agreement cannot be concluded, or an existing agreement has been breached, Natural England may in some cases compulsorily acquire the land.<sup>121</sup>

#### **Covenants made under local Acts of Parliament**

A.75 There are also covenants that can be made under various local Acts,<sup>122</sup> the only example of which we are aware in relation to England and Wales is section 4 of the Oxfordshire Act 1985, which provides that section 33 of the Local Government (Miscellaneous Provisions) Act 1982 (for which see paragraphs A.48 to A.50) applies in Oxfordshire with the modification that a covenant made under it can concern anything “relating to the land”. We have not yet come across any other references to similar local Acts in England and Wales.

<sup>118</sup> Natural Environment and Rural Communities Act 2006, s 7(2).

<sup>119</sup> Natural Environment and Rural Communities Act 2006, s 7(3).

<sup>120</sup> Countryside Act 1968, s 41(2)(a).

<sup>121</sup> Countryside Act 1968, s 15A as amended.

<sup>122</sup> A Francis, *Restrictive Covenants and Freehold Land: A Practitioner's Guide* (3rd ed 2009) para 10.7.

# **APPENDIX B**

## **STATUTORY PROVISIONS**

### **SECTION 8 OF THE NATIONAL TRUST ACT 1937**

#### **Power to enter into agreements restricting use of land**

Where any person is willing to agree with the National Trust that any land or any part thereof shall so far as his interest in the land enables him to bind it be made subject either permanently or for a specified period to conditions restricting the planning development or use thereof in any manner the National Trust may if it thinks fit enter into an agreement with him or accept a covenant from him to that effect and shall have power to enforce such agreement or covenant against persons deriving title under him in the like manner and to the like extent as if the National Trust were possessed of or entitled to or interested in adjacent land and as if the agreement or covenant had been and had been expressed to be entered into for the benefit of that adjacent land.

### **SECTION 84 OF THE LAW OF PROPERTY ACT 1925**

#### **Power to discharge or modify restrictive covenants affecting land**

(1) The Upper Tribunal shall (without prejudice to any concurrent jurisdiction of the court) have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction on being satisfied –

- (a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Upper Tribunal may deem material, the restriction ought to be deemed obsolete; or
- (aa) that in a case falling within subsection (1A) below the continued existence thereof would impede some reasonable user of the land for public or private purposes or, as the case may be, would unless modified so impede such user; or
- (b) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed, have agreed, either expressly or by implication, by their acts or omissions, to the same being discharged or modified; or
- (c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction: and an order discharging or modifying a restriction under this subsection may direct the applicant to pay to any person entitled to the benefit of the restriction such sum by way of consideration as the Tribunal may think it just to award under one, but not both, of the following heads, that is to say, either –

- (i) a sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge or modification; or
- (ii) a sum to make up for any effect which the restriction had, at the time when it was imposed, in reducing the consideration then received for the land affected by it.

(1A) Subsection (1)(aa) above authorises the discharge or modification of a restriction by reference to its impeding some reasonable user of land in any case in which the Upper Tribunal is satisfied that the restriction, in impeding that user, either –

- (a) does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; or
- (b) is contrary to the public interest;

and that money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification.

(1B) In determining whether a case is one falling within subsection (1A) above, and in determining whether (in any such case or otherwise) a restriction ought to be discharged or modified, the Upper Tribunal shall take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas, as well as the period at which and context in which the restriction was created or imposed and any other material circumstances.

(1C) It is hereby declared that the power conferred by this section to modify a restriction includes power to add such further provisions restricting the user of or the building on the land affected as appear to the Upper Tribunal to be reasonable in view of the relaxation of the existing provisions, and as may be accepted by the applicant; and the Upper Tribunal may accordingly refuse to modify a restriction without some such addition.

(2) The court shall have power on the application of any person interested –

- (a) To declare whether or not in any particular case any freehold land is or would in any given event be affected by a restriction imposed by any instrument; or
- (b) To declare what, upon the true construction of any instrument purporting to impose a restriction, is the nature and extent of the restriction thereby imposed and whether the same is or would in any given event be enforceable and if so by whom.

Neither subsections (7) and (11) of this section nor, unless the contrary is expressed, any later enactment providing for this section not to apply to any restrictions shall affect the operation of this subsection or the operation for purposes of this subsection of any other provisions of this section.

(3) The Upper Tribunal shall, before making any order under this section, direct such enquiries, if any, to be made of any government department or local authority, and such notices, if any, whether by way of advertisement or otherwise, to be given to such of the persons who appear to be entitled to the benefit of the restriction intended to be discharged, modified, or dealt with as, having regard to any enquiries notices or other proceedings previously made, given or taken, the Upper Tribunal may think fit.

(3A) On an application to the Upper Tribunal under this section the Upper Tribunal shall give any necessary directions as to the persons who are or are not to be admitted (as appearing to be entitled to the benefit of the restriction) to oppose the application, and no appeal shall lie against any such direction; but Tribunal Procedure Rules shall make provision whereby, in cases in which there arises on such an application (whether or not in connection with the admission of persons to oppose) any such question as is referred to in subsection (2)(a) or (b) of this section, the proceedings on the application can and, if the rules so provide, shall be suspended to enable the decision of the court to be obtained on that question by an application under that subsection, or otherwise, as may be provided by those rules or by rules of court.

...

(5) Any order made under this section shall be binding on all persons, whether ascertained or of full age or capacity or not, then entitled or thereafter capable of becoming entitled to the benefit of any restriction, which is thereby discharged, modified, or dealt with, and whether such persons are parties to the proceedings or have been served with notice or not.

(6) An order may be made under this section notwithstanding that any instrument which is alleged to impose the restriction intended to be discharged, modified, or dealt with, may not have been produced to the court or the Upper Tribunal, and the court or the Upper Tribunal may act on such evidence of that instrument as it may think sufficient.

(7) This section applies to restrictions whether subsisting at the commencement of this Act or imposed thereafter, but this section does not apply where the restriction was imposed on the occasion of a disposition made gratuitously or for a nominal consideration for public purposes.

(8) This section applies whether the land affected by the restrictions is registered or not.

(9) Where any proceedings by action or otherwise are taken to enforce a restrictive covenant, any person against whom the proceedings are taken, may in such proceedings apply to the court for an order giving leave to apply to the Upper Tribunal under this section, and staying the proceedings in the meantime.

...

(11) This section does not apply to restrictions imposed by the Commissioners of Works under any statutory power for the protection of any Royal Park or Garden or to restrictions of a like character imposed upon the occasion of any enfranchisement effected before the commencement of this Act in any manor vested in His Majesty in right of the Crown or the Duchy of Lancaster, nor subject to subsection (11A) below to restrictions created or imposed –

- (a) for Naval, Military or Air Force purposes,
- (b) for civil aviation purposes under the powers of the Air Navigation Act 1920 or of section 19 or 23 of the Civil Aviation Act 1949 or of sections 30 or 41 of the Civil Aviation Act 1982.

(11A) Subsection (11) of this section –

- (a) shall exclude the application of this section to a restriction falling within subsection (11)(a), and not created or imposed in connection with the use of any land as an aerodrome, only so long as the restriction is enforceable by or on behalf of the Crown; and
- (b) shall exclude the application of this section to a restriction falling within subsection (11)(b), or created or imposed in connection with the use of any land as an aerodrome, only so long as the restriction is enforceable by or on behalf of the Crown or any public or international authority.

(12) Where a term of more than forty years is created in land (whether before or after the commencement of this Act) this section shall, after the expiration of twenty-five years of the term, apply to restrictions affecting such leasehold land in like manner as it would have applied had the land been freehold:

Provided that this subsection shall not apply to mining leases.

## **SECTION 98 OF THE TITLE CONDITIONS (SCOTLAND) ACT 2003**

### **Granting other applications for variation, discharge, renewal or preservation of title condition**

An application for the variation, discharge, renewal or preservation, of a title condition shall, unless it falls to be granted as of right under section 97(1) of this Act, be granted by the Lands Tribunal only if they are satisfied, having regard to the factors set out in section 100 of this Act, that –

- (a) except in the case of an application under subsection (3) of section 34 or, in respect of a deed of variation or discharge granted by the owner of an adjacent unit, subsection (1) of section 37 of this Act, it is reasonable to grant the application; or
- (b) in such a case, the variation or discharge in question –
  - (i) is not in the best interests of all the owners (taken as a group) of the units in the community; or

- (ii) is unfairly prejudicial to one or more of those owners.

### **SECTION 100 OF THE TITLE CONDITIONS (SCOTLAND) ACT 2003**

#### **Factors to which the Lands Tribunal are to have regard in determining applications etc**

The factors mentioned in section 98 of this Act are –

- (a) any change in circumstances since the title condition was created (including, without prejudice to that generality, any change in the character of the benefited property, of the burdened property or of the neighbourhood of the properties);
- (b) the extent to which the condition –
  - (i) confers benefit on the benefited property; or
  - (ii) where there is no benefited property, confers benefit on the public;
- (c) the extent to which the condition impedes enjoyment of the burdened property;
- (d) if the condition is an obligation to do something, how –
  - (i) practicable; or
  - (ii) costly,it is to comply with the condition;
- (e) the length of time which has elapsed since the condition was created;
- (f) the purpose of the title condition;
- (g) whether in relation to the burdened property there is the consent, or deemed consent, of a planning authority, or the consent of some other regulatory authority, for a use which the condition prevents;
- (h) whether the owner of the burdened property is willing to pay compensation;
- (i) if the application is under section 90(1)(b)(ii) of this Act, the purpose for which the land is being acquired by the person proposing to register the conveyance; and
- (j) any other factor which the Lands Tribunal consider to be material.

## **SECTION 237 OF THE TOWN AND COUNTRY PLANNING ACT 1990**

### **Power to override an easement and other rights**

(1) Subject to subsection (3), the erection, construction or carrying out or maintenance of any building or work on land which has been acquired or appropriated by a local authority for planning purposes (whether done by the local authority or by a person deriving title under them) is authorised by virtue of this section if it is done in accordance with planning permission, notwithstanding that it involves –

- (a) interference with an interest or right to which this section applies, or
- (b) a breach of a restriction as to the user of land arising by virtue of a contract.

(1A) Subject to subsection (3), the use of any land in England which has been acquired or appropriated by a local authority for planning purposes (whether the use is by the local authority or by a person deriving title under them) is authorised by virtue of this section if it is in accordance with planning permission even if the use involves –

- (a) interference with an interest or right to which this section applies, or
- (b) a breach of a restriction as to the user of land arising by virtue of a contract.

(2) Subject to subsection (3), the interests and rights to which this section applies are any easement, liberty, privilege, right or advantage annexed to land and adversely affecting other land, including any natural right to support.

(3) Nothing in this section shall authorise interference with any right of way or right of laying down, erecting, continuing or maintaining apparatus on, under or over land which is –

- (a) a right vested in or belonging to statutory undertakers for the purpose of the carrying on of their undertaking, or
- (b) a right conferred by or in accordance with the electronic communications code on the operator of an electronic communications code network.

(4) In respect of any interference or breach in pursuance of subsection (1) or (1A), compensation –

- (a) shall be payable under section 63 or 68 of the Lands Clauses Consolidation Act 1845 or under section 7 or 10 of the Compulsory Purchase Act 1965, and
- (b) shall be assessed in the same manner and subject to the same rules as in the case of other compensation under those sections in respect of injurious affection where –

- (i) the compensation is to be estimated in connection with a purchase under those Acts, or
- (ii) the injury arises from the execution of works on, or use of, land acquired under those Acts.

(5) Where a person deriving title under the local authority by whom the land in question was acquired or appropriated –

- (a) is liable to pay compensation by virtue of subsection (4), and
- (b) fails to discharge that liability,

the liability shall be enforceable against the local authority.

(6) Nothing in subsection (5) shall be construed as affecting any agreement between the local authority and any other person for indemnifying the local authority against any liability under that subsection.

(7) Nothing in this section shall be construed as authorising any act or omission on the part of any person which is actionable at the suit of any person on any grounds other than such an interference or breach as is mentioned in subsection (1) or (1A).

## **SECTION 5 OF THE FORESTRY ACT 1967**

### **Forestry dedication covenants and agreements**

- (1) The provisions of this section shall have effect with a view to allowing land to be devoted to forestry by means of agreements entered into with the Commissioners, being agreements to the effect that the land shall not, except with the previous consent in writing of the Commissioners or, in the case of dispute, under direction of the Minister as regards England and Wales and the Scottish Ministers as regards Scotland, be used otherwise than for the growing of timber or other forest products in accordance with the rules or practice of good forestry or for purposes connected therewith; and in this Act –
  - (a) “forestry dedication covenant” means a covenant to the said effect entered into with the Commissioners in respect of land in England or Wales without an intention being expressed contrary to the application of section 79 of the Law of Property Act 1925 (under which covenants relating to land are, unless the contrary is expressed, deemed to be made on behalf of the covenantor, his successors in title and persons deriving title under him or them); and
  - (b) “forestry dedication agreement” means an agreement to the said effect entered into with the Commissioners in respect of land in Scotland by a person who is the proprietor thereof for his own absolute use or is empowered by this section to enter into the agreement.

- (2) Where land in England or Wales is subject to a forestry dedication covenant, –
- (a) the Commissioners shall, as respects the enforcement of the covenant against persons other than the covenantor, have the like rights as if they had at all material times been the absolute owners in possession of ascertained land adjacent to the land subject to the covenant and capable of being benefited by the covenant, and the covenant had been expressed to be for the benefit of that adjacent land; and
  - (b) section 84 of the Law of Property Act 1925 (which enables the Upper Tribunal to discharge or modify respective covenants) shall not apply to the covenant.
- (3) A forestry dedication agreement affecting land in Scotland may be recorded in the General Register of Sasines and, on being so recorded, shall be enforceable at the instance of the Commissioners against any person having an interest in the land and against any person deriving title from him:
- Provided that such an agreement shall not be so enforceable against any third party who shall have in bona fide onerously acquired right (whether title has been completed or not) to his interest in the land prior to the agreement being recorded as aforesaid, or against any person deriving title from such a third party.
- (4) Schedule 2 to this Act shall have effect to empower limited owners, trustees and others to enter into forestry dedication covenants or agreements and to provide for matters arising on their doing so.