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## **Easements, Covenants and Profits à Prendre Consultation Analysis**

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**Consultation Paper No 186 (Consultation Analysis)  
8 June 2011**

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# MAKING LAND WORK: EASEMENTS, COVENANTS AND PROFITS À PRENDRE

## CONSULTATION ANALYSIS

*This document analyses the responses of consultees to the Law Commission's Consultation Paper, Easements, Covenants and Profits à Prendre (Law Com Consultation Paper No 186). This analysis of responses is designed to be read in conjunction with the Law Commission's Report, Making Land Work: Easements, Covenants and Profits à Prendre (Law Com No 327), available at <http://www.justice.gov.uk/lawcommission/easements.htm>.*

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# **PART 1**

## **INTRODUCTION**

**We would welcome the views of consultees on the human rights implications of the provisional proposals described in this paper.**

**[paragraphs 1.29 and 16.2]**

- 1.1 26 consultees replied to this question, and most had no misgivings about the human rights implications of our proposals.
- 1.2 Following the enactment of the Human Rights Act 1998, all domestic legislation must be compliant with the rights enunciated in the European Convention on Human Rights and Fundamental Freedoms. Of these rights, two are most likely to be in issue in the context of this project.
- 1.3 The most pertinent is Article 1 of the First Protocol to the Convention, which states:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Although the second part of this Article does allow the state to intervene in order to control the exercise of property rights, the European Court of Human Rights has developed a “fair balance” test which must be met in order to justify any such intervention. This broadly requires that a property owner should not be not subject to an “individual and excessive burden” which should instead have been shared by the affected community, and that measures are proportionate to the aims sought.

- 1.4 In addition, the European Convention on Human Rights also guarantees procedural rights, which are found in Article 6. That article states:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

This article has to be complied with in respect of any recommendations we make which would have procedural implications. We have had it in mind when formulating our recommendations for reform of the jurisdiction of the Lands Chamber of the Upper Tribunal.

### ***The responses***

- 1.5 A number of consultees stated either that our proposals raised no human rights issues, or that they were human rights compliant. For instance, Jeffrey Shaw (Nether Edge Law) said:

I do not believe that there are any human rights implications. In fact, the position would be considerably improved in that context by the certainty and clarity that modernised statutory provisions bring to easements and covenants.

In a similar vein, the Council for Licensed Conveyancers stated that:

The CLC believes that the human rights implications have been adequately considered by the Commission in Part 13 and agree with its conclusions.

- 1.6 A few consultees felt that certain proposals would also have a positive effect on human rights by adding certainty to the law. Dr Martin Dixon (Queens' College, University of Cambridge) commented that:

In so far as the law of prescription might be clarified, this could have a positive human rights impact, making it more certain when an owner of land might find his/her ownership compromised through use by another.

- 1.7 On the other hand, a number of consultees identified potential issues. Gregory Hill (Barrister, Ten Old Square Chambers) stated that, whilst he "would expect sensible reform applicable to future transactions to be within 'the margin of appreciation'", he could conceive that:

Any root-and-branch reform of the law applicable to existing restrictive covenants would engage Protocol 1 Article 1 if it automatically deprived owners with the benefit of existing covenants of the ability to enforce them; and since one of the main defects of that branch of the law is the difficulty of tracing "who has the benefit" (so that those who believe they may be covenant beneficiaries only bestir themselves when an infringing development is being proposed), it seems eminently possible that any such claims under article 1 would be capable of "coming out of the woodwork" for decades or even centuries.

- 1.8 Trowers & Hamblins had a more specific concern:

We are not convinced that the balance between the rights of those who own corporeal property subject to incorporeal property in it and those who own incorporeal property have been fairly struck, and find it difficult to see why the rights of owners of the former should be preferred over the latter. We think that the law should afford equal protection to the property owner regardless of whether the extent of his property is limited by incorporeal rights or is itself incorporeal.

- 1.9 Additional registration requirements were also identified as potentially creating human rights issues. Dr Martin Dixon (Queens' College, University of Cambridge) said:

It is difficult to envisage how reform could have a negative impact in terms of human rights, unless the proposals resulted in existing owners of dominant titles losing their easements/profits through a disproportionate and retrospective obligation to (say) register an existing easement where no such obligation currently exists.

### ***Conclusion***

- 1.10 We have had human rights issues in mind when formulating our recommendations, and have been alive to consultees' concerns. We have approached the subject of reforming existing restrictive covenants with particular care. We have avoided making recommendations with retrospective effect, and have given particular attention to the need to ensure that existing rights are not jeopardised and that balances already struck in the law are not disturbed. Although the introduction of land obligations as legal interests in lands (outlined in Part 6 of the Report) will create additional registration requirements on parties to the transaction on their creation, these will not affect any existing rights.
- 1.11 Most consultees' comments about human rights implications were expressed in the context of specific questions. We address these questions when they arise in the course of this Analysis.

**We would welcome any information or views from consultees about the likely impact of our provisional proposals.**

**[paragraphs 1.34 and 16.3]**

- 1.12 We have received a great deal of assistance from consultees in assessing the impact of our proposals, for which we are very grateful. The information that they provided is summarised in our formal Impact Assessment, available on our website at <http://www.justice.gov.uk/lawcommission/easements.htm>.

## **PART 3**

# **CHARACTERISTICS OF EASEMENTS**

**Our provisional view is that the current requirement that an easement be attached to a dominant estate in the land serves an important purpose and should be retained. We do not believe that easements in gross should be recognised as interests in land. Do consultees agree? If they do not agree, could they explain what kinds of right they believe should be permitted by law to be created in gross?**

**[paragraphs 3.18 and 16.4]**

- 3.1 Currently it is not possible to have an easement over someone else's land without also holding land that benefits from the easement. By contrast, profits à prendre (which we call "profits" in the remainder of this document) can be held "in gross", that is, without associated land. We explained at paragraphs 3.11 to 3.17 of the Consultation Paper ("CP") why we did not propose to extend to easements the potential for rights to be held in gross.
- 3.2 39 consultees responded to this question, with the majority expressing agreement with the provisional view that easements in gross should not be recognised.

### ***The responses***

- 3.3 Consultees justified their support for our policy on a number of grounds, of which the most common was a lack of convincing arguments for recognising a new type of proprietary right. Gregory Hill (Barrister, Ten Old Square Chambers) commented:

I see no need to alter the existing law. If anyone really wanted (no client of mine ever has) to produce something which would in effect be an easement in gross, I think it could be done by means of a "novation and restriction" structure (if necessary with voluntary registration of the land affected) – compare paragraph 7.49 of the paper – and legislation to deal with something which is either only a tiny problem, or non-existent, would be a sledgehammer to crack a nut.

- 3.4 Some consultees felt there would be negative consequences if easements in gross were recognised. Currey & Co warned that:

The notion that easements in gross might be recognised seems to us an added complication which would serve little or any purpose which is not achievable otherwise by other means, eg by lease or licence.

- 3.5 Two consultees further cautioned that proprietary easements in gross could have an adverse effect on property rights in general. Dr Martin Dixon (Queens' College, University of Cambridge) expressed this concern by saying:

No convincing reason has been suggested to permit easements in gross. Indeed, by tying the benefit to an estate, the current law emphasizes the essential proprietary nature of these rights and ensures that land does not become subject to “free floating” burdens. Easements in gross might well have a negative impact on alienability

... .

- 3.6 We noted at paragraph 3.7 of the CP the suggestion by Michael Sturley (“Easements in Gross” (1980) 96 *Law Quarterly Review* 557) that some rights could feasibly be easements in gross. Some consultees who agreed with our proposal helpfully suggested alternative ways of recognising the rights that Sturley identified. For example, Jeffrey Shaw (Nether Edge Law) said:

I agree that an easement in gross should not be capable of creation. Where a right is necessary but not for the benefit of a dominant tenement, the existing arrangements under statute (mentioned in 3.8) are sufficient. Referring to the examples provided in 3.7, this would cover the second category mentioned by Sturley. The third category can be covered by contractual means or a letting of advertising hoarding. The first and fourth categories are far too vague to be meaningful.

- 3.7 On the other hand, a few consultees expressed some opposition to our proposal. These included a number who felt that there might be some benefit in accepting easements in gross, or suggested some methods through which they could be effectively implemented. The most direct disagreement came from Jeremy Johnston (Osgoode Hall Law School, Canada) who gave a detailed criticism of our stance. He said:

I disagree with the Commission’s provisional position opposing easements held in gross as a general right ... . I think it should be possible for the benefit of an easement to be held in gross, or as appurtenant to specific land. Whether it would be one or the other would depend on the intention and desire of the original parties, based on the language of the instrument creating the easement and surrounding circumstances. For a useful and sensible discussion of the American courts’ approach to this question, see Gerald Korngold, *Private Land Use Arrangements: Easements, Real Covenants and Equitable Servitudes*, 2nd ed (Colorado Springs: Shepard’s/McGraw-Hill, 2004) at 10-15.

I agree with the Commission’s comment that the issue is whether there are good policy reasons for retaining the prohibition on easements in gross ... . But the answer is tilted in some degree by the way in which the question is put. The flip side of the issue is whether there are good policy reasons for retaining the rule that there must invariably be a dominant tenement that is “accommodated” by the easement. As the Ontario Law Reform Commission concluded after a similar analysis, “there are no compelling reasons why easements in gross should *not* be permitted in modern Ontario law” [citing Ontario Law Reform Commission, *Report on Basic Principles of Land Law* (Toronto: Ministry of the Attorney General, 1996) at 143].



### **Conclusion**

- 3.8 The recognition of easements in gross as a new property right was not popular with practitioners who responded to this question. The majority felt that, in light of existing statutory alternatives, general recognition of easements in gross would be a disproportionate solution to a small problem, despite a few situations where they might be of limited use.
- 3.9 Accordingly, and despite the disagreement of the minority, we have concluded that easements in gross should not be recognised as proprietary rights.
- 3.10 Recognition of easements in gross could overburden servient tenements by allowing the benefit to be shared by an unlimited range of dominant owners. Currently the requirement of a dominant tenement acts as an important filter on the creation of property rights. Removing this would potentially have negative effects on alienability of land and could adversely affect the whole property market, as some consultees pointed out.
- 3.11 The introduction of easements in gross could also overburden Land Registry, since such easements would each have to be registered with a separate title.
- 3.12 Overburdening servient tenements is a particular concern in this jurisdiction due to the relatively small amount of available land. In comparison to the jurisdictions brought to our attention where easements in gross are possible, the United Kingdom has a far higher population density, with over 250 people per square kilometre compared to as few as 3 in Australia or 32 in the United States (see the estimate in the United Nations World Prospects Report (2004 revision)). A far greater number of dominant owners will be vying for rights over a much smaller pool of desirable servient tenements, creating problems not encountered in other jurisdictions. As Dr Caroline Sawyer (Victoria University of Wellington, New Zealand) put it, with reference to the United States' approach:

Their situation is different. They have more land and a different historical and cultural approach to its regulation and use.

### **Other related issues**

- 3.13 Finally, two consultees raised issues in their responses which were not directly related to the consultation question. The first was a request by DLA Piper UK LLP for the Law Commission to provide a better definition of the difference between a wayleave and an easement. Second, Inexus Group (Holdings) Ltd took the question as an opportunity to suggest the recognition of utility easements as proprietary interests in land, in reliance on *Re Salvin's Indenture* [1938] 2 All ER 498. Both of these subjects are outside the scope of our project. They are highly specialised topics which affect only a limited circle of parties compared to the more universal principles which our proposals have covered. Trying to resolve these two technical topics of law alongside the rest of our proposals risks giving them less attention than they deserve.

**We consider that the basic requirements that an easement accommodate and serve the land and that it has some nexus with the dominant land serve an important purpose and should be retained. We invite the views of consultees as to whether there should be any modification of these basic requirements.**

**[paragraphs 3.33 and 16.5]**

3.14 At present, easements must “accommodate and serve” the dominant tenement. The test for “accommodate and serve” has been developed through many cases and can be summarised briefly as requiring the easement to benefit the dominant owner in his or her capacity as owner of the land, rather than personally. It necessarily includes a requirement for there to be some proximity between the dominant and servient tenements. We explained these requirements and why we proposed to retain them at paragraphs 3.19 to 3.33 of the CP.

3.15 37 consultees responded to this question, and all of them expressed general agreement with the CP’s conclusions, although a number highlighted areas of concern.

#### ***The responses***

3.16 The majority of consultees felt that the “accommodate and serve” test was an important element of an easement. For example, HHJ David Hodge QC (Civil Committee of the Council of Circuit Judges) said:

The basic requirements that an easement should accommodate and serve, and that it should have some connection (or nexus) with, the dominant land serve an important purpose and should be retained without modification.

3.17 On the other hand, a number of consultees suggested retaining the substance of “accommodate and serve” while modifying the way that it is expressed. B S Letitia Crabb (University of Reading) suggested that the current test could be expressed by the term “accommodate” alone, with “serve” being unnecessary. On a similar theme, Herbert Smith LLP thought that re-phrasing would help to clarify the requirements of this test:

In our view these basic requirements should not be modified except in the way in which they are expressed. If the basic requirements were expressed as *An easement must be related to and facilitate the enjoyment of, a defined area of land*, we imagine the basic tenet would be easier understood.

3.18 Amy Goymour (Downing College, University of Cambridge) felt that “accommodate and serve” is effectively the same as the fourth limb of the *Re Ellenborough Park* [1956] Ch 131 test and that it did not need to be regarded as a separate requirement.

- 3.19 Michael Croker, Miriam Brown and Kevin Marsh (writing when Michael Croker was Land Registrar, Peterborough Office, Miriam Brown was a Lawyer at Land Registry, Peterborough Office and Kevin Marsh was Senior Casework Executive, Land Registry, Stevenage Office; their response was written in their personal capacity) argued that the current test is unsatisfactory. They presented a number of scenarios where they felt “accommodate and serve” could create problems. They said:

We think that a better approach would be to keep the parties and their successors to the original bargain and to have a presumption that what the original bargain defined as the accommodated land should be accepted as such. If this proves subsequently to sterilise land then either a formal release can be obtained or the Lands Tribunal could release it under its expanded jurisdiction ... . Fundamentally we believe that the market should be left to limit or police the parties’ bargains. If land is burdened with an unusual right then its value will be diminished.

If others have made a stronger case for the retention of “accommodation” we are attracted to the replacement of “accommodation” with the Canadian test of “reasonable necessity” mentioned in CP 3.24. We think that this better meets the “certain” test and our “clear” test. Although, again, we are not sure how we could assess this necessity on registration. We would need to agree clear rules for the successful operation of such a requirement unless our proposal that there is no unilateral failure or determination under this provision is accepted.

- 3.20 Two consultees highlighted problems which the “accommodate and serve” test creates for developers who want to create easements for the benefit of land which they have the option of acquiring in the future. At present, an easement cannot be used for the benefit of additional land which is added to the dominant tenement after its grant. For example, the London Property Support Lawyers Group gave the following response:

We think it would be useful to allow the grant of an easement to benefit not just the existing dominant tenement but also some predictable and defined extensions of it. The particular legal difficulties faced by developers in such situations were brought sharply into focus in *London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [3] EGCS 100, and also in *Voice v Bell* [3] EGCS 128. These cases established that rights granted for the benefit of land to be acquired in the future did not operate to create a legal easement that was binding on a successor in title to the grantor of the rights ... . Developers would welcome a simple and effective scheme that enables them to reserve easements for defined areas of land that they do not yet own, but which they are planning to acquire in the future.

### ***Conclusion***

- 3.21 We discuss in the Report the need for the law of property to police, to some extent, the bargain that the parties have made in order to ensure that land is not readily rendered unmarketable. Some jurisdictions have taken a different approach to this; notably, the American Restatement relies upon the availability of a jurisdiction to vary obligations, and therefore has abandoned the “touch and concern” test for covenants, which fulfils a similar function. We take the view that it is better to avoid litigation by retaining a control mechanism within the substantive law. As Gregory Hill (Barrister, Ten Old Square Chambers) put it, the “accommodate and serve” test “is an instance of the balance being struck between party autonomy today and turning the land to best account tomorrow and thereafter”.
- 3.22 We are equally unhappy with the idea of substituting a differently worded test. Such a change would require crystal clarity in the statute as to the difference between the old test and the new, and we think that that would be very difficult to achieve. The cost of discovering, through litigation, the meaning of the new test would far outweigh the cost of retaining well-established wording. The impact upon Land Registry of a new test could also be very troublesome.
- 3.23 As we say in the Report, we take the view that the “accommodate and serve” test should be retained for easements in its present form (see the Report, paragraphs 2.25 to 2.27). Many consultees warned against unnecessary interference with familiar principles; even minor changes to terminology could have a substantial impact and could be misleading.
- 3.24 We are also not convinced that the problems for property developers justify changes to the current rules for a number of reasons. These situations will only affect a small minority, who will invariably be developers undertaking large-scale projects with extensive legal support. Changing the general law in order to meet this point would be a disproportionate response, and would not have a wide enough benefit to outweigh the difficulties that changing an established rule would entail.

### ***Other related issues***

- 3.25 The Institute of Legal Executives recommended a more sweeping change to the basic requirements beyond the scope of this question, saying:

This basic requirement could be extended. The nature of an easement as a right arising by way of grant, prescription, necessity or statute does not necessarily provide a wide enough scope for contemporary rights which have developed more recently. For example, it may be that a right of way, a right of access to conduct repairs, a right of use or the more contemporary forms of emblements would in themselves serve the servient land so as to give it something which without the grant would affect its use and marketability. It may be that after a millennium of land law development that we should look at prescribed easements for every transfer of part which could sit alongside more specific easements relevant to the particular characteristics of the land. Particularly, one would think of rights of access in this regard together with rights relating to drainage or such like. By introducing an element of codification and standardisation to the drafting of such “usual” easements more certainty could be created.

- 3.26 While we note that the rights highlighted would be useful, we think the introduction of prescribed easements in every transaction would fundamentally interfere with property rights and so should not be recommended. Despite the need to maintain some regulation of easements, this proposal goes beyond our desired balance between autonomy for land owners and protection for the continued alienability of land. This would be an intrusive and unnecessary change, restricting the freedom of the parties best placed to decide which property rights should exist between them. There are also a number of statutes which already allow for some standard rights over neighbouring parts of land, such as the Access to Neighbouring Lands Act 1992 and the Party Wall etc. Act 1996.
- 3.27 Finally, a few consultees, while agreeing with the proposal, took this question as an opportunity to comment on the language used in defining the parties to an easement. The Agricultural Law Association argued that the terms “dominant” and “servient” “have ceased to be as clear as when they were first coined” and that “benefited and burdened” should be used instead, a conclusion supported by two other consultees.
- 3.28 We do not think that there is any lack of clarity in the terms “dominant” and “servient”, although they are a little old-fashioned. In the Report we use “benefited” and “burdened” where possible, but there are occasions when the older terms are clearer, for the purposes both of the Report and the draft Bill. Certainly we do not think that the law can or should prevent the use of the older terminology by practitioners where they find that helpful.

**We provisionally propose that in order to comprise an easement:**

**(1) the right must be clearly defined, or be capable of clear definition, and it must be limited in its scope such that it does not involve the unrestricted use of the servient land; and**

**(2) the right must not be a lease or tenancy, but the fact that the dominant owner obtains exclusive possession of the servient land should not, without more, preclude the right from being an easement.**

**[paragraphs 3.55 and 16.6]**

- 3.29 Currently, an easement cannot exist where it effectively gives the dominant owner exclusive possession of land. It has also been held (*London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1992] 1 WLR 1278) that an easement must not exclude the servient owner from all reasonable uses of the land – this is subtly different from a purported easement granting exclusive possession, and is referred to as the “ouster principle”.
- 3.30 Both rules have caused difficulties, particularly in the context of parking easements. How intensive a use of how small a parking space will fall foul of the ouster principle? And at what point does the purported grant of an easement to park amount to exclusive possession (and therefore to the grant of an estate in land)?
- 3.31 We explained the current state of the law in this area at paragraphs 3.34 to 3.55 of the CP and proposed a new test for validity of an easement, with a view to alleviating some of the difficulties caused by the current law.
- 3.32 36 consultees responded to this question, with diverging opinions on the merits of our proposed test.

### ***The responses***

- 3.33 There was universal support for the first part of our proposals, which a number of consultees felt merely reflected the current state of the law. Nonetheless, some consultees were concerned about how the test would be applied to developers, who often need to create easements where the servient tenement is not strictly defined in order to allow for alterations, including using land which was not part of the servient tenement at the time of grant. Richard Coleman (Clifford Chance LLP) described this problem in the following way:

A developer of an industrial or commercial estate will often wish to reserve the right to vary the route of the estate roads, pipes, conduits and the rest serving the units on the estate. To reflect that wish leases (or other disposals) of the units will contain provisions entitling the grantee rights to use the common parts and services. A definition of those common parts and services will include rights of way over estate roads, rights to use pipes, conduits etc together with scope for the developer to make the variations which may from time to time be needed.

- 3.34 The majority of consultees focused their responses on the second part of the test, which would, in some situations, allow easements to exist that amounted to a grant of exclusive possession. This proposal split consultee opinion; most were unconvinced that the proposed test was the correct approach.
- 3.35 A number of consultees were concerned that the proposed test did not clearly differentiate the requirements of an easement from those of a lease or fee simple. Herbert Smith LLP said:

Our concerns are to do with the risks of uncertainty and of a reliance on form instead of substance which we believe may result from the proposal. Just as an easement must not be a lease, so (in order to emphasise), a lease must not be an easement.

We believe it is good policy that an arrangement which comprises the normal indicia of a tenancy (inevitably involving exclusive possession but not necessarily the payment of rent) should not be susceptible to counter-argument that it is something else. In our view, the second limb of proposal (2) will run counter to that policy. Exclusive possession is, and should remain, substantially the exclusive preserve of tenancies. Easements are, and should remain, about use. If the line is crossed from one to the other, the code which applies 'on the other side of the line' is quite capable of accommodating the transaction. But if the line becomes blurred, the law will become uncertain and harder to administer.

Similarly, Ian Williams (Christ's College, University of Cambridge) said:

The distinction between a term of years and fee simples is premised upon the fact that the loss of possession experienced by the owner of the fee simple is only for a time (this is the purpose of the requirement that leases have a certain term). That is not the case with the proposed definition of an easement. Take an example: varying the facts of *Wright v Macadam* [1949] 2 KB 744 so that the coal shed in which coal could be stored was a distinct piece of land separate from its owner's other property holdings. On the current law this could not be an easement as it is too substantial an interference with the owner's rights. On the proposed test the right is a clearly defined one to store coal and is not unrestricted in its use of the servient land, as the dominant owner may only store coal. This would suggest that the right would be an easement. Is this the intention of the Commission? If so, what rights remain in the owner of the fee simple of the servient land?

- 3.36 Concerns were expressed about the wording of the proposed test, in particular the idea that exclusive possession did not prevent the right being an easement "without more". The London Property Support Lawyers Group said:

The proposal suggests that the grant of exclusive possession should not disqualify it as an easement “without more”. What is the “more” likely to encompass? It is true that case law has developed which classifies as licences (not leases) some occupation arrangements which grant exclusive possession. Here such factors as absence of rent, or flexibility of the grantor to move location, prevent it being a lease. It should be made very clear what additional factors will mean that an arrangement is viewed as an easement, rather than a lease. Otherwise draftsmen will not be able to be confident that they are creating what they intend and no more.

- 3.37 In contrast, the “restricted use” element of the test received support as well as criticism. While a few consultees were unhappy with this formulation, such as Wragge & Co LLP who felt “limited in scope” was too uncertain, others felt this change would be helpful. Land Registry expressed support by saying the following:

We also agree that it would seem better for the mark of an easement not to be whether the right gives exclusive use (in other words, whether it leaves the owner without any reasonable use of the land), but whether it gives unrestricted use or allows only for use for a defined purpose. “The right to receive water through a pipe, the right to store particular materials, the right to lay and to retain a pipe” are after all, as the consultation paper says, established easements: this is consistent with the unrestricted use test, but difficult to reconcile with the exclusive use test (at least it is if the servient land is treated as being no more than the area taken up by the pipe or shed etc).

- 3.38 The practical consequences of recognising easements involving exclusive possession were noted by many of the consultees, who brought attention to negative examples from both the commercial and residential sphere. In the commercial context, attention was drawn to business security of tenure, which could be circumvented by using exclusive possession easements rather than leases, while in the residential sphere consultees warned that exclusive possession easements could overlap with more extensive property rights. In the latter case, Dr Caroline Sawyer (Victoria University of Wellington, New Zealand) considered the historic reasons for limited recognition of easements, and warned that extensions could cause unintended developments for property law:

A legal easement that allowed exclusive possession would therefore amount in reality, even if not in theory, to effective ownership of the land, for a term equivalent to a term of years or a fee simple. It would be interesting and maybe necessary to hear more about the practical difference asserted between having an easement of exclusive possession and having a lease or freehold ownership of the land. Can one buy and sell in the same way as if one had registered title, provided that it is attached to the dominant tenement, thus extending the effective plot even if that part can be used only as a car parking space? Perhaps once he has exclusive possession, the dominant owner will put a shelter up for the car, perhaps with an extra bedroom over. Can the easement of car parking be sub-eased to a neighbour?



Peter Bennett (University of Reading) noted a further potential problem:

In practical terms, land needs to be maintained. Even where it is only used for parking it will need to be re-surfaced periodically, drainage may need attention, leaves need to be swept up and most importantly in our litigious age responsibility to be shouldered for the purposes of occupier's liability and consequent insurance. It seems highly unreasonable to expect the servient owner to accept these burdens for a piece of land he has effectively no further right to. But he may nevertheless be liable, if effective control is in the hands of the dominant owner then possibly jointly, [*Wheat v Lacon*], should anyone be injured owing to neglect of the premises. What insurers will say I can only guess.

- 3.39 However, some consultees were untroubled by the possibility of clouding the distinction between various property rights. Amy Goymour (Downing College, University of Cambridge), while generally writing in favour of using the test established in *Moncrieff v Jamieson* [2007] UKHL 42, [2007] 1 WLR 2620, considered the implications of allowing easements with exclusive possession:

In agreement with what you say, I am not convinced that there is anything inherently wrong with allowing easements to confer exclusive possession on the dominant land owner. As discussed above, leases are limited by the requirement of a certain term, whereas easements are limited by the requirement of a dominant tenement. These are two different mechanism by which property rights are restricted from being too widespread.

### **Conclusion**

- 3.40 We have taken into consideration the comments made by consultees who favoured our original proposal, but overall we were unconvinced that the test we had proposed could be recommended. This is an issue that we have discussed in some detail in the Report in Part 3, at paragraph 3.188 and following; briefly, here, we can summarise by saying that it is not possible to permit easements that confer exclusive possession on the dominant owner, because of the conflict with the definition of a lease and with the characteristics of a fee simple. However, we have recommended that the "ouster principle" be abolished, with a view to removing unrealistic impediments to the creation of parking easements.
- 3.41 The London Property Support Lawyers Group and a number of other property developer consultees asked the Law Commission to recognise expressly the validity of a number of arrangements used in large scale property development projects. These arrangements rely on easements which can have their burden changed in both scope and location in order to meet the evolving demands of the dominant tenement. We have concluded that it would be inappropriate for us to make any such recommendation as part of this project, as these arrangements concern a small number of users and fall outside the scope of the general review of property law which we have undertaken.

**We provisionally propose that where the benefit and burden of an easement is registered, there should be no requirement for the owners to be different persons, provided that the dominant and servient estates in land are registered with separate title numbers.**

**[paragraphs 3.66 and 16.7]**

- 3.42 At present, when a servient and dominant tenement fall into the possession and ownership of a single owner, any easements between them are extinguished because a person cannot have an easement over his or her own land (see *Re Ellenborough Park* [1956] Ch 131). Equally, it is impossible to grant easements between different parts of one's own land. We discussed the problems with this rule at paragraphs 3.56 to 3.65 of the CP, and proposed its abolition at paragraph 3.66.
- 3.43 We asked the same question, in effect, at paragraph 8.88 of the CP in relation to land obligations, because the same issue has to be raised if a new legal interest is created. Equally, as we mentioned at paragraph 6.43 in the CP, the same principle currently applies to profits.
- 3.44 We explain in detail in the Report in Part 4 (at paragraph 4.19 and following) the reasons why these are important proposals, and the contexts in which the impact of change will be felt. Briefly, these are:
- (1) estate developments;
  - (2) situations where land falls into common ownership; and
  - (3) mortgages of part.
- 3.45 34 consultees responded to the question at paragraph 3.66, and 33 consultees responded to the question at 8.88. In both cases consultees expressed near universal support for our proposal.

### ***The responses***

- 3.46 A significant number of consultees gave their support for these proposals. Michael Croker, Miriam Brown and Kevin Marsh described it as "the single most important proposal in the CP". The rule that unity of ownership and possession extinguishes appurtenant interests has been accepted as a principle of property law for centuries and so significantly predates the land registration system; so these proposals was a generally welcomed update of an outdated rule. The Chancery Bar Association, in respect of easements said:

In the case of registered land, we agree that where both the benefit and burden of an easement is registered, there should be no requirement for the owners to be different persons, provided that the dominant and servient estates in the land are registered with separate title numbers. This reform should be prospective only and not retrospective.

Other consultees noted the practical benefits which this development would have, including supporting modern mortgaging practice. In respect of the latter, the Council of Mortgage Lenders (on behalf of its lenders) commented that:

Lenders have real issues with the current requirement that the dominant and servient tenements to be owned by separate persons. This is because lenders often wish to grant a charge over part only of a property. Should the lender need to take possession the lender will need appropriate rights over the part of the borrower's land that does not come within the charge. However because of this rule this is very difficult to achieve.

We therefore strongly agree with and support the view that where the benefit and burden of an easement is registered, there should be no requirement for the owners to be different persons, provided that the dominant and servient estates in land are registered with separate title numbers ... .

- 3.47 In highlighting the practical problems for developers under the current law, Michael Croker, Miriam Brown and Kevin Marsh said:

The legal process for easement creation now follows the path of five stages: no contract, contract, protecting search, transfer of part, registration ... developers cannot now control the order of creation of easements because any one of these stages can occur at any time. In an estate of ten properties with a single easement of vehicle access across nine of them, the possible number of combinations of stages (ie whether each unit is at one of the five stages) reaches a maximum of one million possible combinations. Where as is normal, units are to have the benefit of or be burdened by five or six different easements (not necessarily over the same adjacent units), the number of combinations is nearly infinite; so developers' documentation cannot follow the conventional grant followed by the servient land being stated to be subject to the grant already made. Instead the documentation (eg the transfer of part) is drafted to assume the grant may be either a grant or a reservation. It may randomly operate as grant over one part and over another as a reservation

- 3.48 A few consultees went on to say that these proposals should not just be prospective, and instead that it should apply to all appurtenant interests, whether or not they were created after the enactment of these proposals. At paragraph 3.65 of the CP, we argued that applying this reform to existing easements would interfere with the expectations of parties that created easements before this rule was implemented. Similar arguments apply to profits. However, Gregory Hill (Barrister, Ten Old Square Chambers) argued that:

I do not believe it is either necessary or appropriate to limit the principle to easements created after the implementation of reform. There is, with respect, no reliance interest in the existing law still applying to an easement created before then, as suggested at 3.65: whenever (and however) the easement arose and (if different) was registered, the common owner is in complete control and the passage from the 1984 report quoted in 3.59 is apposite; the comment in 3.60 that “there is no obvious process whereby [that easement is] to be removed from the register of title” is also apposite; and once the two titles have come into the same hands, the question is simply, “what easement, if any, should apply when they are separated?”, to which the answer “the easement appearing on the titles” is convenient and very probably right, and therefore the appropriate “default”.

3.49 A number of consultees also questioned the need for separate title numbers when creating an interest over one’s own land. They argued that the rule creates additional work, and therefore cost, as well as going against the general aim of consolidating land titles.

3.50 The London Property Support Lawyers Group explored both sides of this debate:

We support this proposal. However, opinions are divided on the merits of requiring the dominant and servient tenements to be in different titles. One group is against that requirement because of the large number of additional titles which would be created and the work – both for practitioners and the Land Registry – which would be involved, with consequent costs and delay. There is also the argument that the validity of an easement should not depend on how a landowner chooses to divide his property. Most practitioners are in favour of consolidation of titles where possible, not further fragmentation.

The other group is in favour of the requirement because they consider it would be too confusing to have easements in favour of one part of a title over the other part. Since the creation of such easements is almost invariably going to be a prelude to a sale of part of the landholding, the additional work is simply being shifted in time and responsibility. It would be to the advantage of the creator of the easement to be able to control its registration and ensure it is correct on both dominant and servient titles ... .

3.51 On the other hand, a small minority of consultees were against these proposals. They argued that it should remain impossible to have rights over one’s own land: would it give a landowner a cause of action against him or her self? The Treasury Solicitor’s Bona Vacantia Division said:

We would suggest that the requirement that the owners of the dominant and servient tenements should be different persons should be retained, as this is fundamental to the concept of an easement, whether the titles are registered or unregistered. To be more precise the dominant and servient tenements must not be owned and occupied by the same person in the same right. The rule is therefore no more than the self-evident proposition that a man cannot have rights against himself. There are special rules that apply to quasi-easements, and for deciding if an easement is extinguished or merely suspended if the two tenements subsequently come into separate ownership or possession. However, as a general proposition, and subject to the special rules referred to above, we would suggest that normally the requirement that the owners of the dominant and servient tenements should be different persons should be retained. Although this may cause some problems with regard to residential and commercial developments, these problems can be solved by appropriate drafting of the easements in the individual transfers.

- 3.52 While most consultees who disagreed with these proposals did so in respect of both easements and land obligations, the Chancery Bar Association agreed with our proposal in regard to easements, but thought that the unity of ownership and possession rule should still apply to land obligations. They explained:

We do not agree that there is any purpose to be served in preserving land obligations once both dominant and servient land are in single ownership.

- 3.53 Finally, some consultees who supported the proposals observed that it would be important for developers, when planning an estate made up of many units, to think ahead. Dr Nicholas Roberts (Oxford Brookes University) said:

If these proposals are adopted then developers will have to make a very clear decision on whether any restrictions (and perhaps positive covenants) are to be enforceable by all other owners, or only by the developer in respect of the land which it retains.

### ***Conclusion***

- 3.54 In agreement with the majority of consultees, we recommend (see the Report, paragraph 4.44) that unity of possession and ownership should no longer extinguish or prevent the creation of easements (or, post-implementation, land obligations) between plots of land where title to the relevant land is registered. However, we have taken into consideration consultees' concerns that the requirement for separate title numbers is unnecessary and that these reforms should apply to all existing easements. We have been convinced on both of these points.

## PART 4

# CREATION OF EASEMENTS

**We provisionally propose that an easement which is expressly reserved in the terms of a conveyance should not be interpreted in cases of ambiguity in favour of the person making the reservation.**

[paragraphs 4.24 and 16.8]

- 4.1 When an easement is granted expressly, any ambiguity in the grant is interpreted against the grantor – and thus in favour of the dominant owner. This rule has its origin in contract law principles and was first applied to easements in the mid-nineteenth century in *Williams v James* (1867) LR 2 CP 577, where the court accepted it as an uncontroversial extension of a general principle and emphasised that it would only be applied as a last resort.
- 4.2 In the CP we looked at the situation where an easement is reserved, so that on the sale of part of X's land to Y an easement is reserved for X. In that situation, where there is ambiguity in the terms of the easement, the court resolves the matter in favour of the party who made the reservation; again, therefore, the rule favours the dominant owner. The rule originated from a time when reservations had to operate by way of a fictional "re-grant" to the vendor by the buyer, a fiction which was ostensibly removed by section 65 of the Law of Property Act 1925. Despite this, the Court of Appeal in *St Edmundsbury & Ipswich Diocesan Board of Finance v Clark (No 2)* [1975] 1 WLR 468 held that it was bound by previous authority, which had assumed that reservations still operated by a form of re-grant by the purchaser, and so concluded that reservations of easements should still be interpreted in favour of the party receiving them.
- 4.3 Although this rule is based on an outdated principle and has been criticised by a number of academic authors, its result is nonetheless consistent with situations where easements are created through express grant, because the result of both rules is that any ambiguity is resolved in favour of the dominant owner.
- 4.4 In the CP, we proposed that the decision in *St Edmundsbury* should be reversed, so that any ambiguities in a reservation would no longer be interpreted in favour of the person making a reservation. We made that proposal on the basis of the argument, at paragraph 4.21 of the CP, that because the vendor controls what he or she wishes to sell or reserve, ambiguities should be construed against the vendor, in line with the general principle that documents are interpreted *contra proferentem*, that is, against the party who drafted them.
- 4.5 Although 34 consultees responded to this question, the problems outlined below meant that there was little consistency between responses.

### ***The responses***

- 4.6 Most of the consultees who responded to this proposal said that they agreed with it. For example, the Agricultural Law Association said:

We agree that the *St Edmundsbury* decision is illogical and support the Commission's proposal. The control of meaning is in the hands of a vendor making a reservation and ambiguity should be construed against him.

4.7 The Chancery Bar Association put it this way:

We agree that an easement which is expressly reserved in the terms of a conveyance should not be interpreted in cases of ambiguity in favour of the person making the reservation. The rule to that effect is illogical and contrary to the principle that in the case of ambiguity a document should be interpreted against the interest of the party which was responsible for drafting it.

4.8 But it was pointed out that the consequences of the proposal were unclear. Herbert Smith LLP said:

We think there is, in some quarters, a lack of understanding about the *contra proferentem* rule so far as concerns construction against grantor or draftsman, particularly in the case of reservations. Such occasional lack of understanding is fuelled by the fact that the draftsman does not necessarily represent the grantor (whether the grantor is purchaser or vendor). We wonder whether the clarity of the proposal might be improved if the intended consequence of the proposal on the application of the *contra proferentem* rule could be expressed.

4.9 Consultees expressed two views as to how the reform would operate. Some took the view that the removal of the *St Edmundsbury* rule would mean that ambiguities would be interpreted in favour of the person against whom the reservation was made, the servient owner. Others took the view that the reform we proposed would mean that there were no presumptions save for the general *contra proferentem* rule. This would mean that ambiguities would be resolved against the party responsible for drafting.

4.10 The latter view received significant support from consultees, though a number pointed out that it may be difficult to identify who was responsible for drafting a reservation. In practice, both parties to a transaction will participate in drafting; control of the terms of a deal may be a matter of the parties' relative bargaining position or skill. As the Treasury Solicitor's Bona Vacantia Division put it:

Although the deed will be drafted by the vendor, it will be seen and approved by the purchaser before it is engrossed, and both parties should ensure that the rights they require are fully contained in the deed.

4.11 An *Emmet and Farrand on Title* Subscriber's Bulletin from December 2008 also highlighted the fact that the CP did not distinguish between a reservation and an exception. Whilst a reservation can be seen as a grant of a right by the buyer to the vendor, out of the rights that the buyer is acquiring, an exception is conceptually different and involves the vendor keeping something already in existence, such as timber or minerals. An ambiguity in an exception will be

interpreted against the vendor, as he or she put it outside the scope of the sale. The editors regard both rules as logical.

- 4.12 A number of practitioners noted that the *St Edmundsbury* rule is very rarely applied. Gregory Hill (Barrister, Ten Old Square Chambers) commented that:

I think the first point to make is that because “*contra proferentem*” in the case of ambiguity is very much the rule of last resort, this area may be hoped to be of greater academic interest than practical importance ... .

### **Conclusion**

- 4.13 Consultation responses reveal that while the *St Edmundsbury* rule is not universally supported, there is little agreement as to how it should be reformed. We are concerned that any reform that introduced a rule of interpretation against the vendor on the basis of theory as to who controls the drafting would be difficult to justify, and we note that the reasoning in the CP did not take account of the different considerations operating in the case of an exception. Above all, we are swayed by the fact that the impact of reform would be too insignificant to justify either the cost of reform or the risk of introducing an inappropriate substitute. As consultees pointed out, this is a rule that operates very rarely indeed. We now take the view that it is best left as it is.



**We invite the views of consultees as to whether it should be possible for parties to create short-form easements by reference to a prescribed form of words. Where the prescribed form of words is used, a fuller description of the substance of the easement would be implied into the instrument creating the right.**

**[paragraphs 4.34 and 16.9]**

**We invite the views of consultees as to which easements should be so dealt with and the extent to which parties should be free to vary the terms of short-form easements.**

**[paragraphs 4.35 and 16.10]**

**We provisionally propose that it should be possible for parties to create short-form Land Obligations by reference to a prescribed form of words set out in statute. Where the prescribed form of words is used, a fuller description of the substance of the Land Obligation would be implied into the instrument creating the right.**

**[paragraphs 12.25 and 16.82]**

**We invite the views of consultees as to which Land Obligations should be so dealt with and the extent to which parties should be free to vary the terms of short-form Land Obligations.**

**[paragraphs 12.26 and 16.83]**

- 4.14 We discuss these questions and proposals together, as they raise the same issues in relation to different interests.
- 4.15 At present, an express grant or reservation of a legal interest in land must clearly set out the terms and scope of the right to be created. A number of other common law jurisdictions have implemented statutory forms of a number of frequently used easements. This allows express grants or reservations merely to refer to the statutory wording of a desired easement, rather than setting out its details in full. We discussed the advantages of such short-form easements at paragraphs 4.25 to 4.33 of the CP, and raised the issue again in the context of land obligations in Part 12 of the CP.
- 4.16 37 consultees replied to the question in 4.34 and, of those, 29 also replied to the further question at paragraph 4.35. A majority of the consultees supported the introduction of short-form easements, but there was little consensus on how far it should be possible to vary the terms of any such easement. 26 consultees responded to the corresponding questions on short-form land obligations asked at paragraphs 12.25 and 12.26 of the CP, many of whom reiterated the comments made on short-form easements earlier on in their responses.

### ***The responses***

- 4.17 A number of consultees were enthusiastic about short-form easements and land obligations, on the basis that it would make conveyancing easier and clearer, especially in the residential context. Many consultees also noted the positive impact that this proposal could have on the land registration process. Land Registry commented:

Not only should short-form easements simplify the conveyancing process, they should also simplify the registration process in that where we set out the terms of the easement *verbatim* (as opposed to referring the reader to the deed containing the grant or reservation), we may be able to start using standard entries rather than having to copy out the particular wording each time.

4.18 Similar responses were received in the context of land obligations; G J Wadsworth (University of Newcastle) in particular felt that short-form obligations would be useful in the specialised context of Tyneside flats.

4.19 However, a substantial number of consultees agreed with the proposals but raised a concern about the accessibility of the detailed terms of both short-form easements and land obligations. This was argued to be of particular importance in residential situations, as members of the public might have difficulty understanding how to find and interpret the terms of short-form interests created over their land. For example, in the context of short-form easements, B S Letitia Crabb (University of Reading) said:

In relation to short-form easements, it is important that ordinary people are provided with accurate information about the rights affecting their property. Would the fuller description be available for those accessing their title on the register? It would be invidious if professionals enjoyed better factual information about the nature of a right than the property owner whose right may have been challenged.

4.20 A few consultees further highlighted the need for careful consultation with practitioners on the precise form of any short-form easements that are created. Gregory Hill (Barrister, Ten Old Square Chambers) said:

I suggest, however, that it will be important to get the prescribed forms “right first time”: amendments to the forms would introduce at least a risk of confusion, and possibly serious catastrophe if someone used an old form after a new one had been substituted.

4.21 On the other hand, a significant number of consultees, many of whom were practitioners, warned that short-form easements might not be popular. They argued that most grants or reservations are dependent on their own unique circumstances, making it difficult to create an all encompassing statutory short-form. Currey & Co suggested that:

In most instances, we suspect that conveyancers will prefer to use tailor-made provisions suited to the location and circumstances of each individual case, and the use of standard forms which can only be comprehended by reference to some other source is not likely to commend itself to most “users”.

Similarly, Farrer & Co LLP drew on the previous experience that this jurisdiction has had with prescribed forms for legal interests:

Experience with the 19<sup>th</sup> century prescribed form of lease covenants (Leases Act 1845) is not helpful. Similarly, as the report appreciates the use of section 62 which was intended to replace the lengthy formula of “general words” has also given rise to problems. In practice we believe most conveyancers would prefer to specify a right in full. The only workable uses of abbreviated words are those such as “with full title guarantee” which serve a different purpose.

For example, easements such as a right of way normally have to be granted “in common with the grantor and all others having or hereafter granted the like right” to avoid the risk that the easement takes precedence over any other use by other persons. It is not clear, for example, to what extent the standard wording might or might not include such expressions. The Commission may wish to amend that specific rule but in general it is better for a document to say in full what it means rather than the reader having to refer to some other document.

- 4.22 Which easements should be capable of creation through short-form? There was general consensus amongst consultees that short-forms should be available for the most commonly used easements. These were generally considered to be rights of way and access, rights for services, rights of support and rights to light. Network Rail’s response was broadly representative of these views:

We are of the view that most commonly used easements eg pedestrian and vehicular rights of way, rights to lay conduits for services, rights for the passage of such services and rights of support etc could all be dealt with by way of short-form easements.

- 4.23 A few consultees went further and suggested that all existing forms of easement should be capable of creation through short-form. HHJ David Hodge QC (Civil Committee of the Council of Circuit Judges) said:

All easements known to the law should be capable of being dealt with in this way, and the list should be capable of expansion and adaptation over the course of time as circumstances change and develop; but the parties should be free to vary and adapt the terms of short-form easements by express language.

- 4.24 In response to the corresponding question on short-form land obligations, a substantial number of consultees supported short-form versions of the commonly used covenants found at paragraphs 12.23 and 12.24 of the CP. Similarly, other consultees provided exhaustive lists of short-form land obligations which closely resembled those recommended in the CP. However, one consultee argued for a broader approach; HHJ David Hodge QC (Civil Committee of the Council of Circuit Judges) said:

We consider that the list of short-form land obligations should be as extensive as possible, and capable of expansion and adaptation over the course of time as circumstances change and develop ... .

- 4.25 Consultees were split almost evenly in their opinion on whether or not short-form interests should be variable by the parties using them, with a bare majority in favour of allowing variation. Of those consultees who did favour allowing amendment to prescribed forms, there was further disagreement on how far these amendments should be allowed to go. Some consultees advocated complete freedom, such as Roger Pickett (Diocese of Southwark):

We take the view that parties should be free to vary matters as they choose since it is impossible to anticipate all the circumstances that might arise.

- 4.26 On the other hand, a greater number of consultees suggested that if amendments were to be allowed, they should be limited in scope. The Chancery Bar Association said:

Whilst we can see the advantages of allowing the parties some flexibility in the use of the short-form, to allow them total freedom once they have chosen the statutory form is inimical to the uniformity sought to be achieved; the form should be in the same or substantially the same form as that prescribed in the secondary legislation. If the parties want total freedom of action they can so provide by not using the statutory short-form.

- 4.27 In the context of short-form land obligations, Dr Nicholas Roberts (Oxford Brookes University) further suggested that if any variation were permitted, it should follow a certain form:

It would seem desirable that, if a standard wording is used, any departure from the standard wording should be clearly flagged up so as to alert purchasers and their conveyancers. Either the standard wording would have to be used, with a note immediately following it to amend it; or, if practicable, departures from the standard wording should be shown in a different (eg italic) typeface.

- 4.28 In contrast, consultees who thought that no amendments should be possible argued that allowing such modifications by the parties would undermine the benefit of introducing short-form interests. Herbert Smith LLP pointed out that:

If parties choose to adopt the principle of using them, we think they should adopt them completely; without any variation. Were it otherwise, we believe the prospect of (i) short-form (ii) varied short-form and (iii) voluntary form (which we regard as fundamental) would produce an embarrassment of riches and potential uncertainty which would distort the paragraph 4.29 advantages.

- 4.29 Land Registry also warned of the problems which might arise if short-form easements were capable of variation:

As for the extent to which parties should be free to vary the terms, we would suggest that this should probably only be to the extent of choosing from a number of prescribed options, as otherwise there would seem to be little if any benefit in terms of simplifying the conveyancing or registration process.

### ***Conclusion***

- 4.30 We received substantial support from consultees on this proposal, and we take the view that short-form grants could be useful and would have a positive impact on conveyancing.
- 4.31 A possible way forward, when resources permitted, would be for Land Registry to investigate the use of Land Registration Rules to provide for short-form grants. Land Registry is better placed than we are to identify what form prescribed rights should take, and have the benefit of greater experience of working with appurtenant interests. As one consultee observed, there is precedent for taking this approach; prescribed forms for another procedure, that of adding restrictions on the register, have already been created under schedule 4 to the Land Registration Rules 2003. See our recommendation at paragraphs 4.64 and 6.89 of the Report.
- 4.32 Finally, a few consultees responded to this question on the basis that this proposal would limit the creation of all easements and covenants to using the prescribed short-forms. However, at paragraphs 4.30 and 12.18 of the CP we explained that use of short-form easements or land obligations would be purely voluntary, and that parties would still be able to draft their own terms if necessary. The same would be true if short-form easements were to be introduced via the Land Registration Rules.

**We provisionally propose that in determining whether an easement should be implied, it should not be material whether the easement would take effect by grant or by reservation. In either case, the person alleging that there is an easement should be required to establish it.**

**[paragraphs 4.53 and 16.11]**

- 4.33 Currently, it is more difficult to establish an implied easement as a reservation than it is to imply an easement as a grant. In other words, when X sells part of his land to Y, it is easier to establish that an easement is implied in Y's favour (granted by X to Y) than to establish an implication in X's favour (reserved by X to himself).
- 4.34 The grant of an easement from seller to buyer can be implied in a wide range of circumstances; but two of the rules that apply to the implication of grants do not extend to reservations. In the CP we provisionally proposed that that distinction should be removed, as part of a wider reform of implication. The CP discussed the current application of this rule between paragraphs 4.42 and 4.52. As a general principle of law, where it is argued that an easement has been implied, whether through reservation or grant, it is up to the party alleging its existence to establish it, and we proposed no change to that.
- 4.35 35 consultees responded to the provisional proposal with near universal support for it.

#### ***The responses***

- 4.36 The majority of consultees agreed with our proposal, especially in the context of the other reforms to the law of implication which the CP proposed.
- 4.37 A couple of consultees asked whether it should be possible to imply the reservation of easements, on the basis that an implied reservation takes away rights from the granted estate, so that a purchaser would get less than he or she bargained for. In particular, some members of the London Property Support Lawyers Group expressed support for:

... retaining the existing harder line to prevent (or at least make extremely difficult) any implied reservations from arising, so that the purchaser has certainty about what he has bought. The seller is in a much better position to decide what rights he needs and reserve them expressly.

- 4.38 A small minority of consultees disagreed with the arguments put forward by the CP for making this change. Two additional issues were raised by other consultees. HHJ Ian Leeming QC disagreed on the basis that:

The "second rule" in *Wheeldon v Burrows* is well known and respected. It has logical support and is harmonious with the desire to restrict the creation of easement by implication. I take the point to the contrary in the paper, but successors in title can reasonably be bound by what their predecessors did/ failed to do. I am not personally at all convinced by it.

Meanwhile, Amy Goymour (Downing College, University of Cambridge) questioned the underlying principle of our reform:

As you point out in para 4.67, many of the rules of implied easements have as a doctrinal basis the principle of non-derogation from *grant* (especially s 62 and *Wheeldon v Burrows*). If we allow the rules on implied grant to apply equally to reservation, we must be very careful to ensure that implication is justifiable on other grounds (non-derogation from grant being clearly irrelevant in the context of reservation).

### **Conclusion**

4.39 As we explain at paragraphs 3.28 to 3.30 of the Report, and in accordance with the view of the majority of consultees, we have recommended that the rules for the implication of easements should not distinguish between grant and reservation.

4.40 The comments made by consultees have to be read in the context of the rules we recommend for implication. We take the view that the principle of necessity for the reasonable use of the land goes to the heart of what implication should be achieving. The practical effect of the current rules of implication is retained through the factors now to be taken into consideration in the context of implication. As to the issue of what a purchaser bargained for, the rules of implication seek to reflect this, not to override it.

### **Other related issues**

4.41 A number of practitioners raised concerns in relation to “reverse section 62” provisions which are included as standard in many land transfers. These are used to work around the limitation on section 62 of the Law of Property Act 1925, which would normally only allow implication of a grant. For example, Currey & Co said:

In any legislation, provision should be made for a “section 62 in reverse” provision, as not only are such provisions routinely made in estate conveyances, but statutory implication would have the merit of simplifying documentation.

The Report does not recommend this. There are principled reasons for limiting the effect of section 62, while allowing conveyancers to re-create its current effect, and indeed the converse of its effect, by drafting.

**We provisionally propose that section 62 of the Law of Property Act 1925 should no longer operate to transform precarious benefits, enjoyed with the owner's licence or consent, into legal easements on a conveyance of the dominant estate. Do consultees agree?**

**[paragraphs 4.104 and 16.12]**

- 4.42 Section 62 of the Law of Property Act 1925 was originally enacted (in the Conveyancing Act 1881) as a word saving provision for conveyances; it was intended to remove the need to identify every appurtenant interest which was to pass on a conveyance of land. However, it took on an unexpected role at a relatively early stage, following a decision of the High Court in 1903: as well as passing existing appurtenant right to a purchaser along with land, it also operates to transform rights that are not property rights and turn them into easements. So when a tenant buys the freehold of land over which he or she has a lease, the tenant's licence to cross the neighbouring land of the landlord will become an easement appurtenant to his or her freehold land. Similarly, section 62 will upgrade leasehold easements so that they become freehold easements, over land retained by the former landlord, when a leaseholder purchases the freehold reversion.
- 4.43 The right transformed or upgraded in a conveyance of a legal estate must have been enjoyed over land retained by the grantor, with the right being one capable of taking effect as an easement and enjoyed at the time of that conveyance. We discussed the effect of section 62 between paragraphs 4.68 and 4.78 of the CP, and proposed at paragraph 4.104 to prevent section 62 from operating to turn precarious benefits (that is, benefits enjoyed by permission) into easements.
- 4.44 38 consultees responded to this question and nearly all supported the proposed change.

### ***The responses***

- 4.45 The majority of consultees strongly supported our proposal and a number of those consultees provided examples of where section 62 creates problems by transforming licences into easements. The most commonly identified problem was the ability of section 62 to act as a trap for the unwary; it is possible to exclude its effect expressly, but those without legal advice are at risk. The Chancery Bar Association said:

[The creative effect] of section 62 is capricious and has led to pernicious results where the creation of a legal easements was clearly not intended, but was not properly excluded.

A more specific impact was identified by Andrew Francis (Barrister, Serle Court Chambers), who said:



I agree strongly. Section 62 is especially dangerous in rights of light cases. This is particularly so where leases have been granted which do not exclude the section 62 etc where the common lessor has leased a building which may often be under twenty years old. A particular problem arises, for example, in docklands where, owing to the form of transfer and lease used by the London Docklands Development Corporation in the 1980s, section 62 and other implied grants are not excluded in the grant of leases and some transfers. Unintended consequences, therefore, arise and rights of light and other rights can be asserted.

Dr Martin Dixon (Queens' College, University of Cambridge) provided a more fundamental criticism of the current law:

Section 62 LPA 1925 is difficult to justify and usually operates only to rescue parties who have failed to specify what they really want or to catch out the innocent but unadvised land owner. It is not clear that it has a role in a system of e-conveyancing. There are uncertainties about its precise field of operation, save that it operates only on grant.

However, Richard Coleman (Clifford Chance LLP) cautioned that our proposal would need to more clearly distinguish between the transformative and upgrading effects of section 62:

Generally I agree but perhaps the proposed change might (without more) work to the disadvantage of a tenant who enfranchises?

- 4.46 A few consultees argued for a complete repeal of section 62, as they did not think that there was any benefit in its retention. For example, Land Registry said:

We are not clear what exactly the remaining "word-saving" function of the section would be. *Megarry & Wade* states "Section 62 has no effect on existing easements or profits appurtenant to the land conveyed, which pass with it automatically and without mention" ... . The consultation paper appears to share the view of *Megarry & Wade*. If this proposal is carried through, we wonder if it might be a good idea to clarify the remaining function of the section.

However, this was not a view shared by the majority of consultees, many of whom recognised the need to retain section 62 for its other functions.

- 4.47 Some practitioners agreed with our proposal but expressed concern about what transitional provisions would be introduced. How would our proposals affect contracts for conveyancing transactions or options which were drafted before any changes are implemented, but not yet executed?
- 4.48 Finally, two consultees disagreed with the proposal. Northumberland County Council argued that:

Section 62 of the Law of Property Act 1925 should remain. Experience would suggest that it is a counsel of perfection to expect that necessary easements would always be included in land transfers.

### **Conclusion**

- 4.49 We conclude that section 62 should no longer be able to transform precarious benefits into property rights. Parties to a conveyance who want such a transformation can provide for it expressly; our recommendation makes the default provision far safer than it is at present. However, we do not recommend the complete repeal of section 62, as it still retains an important “upgrading” function in relation to leasehold easements. This is especially important for enfranchising tenants and in other situations where leaseholds become freehold through a unilateral statutory process, due to the possible reluctance of a landlord to include ancillary rights in such cases.
- 4.50 We recommend in paragraph 3.64 of the Report and in clause 21 of the draft Bill that this change will affect all dispositions entered into after implementation, unless there was a contract entered into or court order made before the implementation date. This will resolve the potential transitional problems identified by practitioners.

### **Other related issues**

- 4.51 Michael Croker, Miriam Brown and Kevin Marsh noted that a number of statutory provisions exist which currently support the transformative effect of section 62, and they suggested that these should be repealed as part of our reform:

If this is enacted we think that section 27(7) LRA may need to be prospectively repealed.

As we are retaining the “upgrading” effect of section 62, we are not recommending the repeal of such statutory provisions, as they need to be retained in order for this function to operate correctly.

- 4.52 Addleshaw Goddard LLP asked for clarification of a neighbouring provision in the Law of Property Act 1925:

In passing, we would also mention that the meaning of section 63 of the Act is far from clear, and may warrant consideration if section 62 is being addressed.

There is no general call for the revision of section 63 and so we have not taken this proposal further, particularly in view of Mr Justice Lindsay’s review and clarification of this section in *Harbour Estates Ltd v HSBC Bank Plc* [2004] EWHC 1714 (Ch), [2005] Ch 194.

- 4.53 Farrer & Co LLP also mentioned “reverse section 62” clauses:

It is common practice on sales particularly out of larger holdings such as landed estates to take two steps with regard to implied easements. One may be an express statement that no easements are implied. The other may be a "reverse section 62" provision stating that there will be reserved to the seller such easements as would have been implied under section 62 by a transfer immediately before the transfer in question. This is incorporated as a matter of standard practice in the Standard Conditions of Sale (Fourth edition) Condition 3.4 and therefore applies to virtually all sales which are preceded by a contract.

Our recommendations will not affect the ability of parties to include such provisions.

**We invite the views of consultees as to whether it should be provided that the doctrine of non-derogation from grant should not give rise to the implied acquisition of an easement. If consultees are aware of circumstances in which the doctrine continues to have residual value, could they let us know?**

**[paragraphs 4.106 and 16.13]**

- 4.54 The doctrine of “non-derogation from grant” is based on the idea that once a person has made a grant, he or she cannot act in a way that will detract from or take away what he or she has granted. It can be used to imply rights into a conveyance, on the basis that it would not otherwise be possible to use the property in the way that was intended.
- 4.55 There is little definitive authority on whether non-derogation from grant, without the application of any other doctrine, has ever been used to create an easement by implication. But it is regarded as the theoretical underpinning of other rules which create easements through implication; for example, the rule in *Wheeldon v Burrows* (1879) LR 12 Ch D 31 has been referred to as a branch of the “non-derogation from grant” rule, and the link with the creation of easements of intended use (see paragraphs 4.86 to 4.90 of the CP) is obvious.
- 4.56 We discussed this doctrine between paragraphs 4.91 and 4.94 of the CP, and we invited views on a statutory clarification to ensure that it could not, in future, give rise to the implication of an easement independently of any other principle.
- 4.57 27 consultees responded to this question, of whom over half agreed with our suggestion. However, a significant minority of consultees expressed concerns about limiting the application of this principle.

### ***The responses***

- 4.58 A number of consultees agreed with our suggestion on the basis that they were unable to find any examples where the doctrine of non-derogation from grant is necessary for the implication of easements. However, some of these consultees made their agreement conditional on our general reform of implication, as they noted that the necessity of this flexible doctrine would depend on how clearly implication will operate under our proposed scheme. For example, the Agricultural Law Association said:

The benefit of this proposal depends upon clarity in the regime of implied easements. The doctrine would arguably be redundant if that regime were clarified.

- 4.59 In contrast, many consultees were sceptical about making any changes to the doctrine of non-derogation from grant. Some said that reform was unnecessary and would be of no practical benefit. The Chancery Bar Association said:

We are not, however, convinced that there should be any reform of the law relating to non-derogation from grant. It may be that the doctrine has effect only rarely, but we have not found in practice that its existence leads to any of the problems caused by the other, more elaborate rules relating to the creation of implied easements. We do not see that any real advantage would be gained by the proposed reform in this area.

On a similar note, Gregory Hill (Barrister, Ten Old Square Chambers) argued that this proposal would both lack utility and be, in practice, very difficult to implement successfully:

I doubt whether an enactment on the lines suggested in 4.105 would be of any very great utility, and it would have to be framed with considerable care, since prohibiting the forensic deployment of a suggestion, in circumstances in which it was plausible, that the opposition was 'attempting to take away with one hand what it had expressly given with the other' would not be appropriate or, probably, possible.

- 4.60 Other consultees echoed the concern that any limitation of this flexible and useful doctrine could cause problems in a number of contexts, particularly in the law of landlord and tenant and in connection with the reservation of rights to extract minerals. Trowers & Hamlins said that doctrines such as non-derogation from grant have:

... arisen to do justice according to law, and in our view they succeed. This would add complexity for negligible practical advantage, and so doing would be likely to generate its own injustices.

### ***Conclusion***

- 4.61 We agree that non-derogation from grant is a useful background doctrine and that unforeseen problems could arise from any statutory modification of its scope. Our recommendations on implication, which have evolved from the proposals made in the CP, require no amendment to the doctrine of non-derogation; see paragraphs 3.45 to 3.51 of the Report and clause 20 of the draft Bill.

**We invite consultees' views on the following:**

**(1) Whether they consider that the current rules whereby easements may be acquired by implied grant or reservation are in need of reform.**

**[paragraphs 4.149(1) and 16.14(1)]**

4.62 At present, there are a number of different doctrines through which an easement can be implied in a transaction – that is, created in the transaction despite there being no express grant or reservation of the easement. We discussed these at paragraphs 4.36 and 4.148 of the CP; we can summarise them here as:

- (1) the rule in *Wheeldon v Burrows* (1879) LR 12 Ch D 31, which allows an easement to be implied when a dominant and servient tenement were previously owned by the same person, and there had been a “quasi easement” enjoyed for the benefit of the land disposed of over the part retained;
- (2) easements of necessity, which can be implied into a transaction where the land granted would be essentially unusable without additional rights over surrounding land retained by the transferor; and
- (3) easements of intended use, which are implied into a transaction to give effect to the intentions of the parties for the use of the transferred land.

4.63 While each of these doctrines operates in slightly different circumstances, there will often be overlap between them. They are closely linked with the functions of section 62 of the Law of Property Act 1925, and the doctrine of non-derogation from grant.

4.64 The implication of easements can be an important protection for sellers and buyers, ensuring that land remains usable and that bargains are not subverted by inadvertence. But there are concerns about the complexity of the law here, arising from its piecemeal development in the case law. We asked a series of questions on whether or how the different methods of implication should be reformed.

4.65 38 consultees responded to the first part of the question at paragraph 4.149 of the CP, all of whom expressed support for reforming this area of the law.

***The responses***

4.66 The majority of consultees agreed unreservedly that there is a need for reform in this area; the current law was described as “unnecessarily complex” by the Treasury Solicitor’s Bona Vacantia Division and “much too vague for practical use” by Jeffrey Shaw (Nether Edge Law). The London Property Support Lawyers Group identified further problems with the current law:

Implied easements can seriously adversely affect both the value and the potential use of land, and are not necessarily easily discovered by the prospective purchaser of that land. He may be caught unawares. For this reason we agree that the current rules on implied grant/reservation would benefit from reform. Ideally, the categories of implied easement need to be reduced to a minimum.

- 4.67 Similarly, Gregory Hill (Barrister, Ten Old Square Chambers) noted that while most property transactions expressly excluded the application of these doctrines, this was not a convincing reason to avoid reform:

As to 4.149(1), I agree emphatically that the current rules for implication of easements are unnecessarily complicated. As a practical matter the main defect, the distinction between implied grant and implied reservation, *Wheeldon v Burrows* and “necessity”, is usually eliminated by conditions of sale: Standard Conditions, fourth edition, condition 3.4; Standard Commercial Property Conditions, second edition, condition 3.3; there were similar but not identical provisions in, for example, the Law Society’s General Conditions 1980 condition 5(3), and in the National Conditions, 20<sup>th</sup> edition, condition 20 – and I do not recall ever having seen a contract in which the relevant condition was disapplied and the general law reinstated. I do not suggest that the widespread use of such conditions makes reform superfluous: to quote (from memory) Maitland on the pre-1926 law of inheritance, “you do not prove that a law is good by showing that all sensible men contrive to evade it”.

- 4.68 Dr Martin Dixon (Queens’ College, University of Cambridge) commented:

*Wheeldon* is of similar ilk to section 62 but born of the non-derogation principle. I would be in favour of a new rule, based on reasonable use, springing from non-derogation that covered this situation and “common intention” cases (and section 62?). Query, however, whether a way should be found to include reserved easements under this new statutory rule.

- 4.69 However, one consultee was more cautious in his agreement; although he supported the need for reform, HHJ Ian Leeming QC warned:

This area would benefit from modest reform, mainly by way of clarification accompanied by some simplification. It would be very unwise, in my view, to address the problem of multiple bases of grounding implication by some “elegant” but inappropriate reform. The reduction of the bases to a single general principle, or to just a few general principles, is academically attractive, but is unlikely to serve the purpose of the reforms well.

- 4.70 There were also reminders, particularly from the Church Commissioners for England, of the usefulness of implication and its importance in preventing land from, for example, being landlocked. Any reform should not diminish the scope or effectiveness of the law.

### **Conclusion**

- 4.71 We recommend reform of the law of implication, in line with the views of consultees; we discuss this in paragraph 3.11 and following of the Report. The objective of our recommendation is to preserve the useful elements of the current law, while bringing together in one statutory provision the different grounds for implication.

**We invite consultee's views on the following:**

**(2) Whether they consider that it would be appropriate to replace the current rules; (a) with an approach based upon ascertaining the actual intentions of the parties; or (b) with an approach based upon a set of presumptions which would arise from the circumstances.**

**(3) Whether they consider that it would appropriate to replace the current rules with a single rule based on what is necessary for the reasonable use of the land.**

**[paragraphs 4.149(2) and (3) and 16.14(2) and (3)]**

**We invite consultees' views as to whether it would be desirable to put the rules of implication into statutory form.**

**[paragraphs 4.150 and 16.15]**

- 4.72 These questions followed on from the question at paragraph 4.149(1) on whether or not the law on implication of easements should be reformed.
- 4.73 Consultees were invited to consider which of the four approaches to reforming implication, outlined between paragraphs 4.107 and 4.148 of the CP, would be the most appropriate. While options (2)(a), (2)(b) and (3) at paragraph 4.149 would involve introducing a new regime for implication, the option at paragraph 4.150 would simply codify the current law with minor modifications. As this series of questions was designed to promote an open debate with consultees and tease out their views on the various options presented, we did not express any strong preferences as to which alternative, if any, should be pursued.
- 4.74 One further option was presented to consultees between paragraphs 4.122 and 4.131 of the CP where we suggested that the rules of implication might be based on contract law principles. We noted that in the law of contract, terms are implied on the basis of necessity; on that basis the courts might imply easements in an individual transaction, or could operate a rule based on standardised implied terms, implying certain easements into specified categories of transaction. A number of consultees chose to comment on this approach as well as on those listed in the question itself.
- 4.75 42 consultees contributed to this discussion and their preferences were divided equally between the options listed; none attracted majority support.

### ***The responses***

#### **RESPONSES TO THE OPTIONS FOR REFORM**

- 4.76 Consultees offered numerous comments on the alternative options for reform.
- 4.77 Implication based on the actual intentions of the parties was the least popular; the most common problem highlighted by consultees was application of this rule to transactions (particularly of registered land) which had occurred a long time in the past. For example, Roger Pickett (Diocese of Southwark) said:



Although we accept that relying on the intentions of parties is sound in principle, we nevertheless believe that with the passage of time (and an ever greater reliance on the registration of property leading to the lack of necessity for abstract of title) the actual intentions of parties will become lost. This leads us to believe that relying on the intentions of parties is not a good long-term solution.

The consequences of trying to ascertain the actual intention of parties were further explored by Addleshaw Goddard LLP:

We note that most contractual arrangements which are litigated tend to be both comprehensive and relatively recent, thereby facilitating the task of ascertaining the parties' actual intentions. Property documents may well be older and more succinct. Any search for the parties' intentions could rapidly sink into a search for imputed intention, which the courts in other contexts (*Stack v Dowden*) seem keen to avoid.

Mr Justice Lewison argued that the actual intention approach contradicted the normal contractual principles of interpretation, which would otherwise be used to interpret a grant or reservation:

I would be concerned if the Commission adopted the "intention-based rule" discussed in paras. 4.108 et seq. The proposal looks to the *actual* intention of the parties. The whole theory of the interpretation of contracts in England & Wales is based on the objective interpretation of the contract. The actual intention of the parties is generally irrelevant. What is relevant is the intention imputed to reasonable persons in the position of the parties (or, in the modern formulation) what the document would mean to a reasonable reader with the background knowledge of the parties. This principle applies as much to the implication of terms as to the interpretation of express terms.

- 4.78 In contrast, a substantial number of consultees preferred option (2)(b) at paragraph 4.149 of the CP, whereby there would be a set of rebuttable presumptions implying easements into a transaction. Gerald Moran (Hunters, Solicitors; City of Westminster and Holborn Law Society) noted that such an approach was capable of "reducing uncertainty", while DLA Piper UK LLP explored how this option should operate in greater detail:

We consider that there would be severe evidential difficulties in ascertaining the actual intentions of the parties at the time of the relevant transaction. Very often the relevant party simply will have not considered the point. A set of presumptions are therefore useful. A presumption that parties intend that land transferred should have a right of adequate access should be rebuttable where the transferor did not have an interest in sufficient land in an appropriate location to provide such access in a manner approved by the relevant highways authority where appropriate. As well as creating a presumption of the grant of rights of access, it should be presumed that the parties intended to create a right to use existing utility services benefiting or

potentially benefiting the land transferred or retained.

Similarly, the Charities' Property Association expanded on which elements of the present law these presumptions should be based:

Though there are arguments both for and against reforming the present law on this point, we believe that, on balance and in the interests of clarity, there should be a set of presumptions incorporating *Wheeldon v Burrows*.

- 4.79 However, some consultees warned that identifying which presumptions to use under this option would be a difficult and controversial process; the London Property Support Lawyers Group commented that this approach will lead to a “vigorous and lengthy debate” which “may delay implementation of the change”. More significantly, other consultees observed that the end result would be similar to a rule based on reasonable user of the land. Land Registry explained that:

We are not sure that there would, in practice, be any significant difference between an approach based upon a set of presumptions arising from the circumstances and an approach based on what was necessary for the reasonable use of the land. Would not the easements such presumptions were designed to create be those necessary for the reasonable use of the land?

- 4.80 Some consultees expressed support for an approach to implication based on the contract law doctrine of implied terms. The National Trust advocated such an approach:

Of the various options explored in the paper, we favour the contractual approach, combining individualised and standardised terms, with provision for presumptions to be rebuttable where there is *clear* evidence to that effect. That would, though, need to be seen in the context of our earlier comments about the need to take a more restrictive view than courts have tended to in the past about the scope and extent of implied easements.

- 4.81 David Halpern QC (Barrister, 4 New Square Chambers) also supported this alternative, though he added a proviso that there could be difficulties in applying contractual principles to the creation of proprietary rights:

One advantage of a test based on implied terms is that the test is well understood by lawyers and there is a large body of existing case-law in contract on which one can draw. A second advantage is that it maintains the balance between freedom of contract and judicial or statutory intervention. I feel instinctively uncomfortable about the suggestion of a rule of necessity rooted in policy (para. 4.133). Just as contract law tends to favour rules of construction over rules of law (eg *Photo Productions v Securicor* [1980] AC 827 at 842-3 and *Basingstoke BC v Host Group* [1988] 1 WLR 348 at 354-5), so one can achieve the desired policy by saying that, the more unreasonable the result, the more the court will strive to construe the transaction or imply terms into it so as to prevent injustice. This has an in-built

flexibility which avoids the need to choose between a *de minimis* rule and a “reasonable use” rule.

However I do acknowledge that there is a real problem with a contractual approach, and that is that property interests affect successors in title who might be entirely ignorant of the factual matrix at the date of the contract.

- 4.82 The tension between implicitly created property rights and the otherwise personal nature of contracts was also the subject of comment by Amy Goymour (Downing College, University of Cambridge):

When contractual terms are implied, they affect only the two parties to the contract; where an easement is implied, it will (subject to schedule 3 para 3 LRA 2002) normally bind third parties who acquire the servient land. Nonetheless, because the contractual rules on implied terms are so strict, little problem seems to be imposed on this front by translating the contractual rules to property law. More significantly, the creation of easements serves not only to reflect the spirit of the parties’ bargain but also has implications for the use of land. Unlike in the purely contractual context, implied easements need to take account of public policy concerns in order to render land usable. Probably therefore the implication of easements ought to be somewhat wider than the implication of contractual terms to reflect this difference.

- 4.83 As we note in the Report at paragraphs 3.35 and 3.36, further discussion about the contractual rules as a potential basis for implication raised additional concerns. It was felt that rules designed for a very different context would yield results different from those found in the current law, and that too much of value in the current law would be lost.

- 4.84 The option at paragraph 4.149(3) of the CP, a test based on what is necessary for the reasonable use of the servient land, received significant support from practitioners and other consultees, though again this was short of a clear majority. The most commonly cited advantage of this option was its flexibility, since what was reasonable for the use of land could change naturally over time, in contrast to a set of presumptions which might later require statutory amendment. The London Property Support Lawyers Group discussed these issues at length:

We would support route (3) as the easier test to apply. It would provide the minimum safety net, but not create uncertainty. It would be responsive to changing needs over time (which (2)(b) might not be) in that what is necessary might vary – for a transfer granted now it might be necessary to have a right to lay telephone cables, whereas for a transfer granted in 2040, the necessary service might be satellite phone services (these having replaced normal telephone services).

The Conveyancing and Land Law Committee of the Law Society was also in favour of this option:

We feel that it would be more appropriate to replace the current rules with a single rule based on what is necessary for the reasonable use of the land. We can envisage that this will lead to argument over what is 'necessary' and which use is 'reasonable' however we feel this option is more preferable to the alternatives put forward as it would be the easiest to apply. It would also be capable of being responsive to change over the years.

- 4.85 There was some disagreement over what theoretical underpinning such a "reasonable use" test should have. Dr Martin Dixon (Queens' College Cambridge) noted that it should be very similar to that of the current rules of implication:

I would be in favour of a new rule, based on reasonable use, springing from non-derogation that covered this situation and "common intention" cases (and section 62?).

- 4.86 An alternative view of the reasonable use test was presented by the Treasury Solicitor's Bona Vacantia Division, who argued for an approach expanding the current operation of section 62 of the LPA 1925:

We agree that the existing plethora of statutory and common law rules should be replaced with a single statutory rule based upon what is necessary for the reasonable use of the land. In our view this could be best achieved by amending or replacing section 62 of the 1925 act with a new statutory provision that applies both to the land sold and to land retained. We would suggest that there should be deemed to be included such rights of way, support, drainage, services, (etc) as were currently being exercised de facto over the land sold and the land retained, and making it clear that it is now the only rule of construction for the creation of an implied easement.

- 4.87 However, some consultees cautioned about aspects of this test. Amy Goymour (Downing College, University of Cambridge) cautioned that the "reasonable use" test could affect the bargaining power of parties to a transaction:

The "reasonable use" rule would be more workable than the "de minimis" rule as the sole means of implying easements. However, it suffers from the defect of being blind to the parties' actual bargain. This could allow parties too easily to escape from bad bargains by acquiring an easement for nothing (eg a parking space) when they could (or should) have bargained and paid for it (again see Lord Rodger in *Moncrieff*). This argument is, of course, not watertight because if the law is changed, the parties would not need to bargain for such rights. I would be nervous, however, of encouraging such a move and would favour an approach based on the parties' intentions.

Another concern was raised about the timing of the "reasonable use" test; would it refer to what was "reasonable use" at the time of the transaction or at the point at which the easement is claimed? Consultees warned that the rule would have unfair consequences on the vendor in a transaction if the rule referred to "reasonable use" at any time other than when the transaction took place. Martin Pasek said:

I think reform in this area could be beneficial and I favour a single reasonable necessity rule, but with qualification. Reasonable use of the land would mean *at the time the deed was made* given the condition, character of the land and the surroundings at that time. It should not be used to gain, say, vehicular rights of way by implication into a deed for the sale of a paddock, which has now gained planning consent. There would, I think, be HRA 1998 implications here too, if that were possible.

- 4.88 A few consultees criticised this approach. The main concern was that “reasonable use” would be too vague a concept and so often lead to costly litigation. HHJ Ian Leeming QC succinctly summarised this view:

The suggestion at sub-paragraph (3) is no better [than (2)]: it looks elegant but is calculated to lead to uncertainty, unnecessary disputes and injustice in individual cases that the present rules (admittedly complex) would be likely to avoid.

#### PUTTING THE EXISTING RULES OF IMPLICATION INTO STATUTORY FORM

- 4.89 At paragraph 4.150 we presented an alternative to reform: statutory codification of the current law with some minor amendments, as discussed between paragraphs 4.142 and 4.145 of the CP. Responses to this approach were mixed, as a number of consultees interpreted this as questioning whether the previously listed alternatives should be enacted in statutory form, instead of as a separate option in itself. As a result, it is difficult to assess the support that this option received.

- 4.90 However, a few consultees did support codifying the current rules on implication, though not all of these consultees were satisfied with the form of codification proposed at paragraph 4.144. HHJ David Hodge QC (Civil Committee of the Council of Circuit Judges) favoured this option:

We support the approach outlined in para 4.142 of modifying and codifying the current legal rules governing the implication of easements by the creation (subject to express contrary intention) of the three statutory rules of implication outlined in para 4.144 ... .

- 4.91 Currey & Co argued that this was a necessary reform, but would need to be approached carefully:

Of all the topics discussed in the paper, we would suggest that the present collection of mainly judge made rules cries out for modification and codification. On the other hand, as implication by its very nature is a “fallback position”, we would suggest that the implications need only be codified in rudimentary form, with the minimum necessary to safeguard the rights of parties which have been omitted through ignorance or inadvertence.

Wragge & Co LLP supported this choice but doubted the form of codification which was proposed:

We would support the proposal to codify the current law, although we do not agree with the proposal at para. 4.144(2) that the rule in *Wheeldon v Burrows* should be extended to any easement necessary for the reasonable enjoyment of the *retained* land for the reasons set out above.

#### OTHER OPTIONS

- 4.92 Finally, a few consultees recommended alternative options for reform. Michael Croker, Miriam Brown and Kevin Marsh suggested a model which contained elements of compulsory purchase and which drew on experience from New Zealand. Their model was based on the argument that while a limited form of implication should remain when the servient land is still owned by the party to the transaction into which the easement is implied, a different approach is needed where this is not the case:

Where ... the servient owner has changed (whether for value or not), we would not permit the easement to be implied. Instead we are attracted to the solution enacted last year in New Zealand. Sections 326 to 331 of that jurisdiction's Property Law Act 2007 provide for a court to order remedies in the event that land is landlocked. These remedies include compensation for the acquisition of the necessary right. Moreover the provisions operate against any adjacent landowner not just the original servient owner. This may be useful where the servient owner has constructed a building that renders access to the landlocked land impossible on his parcel.

Unlike the limited implications proposed in the CP, the NZ legislation takes the view, correctly in our opinion, that landlocked cannot just mean impossible physical access but also the inability to access necessary services. Since the proposals in the CP involve a court intervention to determine the outcome in any event, it seems sensible to us to provide a wider framework. Clearly such proceedings will involve costs and we would expect these to be recoverable from those who provided negligent advice.

Another approach was offered by Gregory Hill (Barrister, Ten Old Square Chambers) which mixed elements of the existing test:

I have a suggestion for reform, which however does not exactly follow any of the proposals in 4.149(2) and (3), and which I would characterise as "minimalist" rather than "interventionist" in that it is an attempt to get a sensible result which is close to, but I hope simpler than, what actually happens at present. It seems to me that *Wheeldon v Burrows* is right to look at what has been going on in the past, and that *Pwllbach Colliery v Woodman* is also right to look at anything which both sides actually contemplate is going to happen in the future. I suggest, therefore, that in the absence of other provision in the documentation, the default position should be that both the granted land and the retained land should be entitled, after severance, to the benefit (and subject to the burden) of the use of (i) all actually existing facilities, including rights of support for existing buildings, and (ii) any additional facilities which are reasonably

appropriate, to the use previously made of the land – ie making “*continuous and apparent*” and “*reasonably necessary*” into alternative and not cumulative requirements, and applying them “both ways” – plus (iii) any additional facilities which are reasonably appropriate to any new use of either parcel which is actually in the contemplation of both parties at the time of the transaction – ie *Pwillbach* applied “both ways”, (and with due regard to the “*negotiations inadmissible*” principle of interpretation, at least to the extent of ignoring matters on which the parties’ positions differ – 4.89-90.) but (iv) no rights of light or air to any windows or other apertures on either the granted or the retained parcel should arise unless expressly specified; this follows the approach to light adopted in both the current sets of standard conditions, and extends it to retained land, which seems to me to be right as the “default” if granted and retained land are otherwise to be treated similarly, though I acknowledge that in the real world vendors would be likely to want to adopt the current position under the conditions, ie Rights of light reserved but not granted.

### **Conclusion**

- 4.93 We received a wide range of opinions on the various options presented, from which it emerged that, while simplification is seen as a virtue, a number of the elements of the current law remain very important. As we discuss in greater detail at paragraph 3.42 and following of the Report, we have recommended a test based on a modified form of what is necessary for the reasonable use of the land at the time of the transaction into which the easement would be implied. This new statutory form of implication will capture many of the features that consultees argued to be the most valuable, as it will go beyond the test suggested in the CP by including a non-exhaustive list of factors to be used in assessing reasonable necessity. The test will therefore have the advantage of flexibility while retaining certainty by being rooted in the current law.
- 4.94 As we noted above, one response made a suggestion which departed some way from the current law. The scheme proposed by Michael Croker, Miriam Brown and Kevin Marsh would allow the courts to create easements between any adjoining land owners to ensure reasonable access in exchange for compensation paid to the servient land owner(s). Although such a scheme has operated in New Zealand since 1 January 2008, we do not think that it would be appropriate here. First, New Zealand has a significantly different pattern of land use to that of the UK and takes a different approach to its control: for example, the New Zealand Resource Management Act 1991 places stronger limitations on the use of land than does the UK’s planning system. Secondly, the New Zealand approach could be said to amount to a scheme of compulsory purchase of rights between private land owners. A scheme that involved the payment of compensation for implied easements would substantially depart from the current law; the function of implication as a “safety-net” would be undermined if necessary easements could only be obtained at a cost. Finally, such a scheme would go further than rectifying mistakes in transactions, as it would be capable of affecting any adjoining land owner; again, this is well beyond the present function of implication.

**We provisionally propose that the current law of prescriptive acquisition of easements (that is, at common law, by lost modern grant and under the Prescription Act 1832) be abolished with prospective effect.**

**[paragraphs 4.174 and 16.16]**

**We invite the views of consultees as to:**

**(1) whether prescriptive acquisition of easements should be abolished without replacement;**

**[paragraphs 4.193(1) and 16.17(1)]**

- 4.95 At present, the law of prescription is widely considered by practitioners and academics to be unnecessarily difficult; we discuss the different, and overlapping methods of prescription at paragraph 3.71 and following of the Report.
- 4.96 Under each of these methods the use of the land has to meet certain conditions; it must have been enjoyed without force, stealth or permission, and it must be a use that is capable of taking effect as an easement. The three methods differ, however, in their timing requirements and other details. We discussed the current law on prescription between paragraphs 4.151 and 4.171 of the CP, and concluded that it operates in an unsatisfactory manner. We proposed abolishing the existing rules of prescription as a first step in a wider discussion on reform of this doctrine.
- 4.97 The CP then went on to ask whether the current law of prescription could be abolished without replacement. We discussed the arguments in favour of such a proposal between paragraphs 4.175 and 4.177 of the CP, but concluded that this might not be appropriate.
- 4.98 42 consultees responded to these two questions, with the majority commenting on them jointly. While endorsement for changing the current system of prescription was near universal, there was very little support for outright abolition without replacement.

### ***The responses***

- 4.99 The majority of consultees strongly advocated abolition of the current rules of prescription. Many of the responses, including that of Land Registry, expressly supported paragraph 4.173 of the CP which stated that “the case for doing something with the current mixture of uncertainty, duplication and overlap is quite overwhelming”. Other consultees described the present law of prescription as “disgracefully complicated” (Gregory Hill (Barrister, Ten Old Square Chambers)), elements of which are “archaic” (The Chancery Bar Association) and even “dangerous” (Andrea Fusaro (University of Genoa)). In addition, HHJ David Hodge QC (Civil Committee of the Council of Circuit Judges) highlighted a recent decision of the Court of Appeal which reinforces the need for reform in this area:



We note that in the recent case of *Housden v Conservators of Wimbledon & Putney Commons* [2008] EWCA Civ 200, decided on 18<sup>th</sup> March 2008, Mummery LJ (who delivered the leading judgment, with which both Carnwath and Richards LJJ agreed) described the law of prescription (at paragraph 32) as a notoriously difficult branch of English land law; and (at paragraph 72) wished the Law Commission well in its deliberations, observing that the need for a simpler law of prescription had become of more, rather than less, concern with the recent expansion of home ownership and the increasing pressures on land available for development.

Dr Martin Dixon (Queens' College, University of Cambridge) was similarly unequivocal in his support for this proposal:

The current law is a mess, with the Prescription Act 1832 the worst offender. Statutory reformulation of the entire law of prescription would be most welcome, carrying with it the abolition of all forms of common law prescription – subject as ever to transitional rules.

- 4.100 However, nearly all of the consultees who responded to these questions expressed discomfort at the idea of being left with no means of legally recognising the long enjoyment of a right. As a result, support for abolition was, in most cases, conditional on the introduction of a replacement method of prescription; outright abolition was described as “neither desirable or acceptable” (Jeffrey Shaw (Nether Edge Law)) and as not being “practical” (Dr Peter Defoe, calfordseaden LLP). DLA Piper UK LLP summarised the importance of the law’s reflection of public perceptions of rights to explain why outright abolition was unacceptable:

The law functions best when it recognises that in the vast majority of circumstances, people do not carefully record and define their relationships with their neighbours. The system of acquisition by prescription recognises the equity of enforcing obligations which a reasonable person would expect to be enforced and which are created by day to day conduct. Evidence of conduct is far easier to obtain than evidence of original intentions.

Similarly, the London Property Support Lawyers Group said:

We support the prospective abolition of the current law (which is muddled and unnecessarily complicated). However, we do believe that a simplified form of prescription has a valuable role to play where rights are granted, or at least acquiesced in, informally. It is also a useful tool to cure historic conveyancing defects.

- 4.101 Gregory Hill (Barrister, Ten Old Square Chambers) noted another factor in favour of retaining some method of prescription:

I agree that some form of prescription is still required, for the reasons at 4.178-183. I think there is an additional point to be made, that the registration system actually increases the importance of having a system of prescription. This may at first sight appear paradoxical, but the reason is that easements arising by implication on dispositions arising out of common ownership are – *ex hypothesi* – not fully documented; under the unregistered system, there was a strong tendency to preserve, with the current muniments of title, copies or abstracts of older documents even when they were “behind the root of title”, so that if or when a dispute arose it could often be shown at least that the properties had been in common ownership and that a disposition had been made on which an easement would have arisen by implication; but when the properties are registered (whether first registration was before or after the relevant disposition), and *a fortiori* when there have been registered disposals of each of them, it is much less likely that the original common ownership will be disclosed by anything on the register – and if a disposition creating an easement by implication cannot be demonstrated, it is all the more important that prescription be available to support an entirely justified use.

- 4.102 In contrast, the Conveyancing and Land Law Committee of the Law Society based their support on a lack of satisfactory alternatives, which could lead to increased litigation:

The law as it is at present is confusing and complex. Whilst, we would support the abolition of prescription, we do not think that existing principles, eg proprietary estoppel, would replace the function of prescriptive acquisition as it would be difficult for the parties to ascertain their rights without involving the courts.

- 4.103 A few consultees argued that at least some elements of the present law of prescription should be retained. However, there was little consensus on what was worth keeping. Trowers & Hamlin favoured the doctrine of lost modern grant:

The doctrine of lost modern grant as developed by the courts seems to us to be very satisfactory; the date of legal memory could be brought up to date as formerly (say 60, 40, or 20 years ago instead of 1189), and then the common law could be reformed rather than abolished. The Prescription Act should be repealed.

HHJ Ian Leeming QC also noted the advantages of keeping one of the features of lost modern grant:

I agree, but care should be taken to avoid the “next before action brought” trap being merely repeated in the new provisions. This is the type of situation where at present “lost modern grant” has to come to the rescue.

- 4.104 In contrast, the Treasury Solicitor’s Bona Vacantia Division advocated retaining the Prescription Act 1832:

We agree that the current law of prescriptive acquisitions of easements at common law and by the doctrine of lost modern grants should be abolished. With regard to the Prescription Act 1832, we would suggest that this should be retained, but with substantial amendment.

- 4.105 Finally, a very small minority of consultees favoured outright abolition of prescription, but there was no consensus on which doctrines, if any, could be used to replace the role it currently plays. Addleshaw Goddard LLP based their reasoning on the availability of proprietary estoppel, which they argued could be used as a replacement:

We believe that the doctrine of proprietary estoppel would provide sufficient safeguards in those instances where prescriptive rights are currently relied upon.

### ***Conclusion***

- 4.106 As we discuss at Part 3 of the Report, we have recommended the abolition of the current law on prescription and the creation of a new statutory scheme. In the light of consultees' comments we take the view that such reform would be strongly welcomed by practitioners, academics and the general public. We discuss the scheme we recommend at paragraph 3.115 and following of the Report and later in this Analysis. Although we considered the capacity of other existing legal doctrines to replace the functions played by prescription, we have concluded that they would not be suitable; we examine this issue further below along with the responses to paragraph 4.193(3) of the CP.

### ***Other related issues***

- 4.107 A number of consultees noted that transitional provisions will need to be carefully drafted if the current laws are to be abolished. We have taken this issue into consideration and we discuss our recommendations on transitional provisions at paragraphs 3.179 to 3.187 of the Report. As seen in clause 18 of the draft Bill, prescriptive periods which have been completed before our proposals come into force will continue to be subject to the pre-reform rules, while a prescriptive period that includes, or ends on, the date of commencement of legislation will be subject to the new law.
- 4.108 Ian Williams (Christ's College, University of Cambridge) cautioned that prescription might be extended too widely if it became possible to acquire easements that involve exclusive possession:

If prescriptive acquisition is to continue, it might be prudent to bar the acquisition of easements which seem to entail exclusive possession of the servient land, if the Commission decides to implement their proposed definition of easements. There are obvious difficulties in ascertaining whether a use of land amounts to exclusive possession for the purposes of adverse possession of the relevant portion of the servient land or merely prescriptive acquisition of an easement over it. The current rules of easements would tend towards exclusive possession only being relevant for adverse possession, but that will no longer be the case if the complete set of changes proposed in the consultation paper are enacted.

As we explain at paragraph 3.188 and following of the Report, we no longer recommend the recognition of rights that grant exclusive possession as easements.

4.109 The Chancery Bar Association expressed a concern about the registration rules which would apply to any new law of prescription:

We consider that some form of prescriptive acquisition is needed. This is provided that there is some system for securing proven prescriptive rights on to the register of title of both dominant and servient tenements (or in the case of unregistered titles cautions against first registration) as quickly as possible so that any registered titles become the “mirror” of the rights both for and against those titles.

Our recommendations for the reform of the law of prescription will have no effect upon the registration of easements acquired by prescription. It will remain the case that dominant owners are able to apply for registration and that, pending registration, prescriptive easements will be overriding interests subject to the terms of paragraph 3 of schedule 3 to the Land Registration Act 2002.

**We invite the views of consultees as to:**

**(2) whether certain easements (such as negative easements) should no longer be capable of prescriptive acquisition, and, if so, which;**

**[paragraphs 4.193(2) and 16.17(2)]**

- 4.110 Negative easements are those which prevent the servient owner from taking certain actions on his or her own land, such as building in a certain place or removing a structure – by contrast with positive easements, which are rights to do something on another’s land. Only a limited number of negative rights have been recognised as being capable of taking effect as easements: rights to light, rights of support, and rights of water or air flowing in defined channels. Such negative easements are considered a historic anomaly, but they have nonetheless been upheld as valid in recent case law. Aside from their negative character, such easements are generally subject to the same rules as positive easements, including the methods through which they can be acquired by prescription.
- 4.111 Rights to light are a particularly important sub-species of negative easements. They give the dominant owner the right to receive light through some defined aperture in a building. This prevents the owner of the neighbouring servient tenement from constructing anything which would block the light. Rights to light play an important role in the urban development context; prescribed rights to light can be used to prevent the construction of buildings on servient land. Unlike negative easements generally, rights to light are subject to special rules for prescription under section 3 of the Prescription Act 1832, and putative servient owners are able to prevent prescription through registering an objection under the Rights of Light Act 1959.
- 4.112 There was little consensus among the 31 consultees who responded to this question, though there was a slender majority against imposing any limitations on which easements could be acquired through prescription.
- 4.113 Negative easements were also the subject of a separate consultation question at paragraph 15.42 of the CP, where we asked whether it should still be possible to create negative easements after the implementation of land obligations.

***The responses***

- 4.114 A number of consultees felt that it should be impossible to prescribe negative easements. However, views about which negative easements should be affected and the justifications for doing so varied widely. Consultees who opposed the retention of any scheme of prescription, such as Addleshaw Goddard LLP, argued that if some method of prescription were still possible, it should be heavily limited. Many consultees were cautious: for example, the National Trust warned that the benefits of preventing prescription for negative easements “would need to be weighed against the greater complexity in treating different categories of easements differently”.

- 4.115 Other consultees supported only the prevention of prescription for rights to light. The most common argument made in favour of this approach was based on the positive experience of certain Australian states that have recently taken a similar step. Notably, a number of consultees who shared these views were practitioners, including the Chancery Bar Association. However, Gregory Hill (Barrister, Ten Old Square Chambers) provided a counter argument:

Much more difficult is the question whether prescription should be available for rights of light; on the whole, I suspect that the world at large is sufficiently aware that “a window may have ‘ancient lights’ if it has been in position long enough” for it to be impolitic to disappoint expectations founded on that sort of belief.

In addition, B S Letitia Crabb (University of Reading) questioned the difficulties that would be involved in any reform of rights to light:

There would need to be a very, very careful enquiry into the impact of abolishing prescriptive acquisition of easements of light. To what extent do building regulations/planning consents take into account the amount of daylight required for different types of premises? While prescription gives a right to a degree of light only, could this be more in some circumstances (eg where there is a special use), than such public regulation? While the strong protection to rights of light may have been devised in a darker age, is it even now appropriate to force more premises into artificial light?

- 4.116 On the other hand, a higher proportion of consultees thought that there would be no benefit in applying different rules of prescription to different forms of easements. A number of these consultees, including some practitioners and representative bodies, highlighted the fact that prescriptive acquisition of rights to support and light play an important role in practice: for example, Network Rail emphasised the importance of such rights for its rail network. Meanwhile, the Agricultural Law Association suggested that restriction of what can be prescribed focused on the wrong issue:

There is a place for prescriptive acquisition for both positive and negative easements – it is the vertiginous complexity of the present law which needs to be reformed.

Similarly, HHJ David Hodge QC (Civil Committee of the Council of Circuit Judges) thought that measures short of an absolute restriction would be an appropriate solution to the problems identified with negative easement in the CP:

We would not favour a system whereby certain easements (such as negative easements) should no longer be capable of prescriptive acquisition; but, because of the peculiar difficulties associated with actual interference with such easements, we would favour an extension of the existing statutory scheme for the notional interference with inchoate rights of light to all negative easements, and particularly to rights of support.

### ***Conclusion***

- 4.117 We have not made any recommendations limiting the types of easements which can be acquired by prescription. There was insufficient support from consultees, and we do not think that it would be appropriate to recommend reform specific to rights to light as part of this project. This is a general project. Rights to light form part of a delicate balance in the urban development context, and are a highly specialised field of practice. This is a topic that could benefit from separate review in the future.
- 4.118 We have not recommended the introduction of any new methods of interference or objection for prescription of negative easements; it will still be open for the putative servient owner to normalise the basis on which some negative right is being enjoyed against their land by the putative dominant owner through giving the latter consent. In respect of rights to light, it will still be possible to register objections under the Rights of Light Act 1959. We discuss notice of objection to prescription below in this Analysis in relation to the proposal at paragraph 4.221 of the CP.

**We invite the views of consultees as to:**

**(3) whether existing principles (for example, proprietary estoppel) sufficiently serve the function of prescriptive acquisition.**

**[paragraphs 4.193(3) and 16.17(3)]**

4.119 This question is closely connected with the first option offered at paragraph 4.193(1) of the CP: the abolition of the current rules of prescription without replacement.

4.120 At present, easements can be created through the equitable doctrine of proprietary estoppel. In order to establish such a right, the following elements need to be established by the putative dominant owner of the easement:

- (1) the putative dominant owner was encouraged or induced into believing that he or she had a right over the putative servient owner's land;
- (2) the putative dominant owner relied on this belief to his or her own detriment;
- (3) the putative servient owner was aware of this reliance; and
- (4) the putative servient owner unconscionably denied the existence of the right relied upon.

Even if all of these elements are present, the remedy is in the discretion of the court, and the order made will depend on what is found to be appropriate in the circumstances. The grant of an easement is not inevitable; see for example *Crabb v Arun District Council* [1976] Ch 179, and *Megarry & Wade, The Law of Real Property* (7th ed 2008) ch 16.

4.121 We discussed between paragraphs 4.187 and 4.192 of the CP how the results of this doctrine will sometimes overlap with prescription. However, we concluded that the doctrines are fundamentally different, and that proprietary estoppel would not be an appropriate substitute if prescription were to be abolished without replacement.

4.122 32 consultees responded to this question and all but one rejected the possibility of relying on proprietary estoppel or any other legal doctrine to replicate the functions of prescription.

***The responses***

4.123 Consultees were near unanimous in their disagreement with the suggestion that proprietary estoppel or other legal doctrines might be capable of acting as an alternative for prescription. Most consultees noted that these alternative doctrines were underpinned by different principles compared to prescription. For example, Amy Goymour (Downing College, University of Cambridge) said:



I do not consider that functional equivalents of prescription can currently be found in other areas of the law. Furthermore, other doctrines, such as proprietary estoppel, have wholly different rationales. Estoppels arise from unconscionable conduct and protect expectations and/or reliance. Prescription is very different. Whilst in some circumstances, it might overlap with estoppel, prescription operates to regularise and legitimise long-standing practice, something which is valuable in its own right. Long use deserves recognition as a mode of creating easements in its own right.

Dr Martin Dixon (Queens' College, University of Cambridge) made a similar point in the specific context of proprietary estoppel:

In this regard, proprietary estoppel does not fit. Estoppel is a remedy for unconscionability, it does not validate long use. Estoppel can lead only to a personal remedy and perhaps these land use issues should not be left to the court's discretion.

- 4.124 Consultees also highlighted the uncertainty which proprietary estoppel can cause; it is an equitable doctrine, and the court has a wide discretion as to which remedy, if any, is granted. DLA Piper UK LLP described any extension of the doctrine of proprietary estoppel as a "retrograde step". The Chancery Bar Association held a similar opinion:

We consider proprietary estoppel to be an unsatisfactory way of either asserting or protecting easements which have been acquired by some form of use. Such a means of acquisition leaves too much to chance, to historic evidence, and ultimately the discretion of the court or, if within his jurisdiction, the Land Registry adjudicator.

In addition, Ian Williams (Christ's College, University of Cambridge) noted that:

The remedial discretion in proprietary estoppel renders it generally unsuitable for providing the long-term planning which the law of easements does so well.

- 4.125 In contrast, Addleshaw Goddard LLP argued that prescription should be abolished without replacement as "proprietary estoppel would provide sufficient safeguards in those instances where prescriptive rights are currently relied upon."

### **Conclusion**

- 4.126 We agree with consultees that existing legal doctrines such as proprietary estoppel would not serve the same function as prescription, and so we have not taken this suggestion any further. As seen at Part 3 of the Report, we have instead recommended the implementation of a new statutory scheme of prescription.

**We provisionally propose:**

**(1) that it should be possible to claim an easement by prescription on proof of 20 years' continuous qualifying use;**

**[paragraphs 4.221(1) and 16.18(1)]**

- 4.127 The existing methods of prescription involve several different time periods over which qualifying use must take place in order for it to give rise to an easement. For example, prescription by lost modern grant requires at least 20 years of continuous use while prescription under the Prescription Act 1832 requires either 20 or 40 years. But 20 years is the period generally required.
- 4.128 We discussed the period that should be required under a new statutory scheme of prescription at paragraphs 4.221 and 4.222 of the CP. We concluded that a single period of 20 years' qualifying use would be the most appropriate for the proposed scheme, so as to preserve an element of continuity with the methods of prescription which we proposed to abolish.
- 4.129 36 consultees responded to this questions and a significant majority agreed that we should introduce a single prescription period of 20 years.

***The responses***

- 4.130 Most consultees agreed that a 20 year period of continuous use was suitable for our proposed new method of prescription. Comments included that such a length of time was "sensible" (Amy Goymour (Downing College, University of Cambridge)) and that there was not "any sufficient reason for changing" (Gregory Hill (Barrister, Ten Old Square Chambers)) the length of prescription usually applied at present. Similarly, Network Rail described the proposal as a "logical and coherent extension of the current legal position" while Currey & Co noted that it was "flexible enough to cope with changes in social, environmental and other circumstances". However, while the Chancery Bar Association supported the proposed period, they questioned why it was at odds with the rule on adverse possession:

We agree that the period of 20 years' continuous qualifying use is about right. We do, however, draw attention to the curious difference between the 10 year period prescribed by the Land Registration Act 2002 for adverse possession and the period of 20 years for the acquisition of easements. It may be asked why 10 years is not long enough for prescription and abandonment of easements, whereas 10 years is long enough for the potentially far more significant consequences of the acquisition and loss of title. We do, however, consider that as the 20 year period has been in the past the generally accepted period for most easements (save where the 40 year period might apply), that period should apply as the qualifying period. We would therefore accept the recommendation that the 20 year period applies under any proposed reform. There should no longer be any 40 year period.

- 4.131 A few consultees advocated a shorter prescription period, though they did not disagree with our proposal in principle. Jeffrey Shaw (Nether Edge Law) based this argument on the relationship of prescription to adverse possession:

I agree that the new statutory scheme's period should be no more than twenty years, although I would have been minded to opt for ten years instead (as postulated in 4.212). The shorter period would not cause any problems in real terms. Reduction of a qualifying period is already precedented by the slight reduction in limitation periods (from twelve years to ten years) effected by the Land Registration Act 2002. Selecting a ten-year period for prescription's replacement would therefore align the periods. Despite the qualifications in 4.230, alignment is desirable.

- 4.132 Addleshaw Goddard LLP also preferred a ten year prescription period, though they based their argument on the introduction of a veto for the servient owner of registered land, a proposal which was discussed at paragraph 4.232 of the CP:

If the basis of any prescriptive acquisition is 'open' use, we consider that 10 years is a more than sufficient period. We see there being a bit of a 'trade off' between (i) a longer period and no registered proprietor's right to object and (ii) a short period with a right to object (similar to the new adverse possession rules).

### ***Conclusion***

- 4.133 We have recommended that the new statutory method of prescription should require 20 years of qualifying use, as seen in the Report at paragraph 3.123 and clause 16 of the draft Bill. There was very little support among consultees for making prescription easier to establish, and a notable majority supported the proposed 20 year period. This allows the new statutory scheme to retain an element of continuity with the current methods of prescription.

### ***Other related issues***

- 4.134 Two consultees asked how the 20 year prescription period would operate when applied to easements that would, by their nature, be used very infrequently. Mr Justice Lewison summarised the issue:

The notion of "qualifying use" for the purposes of prescription (para 4.202 et seq) needs some more thought. The Commission's proposal requires 20 years continuous use. Some thought needs to be given to easements which, by their nature, are not continuously used. One example might be a right to discharge storm water into a drain. Another (which I came across in practice) was a claim to a right of escape in case of fire.

- 4.135 At present, it is possible to prescribe for an intermittently used easement. This aspect of prescription was discussed by Buckley J in *White v Taylor (No 3)* [1969] 1 Ch 160, where it was held that asserting a right to an easement does not require continuous use if, by its nature, the “right” can only be used intermittently. In such cases, even infrequent use is sufficient if it is of the correct “character, degree and frequency” so as to indicate that the claimant is asserting a continuous right of the kind claimed. So it is technically possible to prescribe rights that are used very infrequently, such as rights to fell trees, although proof of qualifying use may be difficult. For further discussion of this rule, see paragraphs 4-120 to 4-122 of *Gale on Easements* (18th ed 2008).
- 4.136 We do not propose any change to the way in which an intermittently used easement may arise by prescription under our new statutory scheme.

**We provisionally propose:**

**(2) that qualifying use shall continue to within 12 months of application being made to the registrar for entry of a notice on the register of title;**

**[paragraphs 4.221(2) and 16.18(2)]**

- 4.137 Under the current law, in order to prescribe for an easement under the Prescription Act 1832 it is necessary to show 20 or 40 years of continuous qualifying use immediately prior to the claim for an easement being brought, or to the use being disputed in legal proceedings. Where the claim is for a profit, the prescribed periods of use under the Act are 30 or 60 years. The requirement that the use continues right up to the time litigation commences arises from section 4 of the Act, and it is widely referred to as the “next-before action” rule; until the claimant has completed the prescribed period of use, and has satisfied the rule, no proprietary interest arises.
- 4.138 In contrast, where an easement or profit is claimed under the common law or the doctrine of lost modern grant, there is no equivalent of the next-before action rule. Subject to any defence that may be available to the putative servient owner, 20 years of qualifying continuous use at any point in time will create a prescriptive right, even where the use ended many years before the existence of the easement is disputed. For further details of these methods of prescription, see paragraphs 4.155 to 4.166 of the CP.
- 4.139 We proposed in the CP, and explained at paragraphs 4.235 and following, that the basis for the prescriptive acquisition of an easement under the new scheme should be that on a claimant being able to establish 20 years’ qualifying use he or she would acquire, not an easement, but the right to make a claim to Land Registry for an easement to be noted by the registrar as appurtenant to the dominant estate. Only where the application was successful would an easement come into being. Until that time a claimant had nothing more than an inchoate right to have the easement registered.
- 4.140 We noted that the owner of the land over which the easement was being asserted might prevent the claimant’s use before the application was made. We therefore proposed that qualifying use should have continued to within 12 months of the application to Land Registry being made; see paragraphs 4.222 and following of the CP.
- 4.141 34 consultees responded to this question. While there was some qualified support for the proposal it was also strongly criticised by a significant number of consultees.

***The responses***

- 4.142 HHJ Ian Leeming QC expressed general support for the entire proposal at paragraph 4.221 but said in relation to this sub paragraph (4.221(2)):

I agree with all these proposals, but care needs to be taken that the 12 month period requirement at sub-paragraph (2) does not operate unfairly or in an unnecessarily restrictive fashion. There should be a power to relax or waive the provisions conferred upon the court or registrar, subject to appropriate conditions.

- 4.143 Martin Pasek also agreed with the proposal but felt that the requirement that use continue to within 12 months of an application being made may “need qualification and exceptions in some circumstances ...”.
- 4.144 The National Trust agreed with the general thrust of the proposal but was concerned that the 12 month period might allow insufficient time for negotiation between the parties where this was needed.
- 4.145 Gregory Hill (Barrister, Ten Old Square Chambers) agreed with all the sub paragraphs of the proposal except his one with which he “emphatically” parted company. He said in relation to the 1832 Act

I have thought – and have believed it to be a widely held view – that one of its major *defects* is “*next before action*” (which 4.221(2) would in substance preserve ...).

He argued that if the doctrine of lost modern grant was not available many ancient rights would be lost where the next before action rule, or its equivalent, could not be satisfied. He suggested that non-use for up to a year was entirely possible where, for example, a householder ceases to use a pedestrian right of way that provides a short cut to the shops because he finds that with advancing years he must use his car.

- 4.146 Dr Caroline Sawyer (Victoria University of Wellington, New Zealand) thought that the 12 month period could cause problems and seemed unnecessary. She pointed out that “the same idea was in the Prescription Act 1832 that has never been useful. It would cause extra requirements of evidence which would lead to awkward litigation”.
- 4.147 The City of London Law Society, the London Property Support Lawyers Group, Norton Rose LLP and Nabarro rejected the proposal and suggested an example of an elderly householder who after many years use of a shared drive to her home then ceased to use it for a couple of years before entering a nursing home. On the subsequent sale of her home it would not be possible to establish the right of way, should it be contested, as she would not be able to satisfy the requirement that use must continue to within 12 months of the issue arising. The Chancery Bar Association raised a similar concern and felt that the imposition of the 12 month requirement might result in instances where it operated harshly or unfairly, such as in cases where use stopped because of advancing age or illness.
- 4.148 Network Rail felt that the 12 month period would present a problem for them, since many rights of access to the railway are often used intermittently and “several years may elapse between visits”.
- 4.149 The Conveyancing and Land Law Committee of the Law Society expressed a different concern. They pointed out that a large number of easements exist without good documentation. If the law was changed so that long use no longer created the interest but merely gave the person enjoying the use a right to apply to have the interest registered, this could result in a long used but unregistered interest falling victim to interference by another, without the user being able to take action to prevent the interference.

### **Conclusion**

- 4.150 In the light of the strong criticism that the proposal received, and the clearly evident and widespread dislike of the next-before action rule in the current law, we have concluded that there should be no analogous requirement of any form or duration in the new scheme. See paragraph 3.131 and following of the Report.
- 4.151 Some consultees queried the status of the right to claim an easement at the close of the prescription period.
- 4.152 The City of London Law Society, the London Property Support Lawyers Group, Norton Rose LLP and Nabarro, in their group response, referred to the right to claim during this period and asked “is it inchoate or substantive?” They believed that it should be substantive: as regards the original servient owner, “as soon as the qualifying criteria have been satisfied, regardless of whether they have been registered. The position as against a successor in title to that servient owner would be different, and governed by the overriding interest rules”.
- 4.153 Land Registry said:
- The consultation paper states “Prior to registration, the claimant who can establish 20 years’ qualifying use has the right to make a claim, and in that sense has an inchoate right to have the right registered ... . A purchaser of the servient estate would take subject to the claimant’s inchoate right to have an easement entered on the register”. The consultation paper does not spell out how this is to be achieved. It might be by the “inchoate right” being treated as an interest in land and added to schedule 3 to the Land Registration Act 2002 so as to make it an overriding interest. This seems to be implied. If this is the intention, then we find it difficult to see how the result is different, in practical terms, from a system where the easement arises automatically at the end of the period, as at present. Both the inchoate right and easement, being overriding interests, will have priority over any subsequent registrable disposition, such as a transfer or charge.
- 4.154 Under the current law a mere right to make an application for an interest in land that has yet to come into existence is not a substantive right and does not rank among the class of interests in land that are capable of overriding a subsequent disposition of the affected land; it would make a startling addition to their number.
- 4.155 The recommendation we make is that an easement should come into being at the close of the prescription period; see the Report at paragraphs 3.134 to 3.138. Accordingly the difficulty highlighted above does not arise.

**We provisionally propose:**

**(3) that qualifying use shall be use without force, without stealth and without consent; and**

**[paragraphs 4.221(3) and 16.18(3)]**

- 4.156 Currently, regardless of which method of prescription is used, it is necessary to show that the long use by the putative dominant owner was “as of right”, which requires the use to have been without force, without stealth and without consent (these requirements are often referred to in their Latin form of *nec vi, nec clam, nec precario*). In addition, it must be shown that the putative servient owner had knowledge or means of knowledge of the right claimed. These elements, developed by the common law since the early eighteenth century, reflect the present theoretical underpinning of prescription: rights are created on the basis of acquiescence by the servient owner.
- 4.157 We discussed these requirements for prescription between paragraphs 4.202 and 4.209 of the CP. We proposed that our new statutory method of prescription would still require use to have been without force, without stealth and without consent, but that there would be no separate knowledge requirement.
- 4.158 35 consultees responded to this question, a majority of whom agreed with these elements.

***The responses***

- 4.159 A number of consultees agreed with our arguments for making these proposals without comment, which reflected the uncontroversial nature of the “without force, without stealth and without consent” requirements. Amy Goymour (Downing College, University of Cambridge) summarised the reasons for retaining these elements of prescription:

I agree entirely, and I very much agree with your reasoning in para 4.205 that long use alone justifiably underpins prescription, without resort to the notion of acquiescence. Retaining the *nec vi, nec clam, nec precario* requirement for the reason Lord Hoffmann gives in *Sunningwell* is also very sensible.

- 4.160 However, a few consultees qualified their support with questions or criticism on how these requirements might operate in the future. Some focused on the “without consent” part of the test. For example, Richard Coleman (Clifford Chance LLP) asked if we proposed to allow consent to be noted so that it could bind subsequent owners of the putative dominant tenement:

If A, the owner of the freehold of the “servient” land gives a consent to B, the owner of the dominant land will B’s successors and those deriving title under B or B’s successors be treated as enjoying the rights with A’s consent if they are not on notice of A’s consent? The answer appears to be no under the present law. That suggests that it should form part of the proposals that A should protect its consent by registering it against B’s title (c.f. Para 4.220).



On a similar topic, the Treasury Solicitor's Bona Vacantia Division suggested that the meaning of "without consent" should be clarified to differentiate it from the present requirement of knowledge:

We would agree that the use must be without force, without stealth and without consent (whether written or oral). However the question of "consent" by the owner needs to distinguish this from mere "knowledge" of the use by the owner.

The Agricultural Law Association said:

The questions of use with consent or by stealth need to be considered carefully.

Disqualification of use by consent would not always produce the intended result. For example, the right to move cattle through a neighbour's field might begin with consent, but continue for many years so as to take on the characteristics of an easement. Note that the Commons Act 2006, s.15(7)(b) has removed the granting of permission for the use of land for sports and pastimes as a bar to the land becoming a registrable village green. Question whether this may be of more general valid application.

It should be clear also that use by stealth is not the same as use in a manner not readily apparent but nevertheless not clandestine, eg access during the hours of darkness

- 4.161 Two consultees argued that these proposed requirements are inappropriate. Paul Chiltock warned that they are too difficult for a putative dominant owner to establish without costly litigation:

The drawback with claiming easements by prescription is that the landowner is usually unwilling to concede to 'nec vi, nec clam, nec precario' so obtaining support for a prescriptive right of way would appear extremely difficult. Even when the right had been used for 20 years the landowner could simply defeat the claim by saying he had contested and opposed the use.

That of course depends upon the circumstances and the strength of the evidence. It must remain the case that someone who claims a prescriptive right must, if challenged, be able to establish the facts on which his or her claim is based. However, the National Trust questioned the test in its entirety:

We are not convinced that the test of "*without force, without stealth and without consent*" is as easy to understand, or to apply, as the text books assume. We also had difficulty in understanding (para 4.204-4.208) the extent to which the Commission sees knowledge by the servient owner as relevant to prescription. If knowledge is not relevant to the issue, why would it matter if use was by stealth? We wonder whether the opportunity might need to be taken to clarify by statute the application of the test.

### **Conclusion**

- 4.162 We have recommended that the new statutory form of prescription should require a right to have been enjoyed without force, without stealth and without permission; these are substantively the same elements as are required to establish a prescriptive claim at present. We discuss them in greater depth at paragraph 3.115 and following of the Report, including the relationship between our “without stealth” requirement and the requirement of knowledge and acquiescence in the present law.

### **Other related issues**

- 4.163 One consultee suggested a minor modification to the “without consent” part of the test, based on the Prescription Act 1832. Gregory Hill (Barrister, Ten Old Square Chambers) said:

But, although I do not like saying anything in favour of the Prescription Act way of doing things, it does seem to me that there is a good deal to be said for distinguishing between written and oral consents, at least to the extent of enacting a presumption that an oral consent is only operative for one year unless the party setting it up can prove that it was given in terms with a more far-reaching effect: I suggest that there should be a real advantage to the servient owner in giving any consent in writing. Consideration might also be given, if “stop the clock” notices are made generally applicable, to whether an unsolicited written consent, short of such a notice, should still be effective to stop time running: *Odey v Barber* [2006] EWHC 3109 (Ch), [2008] Ch 175.

We have not introduced a distinction between oral and written consent for the purposes of use being “without permission”. Oral permission is in any event a weaker protection for the servient owner, being harder to prove. We would be reluctant to complicate matters by introducing a presumption of expiry of an oral consent. For further details on the present law, see *Gale on Easements* (18th ed 2008) paragraphs 4-94 to 4-101.

**We provisionally propose:**

**(4) that qualifying use shall not be use which is contrary to law, unless such use can be rendered lawful by the dispensation of the servient owner.**

**[paragraphs 4.221(4) and 16.18(4)]**

- 4.164 It is not possible to prescribe for an easement where the long use required would be criminal as opposed to merely tortious, save that in *Bakewell Management Ltd v Brandwood* [2004] UKHL 14, [2004] 2 AC 519 the House of Lords confirmed an exception to this rule where the putative servient owner has a power to grant permission which would make the otherwise criminal use lawful. The current law of prescription operates by way of presumed grant; in these circumstances the putative servient owner will have been able lawfully to grant an easement of the type prescribed, thus making it possible to presume that the use had legal origin. While such a power is rare, it does exist in some limited situations: for example, under section 193(4) of the Law of Property Act 1925, it is a criminal offence to drive a vehicle over certain pieces of common land without permission from the owner of the common. As the owner of the common land is able to render otherwise illegal use lawful, it is possible to prescribe easements over such land.
- 4.165 We discussed the effect of illegal use on prescription at paragraph 4.210 of the CP. Although our proposed new statutory scheme of prescription was not based on a fictional grant, we recommended the retention of the general rule on illegality along with the exception established in *Bakewell Management Ltd v Brandwood*.
- 4.166 31 consultees responded to this part of the proposal and nearly all of them supported it.

***The responses***

- 4.167 The majority of consultees agreed without comment. Michael Croker, Miriam Brown and Kevin Marsh noted the importance of express inclusion of this rule, since the new statutory scheme will not be based on presumed grant:

It is important to ensure that despite abolishing the existing law (CP 4.210), that any new scheme includes provision for prescription in relation to user contrary to the law. The current reasoning which saves such prescriptive rights relies the presumption of a grant [such as applies where the right crosses common land]. As the doctrine of lost modern grant would disappear on the abolition of the current law of prescription, specific provisions will be required in the new regime.

Network Rail supported retention of this rule due to its importance in maintaining railway safety:

We particularly support subparagraph (4) ... . For safety reasons throughout its history the grant of easements over railway land has been strictly controlled and has attracted statutory protection against the acquisition of prescriptive rights.

- 4.168 Other consultees qualified their support by highlighting the need to remove the current link between presumed grant as the basis of prescription and the exception established in *Bakewell Management Ltd v Brandwood*. Amy Goymour (Downing College, University of Cambridge) commented on the difficulties which may arise in introducing this exception:

I do agree with this in principle, but perhaps am slightly concerned by a problem you raise, which is that talking about the dispensation of the owner does bring back notions of fictional grant. I wonder whether your proposal might be rephrased to the effect that if the public policy of the statute is not infringed by the creation of a prescriptive easement, then illegality should be no barrier to the right arising. Although this approach has the disadvantage of being more uncertain in application, it would avoid descending into notions of fictional grant which, I suggest, should be avoided completely.

Farrer & Co LLP was similarly concerned with the link created by *Bakewell Management Ltd v Brandwood* between capacity to grant an easement and the legality of its use:

This gives rise to the issues in *Hanning v Top Deck Travel* (1994) 68 P & CR 14 and *Bakewell Management Ltd v Brandwood* [2004] 2 AC 519. The decision in *Brandwood* has given rise to what is in effect an artificial fiction that even though by definition the servient owner has not in fact consented, he is treated by the law as having granted. Obviously a decision such as *Cargill v Gotts* should continue to stand but if prescription is to be recognised it should not be connected with issues such as the capacity of the servient owner.

### **Conclusion**

- 4.169 As we discuss in the Report at paragraph 3.129, we have recommended that under our new statutory scheme of prescription, it will not be possible to prescribe an easement if the qualifying use required is illegal, unless the putative servient owner is able to lawfully grant an easement of the type reputedly prescribed. This rule will have a statutory basis and so will no longer require a fictional presumption of grant.

### **Other related issues**

- 4.170 Jonathan Wragg (Barrister, Highgate Chambers) requested clarification on how the exception established in *Bakewell Management Ltd v Brandwood* can be reconciled with section 12 of the Inclosure Act 1857 and section 29 of the Commons Act 1876. These sections make it a criminal offence to interfere with a village green or common. Due to the scope of our project, we have not addressed the specific statutes which apply to village greens. This area of the law, along with rights of common, has become a particularly specialised field of practice which would require careful and thorough review in a dedicated project.

**We invite consultees' views as to whether prescriptive acquisition of easements should only be possible in relation to land the title to which is registered following service of an application on the servient owner.**

**[paragraphs 4.231 and 16.19]**

- 4.171 Under the scheme proposed in the CP, an easement would not come into being until the claimant had applied successfully to Land Registry for the interest to be noted as appurtenant to the claimant's title. The proposal, and the one that immediately follows, dealt with the administrative process by which a claim to an easement is made. On receipt of the claimant's application the registrar would serve notice of the application on the owner of the affected land, who as a result would be made aware of the pending claim and be put in a position to respond to the application and challenge it if he or she chose. It was envisaged that the procedure would be similar to that already in place in relation to unilateral notices under section 35 of the Land Registration Act 2002.

**We invite consultees' views as to whether the registration of a prescriptive easement should be automatic or subject to the servient owner's veto.**

**[paragraphs 4.232 and 16.20]**

- 4.172 This proposal dealt with the process of prescription under the new scheme from the servient owner's perspective. The suggestion that the servient owner should have a veto, following the claimant's application pursuant to the proposal at paragraph 4.231, above, is loosely based on the current regime for adverse possession of land which we discuss at paragraph 4.224 and following of the CP.
- 4.173 The proposal at 4.231 received 42 responses, 8 of which understood the proposal to be drawing a distinction between the treatment of registered and unregistered title and 3 of which thought the proposal required the claimant to serve notice prior to use of the land in order that the prescriptive period might commence. The proposal at 4.232 received 44 responses; the majority rejected the proposition that the servient owner should have a veto.

### ***The responses***

- 4.174 There was agreement among some consultees that an owner of land should be notified where a claim for an interest in his or her land was being made, in order to provide him or her with the opportunity to challenge the claim.
- 4.175 As Gerald Moran (Hunters, Solicitors; the City of Westminster and Holborn Law Society), Rohit Radia, M I Cunha, Tony Kaye, Chorleywood Station Estate Conservation Group and Churchfields Avenue Residents Association put it in their joint response:

Plainly the owner of land alleged to be subject to a prescriptive easement ought to be notified of an application for notice of it to be registered on his title and an opportunity to dispute whether or not the easement has arisen on the facts but not a veto.

- 4.176 The Chancery Bar Association agreed that there should be a notice procedure and suggested that it should be “along the lines of the current procedure for the noting of interests in applications under the Land Registration Act 2002, but without any veto”. The respondent – the owner of the affected land – could respond under a procedure adopted from the existing procedure where notices are disputed. The dispute would then be resolved by the Land Registry Adjudicator.
- 4.177 The City of London Law Society, the London Property Support Lawyers Group, Norton Rose LLP and Nabarro considered that “any dispute over the facts is, ultimately, a matter for the court and not the Land Registry”.
- 4.178 The proposal that the owner of the affected land should have the option to veto the claimant’s application received limited support. Many of those who did not support the proposal pointed out that it would invariably be used so as to prevent prescription. As Ian Williams (Christ’s College, University of Cambridge) put it:

If prescriptive acquisition continues, then registration should be automatic upon application to the Land Registry – it is difficult to imagine in what circumstances a servient owner would consent to the easement being created.

- 4.179 Similarly the National Trust considered that:

We do not, however, see any need to give the servient owner a veto as such, since to do so would, in effect, all but abolish prescriptive acquisition of easements over registered land.

### ***Conclusion***

- 4.180 For reasons that we explain at paragraph 3.115 and following of the Report, we no longer intend to proceed with the proposed model for prescriptive acquisition as set out in the CP. However, it is clear from responses that there is general support for a putative servient owner to be notified where a claim for an easement over his or her land is made.
- 4.181 Under current law, where a prescriptive easement is claimed against land the title to which is registered, the claim for the burden to be noted against that title is made to Land Registry, and the registrar will notify the registered proprietor of the servient land of the application. If no objection is received the burden is noted against the title to the servient land. This will continue following the implementation of reform, and therefore addresses the concerns raised by consultees about notifying a servient owner issue of a prescriptive claim. So we take no further the proposal at paragraph 4.231 of the CP.
- 4.182 We agreed with the concerns expressed about the possibility of a veto, in the proposal at paragraph 4.232, and are not proceeding with it; see paragraphs 3.134 to 3.138 of the Report.

### ***Other related issues***

- 4.183 In the CP at paragraph 4.220 we sought consultees' views on a related issue. We asked whether it should be possible for an owner who is worried that a neighbour might acquire an easement over his or her land to be able to prevent this by entering a notice of objection against that owner's title. The neighbour could continue to use the land but would be prevented from acquiring a prescriptive easement.
- 4.184 The request drew very little comment from consultees; six responded, with four in general agreement and two against.
- 4.185 Andrew Francis (Barrister, Serle Court Chambers) suggested that:

In respect of any notice procedure, as is contemplated under paragraph 4.220, I would suggest the current procedure under the Rights to Light Act 1959 for the registration of Light Obstruction Notices and the service provisions in that case be adopted as modified so as to apply to Land Registry procedures.

- 4.186 Wragge & Co LLP said:

We have reservations about the registration of things which prevent rights from arising (objection notices para 4.220) as opposed to rights themselves. Light obstruction notices are currently registered on the local land charges register (although we admit this does seem anomalous). There are issues of which title such matters should be registered against, how practical this is where consent is informal, and wider policy questions such as the purpose of the register and the sorts of matters which are noted on it. Once it is accepted that things other than an interest in land can be registered, this could open the way for all sorts of other things to be registered eg contractual licences, trusts, licences to alter.

### ***Conclusion***

- 4.187 The issue has been discussed further with the Advisory Group and with Land Registry, and we have reached the conclusion that technical considerations prevent the introduction of a system of notices of objection. See the discussion in the Report at paragraphs 3.139 to 3.141.

**We invite the views of consultees as to whether the rule that easements may only be acquired by prescription by or against the absolute owners of the dominant and servient lands should be relaxed, and if so in what circumstances.**

**[paragraphs 4.245 and 16.21]**

- 4.188 Under the current law prescription must be by a freeholder against a freeholder; it is not possible to prescribe for an easement over a leasehold estate or for a leaseholder to prescribe, for the benefit of his or her leasehold estate, over freehold land. An easement acquired by long use by a leaseholder will be for the benefit of the landlord's freehold.
- 4.189 There is an exception to this rule in section 3 of the Prescription Act 1832, which has been construed as permitting a tenant to prescribe for a right to light against his or her landlord or against another tenant of his or her landlord.
- 4.190 Although we did not make an express proposal in the CP about the rule, we did seek the views of consultees and received a broad spectrum of responses. In total, 43 consultees responded.

#### ***The responses***

- 4.191 Some consultees agreed that the restriction should be relaxed on the basis that an easement acquired through prescription should be for the same duration as the leasehold interest and should expire concurrently with the termination of the lease. As B S Letitia Crabb (University of Reading) put it:

A lease is an estate in land and a leaseholder should be accorded rights by prescription of the same nature, though not duration, as a fee simple owner.

- 4.192 The National Trust thought that the rule should be relaxed in the case of the servient land but not the dominant land:

We can see merit in the law being changed so that easements may be acquired by prescription against a tenant, with the duration limited to the term of the tenant's lease. However, we cannot, as yet, see the case for prescriptive acquisition by tenants on their own account (as distinct from so as to benefit their landlord's estate).

- 4.193 Amy Goymour (Downing College, University of Cambridge) wrote:

I understand the merit of the current rule that the benefit of prescription by a tenant over land not belonging to the landlord should enure to the landlord. This is consistent with the law of adverse possession. The freehold estate would have the easement, but surely the net effect would be that the tenant would be entitled to the benefit of the easement too for the duration of his or her lease? I am not convinced that reform would strictly be necessary.

- 4.194 Both HHJ Ian Leeming QC and Addleshaw Goddard LLP thought that there could be a modest relaxation in the case of long leases, which they defined as being of a term of at least 90 years or 21 years respectively.



- 4.195 Gregory Hill (Barrister, Ten Old Square Chambers) thought that a tenant should be able to prescribe over his or her landlord's land, but, should only acquire an easement of the duration of the lease. He continued:

This does raise the question, where a lease for less than 20 years is renewed under, for example, Landlord and Tenant Act 1954 Part II, whether the period of use should be continuous from lease to lease, or whether each renewal should "stop the clock"; on balance I would favour continuity.

- 4.196 Some consultees opposed any relaxation of the restriction, for example Roger Pickett (Diocese of Southwark) and the Country Land and Business Association, saw little justification for any change in the current law. Andrew Francis (Barrister, Serle Court Chambers) said:

I would suggest that the easement can only be acquired against the fee simple. The current anomaly in rights to light cases as to tenants should be prospectively abolished.

- 4.197 Network Rail, on the question of whether a tenant should be entitled to prescribe generally and in particular as against his or her landlord said:

No. We are of the view that it is only the freehold owner of the dominant land that can make an application for a prescriptive easement and likewise only the freehold owner of the servient land can have a prescriptive easement registered against his land. As one of the largest landlords in the country, we would not support the acquisition of prescriptive easements by our tenants over our land.

- 4.198 Trowers & Hamblins said:

Although there are arguments in favour of there being a general ability for tenants to prescribe against their landlords, it would cause significant difficulties in practice, and would make the task of securing regeneration (eg of housing estates owned by RSLs or local authorities) very much more difficult than it already is ... .

### **Conclusion**

- 4.199 There was no consensus among consultees on whether the restriction should be relaxed and, if so, the extent to which it should be. The question whether a lease should be a minimum term before a leaseholder could prescribe for the benefit of that lease or suffer prescription for the benefit of other land concerned some consultees. At the very least the term could be no shorter than the prescription periods, but what the minimum term should be is difficult to discern; any length of term that is stipulated will be arbitrary and create winners and losers.

- 4.200 There is also a question of whether periodic tenancies or a succession of tenancies each granted or renewed for a short term should be included in the new scheme for prescription. We do not consider that there is a satisfactory solution to this; a periodic tenancy may continue or be renewed for many, many years but its ultimate duration is, by its very nature, unpredictable. We have concluded that it would be unsatisfactory to extend the scheme to such tenancies as it would cause great uncertainty, particularly for the putative servient owner, and it would result in the law of prescription becoming even more complex than it is at present.
- 4.201 We have concluded that without a clear mandate for the relaxation of the rule its effect should be incorporated in the new scheme for prescription; we recommend that prescription must be by and against a freeholder. For further discussion see paragraphs the Report at paragraphs 3.144 to 3.151 and see clause 16(2) of the draft Bill.

**We invite the views of consultees as to whether adverse possessors should be treated any differently from others who claim an easement by prescription.**

**[paragraphs 4.247 and 16.22]**

- 4.202 This question arose from the well-known conundrum that the limitation period is shorter than the prescription period. In other words, after acquiring title by adverse possession, a squatter may find that he or she has not yet acquired title to the easements needed to access the land, for example, or perhaps to get services to it.
- 4.203 In the CP we raised this problem, and asked for consultees' views about it without making a provisional proposal. We noted that to allow a shorter prescriptive period for squatters would place them in a privileged position and we felt that that would be unsatisfactory.
- 4.204 30 consultees responded to this question, the majority of whom agreed that adverse possessors should not benefit from any special rules of prescription.

***The responses***

- 4.205 Many consultees simply agreed with what we said. HHJ Ian Leeming QC noted:

I cannot see any good case for different treatment.

The Institute of Legal Executives was of the view that:

There can be no justification for treating adverse possessors differently. An owner of land is an owner of land. If the ownership and occupation are lawful, then the law should treat the owner of the land the same irrespective of which route to lawful ownership was taken.

- 4.206 Similarly, the unfairness in giving preferential entitlement to squatters over others claiming easements by prescription was picked up by several consultees. Gerald Moran (Hunters, Solicitors; City of Westminster and Holborn Law Society) asserted:

Someone acquiring land by adverse possession should not be treated more favourably than anyone else as regards the need for 20 years qualifying use for a prescriptive easement.

Roger Pickett (Diocese of Southwark) agreed:

We entirely concur with the view that it would be both unsatisfactory and unacceptable for those acquiring a title by adverse possession to have greater rights conferred on them than those of any other claimant.

- 4.207 A number of consultees were careful to qualify their responses to ensure that qualifying use during the period of adverse possession was able to count towards the total qualifying period of use for the acquisition of an easement by prescription. Jeffrey Shaw (Nether Edge Law) explained:

The only exception would surely be if the adverse possessor acquires title from a registered proprietor in circumstances where the adverse possessor (if the proprietor and not merely a claimant) would have been entitled to claim a twenty-year-prescription easement (which would necessitate ... twenty years' adverse possession ...).

- 4.208 Amy Goymour (Downing College, University of Cambridge) discussed the potential for the implication of an easement into a statutory conveyance of title:

If you adopt an intention-based model of implied easements, however, it might be necessary to consider whether a statutory conveyance of title under sched 6 LRA 2002 should be capable of giving rise to such intention-based easements. I would suggest not. This might be another reason to adopt a de minimis necessity based doctrine of implication alongside the intention model ... in case a squatter's title would otherwise be inaccessible.

### **Conclusion**

- 4.209 There is a mismatch between the prescription period and the limitation period, and squatters may face problems as a result. But in the light of the strong views expressed by consultees we have made no recommendation that adverse possessors should be treated differently from others who claim an easement by prescription. We have heard no evidence that the practical problems potentially faced by adverse possessors are sufficiently significant to warrant a reform that would introduce a major inconsistency into the law. Nor did we think it appropriate to extend the concept of implication to an acquisition by adverse possession; easements can be implied only in a transaction, and the acquisition of title by adverse possession cannot be an occasion for implication.
- 4.210 We agree with consultees – and this follows from the law before and after reform, without special provision – that someone who is in adverse possession of land may, before the limitation period expires, also be prescribing for an easement. In addition, there may be occasions when a squatter takes possession of land whose proprietor has already been engaged in qualifying prescriptive use against land owned by a third party. In that case, as the Chancery Bar Association put it, the squatter can “inherit” the prescriptive use accrued by the dispossessed proprietor.

**We invite the views of consultees on the issue of the capacity of both servient and dominant owners.**

**[paragraphs 4.250 and 16.23]**

- 4.211 At the heart of the current law of prescriptive acquisition is the presumption that where qualifying long use is proved there was once a grant of the right now claimed. The new statutory scheme is based solely on qualifying use of land for a requisite period which will then give rise to an easement.
- 4.212 As we explain in the Report at paragraphs 3.87 and 3.88 the fiction of a grant gives rise to a number of consequences, one of which is that the owner of the putative servient land must have the capacity to make a grant, even though the grant is entirely fictional.
- 4.213 As the presumption of grant plays no part in the new scheme then, unless we provide otherwise, it should not be material whether the putative servient owner has or had the capacity to grant or not. However, in the CP at paragraph 4.249 we said that the question of capacity should be a matter for the general law (and that therefore the special provisions of the 1832 Act would be needed); we suggested that capacity should be relevant to the extent that an easement that could not be acquired through express grant should not be capable of acquisition by prescription.
- 4.214 In the course of the CP discussion we examined *Housden v Conservators of Wimbledon and Putney Commons* [2007] EWHC 1171 (Ch), [2007] 1 WLR 2543 which at the time of publication was a decision of the High Court. Its importance is that it considered the issue of capacity to grant where the power to make a grant had been either expressly modified or excluded by the terms that established and/or governed a landowner such as a charity, corporation or other public body. In *Housden*, it was held that where it could be shown the presumed grantor of an easement could not have made a valid grant – it was argued that the statute that established the Conservators of the commons did not give them a power to make grants – no easement could arise by prescription. The general principle was upheld on appeal by the Court of Appeal ([2008] EWCA Civ 200, [2008] 1 WLR 1172), and it is this decision which is referred to in some consultees' responses.
- 4.215 36 consultees responded to our question with a range of opinions.

#### ***The responses***

- 4.216 Some consultees considered that the capacity or the lack of capacity of the owners of land should not be material.
- 4.217 Richard Coleman (Clifford Chance LLP) felt that:
- Under the proposed new regime incapacity of the servient owner would be irrelevant, I suggest. (A company which lacks capacity could register a notice of objection against the dominant title – para 4.220).

4.218 The Conveyancing and Land Law Committee of the Law Society also thought that the capacity of the dominant and servient owners “should be irrelevant”. Network Rail, while in broad agreement with the comments made in the CP, pointed out that in any event the issue of capacity “is nowadays very limited”.

4.219 Currey & Co commented that:

We do not consider that the issue of capacity should be relevant as regards a person under disability, surely trustees are invariably involved and they have a duty to safeguard the trust property, so that if they fail to do so over a period twenty years they should they should thereafter hold their peace!

4.220 Roger Pickett (Diocese of Southwark), Wragge & Co LLP, and Gregory Hill (Barrister, Ten Old Square Chambers) agreed with the general principle that where an easement cannot be acquired expressly it should not be acquired through prescription. HHJ David Hodge QC (Civil Committee of the Council of Circuit Judges) said:

We consider that easements that cannot, for reasons of incapacity, be acquired by express grant should not be capable of acquisition by prescription.

4.221 Andrew Francis (Barrister, Serle Court Chambers) agreed with the proposition in the CP that the issue of capacity to grant should be left to the existing general law. He continued:

The principle should be that one can only acquire a prescriptive easement where the grantor could have had capacity to make an express grant (or reservation) and to this extent *Housden* is, of course, relevant.

4.222 The Ecclesiastical Judges Association also referred to the relevance of *Housden* and the principle that an owner should not prescriptively acquire an easement that could not have been expressly acquired and expressed concern that the position of churches and churchyards should “not simply be swept up in any general relaxation of the law in relation to acquisition of easements by prescription ...”.

4.223 William Pumphrey expressed a similar concern:

This protection is valuable and necessary, therefore, in such situations: and to remove it is a serious matter that would disadvantage the public interest in the administration of land (often carried out by unremunerated volunteers, with no professional management assistance, and on limited budgets) that benefits the public.

4.224 Land Registry said:

It is clearly important, if the statutory scheme is to be easier to apply than the current law, that the position on this issue is clear.

Land Registry also drew our attention to the provisions at schedule 6 to the Land Registration Act 2002, which deal expressly with the limitation period in cases of disability and continued:

In other words the issue of capacity is dealt with in some detail and not left to the general law.

4.225 The Agricultural Law Association said:

Acknowledging the limited number of cases in which an incapable person has no representative, we believe that time should not run against one under an incapacity. There is no reason on the other hand, why time should not run in favour of such a person.

4.226 This was also the view of Gerald Moran (Hunters, Solicitors; the City of Westminster and Holborn Law Society), Rohit Radia, M I Cunha, Norton Rose LLP, Chorleywood Station Estate Conservation Group and Nabarro in their group response:

As with limitation of actions, time should not run against incapable persons – but that should not stop it running so as to benefit such persons.

4.227 Amy Goymour (Downing College, University of Cambridge) made the point that:

Again, it is desirable to distance prescription as far away from fictional grants as possible. Any limitation on grounds of capacity should not, therefore, be premised on the need to imply a grant. Rather, they should be justified on other grounds, eg because the servient owner might not have the capacity to object to the prescriptive use. There is probably a need for capacity limitations justified along these lines.

4.228 The Chancery Bar Association commented that as the new scheme would not be based on the presumption of grant, *Housden* would be irrelevant and that in any event:

... at present capacity (or *vires*) no longer arises in the case of Companies Act companies.

4.229 Gregory Hill (Barrister, Ten Old Square Chambers) similarly pointed out that “questions of corporate *vires* do not now arise in relation to Companies Act companies”.

### **Conclusion**

4.230 The views expressed by consultees ranged very widely. There was significant support expressed for the principle considered in *Housden*, for example from the Ecclesiastical Judges Association and William Pumphrey.

- 4.231 At paragraph 3.165 of the Report we discuss further concerns expressed to us after the close of the consultation period about the effect of changing the rules about capacity. We also explain in the Report, at paragraph 3.163 and following, that any reform we recommend should not have the effect of enlarging the scope of the current law by making prescription more readily available. Therefore we recommend that where land cannot be made subject to an easement by express grant it cannot be made subject to the prescriptive acquisition of an easement; see paragraph 3.168 of the Report and clause 17(3) of the draft Bill.
- 4.232 This will not alter the position for companies which are subject to section 39 of the Companies Act 2006. The section provides that the validity of an act done by a company cannot be called into question on the ground of a lack of capacity by reason of anything in a company's constitution; third parties are protected from any internal restriction that might exist on a company's capacity. Land owned by such a company can be made the subject of an express grant of an easement, and therefore will be vulnerable to prescription under the new scheme.

***Use where land is let***

- 4.233 Some consultees discussed the use of land that is subject to a lease or tenancy. Prescription under the current law is based on use "as of right" – that is, the use must not be by force, by stealth or by permission; where use satisfies these requirements, and the affected freeholder does nothing to stop the use, he or she will be taken to have acquiesced to it. It follows therefore that the affected owner, in order to acquiesce, must be in a position to stop the use once he or she is aware of it; something that may not be possible to do where land is let. We discuss this in the Report at paragraph 3.169 and following; this is one instance where acquiescence, under the current law, amounts to a requirement separate from the proof of qualifying use.
- 4.234 Herbert Smith LLP explained the steps a landlord might take to protect his or her freehold:

For many years, typical leases have contained a tenant's obligation not to permit the acquisition of easements against the property demised by the lease and to give the landlord notice of attempted acquisition. Leases also typically reserve power for the landlord to enter the premises to inspect them and check that all is as it should be. The law has, for some time, imposed on landlords, who reserve power to enter for certain purposes, the sting of liability to third parties even if they do not exercise the power. That is an example of the law recognising the social responsibility of landowners even though they may not be in exclusive possession of the property at the relevant time.

- 4.235 Gregory Hill (Barrister, Ten Old Square Chambers) said:



As between the landlord and the tenant, it will be open to the landlord if he polices the relationship and the lease permits, to insist on the tenant taking whatever steps are available to him to stop a right being acquired, and at first sight that it appears right that the easement should also bind the landlord when the lease falls in, if he had the ability to stop the prescription and did not make use of it. But that raises the possibility of landlords making a practice of letting on terms which do not enable them to intervene in those circumstances, with a view to terminating any such easement at the end of the lease.

- 4.236 The opportunity for a landlord to protect his or her freehold reversion in this way is an important restriction on the scope of prescriptive acquisition in the current law. In line with our policy not to increase the current scope of prescription, we recommend that it is replicated in the new scheme in relation to use of land that commences after the date on which a lease is granted.
- 4.237 This leaves the case where use of land begins before a lease is granted and of which the landlord is aware. Gregory Hill identified the possibility for a landlord to prevent prescriptive acquisition by deliberately granting a lease on terms that would prevent him or her being able to stop the use; potentially the lease could be granted one day before the prescriptive period is satisfied. That would amount to an abuse of the new scheme. The terms of the recommendation we make at paragraph 3.172 of the Report will prevent this, and see clause 17(4) and (5) of the draft Bill.

**We invite the views of consultees on the appropriate approach to be adopted in relation to prescriptive claims over land the title to which is not registered.**

**[paragraphs 4.256 and 16.24]**

4.238 The new scheme for prescription that we proposed in the CP was premised on the registration of title to the servient land. After discussion of the new scheme we set out two possible approaches to dealing with prescription over unregistered land:

- (1) allowing the old methods of prescription to operate over unregistered land in parallel to the new statutory method for prescription over registered land; or
- (2) applying a modified form of the new scheme to unregistered land.

We discussed the detail of these options between paragraphs 4.251 and 4.255 of the CP, and asked consultees to comment on which option should be adopted.

4.239 31 consultees responded to this question and expressed a variety of opinions on how the new scheme should be introduced. All agreed that the current methods of prescription should not continue to apply to unregistered land.

### ***The responses***

4.240 The majority of consultees agreed with our preferred option of applying a new statutory scheme for prescription to both registered and unregistered land, for the reasons given at paragraph 4.254 of the CP. Consultees particularly agreed with the argument that priority should be given to abolishing the current system of prescription, irrespective of the registration status of the land involved. For example, the London Property Support Lawyers Group commented:

Virtually half of the land in England and Wales (by area) remains unregistered, so it is vital that the statutory scheme, or a version of it, should also apply to unregistered land – the existing law is too unsatisfactory to preserve even for that diminishing market.

The National Trust expressed a similar opinion:

In principle we are comfortable with the proposal in para 4.254. The current law is sufficiently unsatisfactory for it to be worth extending the scheme to the dwindling number of unregistered titles.

Land Registry highlighted the difficulties of operating parallel systems of prescription based on the registration status of the land involved:

As a general point, there is always potential difficulty with a system that operates differently depending on whether the land involved is registered or unregistered. Such a system means, to state the obvious, that owners and Land Registry need to know if the title in respect of a particular area of land is registered or unregistered. This is not always as straightforward as might be imagined.

[...]

Matters are further complicated when dealing with easements (or land obligations) because there are two pieces of land involved, not one. The freehold estates to both may be registered; they may both be unregistered; or one may be registered and the other unregistered.

- 4.241 A substantial number of comments were received on how prescribed easements should be protected if they affect unregistered land. Two alternatives were suggested by consultees: requiring the dominant owner to place a caution against first registration over the putative servient land, or introducing a new class of land charge which would represent a prescribed easement. The former approach was popular with practitioners, including the London Property Lawyers Support Group. For example, the Conveyancing and Land Law Committee of the Law Society argued that:

The proposals will need to deal with cases where both the dominant land and servient land are unregistered, where the dominant land is unregistered and where the servient land is unregistered. The present precautionary system of entering a caution against first registration should give sufficient protection.

On the other hand, Addleshaw Goddard LLP advocated the creation of a new class of land charge:

At the moment, the only methods of protection potentially available for the protection of third party rights are the registration of a land charge (although there is no class of land charge currently available for use by a dominant owner in these circumstances) or a caution against first registration. We consider that the creation of a new class of land charge (Class G) would be consistent with the proposed statutory scheme in relation to registered land.

Similarly, the Council for Licensed Conveyancers preferred creating new land charges:

The CLC believes that in relation to prescriptive claims to unregistered land, similar rules should apply, save that acquisition should form the basis of registration in the [Central] Land Charges Registry to provide notice to prospective purchasers of the servient, and or dominant land.

- 4.242 Consultees also suggested that application of the new statutory method of prescription could be used as a trigger for compulsory first registration; under such an approach, in order for an easement to be validly created through the new method of prescription, the dominant tenement will need to be registered. Andrew Francis (Barrister, Serle Court Chambers) and the Chancery Bar Association explained that:

There is a question as to how far in particular the proposal in paragraph 4.254 will work in practice. We agree that this dual system at the present time raises difficult questions of balance and practicalities. To avoid confusion and the perpetuation of the dual system, as opposed to having an unregistered easement after 20 years of unqualifying use, would it not be preferable to make a requirement that this easement be registered? Further, provision should be made at an application for registration that either triggers registration of the unregistered servient land, or, preferably in our view, that the party seeking to register the easement protects that easement by a caution against first registration against the servient land. This latter alternative may be the only practical solution, bearing in mind that in many cases it may be impossible to find out who is the owner of the unregistered servient land.

- 4.243 Finally, one consultee cautioned about the effects of applying the new statutory scheme to situations where the dominant land was registered but the servient land was not. Roger Pickett (Diocese of Southwark) said:

We are particularly concerned about the issue of establishing prescriptive easements over unregistered land. Although we are currently working with the Land Registry to register all our unregistered land (which is considerable), it is a time consuming and expensive task likely to take some years before it is completed. We believe that there are many other owners of unregistered land who like us are diligently working towards one hundred percent registration and that it would be inequitable for prescriptive easements to be registered without the knowledge of a [servient] land owner in possession of a clean but unregistered title.

### **Conclusion**

- 4.244 We have recommended that a new statutory scheme of prescription should apply equally to both registered and unregistered land, as seen at paragraph 3.134 of the Report. This approach reflects the views of the majority of consultees. As a result, there will be no substantive difference between the application of the scheme to unregistered and registered land. Prescribed easements will continue to be overriding legal interests under the Land Registration Act 2002.
- 4.245 We have not recommended that prescription of easements should trigger first registration. But a registered proprietor will be notified if an application is made to register a prescribed easement against his or her title. And it will still be possible to enter a caution against first registration against an unregistered servient owner's estate; so we see no need to create a new class of land charge for use in such cases.

## **PART 5**

# **EXTINGUISHMENT OF EASEMENTS**

**We provisionally propose that, where title to land is registered and an easement or profit has been entered on the register of the servient title, it should not be capable of extinguishment by reason of abandonment.**

**[paragraphs 5.30 and 16.25]**

- 5.1 As the law stands, it is possible to establish that an easement, whether registered or not, has been abandoned. We discussed this in the CP at paragraphs 5.23 to 5.29, and concluded that it should be impossible to abandon an easement protected by registration.
- 5.2 34 consultees responded to this question and 26 consultees replied to the corresponding question on profits at paragraph 6.54 of the CP. A small majority of consultees disagreed with these proposals.

### ***The responses***

- 5.3 A number of consultees who agreed with this proposal did so on the basis of our proposed changes to section 84 of the Law of Property Act 1925, which were discussed in Part 14 of the CP. Under the proposed expansion of section 84, the Lands Chamber would be able to extinguish registered easements where they have effectively been abandoned, compensating for the loss of a direct doctrine of abandonment. For example, the London Property Support Lawyers Group expressed its support as being conditional, saying:

Provided that the proposal to extend the jurisdiction of the Lands Tribunal is enacted as suggested, we agree that a registered easement or profit should not be extinguished by abandonment. The servient owner could apply to have it discharged in appropriate cases.

- 5.4 In contrast, the Agricultural Law Association took an opposing view on this issue, arguing that our proposal to make easements over registered land incapable of abandonment was inconsistent with our proposals on section 84:

An absolute bar on abandonment might appear excessive. If the proposals to modify s.84 Law of Property Act 1925 (see below) are carried forward, such a bar would be in conflict with its ethos in any case. It would also be anomalous if excessive user for a short period were to be grounds for extinguishment but abandonment for many years not.

- 5.5 Land Registry was more cautious in its support, highlighting the importance of correctly wording this proposal as easements were often noted on the servient title, rather than fully registered. It explained this problem as follows:

This change to the law would be welcome for the same reason as ending automatic extinguishment on unity of seisin: in the words of the consultation paper, “there is no obvious process whereby the easements thereby affected are to be removed from the register of title.” However, our concern would be particularly with cases where the benefit of the easement has been entered in the individual register for the dominant land; where the easement has been no more than noted in the individual register for the servient land then the entry has limited effect. Having said this, we accept that there is an argument, even where the easement has only been the subject of a notice, that the interest should not be subject to the doctrine of abandonment: as the consultation paper points out: “any successor in title will take with full knowledge of its existence, and its effect may well have been reflected in the price negotiated for the land”.

- 5.6 A number of consultees opposed our proposal because they did not feel that the registration status of an easement should affect the possibility of abandonment. For example, the Institute of Legal Executives noted the practical consequences which could arise:

The mere registration of an easement on the official register should not exclude the easement from the rules relating to abandonment. This would potentially give rise to a situation where not only would the register be cluttered with unenforceable easements, but the dominant land’s value may be affected. As long as the proper evidence of abandonment is provided to the registry then such easements should be capable of extinguishment.

- 5.7 Another practical problem was raised by Herbert Smith LLP and by Michael Croker, Miriam Brown and Kevin Marsh. They each presented an example where application of our proposal would cause inconsistent extinguishment of rights. Herbert Smith LLP said:

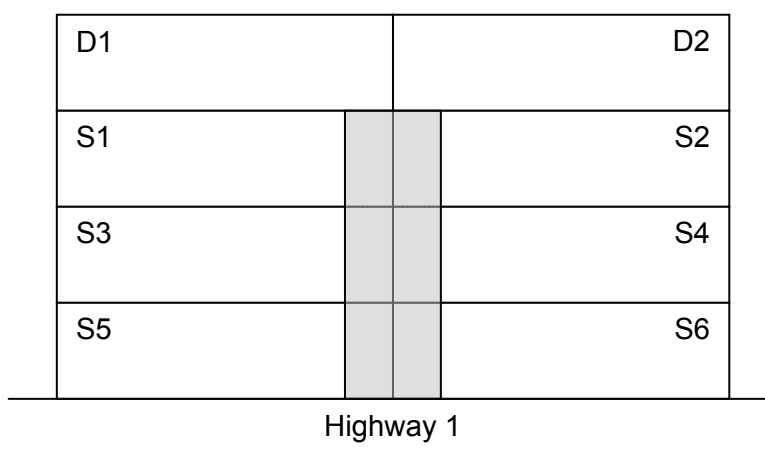
Does it, therefore, follow that, in the example below, where the servient land comprises two parcels in the same ownership, one of which is unregistered land and the other is registered, the proprietor of Parcel 2 is required to apply to the Lands Tribunal (because he cannot compel the dominant owner to apply for cancellation of the notice?)

Dominant land	<i>Servient parcel 1</i> <i>unregistered land</i> <i>easement</i> <i>abandoned</i>  <i>(presumption</i> <i>established)</i>  <i>roadway removed</i>	<i>Servient parcel 2</i> <i>Registered land</i> <i>Abandoned</i> <i>easement still noted</i> <i>on register</i>  =====
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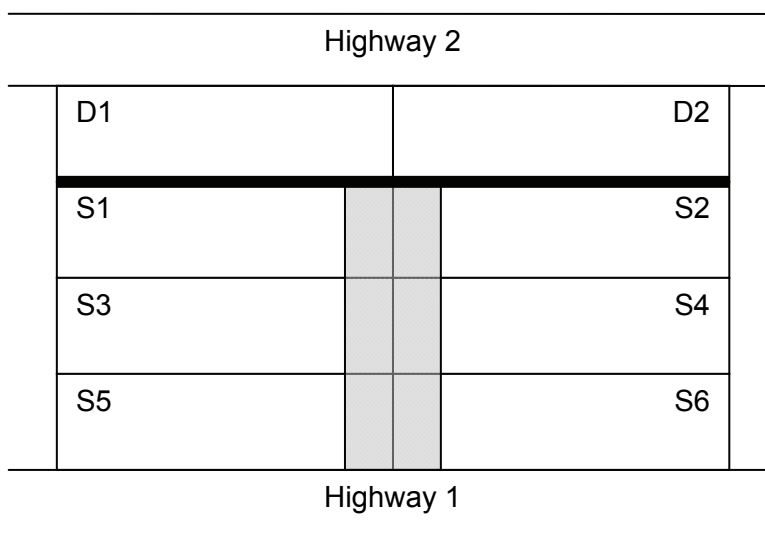
If servient Parcel 1, having become free of the former but now abandoned easement, were then conveyed free from encumbrances, the register of servient Parcel 2 would be misleading because there would be no surviving dominant land. It does not seem proportionate to require an application to the Lands Tribunal in these circumstances. Could there possibly be a Human Rights Act issue of proportionality here?

5.8 Similarly, Michael Croker, Miriam Brown and Kevin Marsh presented the following scenario:

- (1) A housing estate is built in 1970 with a shared access way to highway 1 (shaded on the diagram) serving plots D1 and D2 as well as plots S1 to S6. Plots D1 and D2 benefit from rights of way over S1 to S6 inclusive.



- (2) In 1995 a new highway is built (highway 2) and D1 and D2 start to use this as their sole access. They each build a wall along the entire boundary between D1 and S1, and D2 and S2 – the right of way to D1 and D2 is no longer used.



- (3) In 2020 D1 and D2 have not used the shared access way for 25 years, and it has been unusable for that time. The table below sets out the registration status of the various plots, and the rights of way, in 2020.

D1 – Title is registered. The benefit of the 1970 grants are noted.	D2 - Unregistered
S1 – Title is registered. The burden of the 1970 grants are noted.	S2 – Unregistered
S3 – Unregistered	S4 – Title is registered. The burden of the 1970 grants are noted
S5 – Title is registered. There are no entries regarding the 1970 grants as the deeds were lost prior to first registration.	S6 – Unregistered

In the above circumstances, if the provisional proposal contained in the CP was to be implemented, a presumption of abandonment would arise in respect of that part of the right of way running across S2, S3, S5 and S6 and abandonment may have occurred. Insofar as the right of way crosses S1 and S4, abandonment would not be possible because the land is registered and the burden of the 1970 grant is noted on the register of title. The result is a housing estate where an easement is extinguished in a haphazard fashion which depends entirely upon the registration status of the burden.

- 5.9 Finally, Gregory Hill (Barrister, Ten Old Square Chambers) made a more fundamental criticism of our proposal, arguing that it would interfere with the utility of land:

There is in principle, independently of any conveyancing and registration considerations, a further general objection to the retention of unused and unnecessary easements, which is simply that an easement is a burden on the rights of the servient proprietor which needs to be justified: if it has not been used for a substantial period and the dominant owner cannot show a real prospect of needing it in the future, it seems to me that it no longer accommodates the dominant tenement, so the servient owner should be entitled as of right, and not merely as a matter of discretion, to have it expunged if that position is reached. To put the point colloquially, even if an easement is registered, the dominant owner should “use it or lose it”.



**Conclusion**

- 5.10 The responses of consultees have demonstrated some practical problems with our proposal. It is also worth noting the change in our proposed extension of the method of discharge under section 84 of the Law of Property Act 1925. At paragraph 7.32 of the Report, we note that the extension of section 84 will be prospective and therefore can only be used to discharge easements or profits that came into existence after the reforms are enacted. This means that there will still be a significant role for extinguishment by abandonment.
- 5.11 We now take the view that extinguishment by abandonment should continue to be possible for both registered and unregistered easements, subject to the changes we proposed at paragraph 5.31 of the CP.

**We provisionally propose that, where title to land is not registered or title is registered but an easement or profit has not been entered on the register of the servient title, it should be capable of extinguishment by abandonment, and that where it has not been exercised for a specified continuous period a presumption of abandonment should arise.**

**[paragraphs 5.31 and 16.26]**

- 5.12 The courts are currently reluctant to make a finding of abandonment, even where an easement or profit has not been used for a considerable period of time. We discussed the problems that this can create in the CP at paragraphs 5.23 to 5.29, and concluded that a presumption of abandonment should arise after a period of 20 years if the easement is unregistered.
- 5.13 34 consultees responded to this question and 26 consultees replied to the corresponding question on profits at paragraph 6.54 of the CP; a majority of consultees agreed with these proposals.

### ***The responses***

- 5.14 Although many consultees agreed with our proposals in principle, there was debate as to how long the required period of non-use should be. A number of consultees supported our proposed period of 20 years; the Chancery Bar Association said:

Where the right has not been exercised for a period of 20 years a presumption of abandonment should arise, but the presumption should be capable of being defeated by evidence of some reason for non-user other than a fixed intention never to assert the right thereafter, or the absence on any occasion to exercise the right.

- 5.15 A few consultees suggested a shorter period, arguing that abandonment should reflect the period for adverse possession as established in the Land Registration Act 2002. Andrew Francis (Barrister, Serle Court Chambers) reasoned as follows:

Why not adopt a 10 year period for both acquisition and loss, being the same period applicable under the “new” law on adverse possession – which is far more serious in terms of its consequences; see *Pye v UK* (2007). While that may be thought that 10 years may be too short a period for the acquisition or loss of an easement, if it is long enough for adverse possession, why is 10 years not long enough for prescription and abandonment? So I think that 10 years is worth serious thought here.

- 5.16 There were also responses arguing for an extension of the proposed period; two consultees commented that a longer period would better suit easements, some of which are rarely used. The National Trust said:

We see some merit in this proposal, but are not convinced that it is necessary to use the same period for abandonment as for prescriptive acquisition, particularly for rights which are exercised infrequently. We would suggest that consideration be given to taking a longer period for abandonment, perhaps 40 years.

- 5.17 Further concerns were raised in relation to easements which are used only infrequently. A number of consultees cited the example of easements to haul timber, which by their nature would not be used often. Farrer & Co LLP summarised this situation as follows:

For example, the owner of woodland may sell off land between the wood and the highway reserving the right to use a track for timber haulage. It may not be necessary to use the right for any other purpose. For example planting equipment or inspections can be carried out by another access and this track is only needed for removing heavy tree trunks, perhaps once in a hundred years. Therefore there should not be any arbitrary time limit when an easement is not used.

The London Property Support Lawyers Group suggested a special exception for such easements, arguing the proposals would be more convincing if:

... there was a specific saving for rights which, of their nature, are infrequently used. This would go rather further than the proposal in paragraph 5.28 of the consultation paper that the presumption of abandonment could be rebutted in the case of easements that by their very nature are exercised infrequently.

- 5.18 A minority of consultees had a more fundamental objection to the proposal, arguing that abandonment should not be made easier to establish. For example, Martin Pasek based his objection on the loss of property rights which would be suffered by the owner of the easement:

I disagree. If a person remains resident at the same property for many years he or she may well (for example) give up driving and exercising a vehicular right of way for a long time, as he or she ages. There is no reason for this to lead to a presumption of abandonment, and it would be unjust if the right lapsed before the property was sold or inherited. This is an area where I believe a change in the law would alter the behaviour of opportunists for the worse.

### **Conclusion**

- 5.19 The responses to this proposal have to be read in conjunction with our conclusion, in relation to the provisional proposal at paragraph 5.30 of the CP, that there should not be a distinction between registered and unregistered land so far as abandonment is concerned.
- 5.20 Looking, then, at easements benefiting both registered and unregistered land: as discussed in the Report at paragraphs 3.225 to 3.231, and given the wide-spread support for our proposal, we recommend that there should be a presumption of abandonment after a certain period of non-use. Although we have taken into consideration the wide range of suggestions as to what this period should be, we continue to recommend that it is set at 20 years. This aligns the test for presumption of abandonment with the period for prescription, a connection noted by a number of consultees.

5.21 As to certain infrequently used easements, we do not propose to make specific exceptions. We note at paragraphs 3.227 and 3.228 of the Report that the proposed presumption can be rebutted by evidence of reasons for non-use. We think that the examples raised by consultees in this context are situations in which the presumption of non-use would indeed be rebutted.

**We provisionally propose that excessive use of an easement should be held to have occurred where:**

- (1) the dominant land is altered in such a way that it undergoes a radical change in character or a change in identity; and**
- (2) the changed use of the dominant land will lead to a substantial increase or alteration in the burden over the servient land.**

**[paragraphs 5.51 and 16.27]**

**We provisionally propose that where the court is satisfied that use of an easement is excessive, it may:**

- (1) extinguish the easement;**
- (2) suspend the easement on terms;**
- (3) where the excessive use can be severed, order that the excessive use should cease but permit the easement to be otherwise exercised; or**
- (4) award damages in substitution for any of the above.**

**[paragraphs 5.63 and 16.28]**

- 5.22 We take these two proposals together, as they are closely related.
- 5.23 An easement may not be used in a way that exceeds the scope of the right granted; the obvious examples are that a dominant owner may not drive down a right of way granted for passage on foot only, nor send foul water down a drain where the easement is for rainwater drainage. Transgression of the scope of the easement in this way will amount to trespass and/or nuisance, and the dominant owner may face an injunction or damages.
- 5.24 Difficulties of construction have arisen where the excessive use complained of is of an easement acquired by prescription or implication; the scope of the easement is obviously less easy to determine in such cases, but the principle is the same.
- 5.25 However, there have been cases involving continuous easements, such as easements of light and support (as opposed to discontinuous easements, such as rights of way, where the use happens in discrete episodes), where it has been held that the change in use has been such that the underlying easement itself has been suspended or extinguished. This is not a matter merely of degree of use, but of a change in the character of the dominant land. In *Ray v Fairways Motors (Barnstaple) Ltd* (1969) 20 P & CR 261, 265 to 266, Lord Justice Wilmer summarised the law as follows:

As I understand it, the principle ... is that an easement is extinguished when its mode of user is so altered as to cause prejudice to the servient tenement. Thus, an easement of support in relation to a building may be extinguished if the building is so altered or reconstructed as to throw a substantially increased burden on the servient tenement to the prejudice of the owner thereof.

5.26 In *McAdams Homes Ltd v Robinson* [2004] EWCA Civ 214, [2005] 1 P & CR 30 at [51], Lord Justice Neuberger went through the authorities at length and stated the test in similar terms:

In my opinion, the effect of the authorities in relation to the present case is that it would only be if the redevelopment of the [dominant land] represented a radical change in its character and it would lead to a substantial increase in the burden, that the dominant owner's right to enjoy the easement of passage of water through the pipe would be suspended or lost.

5.27 The principle that a substantive alteration in use of an easement is capable of extinguishing the underlying easement itself is generally taken to apply only to continuous easements. It does not apply to discontinuous easements where the "excess" can be separated from the normal user of the easement.

5.28 The effect of *McAdams Homes* and its predecessor cases is that the circumstances in which an easement may actually be lost as a result of excessive use are very limited. Where the excessive use cannot be separated from the lawful use, the servient owner may prevent any use at all pending a remedy that sorts the matter out; that is a very different matter from extinguishment.

5.29 In the CP we looked first at the question of what constitutes excessive use of an easement, at paragraphs 5.32 to 5.50, and secondly at the remedies available to the servient owner where excessive use has been proved, at paragraphs 5.52 to 5.62. Our provisional proposals have been set out above.

5.30 34 consultees responded to these questions. Most said that they agreed, but most of that majority then qualified their agreement and raised some important questions about the scope and purpose of our proposals.

### ***The responses***

5.31 Consultees raised four main points:

5.32 First, is excessive use of an easement usually a mode of extinguishment (or, as the CP describes it, "implied release"), as its place in the structure of the CP would suggest? In response to the remedies question, Amy Goymour (Downing College, University of Cambridge) said:

Surely the issue is really one of construing the extent of the easement from the circumstances of its creation. If the use exceeds the scope of the right, that use is clearly unlawful, and the normal remedies for use of someone else's land without permission or a right should apply (ie injunctions/damages/self-help in response to nuisance or trespass). What is novel is that the whole easement might be *extinguished* or *suspended* once the *McAdams* rule is satisfied. That would need to be expressly recognised by any proposals ... .

- 5.33 Secondly, a number of other consultees expressed discomfort at the idea that extinguishment of the underlying easement should be readily available as a response to excessive use. Michael Croker, Miriam Brown and Kevin Marsh considered that it should never be an available remedy, at least in relation to registered land.
- 5.34 Thirdly, is the test proposed in the CP intended to apply to express and prescriptive easements? Many consultees were concerned by the idea that the test set out in the CP might displace the express provision of the parties regarding permitted use. The National Trust and the Country Land and Business Association Ltd also argued that a more restrictive test should be applicable to prescriptive easements.
- 5.35 Finally, would the implementation of the proposal change the law? Several consultees pointed out that the CP presented its proposal as a codification of the current law (the *McAdams Homes* test); some important practitioners' groups, including the Chancery Bar Association and the London Property Support Lawyers Group considered that such a codification would not be useful.

### **Conclusion**

- 5.36 In presenting excessive use as a single cause of action that permits the servient owner to seek extinguishment, suspension, damages or an injunction at the discretion of the court, the CP conflated two distinct issues:
- (1) the excessive use of an easement that enables the servient owner to bring a claim for damages or an injunction; and
  - (2) the specific circumstances where excessive use may ground a demand for extinguishment of the underlying easement, which seems at present to be possible only for continuous easements.
- 5.37 The provisional proposal at paragraph 5.51 of the CP was presented as a definition of excessive use as such; and reform in the terms proposed would therefore displace the ordinary tortious liability, described at (1) in the list above. The result would be that if the dominant owner used an easement in a manner beyond the scope of the right, absent any radical change in character of the dominant tenement, the servient owner would no longer be entitled to damages or an injunction. We agree that that would not be desirable. We think that the general principle of tortious liability should remain unchanged.
- 5.38 We take the view that no clarification of the law on issue (2) in the list above is needed. The proposal in the CP did not distinguish between "discontinuous" and "continuous" easements. Such an approach could be justified on the basis that the distinction between these types of easement was no longer relevant following *McAdams Homes*. However, this is not a view shared by leading authorities in this field. If *McAdams Homes* were put on a statutory footing, as we proposed, but applied generally to all easements, that would appear to be a change in the law that would make extinguishment easier. Consultees have not expressed a desire for this.
- 5.39 Nor do we wish to adapt the CP proposal by applying it only to continuous easements. This would in effect put *McAdams Homes* on a statutory footing. The

London Property Support Lawyers Group, the Chancery Bar Association and the Conveyancing and Land Law Committee of the Law Society suggested that nothing would be gained since the issues will remain ones of fact and degree, and we agree.

***Other related issues***

- 5.40 Northumberland County Council suggested that a new element should be added to the enforcement of easements:

We suggest that when the courts or the Lands Tribunal are considering the enforcement or waiver of easements or covenants that they should be under an obligation to have regard to the Community Strategy (Part 1 of the Local Government Act 2000) and the Local Development Scheme (Part 2 Planning & Compulsory Purchase Act 2004). The court or tribunal would not be bound by those policies but this proposal would enable the public interest to be more easily identified.

- 5.41 In view of our conclusions above, we are not minded to take this point any further, since we are not making any other recommendations about the enforcement of easements. Indeed, we would be concerned that such a move might shift the balance between community interests and individual property rights.



**We provisionally propose that, where land which originally comprised the dominant land is added to in such a way that the easement affecting the servient land may also serve the additional land, the question of whether use may be made for the benefit of the additional land should depend upon whether the use to be made of the easement is excessive as defined above.**

**[paragraphs 5.71 and 16.29]**

5.42 This proposal was intended to alter the existing rule derived from the case of *Harris v Flower* (1904) 74 LJ Ch 127. Currently, this rule states that the owner of the original dominant land cannot use the easement for the benefit of any other land that he or she owns. Our proposal would have refocused the test instead on whether the use of the easement in relation to the additional land would result in excessive use, as defined at paragraph 5.51 of the CP.

5.43 31 consultees responded to this question, and most expressed opposition.

### ***The responses***

5.44 A few consultees agreed with our proposal, including the Chancery Bar Association and Jeffrey Shaw (Nether Edge Law). The latter based his support on the importance of giving weight to the rights of the dominant owner:

The easement over the servient land is simply benefiting the dominant land, and what happens to access beyond the dominant land is of no concern to the servient owner (provided that the use is not intensified or excessive).

5.45 On the other hand, the majority of consultees opposed the proposal on the basis that it interfered with the bargaining autonomy of land owners. Repealing *Harris v Flower* would allow unilateral extensions to the geographical scope of the benefited tenement, which may have been unforeseeable by the servient owner. This idea was stated succinctly by the Agricultural Law Association, who said:

It is up to the parties to decide upon the extent of application and their freedom should not be curtailed.

5.46 As part of this loss of bargaining power, Farrer & Co LLP highlighted the financial benefit which the servient owner would lose, potentially creating problems under Article 1 of the First Protocol to the ECHR:

This is a matter of considerable financial importance at the moment and substantial sums change hands where a right subsists for the benefit of one piece of land (perhaps having been expressly granted for that land only under a specific bargain) and the owner wishes to extend the use to another piece of land. It gives the owner of the servient tenement an important financial stake in the use of the dominant land and that is at present highly regarded as a valuable asset. Implementation of this proposal would have the effect of depriving servient owners of an important right of property and would therefore be contrary to the Human Rights Act.

5.47 Another ground of opposition was focused on the more general impact this proposal would have on servient owners' property rights. For example, Gerald Moran (Hunters, Solicitors; City of Westminster and Holborn Law Society) argued that:

If an easement is stated to be for the benefit of specified land it is difficult to see why that should be altered to extend to other land as well merely because there is little detriment to the burdened land because it has spare capacity. The question is whether the additional land should acquire a free right by "piggyback" rather than by actual grant or prescriptive use.

5.48 Furthermore, the Treasury Solicitor's Bona Vacantia Division suggested that this problem would be especially acute in the context of easements created through prescription or by implication, as they:

... impose a limit on the servient owner's otherwise unrestricted right to use his own land as he pleases, we would suggest that implied easements should be limited to the use of the dominant land at the time the easement arose. It seems inequitable that the grantee can unilaterally extend the rights implied by simply changing or extending his use of the dominant land, or extending the amount of land comprised in the dominant tenement.

5.49 Finally, two consultees highlighted the uncertainty and disadvantages which extension of the "excessive" test beyond its current application could create. DLA Piper UK LLP was concerned about how this proposal would operate in practice, saying:

This proposal runs the risk of uncertainty. If one of the aims of reform is to bring greater certainty to identifying dominant and servient tenements, this proposal could interfere with that. If the extent of a dominant tenement is increased, it will almost always be the case that there will be some intensification of the use of the easement. It will not be easy to say in each case whether or not that intensification is "excessive" without resort to litigation.

5.50 Similarly, Roger Pickett (Diocese of Southwark) argued that using the test of "excessive use" would be an inappropriate limit in this context:

We are however, most concerned about the definition of "excessive", since quite clearly there is potential to give unfair financial advantage to either party. For example, we take the view that to extend, say, a right of access on foot to additional land adjacent to the dominant land would not normally be excessive but to permit vehicular use would be. In commercial terms there could be large sums of money involved for small variations of intensification of use and it is important that neither party is unduly advantaged to the detriment of the other party.

**Conclusion**

- 5.51 Overall, consultees' responses have demonstrated that there is little to be gained by altering the existing rule in *Harris v Flower*, the principle of which is well-understood, and has commercial value. Moreover, any alteration might result in a number of conceptual and practical difficulties, as outlined by consultees. We therefore make no recommendations in relation to the rule in *Harris v Flower*.

**We provisionally propose that where an easement is attached to a leasehold estate, the easement should be automatically extinguished on termination of that estate. We invite the views of consultees on this proposal, and in particular whether there should be any qualifications or restrictions on the operation of this principle.**

**[paragraphs 5.86 and 16.30]**

- 5.52 This proposal arises from the decision in *Wall v Collins* [2007] EWCA Civ 444, [2007] Ch 390, in which the Court of Appeal held that when a lessee acquired his landlord's freehold, and the lease merged with it (in this case, at the lessee's solicitor's request), an easement appurtenant to the lease did not come to an end. The decision was contrary to the orthodoxy that an easement is appurtenant to an estate, and must therefore end with it. In the CP we proposed the reversal of this decision.
- 5.53 36 consultees responded to this question and 24 consultees replied to the corresponding question on profits at paragraph 6.54 of the CP. Consultee opinion was balanced between support and criticism for these proposals.

#### ***The responses***

- 5.54 A significant number of consultees preferred a return to the orthodoxy that easements are appurtenant to estates. Consultees noted that the merger of a leasehold and its reversionary freehold is a voluntary action, the consequences of which should be clear to lawyers. B S Letitia Crabb (University of Reading) succinctly summarised this point:

I agree strongly. Legal advisors should understand the occasions and implications of merger or take the consequences in the law of negligence.

In contrast, the practice of merging titles was defended by Wragge & Co LLP, who identified the benefits of merger as a standard practice amongst conveyancers:

Merger is a useful conveyancing device to clean up titles. We do not want to be in a position where there is an incentive not to merge. Where both the leasehold and the freehold title are registered, there will usually need to be an express application to Land Registry to merge the titles.

- 5.55 Other consultees agreed that the decision in *Wall v Collins* should be reversed as a matter of principle, but also thought that the decision had practical value. One of the main justifications for this view was based on sympathy for the dominant owners of newly-merged estates, who could inadvertently lose valuable property rights through this conveyancing "trap", as demonstrated in *Wall v Collins* itself. For example, HHJ Ian Leeming QC said:

I take the points made in the paper, but I have sympathy for the plight of a dominant owner who loses a valuable right through inadvertence to the consequences of merger, even if the merger has been expressly declared or sought. I would favour some saving provision for that situation, which the Court of Appeal appears to have afforded in an unsatisfactory analysis of the law.

- 5.56 A number of ideas for how the practical benefit of the *Wall v Collins* rule could be retained were presented. Andrew Francis (Barrister, Serle Court Chambers) and the Chancery Bar Association both suggested using an expanded version of section 84 of the Law of Property Act 1925, which would give the Lands Chamber of the Upper Tribunal jurisdiction to carry forward easements which would otherwise be extinguished on merger. The Chancery Bar Association said:

We agree that where an easement is attached to a leasehold estate, the easement should be automatically extinguished on termination of the estate. As a matter of principle that must be correct. Nevertheless, we note the concerns of Hooper LJ in *Wall v Collins* [2007] Ch 390 at paragraph 58 of the judgment and the potentially disastrous consequences which might ensue from the proposed amendment and thought should therefore be given as to whether the dominant owner who stands to lose his right through merger in these circumstances should be able to apply under the revised section 84 for its preservation ... . As a matter of common sense, it is difficult to see why a lessee should be worse off, so far as concerns an easement annexed to the land, merely because he has acquired a larger interest in the dominant tenement.

Andrew Francis (Barrister, Serle Court Chambers) said:

I agree with this principle. But, I wonder whether an application could be made by the dominant owner under a reformed section 84 to allow the easement to continue? *Wall v Collins* [2007] shows possible injustice, unless this jurisdiction exists.

Another alternative was suggested by the London Property Support Lawyers group:

The unnecessary preservation of obsolete leasehold titles (in the case of merger) and of loss of currently valuable leasehold interests (in the case of surrender) could be avoided by allowing the transfer to the immediately superior title of the benefit of leasehold easements for the residue of the term of the lease. On completion of that process, the leasehold title could be closed.

- 5.57 On the other hand, a number of consultees wanted *Wall v Collins* to remain in force and the law left in its present state. Consultees argued that academic consistency should not be sought at the expense of practicality, as easements exist to serve property rather than abstract estates. Gerald Moran (Hunters, Solicitors; City of Westminster and Holborn Law Society) presented this view in the following manner:

We do not agree with the proposal at 5.86. If a leaseholder acquires his freehold so that the lease terminates by merger, it should not follow that rights of way etc should be regarded as given up. In this type of case the right continues to serve his physical property rather than some other physical property. The tail of academic theory should not wag the dog of practicality in the real world.

- 5.58 Finally, Peter Bennett (University of Reading) suggested that the reversal of *Wall v Collins* would have human rights implications as it would allow dominant owners to accidentally lose valuable property rights.

### **Conclusion**

- 5.59 In the light of the points raised by consultees, our recommendation differs to some extent from our proposal in the CP. We remain of the view that it is necessary to reverse *Wall v Collins*, and so restate the orthodox position that easements are appurtenant to estates in land; but we have also recommended that it should be possible for the relevant estate owner to make an election so that an easement attached to a leasehold is not extinguished if the lease comes to an end by merger or surrender. We discuss this issue in greater detail at paragraphs 3.232 to 3.263 of the Report and our recommendation is reflected in clause 26 of the draft Bill.

### **Other related issues**

- 5.60 Some consultees commented on the different issues arising in connection with burdens attached to the lease, where the benefit is held by third parties. The law relating to such burdens is not affected by *Wall v Collins* nor by the proposal at 5.86; we have not made any recommendations relating to the survival of burdens where a lease comes to an end, save in relation to bona vacantia and escheat (see the Report, paragraph 6.185 and clause 12 of the draft Bill).
- 5.61 We have not addressed the situation that arises where an easement or other interest is granted to B “for the benefit of such title and interest as B, or B’s successors, may from time to time have in the dominant land”, which we regard as a matter of construction of the grant.
- 5.62 Some consultees referred to sections 139 and 150 of the Law of Property Act 1925, which relate to the effect on a sub-tenant of the surrender of a lease. Our conclusions have no effect on this situation. Herbert Smith LLP asked whether an easement appurtenant to a lease can be revived for the benefit of a sub-tenant in the case where the lease is forfeited but the sub-tenant obtains relief from forfeiture. We have not made any recommendations about this situation since it is not a point on which we consulted and we do not know to what extent it is a problem in practice.

# PART 6

## PROFITS À PRENDRE

We provisionally propose:

**(1) that profits should only be created by express grant or reservation and by statute; and**

**[paragraphs 6.30(1) and 16.31(1)]**

- 6.1 It is currently possible for a profit, like an easement, to be created by prescription or implication, as well as expressly or by statute. We discussed the creation of profits at paragraphs 6.15 to 6.26 of the CP, and concluded that it should no longer be possible to create profits through methods other than by express grant or reservation or by statute.
- 6.2 25 consultees responded to this question. This proposal attracted broad support, with only one consultee disagreeing.

### ***The responses***

- 6.3 Many consultees agreed with the proposal without further comment. For example, Jeffrey Shaw (Nether Edge Law) was enthusiastic about the proposals:

I agree with the provisional proposals, particularly that only express grant/reservation (or statute) should be capable of creating new profits.

- 6.4 Land Registry also agreed with the proposal. It raised two important reasons for the change; the rarity of profits arising by implication or prescription, and the practical benefit of certainty (and thus ease of registration) that the requirement of express creation would bring:

We do not see many applications to register profits arising by prescription or impliedly, but implementation of the ... proposal [at paragraph 6.30(1)] would remove the possibility of some potentially difficult applications.

- 6.5 Both the Chancery Bar Association and Amy Goymour (Downing College, University of Cambridge) observed that the proposal would bring the law on profits into line with the law on commons. The Chancery Bar Association said:

We agree that profits should no longer be acquired by prescription. By section 6(1) of the Commons Act 2006 (when brought into force) the creation of rights of common by prescription will be abolished and it would be odd if other profits could still be acquired by prescription ... . However, we also agree that profits should not be acquired by implication. Under section 6 of the Commons Act 2006 (when brought into force), a right of common can only be created by statute or by an express grant in prescribed form. There is no good reason for having any different rule for other profits.

- 6.6 Disagreement with the proposal was expressed by Trowers & Hamblins on the basis that:

The doctrines of prescription in the law address real genuine social needs, save for the unhelpful intervention of legislation in the Prescription Act 1832 and the Land Registration Act 2002, the former of which is too obscure to be helpful, and the latter strikes the wrong balance between the owner with paper title and the squatter, in relation to which the common law and the Limitation Act 1980 have a better balance, though perhaps the periods prescribed by the latter should be longer, say 20 or 40 years.

### ***Conclusion***

- 6.7 Although we agree that prescription serves a useful purpose, we have not seen any evidence that suggests that restricting the manner of creation of profits will cause substantive difficulty or hardship to any person or group. Profits are very different from easements and so there is no reason for these two types of interest to share the same methods of creation. As the Law Reform Committee said in 1966 (Acquisition of Easements and Profits by Prescription: Fourteenth Report (1966) Law Reform Committee, Cmnd 3100):

The acquisition of a profit is normally a transaction of a more commercial character than is the acquisition of an easement and it is not unreasonable that the purchaser should be required to prove the bargain upon which he relies.

- 6.8 Moreover, as identified by various consultees, the change would bring a number of practical benefits. Therefore, we recommend that profits can only be created expressly or by statute. We discuss this issue further at Part 3 of the Report and have included this proposal as clause 19(1)(b) of the draft Bill.

### ***Other related issues***

- 6.9 Currey & Co agreed with the proposals, but was concerned as to the extent to which the reforms would be prospective:

We agree, but with savings in respect of profits in course of acquisition by prescription under the existing law.

- 6.10 We are not persuaded that if the prescription of profits should cease to be possible, there should be any saving for potential claimants who have not yet completed the prescription period. We note that prior to that point there is no profit in existence. Accordingly, we have made no transitional savings – see paragraph 3.10 of the Report, save for the exceptional case addressed in clause 18(2) of the draft Bill.



**We provisionally propose that:**

**(2) a profit which is expressly reserved in the terms of a conveyance should not be interpreted in cases of ambiguity in favour of the person making the reservation.**

**[paragraphs 6.30(2) and 16.31(2)]**

- 6.11 As with easements, when a profit is reserved in a transfer, any ambiguities in its interpretation are resolved in favour of the party making the reservation, or in other words in favour of the dominant tenement or owner. This is a longstanding common law presumption which is discussed in greater detail above at paragraph 3.42 and following, where an equivalent question was asked in relation to easements. The CP discussed how this rule applies to profits at paragraph 6.27 and proposed its abolition at paragraph 6.30.
- 6.12 22 consultees responded to this question and although all consultees were in agreement with this proposal, we have reached the conclusion that we cannot make a recommendation in line with this proposal. See the conclusion to the analysis of consultees' responses to paragraph 4.24 of the CP, above.

**We provisionally propose that profits should be capable of extinguishment:**

- (1) by express release;**
- (2) by termination of the estate to which the profit is attached;**
- (3) by statute; and**
- (4) by abandonment, but only where the profit is not entered on the register of title.**

**Do consultees agree?**

**[paragraphs 6.54 and 16.32]**

6.13 At present, profits can be extinguished in the following ways:

- (1) by exhaustion, where the subject matter of the profit has been destroyed or depleted;
- (2) by abandonment, where use of a profit can be proved to have been intentionally and permanently discontinued;
- (3) by unity of possession and ownership of the servient and dominant land (or, in the case of profits in gross, where the owner of the profit in gross comes into ownership and possession of the servient land);
- (4) by express release by the dominant owner;
- (5) by statute; and
- (6) on the termination of the dominant or servient estate.

We discussed these methods of extinguishment at paragraphs 6.31 to 6.53 of the CP and proposed reducing their number so that only the methods listed at paragraph 6.54 would be valid. Items 1 (exhaustion) and 3 (unity of possession and ownership) would therefore be lost from the above list.

6.14 As to the methods that would remain, elements of this proposal overlap with questions asked earlier in the CP about easements, as discussed above in this Analysis (see paragraphs 5.1 and following and 5.12 and following, above). In summarising responses, we therefore refer the reader to the more detailed discussion in the context of easements.

### ***The responses***

6.15 The majority of consultees did not refer explicitly to the elimination of any of the current methods for bringing profits to an end, and confined their comments to the methods that were to remain.

#### **EXPRESS RELEASE**

6.16 24 consultees commented on this; clearly the method must remain, as under the current law.

#### TERMINATION OF THE ESTATE TO WHICH THE PROFIT IS ATTACHED

- 6.17 24 consultees commented on this. Although a large majority of consultees agreed with what we proposed, and with our analysis of the decision in *Wall v Collins* [2007] EWCA Civ 444, [2007] Ch 390, there was some disagreement. This proposal covers the same ground as the corresponding question on extinguishment of easements, which we discuss at paragraphs 5.22 to 5.62 above.

#### EXTINGUISHMENT BY STATUTE

- 6.18 24 consultees commented on this; there is, again, no question of changing the current law.

#### EXTINGUISHMENT BY ABANDONMENT, BUT ONLY WHERE THE PROFIT IS NOT ENTERED ON THE REGISTER OF TITLE

- 6.19 26 consultees responded to this question. Although a majority agreed with our proposal, a significant number did not. Disagreement was largely on the basis that registered and unregistered profits should not be treated differently in this context.
- 6.20 The question raised the same issues as did the corresponding question for easements, and of course our recommendations on this point for easements and profits are the same; see paragraphs 5.1 and following, and 5.12 and following, of this Analysis.

#### **Conclusion**

- 6.21 We met with very little support for our proposal that profits should no longer be able to be extinguished by exhaustion, and on reflection we see no need to take that suggestion further. Our recommendations about extinguishment where there is unity of ownership and possession are discussed at length at paragraph 4.19 and following of the Report.
- 6.22 Otherwise, we make no recommendation for reform of the law in relation to the extinguishment of profits.

# **PART 7**

## **COVENANTS: THE CASE FOR REFORM**

**Have we identified correctly the defects in the current law of positive and restrictive covenants? If consultees are aware of other defects which we have not identified, could they please specify them?**

**[paragraphs 7.59 and 16.33]**

7.1 We began Part 7 of the CP by discussing the current law relating to freehold covenants. We then identified and analysed some of its defects, which can be summarised as follows:

- (1) It is difficult to identify who has the benefit of a restrictive covenant for two reasons:
  - (a) there is no requirement that the instrument creating the covenant should describe the benefited land with sufficient clarity to enable its identification without extrinsic evidence; and
  - (b) the benefit of a restrictive covenant, being an equitable interest, cannot be registered as an appurtenant interest on the register of title to the dominant land.
- (2) There are differing and complicated rules for the running of the benefit and burden of restrictive covenants.
- (3) The contractual liability between the original parties to a covenant persists despite changes in the ownership of the land; when the land is sold, the original covenantor remains liable.
- (4) Whereas the benefit of a positive covenant can run at law, the burden of a positive covenant does not run so as to bind successors in title. Although circumvention devices now exist to mitigate the effect of this rule, they suffer from various shortcomings.

7.2 After expanding on these issues between paragraphs 7.34 and 7.58 of the CP, we invited consultees to highlight any other problems which may exist with the current law on restrictive or positive covenants.

7.3 37 consultees responded to this question, the majority of whom agreed with the analysis in the CP. Additional difficulties with the present law were also identified by some of the consultees.

### ***The responses***

7.4 Nearly all of the consultees agreed with the analysis in the CP.

7.5 The most common problem commented on by consultees were the difficulties in identifying the person who holds the benefit of a covenant. For example, the Chancery Bar Association said:

We agree that it is a serious practical problem and injustice that positive covenants cannot be enforced directly between the successors in title to the original land owning contracting parties, in particular in the case of fencing and maintenance covenants.

We agree that the consultation paper identifies correctly the defects in the current law of positive and restrictive covenants. The destruction of historic title deeds in the process of registration is becoming an increasing practical problem in relation to the tracing of the persons entitled to the benefit of a restrictive covenant. There are also the problem about “passing plans” and the problem about annexation to each and every part of the original benefited land.

Similarly, Farrer & Co LLP described a situation where identification of the benefited estate creates additional complications:

Identification is a particular problem in the case of landed estates. Although it is possible using the wording in *Zetland v Driver* [1939] Ch 1 to draft a covenant in the way that it attaches only to unsold land or land sold with the express benefit of the covenant, this is frequently not done. The practice in relation to large estates often of 5,000 or 10,000 acres has been to annex the benefit to each part of the estate capable of benefiting. Experience shows that subsequent purchasers of part who cannot take any direct benefit will often seek to claim it and where land is being sold for development a developer may be concerned at such a risk. For example, we are aware of cases where a covenant not to make alterations to an existing dwelling might be asserted as a benefit by someone living two miles away who had bought land from the estate at some date after the original sale. Furthermore, in relation to ancient covenants, it may be very difficult to identify the person having the benefit.

The Council of Mortgage Lenders focused on the practical problems affecting conveyancing; in the context of mortgages, most conveyancers will not send lenders certificates of title (a form of report that assures a lender that a given property will provide good security for a mortgage) for properties affected by covenants unless indemnity policies are in place. As a result:

A large number of restrictive covenant indemnity policies are therefore purchased by borrowers. In a market where property prices are rising one policy may not be enough – new lenders may require top up policies to cover greater sums advanced. This can involve the borrower in expense where realistically there is very little likelihood that a covenant will be enforceable.

We understand the reluctance on the part of conveyancers to give a clear certificate of title without such a policy in place ... . Without any requirement that the benefit of a restrictive covenant is registered against the benefiting title(s) it is difficult for conveyancers to assess risk.

Richard Coleman (Clifford Chance LLP) made a further criticism of the current law in relation to how it affects Land Registry practice:

If a restrictive covenant is released or modified consensually and the deed effecting that release or modification is registered at the Land Registry, the registration will frequently be made on the basis that the deed purports to affect the release or modification (but may not have in fact done so). That is because the Land Registry cannot always be sure that the person who purports to be entitled to the benefit of the covenant is in fact so entitled or is the only person so entitled.

- 7.6 A few consultees suggested additional defects which were not covered in the CP. Gregory Hill (Barrister, Ten Old Square Chambers) said that in addition to the main issues identified in the CP:

Other criticisms, minor by comparison with these, can also be made: for example the uncertainty which may arise on a “passing of plans” covenant as to the effect of the death of an individual or dissolution of a company named as the person to whom plans are to be submitted (considered at first instance in *Crest Nicholson v McAllister*); and the decision in *Federated Homes* that a covenant annexed to land is annexed to every part of that land, which seems quite likely to have defeated expectation interests that certain covenants would be enforceable by whoever held substantially the whole of the “quasi-dominant” land, and not by anyone else.

Michael Croker, Miriam Brown and Kevin Marsh drew on a specific difficulty in their group response:

Every time there is a major storm, Land Registry enquiry lines are very busy with enquiries about the ownership and maintenance of boundary structures. Owners are very disappointed to learn that Land Registry cannot say who owns them or who is responsible for repairing or replacing them and that no-one indeed can actually be certain of those details if the land is freehold.

- 7.7 Consultees also highlighted alternative methods used to circumvent the current rules preventing positive covenants from running with the land. For example, G J Wadsworth (University of Newcastle) brought attention to a practice in the North East of England applied to two-storey flats: the lease of a flat is transferred alongside the freehold reversion of the vertically adjacent flat to ensure that positive covenants can be enforced between flat owners. Herbert Smith LLP considered leasehold-based schemes generally and concluded that:

It is clearly wrong in concept that parties should be required to adopt some, often complicated, mechanism or, worse, a legal estate structure which would not otherwise be adopted, in order to achieve security on positive covenants.

- 7.8 In contrast, a small minority of consultees did not agree with our analysis. The Country Land and Business Association Ltd argued that the current law prevents unnecessary disputes between neighbours precisely because of the features which we identified as defects:

We are not convinced of the need for wholesale reform in the area of covenants. It is accepted that there are deficiencies in the current law but these need not be overstated. We are concerned that the introduction of compulsory land obligations would amount to the proverbial sledge hammer to crack a nut. We are also concerned that creating legal obligations would lead to the proliferation of positive covenants which might be considered to be undesirable ... . We are not convinced that it is practical or desirable to encourage increased litigation between neighbours over the requirement to perform positive covenants or the recovery of costs for repairing fences or filling in pot holes. All sorts of disagreements could arise over the standard of workmanship of repairs or the costs charged for the same. In essence there is a fundamental distinction between positive and restrictive covenants which justifies them being treated differently.

The potential negative consequences of making covenants easier to enforce were also discussed by Dr Caroline Sawyer (Victoria University of Wellington, New Zealand):

It seems sensible that the benefit of covenants should go on the land register of the dominant tenement. However there may be fairly heavy practical implications of actually doing this, so it would need tying in with everything else. Inconvenient covenants are very common indeed and the fact that the person with the benefit probably does not know they have it is the saving grace. One can take a view as to the likelihood of enforcement and insure against it. If the benefit of covenants is on the register, many more may be enforced or money required for their release or applications made to discharge them. It might be a good idea to ask practitioners whether they foresee a large and awkward workload arising from such a change.

Two consultees (Victor Mishiku (The Covenant Movement) and the Churchfields Avenue Residents Association) replied that they did not experience any difficulty in identifying the land benefited by a covenant, and therefore did not see the need for any change in the law. In other words, the absence of a publicly accessible register showing who benefits from a covenant can be overcome where the conveyancer knows a lot about local titles, as will those who happen to have worked a long time in an area. But that is a matter of luck; while some areas may benefit from local knowledge and historical sources in this way, this is clearly not the case across England and Wales.

### **Conclusion**

- 7.9 As we discuss in Part 5 of the Report, we are satisfied that the defects identified in the current law of covenants are sufficient to justify reform. The additional problems identified by consultees further strengthen the case for reform in this field, accompanied by the safeguards that we identify in Part 5 of the Report. The advantages of being able easily to identify where the benefit of a covenant lies is important and we discuss this at paragraphs 5.5 and 5.6 of the Report.
- 7.10 The reforms we recommend will only apply to covenants created after implementation, so the enforceability of older covenants will not be affected.

***Other related issues***

- 7.11 The National Trust requested that any recommended reforms include provision for restricting the interpretation of covenants. It argued that unless such a provision is made, the courts would be likely to interpret covenants liberally and in favour of servient owners so as to prevent covenants becoming too burdensome.

We do not think that such an approach would be appropriate; the rules of interpretation are well understood by practitioners and there has been no evidence presented to us that they are consistently applied to the detriment of the person with the benefit of a covenant. Furthermore, each covenant is unique and interpreted on its own individual features, which makes it difficult to formulate any general limitation on how the courts should interpret covenants.



**We consider that, despite the introduction of commonhold, there is still a need for reform of the law of covenants. Do consultees agree?**

**[paragraphs 7.66 and 16.34]**

- 7.12 One of the difficulties we highlighted in the current law was that only negative covenants, not positive ones, can run with land. However, since 2004 it has been possible to attach positive obligations to commonhold land.
- 7.13 Commonhold was introduced in order to enable interdependent units with shared facilities to be sold with freehold title, using a commonhold association to own and manage the common parts of the development, if any, and to enforce the unit-holders' obligations. However, commonhold is too complex an arrangement to be suitable for a situation where all that is needed is a single obligation, for example, to mend a fence.
- 7.14 We argued in the CP between paragraphs 7.60 and 7.65 that the introduction of commonhold does not resolve the need to enable positive covenants to run with land.
- 7.15 31 consultees commented on this issue. All but one agreed that commonhold did not alleviate the need for reform.

***The responses***

- 7.16 Many of the consultees who responded to this question agreed with the analysis and conclusions presented in the CP in their entirety. Those consultees who made additional comments on this issue focused on two topics; the relative unpopularity of commonhold and the technical requirements which limit its application. In respect of the former, consultees argued that even if commonhold could be used to remedy some of the defects in the current law of covenants, it is not in common enough use to be a viable solution. Andrew Francis (Barrister, Serle Court Chambers) noted that:

There are apparently only 17 commonhold titles registered after nearly 4 years of the legislation being in force.

Addleshaw Goddard LLP discussed the issue further:

We do not believe that there is any real likelihood in the short to medium term that commonhold will become a tenure of choice for property owners/developers.

- 7.17 However, Trowers & Hamblins suggested that any reforms undertaken should be careful so as to not "inhibit the take up of commonhold, which deserves to be used much more widely."
- 7.18 A number of consultees argued that commonhold is not suited to circumventing the limitations of positive and restrictive covenants. The National Trust said that commonhold was not a "natural solution" to the problems with covenants, while Gregory Hill (Barrister, Ten Old Square Chambers) described using commonhold instead of reforming covenants as taking "a very large sledgehammer to a very small nut". Herbert Smith LLP expanded on the technical differences between these doctrines:

The basic premise of commonhold is to facilitate freehold ownership of flats although its theoretical scope goes further than that. The ability for positive burdens to run is a necessary consequence of that premise (and the current inability for them to do so may be its cause); but a belief that commonhold answers all or even some defects in the current law would be misconceived. This is, primarily, because the nature of structuring and subsequently managing a commonhold is too prescriptive and limiting to be capable of providing practical and easily acceptable solutions to the current defects.

- 7.19 In contrast, Network Rail disagreed with our conclusions on the basis that the current law of covenants does not require reform.

***Conclusion***

- 7.20 As reflected by consultee opinion, we do not think that commonhold is a suitable alternative to reform of the law of covenants. Our recommendations can be seen in Parts 5 and 6 of the Report and will have no effect on the present law of commonhold.

**We provisionally propose:**

- (1) that there should be reform of the law of positive covenants;**
- (2) that there should be reform of the law of restrictive covenants; and**
- (3) that there should be a new legislative scheme of Land Obligations to govern the future use and enforcement of positive and restrictive obligations.**

**Do consultees agree?**

**[paragraphs 7.79 and 16.35]**

**We invite consultees' views as to whether, in the alternative, it would be possible to achieve the necessary reforms by simply amending the current law of positive and restrictive covenants.**

**[paragraphs 7.80 and 16.36]**

- 7.21 We analyse these two questions jointly to reflect the way in which consultees structured their responses.
- 7.22 In these paragraphs we presented the starting point for our scheme for reform. We rejected the idea that simply reforming the law of negative covenants would be sufficient, but we invited consultees to tell us if they disagreed (paragraph 7.80). We proposed to bring positive and negative obligations together to form a new interest in land. We used the term "land obligations" for that new interest to indicate continuity with earlier reform proposals and to mark the break with the current law.
- 7.23 The full arguments for these proposals were made between paragraphs 7.67 and 7.78 of the CP.
- 7.24 These two questions received 44 responses, with consultees expressing a variety of views. A majority of those who addressed the question at paragraph 7.80 were in favour of implementing land obligations, rather than modifying the existing law.

### ***The responses***

- 7.25 There was near universal agreement by consultees on the need to reform the law of positive covenants. The majority supported the arguments made in the CP without additional comment. However, William Shearer (Bidwells) expanded on the practical problems faced by practitioners when dealing with positive covenants:

We support the concept of the ongoing liability of positive covenants for successive owners. When a property is sold it is always difficult for the original owner to insist on positive covenants following a subsequent sale in the form of boundary responsibilities, the erection of fencing, provision of services etc.

- 7.26 Nearly all of the consultees who responded to these questions also favoured a simultaneous reform of restrictive covenants. In support of this, Land Registry said:

We also agree that it would not be satisfactory to reform the law in respect of positive covenants and leave that for restrictive covenants unchanged: as the consultation paper explains, this would be to have “two separate and different regimes ... governing two legal entities (positive and restrictive covenants) which ought in any rational system of law to be conceptually the same”.

Similarly, Dr Nicholas Roberts (Oxford Brookes University) concluded that:

If one is reforming the law to allow for [positive covenants to run with the land], it does not make sense to leave the law on restrictive covenants in its present state of complexity.

- 7.27 In comparison, support for the introduction of land obligations was qualified, with nearly half of the consultees who responded suggesting that it may be possible to effect the necessary reforms through modifications to the existing law. However, consultees who agreed with our proposals included professional bodies, practitioners and Land Registry. The main argument made in favour of land obligations was that the present law was already excessively complex, which would be compounded by any further modifications. The London Property Support Lawyers Group said:

We favour a fresh start with the land obligation. Tinkering with the existing law will inevitably make it more complex (different law applying to the same sort of obligation depending on the date of creation). Having a new creature will make it clear – and thus easier to advise with certainty – which regime is applicable to a title.

The Chancery Bar Association noted how the development of covenants has made the need for reform more pressing:

It is obvious that there is a real need for reform. The perspective which we have adopted is that of remedies. The important remedies in practice are the equitable remedies of injunction and specific performance (or damages in lieu) and not the common law contractual remedy of damages for breach. There is therefore absolutely no reason to maintain the contract concept. All the difficulties and complexities experienced with the current regime in relation to both positive and negative covenants arise from it. For this reason also it is important to bring both positive and restrictive covenants under the same regime. The land obligation is therefore the right course to adopt notwithstanding the difficulties of transition from the current regime in respect of restrictive covenants (there will be no such difficulties in respect of positive covenants which will not be enforceable against successors in title if entered into before the relevant date).

Dr Martin Dixon (Queens' College, University of Cambridge) highlighted the practical benefits of land obligations in the field of conveyancing:

In particular, the proposals concerning registration and the nature of land obligations as legal interests will enhance the e-conveyancing objectives of the LRA 2002 as well as ensuring that existing technicalities are removed.

Gregory Hill (Barrister, Ten Old Square Chambers) not only supported the introduction of land obligations but also rejected the possibility of modifying the existing law:

Despite my aversion to anything which might be regarded as change for the sake of change, I agree emphatically that root and branch reform of the law of covenants, both positive and restrictive, is required. I do not believe there is any real prospect of significantly improving the current law by amending it: the defects and complexities are too deeply ingrained in it.

7.28 Of those consultees who believed that it would be possible to reform the law of covenants through changes to the existing law, a significant number still preferred the introduction of land obligations. Roger Pickett (Diocese of Southwark) argued that modification posed a danger of introducing anomalies, while HHJ David Hodge QC (Civil Committee of the Council of Circuit Judges) did not consider a modification based approach to be “practicable or desirable”. Herbert Smith LLP discussed the practicalities and concluded that, while it would be possible to introduce reforms based on the current system:

... it seems to us that the more complex the status quo, the more complex would be the reforming amendments. One object of reform should be clarity. We think it would, ultimately, be less complex and clearer to start with a clean sheet.

Addleshaw Goddard LLP dealt with the issue concisely:

We see little merit in perpetuating a system of rules which has become the subject of so much (well-deserved) criticism. There is no good reason why restrictive covenants should not now be ‘elevated’ to legal interests with all that that entails.

The National Trust added a proviso that, while it would be possible to make some of the reforms through modification of the current system, that might not be the best course of action:

The two most troublesome aspects are probably the complexity of the law relating to covenants, and the fact that positive obligations do not run with the burdened land. The second could be cured by targeted legislation, but only at the expense of making the law even more complex. Only a comprehensive scheme such as that now proposed by the Law Commission will fully address the issue of complexity.

7.29 On the other hand, a strong minority of consultees considered that the introduction of land obligations was an unnecessary step in dealing with the criticisms of the current law. HHJ Ian Leeming QC expressed a strong view on land obligations:

The proposals concerning “land obligations” are both extremely radical and complex ... . It may be better to build more on the existing law than the proposals do. The existing law could surely be reformed extensively but in a less sweeping and more user-friendly fashion.

Both Gerald Moran (Hunters, Solicitors; City of Westminster and Holborn Law Society) and the Agricultural Law Association made similar criticisms of our proposals, with the latter saying:

We are unconvinced of the need to introduce a complete replacement; one needs to avoid the application of a sledgehammer to a nut. We think that to introduce land obligations without first attempting to cure the present problems by less dramatic means is, at best, premature.

Jeremy Johnston (Osgoode Hall Law School, Canada) also rejected the need for the introduction of land obligations, and instead recommended an alternative approach to reform based on the experiences of other jurisdictions. The reforms undertaken in New Zealand were highlighted, where the burden of positive covenants was made to run with the land in 1987 without the introduction of any wider reforms. Until that date the law of covenants was effectively the same as in England and Wales. In addition, he referred to the United States’ Uniform Conservation Act, which introduced a form of positive obligation which he argued could be used as a template.

- 7.30 Finally, a small minority of consultees argued against the need to undertake any reforms whatsoever, though there was little consensus between them to why this was the case. For example, Victor Mishiku (The Covenant Movement) claimed that the current law of covenants functioned adequately and so did not need any changes, while the Charities’ Property Association warned that reforming covenants may inadvertently affect contract law principles and wondered whether the mischief in positive covenants not running with land could be dealt with simply by specific legislation tailored to particular contexts, such as freehold flats. B S Letitia Crabb (University of Reading) suggested that the proposed reforms could subject burdened land to unjust liability. Similarly, Peter Bennett (University of Reading) criticised the proposals for blurring the distinction between leasehold and freehold land:

A basic principle of freehold title, long established, both at common law and in equity, is that freeholders should not be liable to perform positive obligations arising from their predecessors’ contracts ... . Land obligations already exist in leases. It is a characteristic of freehold ownership to be free of them.

### **Conclusion**

- 7.31 As seen in Part 5 of the Report and Part 1 of the draft Bill, we have recommended the introduction of a new statutory scheme of land obligations based on the proposals made in the CP. We agree with those consultees who argued that it would be unsatisfactory merely to modify the existing law. However, as explained in the Report, the land obligations which we have recommended will be rooted in the principles of the present law and so will retain an element of continuity, reducing the impact of their introduction.

7.32 Specific aspects of the creation and operation of land obligations is discussed further below in this Analysis and in Part 6 of the Report.

## **PART 8**

# **LAND OBLIGATIONS: CHARACTERISTICS AND CREATION**

We provisionally propose that there should not be separate types of Land Obligation, although for some purposes it will be necessary to distinguish between obligations of a positive or restrictive nature:

(1) An obligation of a restrictive nature would be an obligation imposing a restriction, which benefits the whole or part of the dominant land, on the doing of some act on the servient land.

(2) An obligation of a positive nature could be a positive obligation or a reciprocal payment obligation.

(a) A positive obligation would be an obligation to do something such as:

(i) an obligation requiring the carrying out on the servient land or the dominant land of works which benefit the whole or any part of the dominant land;

(ii) an obligation requiring the provision of services for the benefit of the whole or any part of the dominant land; or

(iii) an obligation requiring the servient land to be used in a particular way which benefits the whole or part of the dominant land.

(b) A reciprocal payment obligation would be an obligation requiring the making of payments in a specified manner (whether or not to a specified person) on account of expenditure which has been or is to be incurred by a person in complying with a positive obligation.

[paragraphs 8.23 and 16.37]

In the alternative, we seek consultees' views as to whether there should be any limitations or restrictions on the types of Land Obligations that should be capable of creation and if so, which types.

[paragraphs 8.24 and 16.38]

- 8.1 In the Law Commission's 1984 Report (Transfer of Land: The Law of Positive and Restrictive Covenants (1984) Law Com No 127), we recommended the introduction of land obligations in two forms: neighbour obligations and developer obligations. The former were to be used between neighbouring properties, while the latter would have been used in more complicated housing development scenarios. Although we have built on elements contained in this previous project, we proposed an alternative structure for land obligations in the CP: only a single type of land obligation would exist, and it could be either positive or negative in character. In addition, we did not propose to prescribe the types of positive obligations that could be created, save that they could not be purely personal.



- 8.2 We discussed these proposals, and the general structure of land obligations, between paragraphs 8.1 and 8.22 of the CP. Consultees were invited to comment on the suggested characteristics set out at paragraph 8.23 and on the types of land obligations that should be valid at paragraph 8.24.
- 8.3 34 consultees provided feedback on this issue; a small majority supported the structure and limitations set out in the CP.

### ***The responses***

- 8.4 A majority of consultees agreed with the structure proposed in the CP without further comment. Amy Goymour (Downing College, University of Cambridge) described the new form of land obligations as a “considerable improvement” over those recommended in the 1984 Report, while the Chancery Bar Association agreed with all of the substantive elements. The Agricultural Law Association supported the proposals on the basis that:

If there is to be a land obligation, there should be one type only. A multiplicity of options risks making the replacement system as complex as that it is to replace.

Gregory Hill (Barrister, Ten Old Square Chambers) recognised the practical benefits of our proposals:

I agree that the classification of land obligations should be kept as simple as possible; that the distinctions drawn in 16.37 reflect the differing functions land obligations would perform; I think that in practice an easy way of creating what are described as “positive obligations” and “reciprocal payment obligations” would be useful and used, particularly for the maintenance of boundaries and access-wise  
... .

- 8.5 Opinions on whether our proposals were too prescriptive, or not prescriptive enough, were split. Under our original proposals, positive obligations would only have been binding if they met the criteria described between paragraphs 8.20 and 8.22 of the CP. These criteria allowed for reciprocal payment obligations as well as obligations to carry out any activity on the burdened land. Roger Pickett (Diocese of Southwark) argued against limiting the range of valid obligations:

We can see no reason why there should be any limitations or restrictions on the types of Land Obligations that should be capable of creation once they can be recorded on the register. It seems to us that knowledge of the burden is of fundamental importance and this can be assured by entry on the register. It may be argued that certain positive obligations could incur onerous financial obligations but provided the burden is clearly known, any adverse effects after the obligation had been created would automatically be generally reflected in the value of the residual estate. Thus any party creating an obligation does so willingly and in full knowledge of the intentions and duties of each party and subsequent titleholders know of the burden before purchase and value the estate accordingly.

A similar view was expressed by the Treasury Solicitor's Bona Vacantia Division, who recommended that only the parties' intentions should determine a land obligation's validity:

We would suggest that the overriding principle is that parties should be free to determine the terms of any arrangement or agreement and the law should take account of the parties' intentions. If the covenant expressly says whether it is intended to be binding on successors in title of the covenantee and/or the covenantor, and the extent to which the original parties intend to remain bound, the intention of the parties should be taken into account.

An alternative argument was made by Land Registry, based on the practical difficulties inherent in only allowing certain positive obligations to be land obligations:

If [only some types of positive obligation could take effect as land obligations] it could cause us some concern, as we would need to apply the test in every case where there was a positive obligation ... . Land obligations would be legal interests in land and we would be registering the benefit, so if it were not possible for some types of obligations to constitute land obligations, we would want them to be readily identifiable, otherwise there could be mistakes in the register for which indemnity might be payable.

- 8.6 In contrast, Addleshaw Goddard LLP, while in agreement with the proposals overall, cautioned that the proposed positive land obligations could be abused due to their flexibility:

These could rapidly get out of hand as parties with strong negotiating positions try to set up land obligations to, for example, build entire buildings and not provide in clear terms when they are satisfied (what happens about defects; what's the limitation period?) - obligations of this nature need to be confined to contract.

Likewise, Trowers & Hamblins suggested a strictly limited approach to recognising land obligations:

We are uncomfortable about the notion of binding land with positive obligations that go beyond repair/maintenance of the servient land ... . We consider that any positive obligations capable of binding successors in title and those deriving title should be restricted to obligations in relation to the physical state of the servient land.

Finally, the National Trust warned about the potential consequences of unlimited positive obligations, though they supported our proposals overall:

In principle it would be preferable to leave the proposed scheme as straightforward and flexible as possible, within the limits inherent in the concept of land obligations.

[...]

Properly advised, there is no more reason for anyone to take on an inappropriately extensive positive obligation than there is an inappropriately restrictive negative one. However, we believe that it is much easier to understand the implications of a permanent obligation not to do something than it is to understand the implications of a permanent obligation to do it.

We also believe that, as a very broad rule, the circumstances around positive obligations are likely to change sooner than the circumstances surrounding restrictive ones.

So if the Commission's proposals are implemented we foresee (a) an increase in the number of landowners who consider the obligations binding their land, entered into by predecessors in title, to be wholly inappropriate or disproportionate and (b) a substantial increase in the workload of the Lands Tribunal which will be considering applications for discharge or modification.

### ***Conclusion***

- 8.7 In Parts 5 and 6 of the Report, we recommend the reform of positive and restrictive covenants based on the CP proposals. The main elements discussed in this consultation question have been incorporated into our final recommendations.
- 8.8 We discuss at paragraph 5.45 and following of the Report the advantages and disadvantages of having a closed list of available positive obligations. We think that the benefits of allowing flexibility, within the bounds set by a functional definition and a touch and concern requirement, will create the right balance so as to prevent unduly onerous obligations being created.
- 8.9 Clause 1 of the draft Bill distinguishes between negative and positive obligations, and also makes provision for reciprocal payment and apportionment obligations. Parties creating obligations will have to bear in mind the limits set by those definitions, but there will be no need to state, in the document creating the obligation, which kind it is; for the most part all types of land obligation will behave in the same way, save that there are some special rules for the enforcement and apportionment of positive obligations (see Appendix D to the Report).

### ***Other related issues***

- 8.10 Five consultees queried whether land obligations can be used to secure overage payments. Farrer & Co LLP described such rights:

In broad terms overage is the right of an owner of land to receive an additional payment following the sale, for example, if a future owner obtains planning consent. (It can apply also in other circumstances for instance if one landowner contributes land to a development on land derived from several owners).

Andrew Francis (Barrister, Serle Court Chambers) said:

I would exclude "overage" from land obligations; see 8.80 and footnote 77 of the CP. These are purely financial obligations and, therefore, have no place in the law of restrictive, or positive covenants that relate to land itself.

It will not be possible to create a land obligation to secure overage under our recommendations. Such a right would remain a personal covenant, because it does not touch and concern the benefited land, and because it does not meet the characteristics required by clause 1(3) of the draft Bill. However, the reforms that we recommend will not affect the enforceability of overage payments through other means.

8.11 DLA Piper UK LLP questioned whether there would be any limits placed on reciprocal obligations:

Whilst we agree with the general propositions set out in this paragraph, we would be concerned to ensure that positive obligations and reciprocal payment obligations could not be used as a method of circumventing current statutory controls over residential service charges.

As seen in clauses 9 and 10 of the draft Bill, a reciprocal payment obligation will be limited to the reasonable cost of carrying out the obligation to which it corresponds. This is equivalent to certain statutory controls, such as those in relation to rentcharges under section 2(5) of the Rentcharges Act 1977.

8.12 A couple of consultees asked about how our proposals will impact on easements where the benefit is conditional on the performance of an attached positive obligation. Herbert Smith LLP explained that this occurs in situations where:

There is a nexus between (a) easements and (b) restrictive and positive covenants which may be imposed on the land which is dominant qua easement. An easement may be granted on terms that the person entitled to exercise it does not do so in a particular manner and/or is required to perform positive acts as a condition of exercising the right.

An example would be an easement of drainage, subject to the obligation to maintain a pipe. Such obligations are enforceable; they appear to operate under the principle in *Halsall v Brizell* [1957] Ch 169, that one cannot take a benefit without accepting the associated burden (see *Gale on Easements* (18th ed 2008) paragraph 1-94 and *Megarry & Wade, The Law of Real Property* (7th ed 2008) paragraph 30-003). Certainly the easement would not be able to be enforced unless the obligation upon which it was conditional was performed. Our recommendations will have no effect upon the status and enforceability of these obligations.

**We provisionally propose that a Land Obligation must be expressly labelled as a “Land Obligation” in the instrument creating it.**

**Do consultees agree?**

**[paragraphs 8.28 and 16.39]**

- 8.13 When expressly creating a positive or restrictive covenant, or an easement, it is not necessary to use the relevant label for that interest to be valid. Instead, the test is a functional or practical one: as long as all of the elements required for a valid easement or covenant are satisfied, the interest will take effect as such.
- 8.14 In contrast, we proposed that land obligations would only be valid if the instrument creating them labelled them expressly as such. This was proposed to help distinguish land obligations from other types of proprietary or personal interest. We further discussed the rationale for this additional formality between paragraphs 8.25 and 8.27 of the CP.
- 8.15 Just over half of the 32 consultees who commented on this proposal agreed with the need for additional formalities in the creation of land obligations.

### ***The responses***

- 8.16 The majority of consultees who agreed with this proposal accepted our argument in the CP and did not make any further comment in their responses. Amy Goymour (Downing College, University of Cambridge) and Dr Nicholas Roberts (Oxford Brookes University) both commented that the suggestion was “sensible”, while the London Property Support Lawyers Group fully supported this proposed requirement.
- 8.17 A number of consultees noted the important role prescribed Land Registry forms would play if this proposal were to be introduced. For example, the Chancery Bar Association said:

We agree that express labelling is essential given that it is intended that the land obligation should *not* take effect as a contract. There may, nevertheless, be some disappointed customers of conveyancers at the outset unless there is a prescribed Land Registry form as is suggested under paragraph 8.40.

Similarly, Addleshaw Goddard LLP made its support conditional on the introduction of such forms:

We agree – with a prescribed form of transfer (which we anticipate would have a section headed “land obligations”) this should not cause any difficulties or result in any prejudice in practice.

- 8.18 On the other hand a significant number of consultees opposed this proposal due to the problems mislabelled land obligations could create. Andrew Francis (Barrister, Serle Court Chambers), the Agricultural Law Association and Gregory Hill (Barrister, Ten Old Square Chambers) all argued that some form of safeguard must be included to allow for situations where no label is provided. The latter said:

I agree that it is necessary to ensure that the new animal can be identified, but “if it looks like a duck, and it walks like a duck, and it quacks like a duck, then it is a duck”, and I do not think any specific “magic words” should be required unless that is the only possible way to achieve the desired result.

Other consultees who disagreed with this proposal argued that the introduction of strict formality would do more harm than good. The Conveyancing and Land Law Committee of the Law Society advocated that “as a matter of principle, formal requirements should be kept to a minimum”. Similarly, the National Trust cautioned that it would not be “in anyone’s genuine interest” for a land obligation to be invalid simply due to it missing the right label. Trowers & Hamblins’ response also reflected this view:

We consider this unduly formalistic and of potential prejudice. Best practice would dictate that a land obligation should be expressly labelled as such, but equity should continue to be allowed and required to look at the substance not at the form.

Finally, Land Registry highlighted a practical problem with the rule as proposed:

We would want the scope of such a requirement to be quite clear. For example, would it extend so far as to make labeling an obligation a “land obligation” (all lower case) insufficient? Would it be enough to refer to an “Obligation”? The point is important as there could be a mistake in the register, and indemnity might be payable, in the event that we registered an obligation as a land obligation when in fact it was not. We would not be able to wait for the point to be settled by case law.

### ***Conclusion***

- 8.19 We have not recommended that land obligations need to be labelled as such in order to be valid. Instead, we have provided a functional definition, set out in clause 1 of the draft Bill and discussed at paragraph 6.37 and following of the Report; accordingly, substance rather than their form will determine the validity of a land obligation.

**We provisionally propose that Land Obligations should only be able to be created expressly over registered title. Do consultees agree?**

**[paragraphs 8.38 and 16.40]**

- 8.20 This proposal can be broken down into two elements:
- 8.21 First, we proposed that land obligations should only be capable of express creation. Secondly, we proposed that land obligations should only be available for registered land. We discussed the reasons for this part of our proposal between paragraphs 8.31 and 8.37 of the CP.
- 8.22 27 consultees responded to this consultation question. While there was universal support for requiring land obligations to be created only expressly, opinions were evenly split on whether land obligations should be limited to registered land.

***The responses***

- 8.23 There was consensus on limiting land obligations to express methods of creation, with consultees accepting the arguments made in the CP. The uncontroversial nature of this part of the proposal meant that little additional comment was made.
- 8.24 There was significant disagreement on whether land obligations should only be capable of existing over registered land. Roughly half of consultees supported the proposed limitation. For example, Trowers & Hamlins contended that our reforms should, as far as possible, promote complete registration of land and therefore should not apply to unregistered land:

We agree with this in principle and do not consider that there is merit in protecting or preserving any longer than necessary the historic unregistered land system. Land law already suffers its share of anachronisms and complications and (as will be clear from a number of our responses to this consultation) we consider an exercise such as the current one should have as one of its aims the continued rationalisation of and move towards a single system of registered land in England and Wales.

The Chancery Bar Association supported the proposal on a different basis:

We ... agree that land obligations should only be capable of creation where both the dominant and servient land are registered. The strongest reason for this is that set out in paragraph 8.34 – the practical necessity for identification of the dominant land is only met by registration against the title to that land and this can only be achieved if that land is registered.

- 8.25 A few consultees supported the proposal but suggested that land obligations should be capable of creation in one additional situation: where the transaction in which they are created is completed by first registration. The London Property Support Lawyers Group said:

Land obligations should be capable of creation over land which will be registered on completion of the transaction concerned as well as over land which is already registered or in the course of first registration.

- 8.26 On the other hand, a number of different arguments were raised against limiting land obligations in the way proposed. The Agricultural Law Association, Network Rail and Farrer & Co LLP argued that it was incorrect to accept that “unregistered land has had its day”, especially in relation to rural land or specialised parcels of land, such as railways. The latter consultee explained why a significant amount of land remains unregistered, and why the owners of such land should not be overlooked:

In general the substance of the law relating to registered and unregistered land should be the same as far as possible. It may not be possible to register the subject land. Certain short leases and other arrangements are not registerable. As between landlord and tenant this is not a problem. There may however be other problems. For example, a landowner owns a field which he is letting on a farm business tenancy for three years. He has an option agreement with a developer under which the developer can apply for planning consent both for that field and for other adjoining land. The developer may wish to take obligations from the farm business tenant incidental to the function of the development, for example during the construction period and if land obligations could only be granted over registered land it would mean that no such obligation could subsist in this case. While it might be possible to make the creation of a land obligation into a trigger for first registration it could impose unacceptable burdens. Certain landowners such as traditional charities with substantial estates do not wish to incur the considerable cost of registering title but may be prepared to submit to a land obligation in return for suitable consideration.

- 8.27 A few consultees, such as Andrew Francis (Barrister, Serle Court Chambers), highlighted the importance of not introducing a “two-tier” system. Instead, introducing a new category of land charge was suggested as a way of protecting land obligations over unregistered land. Jeffrey Shaw (Nether Edge Law) drew an analogy with the way in which the burden of a restrictive covenant is currently recorded over such land:

It should be possible for an unregistered estate owner to enter into the burden of a land obligation; protection would be by way of a new class of land charge (eg Class G). Registration of land charges works perfectly well so far as concerns restrictive covenants (Class Dii); land obligations should be no different, to that extent.

### **Conclusion**

- 8.28 We have recommended that land obligations should be capable of express creation only, and therefore that it should be impossible to create them either by prescription or by implication; see paragraphs 6.59 to 6.62 of the Report.



8.29 However, we no longer think that they should be limited to registered land only. First, we accept that it is undesirable to have a two-tier system, especially as this will make the availability of land obligations inconsistent with that of other appurtenant rights, such as easements. Secondly, as highlighted by consultees, we recognise that a number of large-scale land owners of unregistered land would be heavily prejudiced if they were unable to use land obligations; while universal registration of land remains an objective, it is one best served through the current triggers for first registration. Finally, we think that the creation of a new category of land charge for land obligations would provide adequate protection for buyers. Because the transfer of an estate in almost any circumstances is now a trigger for first registration, the disadvantages of the land charges system (whereby charges are registered against the names of estate holders rather than against the estate itself) will be minimised as it is unlikely that more than one name will need to be searched against to discover land obligations.

**We provisionally propose that the express creation of a Land Obligation requires the execution of an instrument in prescribed form:**

**(1) containing a plan clearly identifying all land benefiting from and burdened by the Land Obligation; and**

**(2) identifying the benefited and burdened estates in the land for each Land Obligation.**

**[paragraphs 8.40 and 16.41]**

**If the prescribed information is missing or incomplete, no Land Obligation would arise at all. Do consultees agree?**

**[paragraphs 8.41 and 16.42]**

8.30 At paragraphs 8.40 and 8.41 of the CP, we proposed that land obligations should only be valid if certain prescribed information is provided to Land Registry. This information would include a plan clearly identifying the benefited and burdened land, allowing quick and unambiguous identification of who is bound or benefited by any given land obligation.

8.31 36 responses were received to these questions. A large majority of consultees agreed with the introduction of prescribed information and the need for clear plans when creating land obligations. However, only around half of consultees were in favour of making a land obligation's validity dependent on the presence of this prescribed information.

### ***The responses***

8.32 A majority of consultees were in favour of requiring land obligations to be in a prescribed form and set out in a plan. Addleshaw Goddard LLP commented that this was an "especially sensible proposal" and the Chancery Bar Association conceded that such a requirement was "necessary". The importance of clarifying exactly which land was benefited or burdened was recognised by Roger Pickett (Diocese of Southwark), who said:

We are convinced that the creation of a land obligation must be supported by clear and accurate plans. In our experience many difficulties that lead to litigation arise directly out of inadequate plans or no plans at all. Many such disputes would never arise if proper plans had existed at the time when the transaction was created.

Currey & Co specifically supported the use of a plan instead of other methods of identifying benefited or burdened land:

We agree, with emphasis on a plan being attached to the instrument, and not reliance on title numbers.

Wragge & Co LLP and the London Property Support Lawyers Group also highlighted the importance for any prescribed form to be flexible enough to be useable in a variety of circumstances. The latter noted that:

Land obligations may be imposed on sales of part, sales of one of several adjoining titles belonging to the seller, standalone grants of easements etc.

- 8.33 A substantial number of consultees questioned the need to require a plan clearly identifying the land to which the land obligation relates. In particular, they queried whether it could be enough to identify a burdened or benefited plot by its title number rather than a full plan. Network Rail argued that it may sometimes be “practically impossible to produce a plan showing the whole of the land affected”, while the Agricultural Law Association suggested that “a verbal description should suffice, so long as it is thorough and unambiguous”. Gregory Hill (Barrister, Ten Old Square Chambers) also questioned the necessity of plans in some circumstances:

I agree that the burdened and the benefited land must be identified, to the usual land registration standard of accuracy. But is it essential to require this to be done by plans in every case – even if each parcel affected is the whole of the land in a registered title?

G J Wadsworth (University of Newcastle) warned about the costs of preparing a plan for land obligation applications:

Plans can be expensive to prepare. This was an issue raised by some local practitioners when discussing the standard documentation. A figure of £300-400 was quoted in one case.

- 8.34 A few consultees were against the introduction of any prescriptive form or the need for plans when creating land obligations. Dr Caroline Sawyer (Victoria University of Wellington, New Zealand) cautioned that such prescriptive requirements will make it difficult to deal with errors or omissions made while creating land obligations. Trowers & Hamlins also opposed the proposal, on an alternative basis:

We again consider this unduly prescriptive. We consider that the obligation must in its true construction clearly identify the benefited and burdened land and that the benefited land must be identified, on a plan or in words in the instrument. But we do not agree that the instrument should be in a prescribed form. There are for example instances where a land obligation will be submitted with a wider contractual context where use of a prescribed form would be unduly inhibiting.

- 8.35 Two consultees questioned whether it is appropriate to put the administrative requirements described in the proposal in statutory form. Land Registry was concerned that, if prescribed information was made mandatory by statute, very clear and comprehensive instructions would be needed to make registration accurate. Similarly, the Conveyancing and Land Law Committee of the Law Society argued that:

As a matter of principle, formal requirements should be kept to a minimum. Matters which can be dealt with as registration requirements, rather than matters of intrinsic validity, should be confined to the administrative sphere.

8.36 On the other hand, consultees expressed a range of opinions on the second part of our proposal. While just over half of the consultees agreed that land obligations should be invalidated if any of the prescribed information is missing, most of this support was conditional on the introduction of safeguards. Richard Coleman (Clifford Chance LLP) and Andrew Francis (Barrister, Serle Court Chambers) suggested that the Land Registry's Adjudicator should be responsible for ensuring that minor mistakes do not invalidate the land obligations. The latter said:

I would point out that there should be a power to rectify in the Land Registry Adjudicator (or in the court) where in plain and obvious cases some part of the information is missing or incomplete ... .

8.37 Six consultees proposed that Land Registry should give the parties involved in creating the land obligation an opportunity to correct mistakes or add missing information as necessary. The London Property Support Lawyers Group supported this approach, as did the Conveyancing and Land Law Committee of the Law Society. Mangala Murali further recommended a strict time limit for the submission of corrected information and Herbert Smith LLP broached the use of requisitions by Land Registry to obtain missing details. Gregory Hill (Barrister, Ten Old Square Chambers) also considered the registration priority of an invalid application:

I agree that the information required at 8.40(1) and (2) is essential, and it must follow that the transaction does not work if it is incomplete. It is to be hoped that in such cases the Land Registry could send the document back for completion whilst preserving, at least *pro tem*, the priority of the registration application.

8.38 Two consultees instead supported the use of existing equitable doctrines to rectify mistakes. HHJ David Hodge QC (Civil Committee of the Council of Circuit Judges) agreed with the proposal subject to the qualification that:

A claim may be made to rectify the relevant instrument on the grounds of mistake in accordance with established equitable principles.

8.39 Finally, a minority of consultees expressly opposed this proposal. For example, Farrer & Co LLP described it as potentially imposing "a heavy penalty on those who may make an innocent drafting mistake" and the National Trust argued that:

This seems to us to be unnecessarily draconian. We appreciate that it is administratively convenient for all prescribed information to be included, but we are not persuaded that that alone is a justification for rendering wholly void any instrument which omits some element of it, particularly if that suggested outcome is to be coupled with there being no deemed contract to create such an obligation ... .

### ***Conclusion***

- 8.40 We have not recommended a prescribed form for the creation of land obligations, nor recommended for there to be specific information which must be provided in order for a land obligation to be valid. As discussed at paragraph 6.37 and following of the Report, we have taken a practical approach to recognising validity; as long as an expressly created interest meets the requirements contained in clause 2 of the draft Bill, it will take effect as a land obligation. Land Registry will be able to determine the most appropriate internal practice for registering such rights.
- 8.41 We agree that the use of a plan will be extremely important where the extent of the benefited or burdened land does not coincide with the whole of a registered title. The same applies, of course, to easements, which will not be registered unless a plan is used to show, for example, the route of a right of way. So in practice the requirement for a plan will be dealt with, where necessary, as part of Land Registry's requirements for registration.

### ***Other related issues***

- 8.42 William Shearer (Bidwells) queried whether land obligations can be limited to benefiting specific landed estates:

Many landed estates from time to time dispose of property and the advantage of the current situation whereby there is a reference to a specific landed estate, rather than a designated area avoids confusion that covenants may benefit a number of land owners. We accept that in many circumstances it is appropriate to identify specified land over which future land obligations will be imposed but we consider it essential that in the case of landed estates a reference to "the estate" should still be possible.

Under our recommendations, it will be essential to identify the benefited and burdened land clearly on creation of the land obligation. However, it will remain possible to draft the land obligation in such a way as to make its enforcement conditional on the benefited land remaining in the ownership of a specified owner or part of a specific landed estate.

**We provisionally propose that the creation of a Land Obligation capable of comprising a legal interest would have to be completed by registration of the interest in the register of the benefited estate and a notice of the interest entered on the register of the burdened estate. A Land Obligation would not operate at law until these registration requirements are met.**

**[paragraphs 8.47 and 16.43]**

- 8.43 Under section 27 of the Land Registration Act 2002, the disposition of an estate or charge which must be completed by registration has no effect in law until it is registered. Dispositions affected by this rule include appurtenant rights listed in section 1(2)(a) of the Law of Property Act 1925; for example, the express grant of an easement does not take effect at law until registered over both the benefited and burdened land. The period between the creation of an interest subject to this rule and its registration is known as the “registration gap”; during this period the interest will only exist in equity (see *Lysaght v Edwards* (1875-76) LR 2 Ch D 499).
- 8.44 Between paragraphs 8.42 and 8.46 of the CP, we discussed the current rules on registration of existing appurtenant rights, and provisionally proposed at paragraph 8.47 that land obligations should be subject to the same registration requirements.
- 8.45 31 consultees responded to this question, a majority of whom expressed support for this proposal.

#### ***The responses***

- 8.46 The majority of consultees who responded to this question agreed that land obligations should become a legal interest subject to the registration requirements discussed above. Roger Pickett (Diocese of Southwark) believed this to be “vital”, Gregory Hill (Barrister, Ten Old Square Chambers) described the proposal as following “the general principles of land registration” and Addleshaw Goddard LLP thought it “sensible and consistent”. In addition, both the Chancery Bar Association and Land Registry were in favour of the proposed approach. The latter detailed how the proposal would work in practice:

We agree that a land obligation affecting a registered estate should be a registrable disposition. Assuming that land obligations were added to section 1(2)(a) of the Law of Property Act 1925, this would then mean that, to take effect at law, a notice would be entered in the individual register for the burdened estate and, if the benefited estate were registered, an entry would be made in the individual register for that estate. In other words, land obligations would be treated in the same way as easements. This seems logical to us.

- 8.47 A few consultees qualified their support: while they agreed with this proposal in as far as it applied to registered land, they also wanted land obligations to be capable of express creation over unregistered land. These responses have been considered in the analysis of question 8.38 from the CP.

- 8.48 Consultees also expressed concern over the status of land obligations during the “registration gap”. Herbert Smith LLP and Dr Caroline Sawyer (Victoria University of Wellington, New Zealand) questioned whether the land obligation will exist in equity during this period, drawing an analogy with easements. Similarly, DLA Piper UK LLP said:

Whilst the approach outlined would be consistent with the approach of land registration generally, until we have registration with immediate effect on completion of a transaction there are difficulties with this approach. Would the obligation take effect in equity? Would the creation of an obligation be a dealing which could be protected by a search with priority at Land Registry?

### ***Conclusion***

- 8.49 At paragraphs 5.69 and 5.70 of the Report we have recommended the introduction of land obligations as a legal interest recognised under section 1(2)(a) of the Law of Property Act 1925. As a result, if title to the benefited land is registered, the land obligation will need to be registered as an appurtenant right to that title before it can take effect at law; meanwhile, it will take effect in equity, as do expressly created easements or profits. Where title to the benefited land is not registered, a legal land obligation will be created by deed. For further discussion on this issue, see paragraph 6.49 and following of the Report.

### ***Other related issues***

- 8.50 Michael Croker, Miriam Brown and Kevin Marsh questioned the effect of adding land obligations to the list of legal interests in section 1(2)(a) of the Law of Property Act 1925. Under this section an interest must be equivalent to “an estate in fee simple absolute or a term of years absolute”, which prevents interests of an undetermined or uncertain length short of a fee simple:

We can see that there will be cases where owners will want a land obligation to cease on a predetermined event or time. The Commission discusses this topic in CP 8.50 to 8.53 but seemingly from the standpoint that the 1925 codification should apply to these new rights. We are not overly convinced that this section still represents a sensible way to look at rights in the 21st Century.

- 8.51 As we have emphasised the need to fit land obligations into the existing framework of property interests, we have not recommended any special provisions about their duration beyond those to be found in section 1(2)(a) of the Law of Property Act 1925. We note that flexibility is important; the availability of determinable interests provides for cases where owners wish for an interest to extinguish on the occurrence of a predetermined event.

**We seek consultees' views as to whether equitable Land Obligations should be able to be created in the same way as expressly granted equitable easements, subject to the possible exception raised by the following consultation question.**

**[paragraphs 8.54 and 16.44]**

**We are provisionally of the view that only the holder of a registered title should be able to create a Land Obligation. Do consultees agree?**

**[paragraphs 8.55 and 16.45]**

8.52 A property interest that is capable of existing at law will nevertheless exist only in equity in two circumstances:

- (1) where its creation does not meet the requirements for creation of a legal interest – for example it has not been created by deed; or
- (2) where those requirements have been met, but the requirements in the Land Registration Act 2002 as to its registration have not.

We discuss the operation of this principle in greater detail at paragraph 6.46 and following of the Report.

8.53 In the CP we proposed that land obligations would be a new form of legal interest under section 1(2)(a) of the Law of Property Act 1925 and would operate analogously to existing appurtenant rights. As a result, they would be capable of creation in equity. Consultees were further asked whether they thought it should only be possible to create such equitable land obligations over registered land, tying in with our proposal at paragraph 8.38 of the CP.

8.54 33 consultees commented on these two proposals and just over half agreed that it should be possible to create equitable land obligations.

### ***The responses***

8.55 Many of the consultees who agreed with the proposal that land obligations should be capable of creation in equity supported the arguments contained in the CP. For example, Land Registry accepted the points made in the CP, while Dr Martin Dixon (Queens' College, University of Cambridge) based his approval on the difficulty of preventing the general rules of equity from applying to land obligations:

It would be difficult to legislate against the possibility of an equitable land obligation, and probably not sensible – cf. the need to protect the victims of unconscionable behaviour through estoppel.

Gregory Hill (Barrister, Ten Old Square Chambers) presented an example where the ability to create a purely equitable land obligations would be advantageous:



I think it probable that the requirement to be “for the benefit of land as land” would make it impossible to create a land obligation for an estate measured by reference to the life of an individual or individuals; so in this respect, permitting equitable land obligations would simply make it possible to create (for example) an obligation for the proprietors of units on a residential estate to contribute to the upkeep of a community centre “for so long as it continues to provide communal facilities for the residents”, even though that would necessarily be equitable because it would be terminable but not subject to a right of re-entry, and therefore not within LPA 1925 section 1(2) or section 7(1) as amended.

- 8.56 On the other hand, a substantial minority of consultees rejected the need for equitable land obligations. Two common arguments were made against this proposal: that the operation of equitable land obligations would be too complicated and that they would be unnecessary. The former position was taken by HHJ David Hodge QC (Civil Committee of the Council of Circuit Judges), who suggested that our proposal went against “simplicity, clarity and transparency”. Similarly, the Chancery Bar Association said:

We would preclude the very existence of an equitable land obligation. It is so strange and artificial a creature and the consequences of its potential existence so complicating and so contrary to the thrust of the new land registration regime that it should be impossible to create an equitable land obligation. There is (and should be) nothing to prevent an “equitable” ie an ineffective “land obligation” being enforceable between the original parties in contract, but there is no reason why successors in title should be burdened.

In respect of the second argument, Gerald Moran (Hunters, Solicitors; City of Westminster and Holborn Law Society) described the need for equitable land obligations as “unclear” and the Agricultural Law Association argued that:

If the creation of a land obligation at law is to be subject to such tight prescription as is proposed, we find ourselves unconvinced that the existence of equitable land obligations, as a concept, would be necessary.

Finally, Currey & Co made a different submission arguing that it was unnecessary to make easements and land obligations analogous, as the latter would be an entirely new type of right:

As regards land obligations which are said not to be capable of being legal interests, we see no reason why they should be categorised in the same way as easements. Why should they not be sui generis? In practice, the vast majority of covenants are imposed on sales of land off a larger estate, the transfer of which has to be by deed anyway. In other cases, the instrument creating the obligation would have to be by deed if it was not supported by valuable consideration. We do not think there would be a significant hardship entailed by insisting that all land obligations have to be made by deed, or otherwise not be registerable or effective.

- 8.57 The availability of land obligations in unregistered land has already been discussed in the analysis of preceding consultation questions. The majority of consultees who responded to the second part of these proposals referred to their responses to paragraph 8.38 of the CP. However, a number of consultees added that, taking into account recent case law, in some circumstances equitable easements would have to be capable of creation out of unregistered estates regardless of other proposals. Land Registry explained that:

Account needs to be taken of section 24(b) of the Land Registration Act 2002, and the recent decision in *Bank of Scotland Plc v King* [2007] EWHC 2747. The result would seem to be that an unregistered transferee of a registered estate – who would, necessarily, hold only an equitable estate – could create a land obligation which would be a registrable disposition and hence a legal land obligation once the registration requirements were met.

### **Conclusion**

- 8.58 We have not made any specific recommendations on how land obligations will operate in equity. As land obligations will be legal interests under section 1(2)(a) of the Law of Property Act 1925, they will be subject to the same rules as other appurtenant interests. So land obligations will be subject to the principles expressed in *Lysaght v Edwards* (1875-76) LR 2 Ch D 499; if they fall short of the legal requirements for validity they may take effect in equity.
- 8.59 We do not believe that the possibility of equitable land obligations will cause any undue complexity. Under our recommendations, land obligations will operate in the same way as other existing legal interests, such as easements; this retains consistency between various appurtenant rights and will be familiar to practitioners.

**We seek consultees' views as to whether an equitable Land Obligation (which is not capable of being a legal interest) should be capable of binding successors in title.**

**[paragraphs 8.61 and 16.46]**

**If consultees answer this question in the affirmative, we seek consultees' views as to which of the following options they consider should be used to protect an equitable Land Obligation (not capable of being a legal interest) on the register:**

- (1) the interest would have to be registered only against the title number of the estate burdened by the equitable Land Obligation; or**
- (2) the interest would have to be registered against the title numbers of the estate benefited and the estate burdened by the equitable Land Obligation.**

**[paragraphs 8.62 and 16.47]**

- 8.60 Equitable interests cannot bind successors in title to the burdened land, where that title is registered, unless their existence is noted on the register.
- 8.61 Where land is unregistered, a number of different rules apply to determine whether an equitable interest binds successors in title. Equitable interests which are registrable as land charges will only bind if they have been correctly entered on to the Land Charges Register. Other equitable interests are subject to the general rule of equity that equitable rights bind all purchasers except purchasers in good faith, for value, who do not have notice of the interest's existence.
- 8.62 Between paragraphs 8.56 and 8.60 of the CP we discussed whether purely equitable land obligations should be enforceable against subsequent purchasers. Consultees were further invited to comment on two options presented at paragraph 8.60 of the CP for registering the existence of equitable land obligations created over registered land.
- 8.63 30 consultees responded to this question, the majority of whom were in support of allowing equitable land obligations to bind successors in title. Of that majority, more than half preferred the first registration option set out at paragraph 8.62(1) of the CP, which matches the current law for interests such as easements.

### ***The responses***

- 8.64 The majority of consultees favoured allowing equitable land obligations to bind successors in title. A number of different justifications were given; for example, Andrew Francis (Barrister, Serle Court Chambers) commented that without such a rule there would be "uncertainty of the sort that we have with certain forms of covenant", Gregory Hill (Barrister, Ten Old Square Chambers) observed that "there are practical reasons for and no technical reasons against" such a rule and Martin Pasek emphasised the need for consistency with existing equitable interests. Similarly, Land Registry said:

An equitable easement affecting registered land which is not capable of being a legal interest (perhaps because of the period for which it is granted) can be noted and so bind a successor in title. We find it very difficult to see why the position should be different where an equitable land obligation is involved.

8.65 On the other hand, a few consultees were against making equitable land obligations binding against anyone other than the original parties to their creation. Such responses were primarily based on a rejection of the proposed introduction of equitable land obligations, and so have been considered above (see paragraphs 8.52 to 8.59). Consultees who took this stance included the Chancery Bar Association and Currey & Co.

8.66 Of those consultees who chose to comment on how equitable land obligations should be recorded over registered land, just over half preferred a requirement for notice to be entered in respect of the burdened estate only. The Conveyancing and Land Law Committee of the Law Society suggested that such an approach would be “more straightforward” and the London Property Support Lawyers Group thought this option would “avoid unnecessary complexity”. Both Herbert Smith LLP and Amy Goymour (Downing College, University of Cambridge) drew analogies with the rules relating to equitable easements. The latter said:

I do not think that the benefit of the right should be registered if the right is not capable of being legal, nor do I consider the registration of the benefit to be particularly necessary unless to attract the state guarantee of title (which equitable easements do not). Equitable easements do not require registration of the benefit in order to bind third parties, with no (to my knowledge) adverse consequences. Furthermore, registration of the benefit of equitable easements might result in confusion as to whether the land obligation is equitable or not. The land register is constitutive, rather than reflective, of title.

In addition, Land Registry noted that our alternative proposal would require substantial changes to the current registration system:

We would certainly favour the first option over the second, as this avoids the need for a fundamental change to the Land Registration Act 2002. As the consultation paper acknowledges, the Act makes provision only for the registration of title to legal interests: it does not allow for registering the benefit of an equitable interest.

8.67 In contrast, a small minority of consultees expressed support for the second option: modifying the existing registration system to allow for the registration of both the burden and benefit of an equitable land obligation. DLA Piper UK LLP suggested that:

If there is to be registration of these matters, then in the interests of certainty and identifiability they should be registered against both affected titles.

Gregory Hill (Barrister, Ten Old Square Chambers) argued that the second option would merely reflect developing practicalities of adopting a land registration system:

I recognise that this would significantly attenuate the distinction between a potentially legal land obligation granted by deed, and one which cannot be more than equitable because it is created under hand only, but in my view that would not matter: it would simply be a further instance of what is already in substance the position under LRA 2002, that proprietary effects, and priorities (sections 28-29), depend entirely on what is on the register, and not on whether what is registered originated in a “legal” or an “equitable” assurance.

### ***Conclusion***

- 8.68 Our recommendations in Part 6 of the Report aim to integrate land obligations into the existing rules applying to property interests. There will be registration requirements; successors in title will only be bound where the equitable land obligation has been noted on the title register of the burdened land (section 29 of the Land Registration Act 2002), or, in the case of unregistered land, has been registered as a Class G land charge. See the Report at paragraphs 6.54 to 6.58.

**Our provisional view is that it should not be possible to create Land Obligations in gross. Do consultees agree?**

**[paragraphs 8.65 and 16.48]**

- 8.69 An interest is said to exist “in gross” when its benefit is attached to a person rather than to land; profits can take effect in this way. We discussed, and rejected, extending the range of interests in gross to include easements between paragraphs 3.11 and 3.18 of the CP (see also paragraphs 3.1 to 3.13 above, which deal with consultees’ responses to paragraph 3.18 of the CP).
- 8.70 We argued between paragraphs 8.63 and 8.65 of the CP that allowing land obligations in gross would give rise to a range of practical problems, and would undermine the introduction of land obligations as purely proprietary interests.
- 8.71 Of the 32 consultees who responded to this question, over two-thirds supported our conclusions.

***The responses***

- 8.72 Almost all of the consultees who supported our provisional view accepted the arguments made in the CP, or referred back to their views on easements in gross given in answer to paragraph 3.18 of the CP. Dr Martin Dixon (Queens’ College, University of Cambridge) accepted that:

If land obligations are to be transmissible to, and against, future owners, it is vital to ensure that they are related to land. This is, for me, a given.

The London Property Support Lawyers Group highlighted additional practical difficulties in allowing land obligations in gross:

There would need to be consideration of how to control the alienation of the benefit of the land obligation separately from any corresponding obligation on the part of the beneficiary or other interest held by the beneficiary in the performance of that land obligation.

In addition, Amy Goymour (Downing College, University of Cambridge) noted that land obligations are even less suitable for existing in gross than easements:

The argument is stronger in relation to land obligations than for easements because the categories of land obligations are much more wide ranging than is the case for easements.

- 8.73 On the other hand, a few consultees argued that certain interests which might take effect as land obligations would benefit from being capable of existing in gross. The most common example cited was overage, with consultees such as DLA Piper UK LLP suggesting that:

Positive land obligations could be used to simplify the enforcement of overage/clawback payment obligations (often entered into by public sector bodies). If the obligations cannot exist in gross parties might be tempted to use the system by using the artifice of retaining a small piece of adjoining land.

A different example was that of an estate management company which does not itself own any of the land for which it is responsible. Richard Coleman (Clifford Chance LLP), amongst others, explained the potential relevance of land obligations in such a scenario:

If, for example, a management company was formed to provide services for an estate and units on the estate were sold on terms that the owners for the time being of the units should be obliged to pay the management company services, then it seems to me, those obligations should be enforceable by the management company against the owners for the time being of the units even if the management company did not own the common parts of the estate (or any other land).

### ***Conclusion***

- 8.74 We have not recommended that land obligations should be capable of creation in gross.
- 8.75 We do not think that land obligations in gross would be an appropriate solution to the examples cited by the minority of consultees who opposed this proposal. As discussed in the analysis of paragraph 8.23 of the CP (see paragraphs 3.1 to 3.13 above), an overage agreement would not qualify as a valid land obligation due to it being of personal in nature; it is therefore unnecessary to make provision for facilitating such arrangements as part of our recommendations. In addition, in the rare circumstances where it is desirable for management companies to have proprietary, rather than contractual, rights to collect service fees, it is possible to use a commonhold arrangement. Commonhold associations can exist and manage commonhold land even where that commonhold has no common parts.

### ***Other related issues***

- 8.76 A number of statutory bodies questioned how this proposal would affect their ability to create statutory interests equivalent to covenants in gross in the future. The National Trust said:

As the consultation paper mentions elsewhere, there are situations where under the present law particular bodies (for instance planning authorities and the National Trust) are given by statute powers to enforce covenants as if they had land which benefited from the covenants. We envisage that – in the fullness of time – land obligations will come largely to replace the existing law relating to positive and negative covenants. We can, accordingly, foresee a situation where it may be desirable to reframe those powers on the part of planning authorities and the National Trust by reference to land obligations. In those situations the obligation would, in effect, be in gross. So we believe that there should be built into the scheme the flexibility to accommodate that, at some point in the future.

- 8.77 Our recommendations will not affect the creation of statutory interests equivalent to covenants in gross and reform of such interests is outside the scope of this project. Bodies with the ability to dispose of their property and create statutory interests would, of course, also be capable of creating land obligations which meet the recommended statutory requirements in the future.



**We provisionally propose that a Land Obligation must “relate to” or be for the benefit of dominant land. A Land Obligation would “relate to” or be for the benefit of dominant land where:**

**(1) a Land Obligation benefits only the dominant owner for the time being, and if separated from the dominant tenement ceases to be of benefit to the dominant owner for the time being;**

**(2) a Land Obligation affects the nature, quality, mode of user or value of the land of the dominant owner;**

**(3) a Land Obligation is not expressed to be personal (that is to say it is not given to a specific dominant owner nor in respect of obligations only of a specific servient owner); and**

**the fact that a Land Obligation is to pay a sum of money will not prevent it from relating to the land so long as the three foregoing conditions are satisfied and the obligation is connected with something to be done on, to or in relation to the land.**

**We seek consultees’ views on this proposal.**

**[paragraphs 8.80 and 16.49]**

- 8.78 At present, the benefit of a restrictive covenant will only pass to subsequent owners of the land to which it is attached if the covenant “relates to”, or “touches and concerns”, the benefited land. At paragraphs 8.71 to 8.73 of the CP we proposed that this rule should also apply to land obligations, in order to reflect their nature as interests in land.
- 8.79 The precise definition of the “touch and concern” requirement has developed over centuries of common law, and is generally represented by the “satisfactory working test” suggested by Lord Oliver in *P & A Swift Investments v Combined English Stores Group PLC* [1989] AC 632. We summarised the contents of this “working test” between paragraphs 8.78 and 8.79 of the CP, and concluded that there was merit in applying a statutory version of it to determine the validity of land obligations. Consultees were invited to comment on both the requirement for the land obligation to “relate to” the land and the proposed statutory form of the test based on the decision in *Swift*.
- 8.80 32 consultees responded to this proposal. A bare majority supported the proposed form of the “relate to” test, as nearly half of the consultees questioned the need to introduce a statutory version of the *Swift* test.

### ***The responses***

- 8.81 Just over half of the consultees who responded to this question supported our proposal. The Council for Licensed Conveyancers, the London Property Support Lawyers Group and the Chancery Bar Association all agreed with the conclusions reached in the CP. Andrew Francis (Barrister, Serle Court Chambers) and Gerald Moran (Hunters, Solicitors; City of Westminster and Holborn Law Society) also remarked that this proposed formulation of the test would serve the aim of excluding overage and claw-back obligations from taking effect as land obligations. Gregory Hill (Barrister, Ten Old Square Chambers) was similarly in agreement, albeit with suggestions as to how the proposed wording of the test could be improved:

I agree with the principle that there should be such a requirement, and also with the substance of the proposed formulation in 8.80 as derived from *Swift*: that is a sensible test which already exists, and I see no point in trying to create a different set of criteria. As points of detail, I suggest that para (2) of the *Swift* formulation should also refer to “amenity”, and the final limb might usefully be expanded to read “... connected with something to be done on, to, *for the benefit of or otherwise* in relation to the land”, to make it absolutely clear that a “reciprocal payment obligation” is included.

- 8.82 Some consultees asked for clarification of the proposed first limb of the “touch and concern” test: the requirement for the land obligation to benefit “only” the dominant owner for the time being. Herbert Smith LLP illustrated how this limb could be interpreted as precluding land obligations where a party other than the owner of the benefited land benefits from the right:

We think that there may be a problem with “only” in paragraph 8.80(1). Owners and occupiers of land adjacent to the dominant land may derive some de facto benefit from the observance of an obligation owed by the servient owner to the dominant owner. We consider that incidental benefit should not preclude a land obligation as between covenantor and covenantee, and perhaps, that is intended to be taken as read.

Mr Justice Lewison warned of a further problem with this limb of the proposed test:

The difficulty with adopting the first part of the test in *Swift v Combined English Stores* (para 8.78 and 8.80) is that as Lord Oliver himself pointed out in *Hua Chiao v Chiaphua* [1987] AC 99 it is a circular test. The obligation will benefit the dominant owner for the time being in that capacity if it runs with the land, and will not if it does not. What does it add to the remaining limbs of the test?

- 8.83 A few consultees agreed with the need for land obligations to relate to land but disagreed with the proposed wording of the “touch and concern” test. In particular, consultees noted that the test formulated in *Swift*, which was intended as a “satisfactory working rule” only, may not reflect all of the elements of the “touch and concern” doctrine and thus lead to unexpected results when applied in isolation from the common law. Trowers & Hamblins said:

We have concerns about adopting this formulation in the absence of any reference to the established law about touching and concerning. The first head of the proposed formulation may have the effect, for example, of depriving a land obligation of any force where the dominant owner sells his land but moves nearby. In such circumstances, he could still be benefited by the servient land's restriction against development, yet a strict application of Lord Oliver's first principle may mean that the obligation could not be a land obligation, and so made of no effect. No doubt the courts would approach this with common sense, but we do not think that there should be any departure from the long established rules concerning covenants that touch and concern the land.

Addleshaw Goddard LLP also requested that the new test should be expressly linked to existing principles:

On the basis that "relate to" is synonymous with "touch and concern" (and other expressions, which reform should make clear) then we agree with these proposals.

Similarly, Land Registry highlighted limitations affecting the *Swift* test:

We note that Lord Oliver, in formulating this test in *P&A Swift Investments v Combined English Stores*, expressly did so "without claiming to expound an exhaustive test" and suggested that it only "provides a satisfactory working test". Having said that, we do not feel qualified to offer a better test. We would suggest, however, that the second part of (1) – "if separated from the dominant tenement [it] ceases to be of benefit to the dominant owner for the time being" – needs elaboration: at least to us, it is not clear what this clause means.

- 8.84 Dr Nicholas Roberts (Oxford Brookes University) disagreed with the proposed test on an alternative basis, as he questioned the merit of the existing "touch and concern" test:

Although the consultation cites the "satisfactory working test" of Lord Oliver in *P & A Swift Investments v Combined English Stores Group*, I do not think it sufficiently takes into account the problems that had previously been encountered with the "touch and concern" test, which were such as to lead the Law Commission in its 1988 report to abandon the test for leasehold covenants. Indeed, the Law Commission then rejected the "touch and concern" test as "arbitrary and illogical" (2.23, quoting *Grant v Edmondson* [1931] 1 Ch 1, 28 *per* Romer LJ).

Dr Roberts further argued that the proposed wording of the test would allow a land obligation to require the servient owner to carry out works on the benefited land.

- 8.85 Finally, consultees who supported the introduction of land obligations in gross rejected the need for a land obligation to "relate to" the benefited land in principle. Their responses have been considered at paragraphs 8.69 to 8.77 above.

### **Conclusion**

- 8.86 In Part 5 of the Report, at paragraph 5.69, we have recommended that a land obligation must “touch and concern” the benefited land in order to be valid. But we have not created a statutory definition of this test; see clause 1 of the draft Bill. Consultees have demonstrated the potential inadequacies of a test based purely on the *Swift* formulation, and we have concluded that the term “touch and concern” is well recognised and understood in practice. Retaining the common law definition of “touch and concern” will also add a further element of continuity between land obligations and existing covenants, which will simplify the introduction of the new interest.
- 8.87 We have also added a requirement in clause 1 of the draft Bill that the land obligation must be to do something on the burdened land or in relation to a structure or feature on the border between the burdened and benefited land. This prevents the potential problem of land obligations being created requiring work to be undertaken on the benefited land. For a full discussion of this additional requirement, see paragraphs 6.26 to 6.29 of the Report.

**We provisionally propose that, in order to create a valid Land Obligation:**

**(1) there would have to be separate title numbers for the benefited and the burdened estates; but**

**(2) there would be no need for the benefited and the burdened estates in the land to be owned and possessed by different persons.**

**[paragraphs 8.88 and 16.50]**

8.88 See the analysis of responses to paragraph 3.66 of the CP at paragraph 3.42 and following above.

**We provisionally propose that:**

**(1) in order to establish breach of a Land Obligation, a person entitled to enforce the Land Obligation must prove that a person bound by the Land Obligation has, whether by act or omission, contravened its terms; and**

**(2) on proof of breach of a Land Obligation, the court should be entitled, in the exercise of its discretion, to grant such of the following remedies as it thinks fit: (a) an injunction; (b) specific performance; (c) damages; or (d) an order that the defendant pay a specified sum of money to the claimant.**

**[paragraphs 8.97 and 16.51]**

8.89 Under the current law, the enforceability of a freehold covenant depends on complicated rules of law and equity. As we discuss in Part 5 of the Report, a covenant binds the original parties to it and, if restrictive, may run with the land in equity under the rule in *Tulk v Moxhay* (1842) 2 Ph 774. Enforcement of a restrictive covenant normally involves an injunction, or damages; the remedies are equitable and contractual, by contrast with the enforcement of easements which is achieved through the law of nuisance.

8.90 Between paragraphs 8.90 and 8.93 of the CP we discussed the way in which land obligations could be enforced and concluded that a new statutory cause of action would need to be created. At paragraphs 8.94 to 8.96 we further proposed a limited range of discretionary remedies for breach of a land obligation.

8.91 31 consultees responded to this question and over two-thirds supported our provisional proposal.

***The responses***

8.92 Consultees broadly agreed with our proposal. Substantive comments focused on three main areas. First, a number of consultees stated that declaratory relief should be available. Gerald Moran (Hunters, Solicitors; City of Westminster and Holborn Law Society) said:

Agreed. The remedies are not mutually exclusive. A declaration may also be useful, perhaps with remedies to follow, for example damages to be assessed.

Gregory Hill (Barrister, Ten Old Square Chambers) commented:

I agree in substance with what is proposed ... . If it is intended to specify an exhaustive list of remedies available on proof of contravention of a land obligation, I suggest that the availability of a declaration should be mentioned.

8.93 Secondly, some consultees suggested that charging orders should also be an available remedy. The London Property Support Lawyers Group said:

We agree and suggest that, to this list of remedies are added:

A charging order (so that, even if the servient owner has no cash to meet a damages judgment now, its land will be charged, and that money will be paid when it is sold).

The Conveyancing and Land Law Committee of the Law Society agreed:

We agree but suggest that consideration be given to adding charging orders as a remedy ... .

- 8.94 Thirdly, a few consultees thought that our recommendations should also give prescriptive guidance as to the appropriate remedies in certain situations. Ian Williams (Christ's College, University of Cambridge) said:

The current strong presumption in favour of injunctions as the remedy for breaches of restrictive covenants should be maintained and possibly made explicit ... . It should be made clear that the current approach is to be maintained. If it is not, the Commission needs to make it clear why the present law on this point is undesirable.

Addleshaw Goddard LLP made similar comments:

Yes, but we would invite the Commission to consider whether this is an opportunity to clarify the law as to the remedies for breach of covenant/land obligation, ie should an injunction be the remedy of 'first resort', in what circumstances are damages a proper remedy, how are such damages to be calculated etc. We have particularly in mind the recent cases on rights to light, especially *Regan v Paul Properties* (2006).

Similarly, Dr Martin Dixon (Queens' College, University of Cambridge) said:

Would it be prudent to consider more fully the law of remedies? Recent case law has tended to favour damages in lieu of an injunction, thus emphasising the contract nature of covenants. Land obligations under these proposals would be more "proprietary" ... and the Commission might ask itself about the extent to which this status can be effectively undone by a judicial award of damages?

- 8.95 However, some consultees took the opposite approach, advocating that a less prescriptive approach be taken to the issue of available remedies. The Chancery Bar Association stated:

It is difficult to see why the proposed Act should prescribe a judicial discretion or any particular remedies as none of those proposed differ from what would necessarily be the case without legislative action. If remedies are to be specified then it will be necessary to state further whether damages are to be capable of being awarded in addition to as well as in lieu of an injunction or order for specific performance and, if so, what the measure should be.

Currey & Co said:

Why should not the court have a full range of discretion as to the remedies it can impose under the general law?

Farrer & Co LLP suggested:

The Court should have a wide power to make any order that seems appropriate. For example an order could direct the sale of the land especially if there is a persistent breach.

***Conclusion***

- 8.96 Consultees' comments focused on three main areas.
- 8.97 First, in relation to declaratory relief, we note the comments of consultees but do not include declaratory relief within the list of available remedies in clause 7 of the draft Bill. Declaratory relief is available under the court's inherent jurisdiction and Civil Procedure Rules.
- 8.98 Secondly, we note that charging orders would be available in the usual way for the enforcement of a money judgment.
- 8.99 Finally, we note consultees' comments on the nature of our approach to available remedies. Under the current law a proprietary interest appurtenant to an estate in land (such as an easement) is enforceable in the law of nuisance. As we discuss in the Report at paragraph 6.147, this is not appropriate for land obligations, and therefore we recommend the introduction of a new statutory cause of action, with the available remedies being listed in clause 7 of the draft Bill. But we have not indicated any preferred remedy, since decisions on the appropriate remedy in each case will be fact-specific.



**We provisionally propose that in the event of the introduction of Land Obligations, it should no longer be possible to create covenants which run with the land where both the benefited and burdened estates in the land are registered.**

**[paragraphs 8.109 and 16.52]**

**We seek consultees' views as to whether this prohibition should also apply to new covenants running with the land where either the benefited or burdened estates in land, or both, are unregistered.**

**[paragraphs 8.110 and 16.53]**

- 8.100 The CP provisionally proposed that, following the introduction of land obligations, it should no longer be possible to create restrictive covenants which run with land. That provisional proposal applied only to registered land; we sought consultees' views on whether the same should apply to unregistered land. The effect of this would mean that following reform, and assuming that (as we provisionally proposed at paragraph 8.38 of the CP) land obligations would only be able to be created over registered land, the creation of a land obligation would act as an "indirect trigger" for first registration of land.
- 8.101 32 consultees responded to the provisional proposal and offered views on what the position should be in relation to unregistered land. The vast majority were in favour of our provisional proposal; responses were mixed in relation to unregistered land.

### ***The responses***

- 8.102 First, in relation to registered land consultees supported our provisional proposal. Gregory Hill (Barrister, Ten Old Square Chambers) said:

I agree that land obligations should entirely replace *Tulk v Moxhay* restrictive covenants in relation to registered land.

Network Rail agreed with the provisional proposal, subject to clarification on the scope of the land obligations scheme:

If land obligations are merely covenants under a new name and with a few changes of law, then the new rules would replace the previous law. If land obligations would be a new system even remotely as complicated as commonhold, it would be necessary to see whether the new scheme operates well before discontinuing use of what is familiar to practitioners.

The Agricultural Law Association took a similar approach:

We reserve judgement on this question until it can be seen precisely the form land obligations will take. We remain sceptical of the need for a totally new concept. If land obligations will operate as covenants now do, there may be justification for prohibiting further covenants; if they become something broader and deeper, the new system would need a proving period before we could agree with such prohibition.

Herbert Smith LLP said:

We agree (so long as land obligations associated with a disposition of registered land operate in equity during the registration gap).

Dr Martin Dixon (Queens' College, University of Cambridge) stated:

There would, under these proposals, be no purpose served by retention of the current law of covenants, and I would agree that no new covenants could be created under these proposals.

8.103 Secondly, in relation to unregistered land consultees' views were mixed. Many agreed that new covenants should not be available in unregistered land. Trowers & Hamlins said:

We consider that, in line with the shift towards 100% registration, this prohibition should so apply, thereby further encouraging registration of title.

Similarly, DLA Piper UK LLP commented:

We consider that the prohibition should apply as a means of inducing parties to register their land in furtherance of public policy.

HHJ David Hodge QC (Civil Committee of the Council of Circuit Judges) also agreed:

We are of the view that the proposed prohibitions against the creation of new covenants running with the land and of new estate rentcharges should apply to unregistered, as well as to registered, land: this will serve to promote the desirable policy of encouraging owners of unregistered land who wish to create obligations that will run with their land to register their titles.

The Chancery Bar Association said:

We agree with the proposals ... . The practical consequences of a prohibition on the creation of new restrictive covenants affecting or benefiting unregistered land are likely to be of little practical importance even in terms of the inconvenience and expense of first registration of the relevant parcels of land.

8.104 However, some consultees saw no difficulty with instead having a two-tier system of land obligations for registered land, and restrictive covenants for unregistered land. Currey & Co said:

We disagree – where the benefited land remains unregistered, the existing law should apply.

Similarly, Addleshaw Goddard LLP stated:

We disagree. The current position in respect of unregistered land should be retained. If owners wish to take advantage of the statutory scheme, they can always apply for voluntary registration.

8.105 In addition, some consultees had reservations over using land obligations as an indirect trigger for first registration and referred back to their discomfort with our provisional proposal at paragraph 8.38 in the CP. Amy Goymour (Downing College, University of Cambridge) said:

It would be desirable to rid the law of references to covenants as far as possible. Therefore, I would agree with this proposal. As stated above, in relation to para 8.38, I see no reason in principle why land obligations must relate to registered land.

Jeffrey Shaw (Nether Edge Law) argued:

For the reasons given [in response to paragraph 8.38] I considered that it should be possible to create a land obligation in respect of unregistered land (whether this is the benefited or burdened estate). Certainly, it must be possible to create *either* a land obligation *or* a covenant, in the case of unregistered land. The prohibition contemplated in 8.109 must not be permitted to bar both types of encumbrance.

### **Conclusion**

8.106 The provisional proposal and request for consultees' views at paragraphs 8.109 and 8.110 of the CP must be read in light of the provisional proposal we made at paragraph 8.38, which restricted the use of land obligations to registered land only. As we note in the Report at paragraphs 6.46 to 6.58, our policy has since changed; we recommend that land obligations should be available over both registered and unregistered land.

8.107 With that distinction removed, we can turn to the issue of whether it should be possible, following reform, to create new *Tulk v Moxhay* covenants which run with land. Consultees endorsed our provisional proposal that following the introduction of land obligations it should no longer be possible to create new covenants; we make a recommendation to that effect in the Report at paragraph 5.89. This will, of course, have no effect on existing restrictive covenants, which will remain valid under the old law.

**We provisionally propose that the rule prohibiting the creation of new covenants running with the land should not apply to covenants made between lessor and lessee so far as relating to the demised premises.**

**[paragraphs 8.111 and 16.54]**

8.108 At paragraph 8.109 of the CP we provisionally proposed that, following the introduction of land obligations, it should no longer be possible to create covenants which run with land. That was subject to three proposed exceptions, one of which was where the covenant was made between landlord and tenant in relation to the demised premises.

8.109 30 consultees responded to the provisional proposal. Most consultees expressed agreement with it although, owing to some ambiguity in the discussion in the CP, many consultees' responses were not directly on point.

### ***The responses***

8.110 Many consultees simply agreed with the provisional proposal.

8.111 Roger Pickett (Diocese of Southwark) said:

We entirely agree that the rule prohibiting the creation of new covenants running with the land should not apply to covenants made between lessor and lessee so far as they relate to the demised premises.

The London Property Support Lawyers Group commented:

We agree that you should not, in these reforms, upset the application of the Landlord and Tenant (Covenants) Act 1995 ... . We also presume that there is no intention to duplicate the current regime (under the registration procedure for prescribed clauses leases) by requiring the parties to enter into a separate land obligation document in relation to covenants given by landlord by in relation to land other than that demised.

Gerald Moran (Hunters, Solicitors; City of Westminster and Holborn Law Society):

Agreed. The land obligations system should not affect covenants in leases or covenants under statutory provisions.

### ***Conclusion***

8.112 As we note in Part 1 of the Report at paragraph 1.16, our project is concerned with freehold covenants, defined as all covenants which run with land except those made between landlord and tenant that relate only to the demised premises ("leasehold covenants"). Therefore, none of the recommendations we make in the Report have any bearing on leasehold covenants.

### ***Other related issues***

8.113 Herbert Smith LLP had concerns about land obligations entered into between landlord and tenant which do not relate to the demised premises:

Many (most) landlord's obligations in leases of part of a building or on an estate relate to communal areas and other common parts. The demised premises themselves may be very limited in scope eg the internal surfaces of and the airspace within retail units, office floors and residential flats. The landlord will typically enter into important obligations with tenants for the maintenance, repair and management of all manner of common facilities and common fabric. It does not seem realistic to require covenants of the type exemplified in paragraphs 8.101 and 8.103 and the type of obligations we describe above to be registered separately as land obligations.

We appreciate this point. However, we note that the requirement of separate registration represents the current position in relation to easements, and we do not feel that it would impose too onerous a burden to introduce the same requirement for land obligations. It is particularly important for other tenants to be alerted to the existence of such land obligations, through registration requirements.

**We provisionally propose that, despite the introduction of Land Obligations, powers to create covenants contained in particular statutes should be preserved as such, with the same effect as they have under the existing law.**

**[paragraphs 8.112 and 16.55]**

- 8.114 The second proposed exception to the prohibition of the creation of new covenants following introduction of land obligations is found at paragraph 8.112 of the CP. It concerns the provisions made in various statutes for public bodies to enter into covenants; for example, section 33 of the Local Government (Miscellaneous Provisions) Act 1982 and section 106 of the Town and Country Planning Act 1990.
- 8.115 30 consultees responded to the provisional proposal, the majority of whom were in favour of it.

***The responses***

- 8.116 The London Property Support Lawyers Group said:

We agree. It would be helpful if all the relevant statutes were listed somewhere (the examples given in the consultation paper are a good start). Future statutory provisions should use land obligations as their chosen mechanism.

Amy Goymour (Downing College, University of Cambridge) stated:

I agree, subject to the recommendation that all future legislation relating to statutory covenants be drafted along the land obligation (rather than covenants) model.

Jeffrey Shaw (Nether Edge Law) offered similar comments:

I agree that subsisting statutes which empower creation of covenants should continue to operate. However, why should there not be legislation deemed to empower creation of a land obligation in place of a covenant? Future statutes ought to be drawn so as to contemplate only a land obligation.

Wragge & Co LLP asked:

Could these be changed to land obligations as and when other changes are made to the relevant statutes?

- 8.117 Other consultees offered a different view. Andrew Francis (Barrister, Serle Court Chambers) said:

It will be necessary to amend various statutory powers which enable local authorities and other bodies to impose covenant type obligations; see for example Local Government (Miscellaneous Provisions) Act 1982 section 33, or section 106 Town & Country Planning Act 1990. This will be so that local authorities etc can create land obligations under these various statutory powers.

Trowers & Hamlins mentioned difficulties with the existing statutory schemes, without going into detail:

We do not agree: the existing statutory regimes are not entirely satisfactory, and to preserve a system of covenants thought to be unsatisfactory together with a set of ad hoc statutory devices to circumvent the fact that some person who should be able to enforce covenants (or perhaps be given damages for their breach) do not own benefited land would be less satisfactory than to create a regime allowing such persons to enforce land obligations despite not owning such land.

***Conclusion***

- 8.118 We make no recommendations for the amendment of the various statutory provisions for public bodies to enter into covenants. We have recommended that, for the future, covenants shall take effect as land obligations (see the Report at paragraph 5.70); clause 2 of the Bill provides for this, provided that the covenants concerned meet the conditions for qualifying obligations. Covenants entered into by public bodies will be subject to those provisions and will generally, therefore, take effect as land obligations.

**We provisionally propose that the rule prohibiting the creation of new covenants which run with the land should not apply to covenants entered into where the benefited or burdened estate is leasehold and the lease is unregistrable. Do consultees agree?**

**[paragraphs 8.113 and 16.56]**

- 8.119 The CP provisionally proposed, at paragraph 8.38, that land obligations should only be able to be created over registered land. The Land Registration Act 2002 provides that leases granted for a term of seven years or less cannot in general be registered, meaning that under the provisional proposal in 8.32, a land obligation could not be created to benefit or burden a lease of this duration. We therefore provisionally proposed at paragraph 8.113 that in those circumstances it should instead be possible for the parties to create restrictive covenants which would run with the leasehold estate, constituting the third and final exception to the proposed prohibition of the creation of new covenants following the introduction of land obligations.
- 8.120 29 consultees responded to the provisional proposal, with a majority in favour of it.

***The responses***

- 8.121 Most consultees agreed with the proposal. The London Property Support Lawyers Group said:

We agree that the old regime should continue to apply in these circumstances.

The Chancery Bar Association stated:

We agree ... the likelihood of anyone seeking to create a restrictive covenant for the benefit of or burdening land subject to a short unregistrable lease is insignificant.

Michael Croker, Miriam Brown and Kevin Marsh said:

We agree. It logically follows from the previous proposals.

- 8.122 However, some consultees disagreed, drawing on their wider discomfort with restricting land obligations to use over registered land. Jeffrey Shaw (Nether Edge Law) said:

For the reasons mentioned in reply to [questions 8.109 to 8.112], I do not agree with the provisional proposal ... .

- 8.123 Amy Goymour (Downing College, University of Cambridge) also disagreed:

I disagree. Just like the rule that short leases cannot be registered (see s 27 LRA), so too could land obligations in relation to short leases be exempt from registration. It is desirable to rid the law of the language of covenants as far as possible.



**Conclusion**

- 8.124 As we note in the analysis of consultees' responses to the questions at paragraphs 8.109 and 8.110 (see paragraphs 8.100 to 8.107 above), our policy in the Report differs from that provisionally proposed in the CP in that we no longer recommend that land obligations should be available only over registered land. One consequence of opening up the scheme of land obligations to both registered and unregistered land is that no special provision is required for unregistrable leases. Therefore we do not take up this provisional proposal in the Report.

**We are provisionally of the view that, in the event of the introduction of Land Obligations, it should no longer be possible to create new estate rentcharges where the title to land is registered. Do consultees agree? We seek consultees' views as to whether it should also no longer be possible to create estate rentcharges over unregistered land.**

**[paragraphs 8.119 and 16.57]**

- 8.125 To explain this proposal we have to provide a little historical background. A rentcharge is defined by section 1 of the Rentcharges Act 1977 as “any annual or other periodic sum charged on or issuing out of land”, otherwise than under a lease or mortgage. It was the fashion in certain areas of the country – notably Bristol and Manchester – to impose rentcharges on large-scale sales of freehold plots for development in the nineteenth century, to provide an income for the seller. Alongside the rentcharge, the chargor would retain a right of entry: a legal interest in land which enables the chargor to re-enter (that is, reclaim) the land in the event of default. These very old rentcharges are nowadays something of a nuisance on the title of the charged land. Many have been bought out.
- 8.126 The Rentcharges Act 1977 prohibited the creation of new rentcharges save for a short list of exceptions, and provided that existing rentcharges, other than the excepted list, would be extinguished in 2037.
- 8.127 Of the rentcharges that can still be created, the one relevant to our project is the estate rentcharge, defined in section 2(4) of the 1977 Act as one created for the purpose of either:
- (1) making covenants to be performed by the owner of the land affected by the rentcharge enforceable by the rent owner against the owner for the time being of the land; or
  - (2) meeting or contributing towards the cost of the performance by the rent owner of covenants for the provision of services, the carrying out of maintenance or repairs, the effecting of insurance or the making of any payment by him for the benefit of the land affected by the rentcharge or the benefit of that and other land.
- 8.128 If created for the first purpose the charge must be for a nominal fixed sum (usually £1). If created for the second purpose then section 2(5) of the 1977 Act provides that the amount, if not nominal, must be reasonable in relation to the covenanted services.
- 8.129 Estate rentcharges, when combined with a right of re-entry over the burdened land, can be used to circumvent the rule that the burden of positive covenants do not run with the land. This function was recognised by the Law Commission (see Transfer of Land (1975) Law Com No 68) as one of the reasons for recommending the retention of estate rentcharges in what became the 1977 Act, though it was suggested at the time that this would be a temporary measure while the rules on positive covenants were reviewed.

- 8.130 We discussed the history of estate rentcharges and their use as a method of circumventing the rules on positive covenants at paragraphs 8.114 to 8.118 of the CP. At paragraph 8.119 we proposed to restrict the creation of rentcharges over registered land, and we went on to ask consultees whether the same should be done for unregistered land.
- 8.131 30 consultees commented on this proposal and the majority agreed that the creation of estate rentcharges over registered land should be limited. Opinion was divided on whether such a limit should apply to unregistered land.

### ***The responses***

- 8.132 More than half of those who responded supported limiting the creation of rentcharges over registered land, although this was, in most cases, based on the assumption that this proposal would only be implemented if the land obligations proposed elsewhere in the CP were to be introduced.
- 8.133 A few practitioners added that they would also support a prohibition on the creation of rentcharges over unregistered land as it would promote the uptake of land obligations. The London Property Support Lawyers Group said:

On balance we also agree that it should not be possible to create new estate rentcharges in unregistered land. This will then increase the incentive to use the new land obligations scheme which is simpler to understand, and thus to the need to submit the relevant land for first registration (which supports the aim to get as much land onto the register as possible).

- 8.134 In contrast, a substantial number of consultees preferred to retain the possibility of creating rentcharges over unregistered land. Of these consultees, a few highlighted problems that may arise if different rules were to be applied to registered and unregistered land. Andrew Francis (Barrister, Serle Court Chambers) asked how our proposal would affect registration if rentcharges could still be created over unregistered land:

The only question remains as to what is to happen in unregistered land? If the land is unregistered and there is to be a prospective abolition of new estate rent charges, is there to be a trigger of first registration (or a caution against first registration) by the creation of a land obligation in this type of case? ... . The alternative is to retain estate rent charges in cases where one title is unregistered and convert them to land obligations on the first registration of *both* titles.

- 8.135 However, Gregory Hill (Barrister, Ten Old Square Chambers) doubted that such situations would occur in practice:

In relation to unregistered land, I should be in favour of prohibiting new estate rentcharges if, but only if, land obligations were available: 8.38 above. But I very much doubt whether this is more than an academic point: I find it difficult to envisage that estate rentcharge structures would ever be created by transactions which affected unregistered land but did not trigger a requirement of first registration.

- 8.136 On the other hand, a minority of consultees rejected placing any limits on the creation of rentcharges. The National Trust cautioned that introducing this proposal would be premature as it was not yet possible to predict the impact of land obligations:

We are unclear as to why the Commission believes this proposed change to be needed at this stage. Unless the Commission feels that estate rentcharges might be used in a way which would undermine the take-up or effectiveness of the proposed land obligations regime, we would be more inclined to leave estate rentcharges in place for the time being and review their use at a future date when the operation of land obligations has settled down.

- 8.137 An alternative argument was made by Trowers & Hamlins, who objected on the grounds that rentcharges and the form of land obligations proposed in the CP do not serve the same functions:

We do not agree that it should no longer be possible to create new estate rentcharges over registered land: there are cases in which persons who cannot have benefited land should be able to enforce by agreement – eg givers of grant for socially beneficial purposes. The removal of the rentcharge would leave a serious gap in the law. Rentcharges are in fact increasingly used in regeneration projects, for the collection of estate service charges, and are essential for grant making bodies to ensure that the land in respect of which grant is made does actually get used for the purposes of the grant and in the agreed manner.

- 8.138 Similarly, the Agricultural Law Association noted that:

Estate rentcharges have quite a different function from covenants and, hence, one supposes, land obligations. If parties wish to create them, they should remain free to do so.

### **Conclusion**

- 8.139 In light of the points raised by consultees and further research into the potential impact of this proposal, we have not recommended any limits on the creation of estate rentcharges as part of this project. Estate rentcharges may still have a role to play in some unusual cases where land obligations are unavailable for want of a dominant tenement. This makes estate rentcharges useful to grant making bodies such as the Homes and Communities Agency. See paragraphs 2.47 and 2.48 of the Report.

**We provisionally propose that the rule against perpetuities should not apply to Land Obligations. Do consultees agree?**

**[paragraphs 8.122 and 16.58]**

- 8.140 The proposal was made at a time when the rule against perpetuities applied to easements and certain other interests in land; the law has been extensively altered by the enactment of the Perpetuities and Accumulations Act 2009 in April 2010.
- 8.141 At paragraphs 8.120 and 8.121 in the CP it was explained that the rule operated in relation to certain property interests to limit the time period during they must vest in order to be valid. For example, an easement granted to take effect in the future must do so within the perpetuity period or it will be void.

***The responses***

- 8.142 The proposal received 38 responses. Two consultees opposed the proposal and one made neutral comments; the rest were in support.

***Conclusion***

- 8.143 Given the support for the proposal shown by consultees and the recent change in the law, the provisional proposal can be dealt with shortly.
- 8.144 The 2009 Act provides in section 1 that the rule against perpetuities only applies as stated therein. That provision removed easements, options to purchase land and rights of pre-emption from the ambit of the rule, and indeed ensures that land obligations will not fall within it unless we so recommend. And clearly there is no reason to make that recommendation.

## **PART 9**

# **LAND OBLIGATIONS: ENFORCEABILITY**

**We provisionally propose that a Land Obligation would be appurtenant to an estate in the dominant land (“the benefited estate”).**

**[paragraphs 9.5 and 16.59]**

- 9.1 When introducing the topic of enforceability of land obligations into the CP, we drew upon the law of easements by analogy. We believe it to be accepted orthodoxy that (notwithstanding the Court of Appeal’s decision in *Wall v Collins* [2007] EWCA Civ 444, [2007] Ch 390) an easement is appurtenant to an estate in land, and the CP proposed that land obligations should follow easements in this regard. The alternative, of course, would be to allow the creation of land obligations in gross; we canvassed consultees’ views on this issue at paragraph 8.65 of the CP and, as the analysis of responses shows, consultees supported our view that the ability to create land obligations in gross would not be desirable.
- 9.2 26 consultees responded to our provisional proposal that a land obligation would be appurtenant to an estate in the dominant land. The majority of consultees agreed with the provisional proposal.

### ***The responses***

- 9.3 Gerald Moran (Hunters, Solicitors; City of Westminster and Holborn Law Society):

Agreed. Benefit should be appurtenant to a freehold or leasehold estate.

Jeffrey Shaw (Nether Edge Law) responded in similar terms:

I agree with the provisional proposal. It is consistent with the nature of an estate in land (as distinguished from the land itself).

The Agricultural Law Association added:

We agree with this proposal. The benefit should annexe to a dominant freehold or leasehold.

Land Registry stated:

Once legislation is introduced to deal with the *Wall v Collins* decision, it should be clear again that easements are appurtenant to a particular estate. We agree that the position should be the same for land obligations.

The Chancery Bar Association said:

We agree with the proposal that a land obligation would be appurtenant to an estate in the dominant land. Easements are appurtenant to an estate in the dominant land. The view expressed in *Wall v Collins* [2007] Ch 390, that an easement must be appurtenant to a dominant tenement, not necessarily to a particular interest in that dominant tenement, is contrary to principle.

- 9.4 Trowers & Hamlins also mentioned *Wall v Collins* in response to our provisional proposal:

The benefit and burden should not necessarily be extinguished with any estate to which they were attached; the present law, as properly understood following *Wall v Collins*, does justice.

We agree with this analysis. In the Report at paragraph 3.255 we propose the statutory reversal of the decision in *Wall v Collins*, subject to a power contained in the draft Bill to enable the dominant owner to elect to save the benefit of the easement. This would allow the easement to continue to subsist for the benefit of the new lease (on a surrender and re-grant) or the superior freehold (on surrender or merger). By analogy, we are of the view that the position should be the same in relation to land obligations, and so the power to elect to save appurtenant rights on determination of the leasehold estate to which they are attached extends to land obligations as well by clause 26(1)(c) of the draft Bill.

### **Conclusion**

- 9.5 Our provisional proposal is important for ensuring that land obligations remain conceptually consistent with interests in land, and therefore exist as appurtenant to estates. As we have already noted in the analysis of our provisional proposal at paragraph 8.65 of the CP, we are not convinced that land obligations should exist in gross; the risks of overburdening land far outweigh any of the possible benefits. Therefore we recommend in the Report, at paragraph 5.69, that a land obligation must be appurtenant to an estate in land, be it leasehold or freehold.

**Subject to our proposals on sub-division, we provisionally propose that the benefit of a Land Obligation should pass to any person who:**

**(1) is a successor in title of the original owner of the benefited estate or any part of it; or**

**(2) who has an estate derived out of the benefited estate or any part of it;**

**unless express provision has been made for the benefit of the Land Obligation not to pass.**

**[paragraphs 9.10 and 16.60]**

- 9.6 This question relates to the transmission of the benefit of a land obligation on transfer of the estate to which it is appurtenant (“horizontal transmission”) or on the creation of a derivative estate, such as the granting of a lease (“vertical transmission”). The analysis of this consultation question should be read in conjunction with the analysis of consultees’ responses to the questions asked at paragraphs 10.44 and 10.45 of the CP (see paragraphs 10.49 to 10.58 below). Our provisional proposal was based on the general law relating to appurtenant interests.
- 9.7 Our provisional proposal also asked whether the effect of this general rule could be modified by express provision stating that the benefit of the land obligation would not pass.
- 9.8 26 consultees responded to this provisional proposals. All agreed with us, with the exception of two consultees (one of whom disagreed on the basis of a wider disinclination towards the introduction of land obligations).

### ***The responses***

- 9.9 The vast majority of consultees simply agreed with what we said.
- 9.10 Others, including Land Registry, drew upon the law of easements by analogy:
- Again, this is how easements work, so it would seem sensible for the same to be the case for land obligations.
- 9.11 Jeffrey Shaw (Nether Edge Law) also agreed with us, but questioned how often the parties would want to make express provision for the benefit of a land obligation not to pass:

I agree with the provisional proposal, although it is hard to see in what circumstances it would be likely that (as mooted in 9.8) one might want to “hold back” a land obligation and exclude its benefit from a disposition.

Similarly, Michael Croker, Miriam Brown and Kevin Marsh commented, in relation to the ability for the parties to make express provision for the benefit not to pass:



We consider that this is too broad and will lead to uncertain results in that a land obligation will fail altogether if “held back”. We agree that it should be possible to limit the benefit for inferior estates below the estate to which the land obligation is appurtenant. We do not agree that it should be possible to “withhold” the benefit altogether on a transfer of whole, or part, of the dominant estate. So we make a distinction between the freedom or not to pass the benefit “downward” as against the “sideways” situation where we think the freedom should be restricted.

We agree with both responses. In the context of a horizontal transmission (the transfer of the whole or part of the estate), there is considerable scope for uncertainty in establishing whether a land obligation has been “held back” and thus extinguished. This could cause difficulties for Land Registry, and the indemnity fund, if a land obligation which the parties believe has been extinguished remains valid due to its presence on the register. So we do not recommend in the Report that the parties should be able to “hold back” a land obligation on horizontal transfer; of course, this does not affect the ability to release the land obligation expressly. The draft Bill makes the express release of an appurtenant right a registrable disposition (clause 28), which will ensure that the register remains up to date if this happens. In the context of a vertical transfer (such as the granting of a lease), we agree that the position should be slightly different. As we note in the Report at paragraph 6.94 the general position is that the benefit of a land obligation should be transmitted regardless of whether or not the parties expressly so provide. This is a matter of construction of the grant. Therefore it is also open for the parties to agree expressly that the benefit of a land obligation should not pass to the derivative estate, although we see little reason why this would be wanted by the parties.

9.12 Currey & Co disagreed with our provisional proposal, noting:

We consider the best practice is not to permit the benefit of covenants to pass by operation of law, but only on express assignment, and this should be enshrined in the new system. The occasions on which the benefit of a covenant is taken into account in the consideration for the disposal of a property are extremely few and far between, and there can be no hardship involved in requiring the benefit of covenants to be expressly assigned where the circumstances require eg fencing covenants.

We are not persuaded by these comments; we take the view that there is no hardship involved if the default position is that the benefit does pass on vertical and horizontal transmission. Indeed, the opposite position, that express assignment be required to transfer the benefit of a land obligation, would be likely to act as a conveyancing trap for the unwary, with appurtenant rights being lost due to the lack of express assignment. This could have disastrous consequences for parties, as well as causing difficulties for Land Registry and the register of title for the reasons discussed above.

9.13 Dr Nicholas Roberts (Oxford Brookes University) agreed with our provisional proposal, but recommended that a wider class of person should benefit from a land obligation:

Agreed; but it is submitted that further consideration should be given to the question of how far the benefit of a land obligation should run. Although it seems not to be widely commented upon, the clear effect of s.78 of the LPA 1925 is that covenants of a restrictive nature may be enforced not only by freehold owners and tenants, but even by occupiers of the benefited land ... . I would advocate maintaining the status quo and allowing occupiers to enforce land obligations.

Section 78 of the Law of Property Act 1925 provides expressly that a restrictive covenant can be enforced by an occupier of the dominant land. However, we are unaware of any cases in which an occupier has enforced a restrictive covenant. So we are not persuaded of the usefulness of this approach, particularly in the context of the scheme of land obligations we recommend in the Report; it would give standing to enforce to a potentially wide class of applicants who have no vested interest in the land. This approach is consistent with that taken in relation to squatters in adverse possession of land; see the Report at paragraph 6.134 and following

### ***Conclusion***

- 9.14 The recommendations we make in the Report follow our provisional proposals in the CP, with one exception. We are not convinced as to the purpose or workability of allowing the parties to make express provision for the benefit of land obligations not to pass in situations where the estate is being transferred “horizontally”, although the position is slightly different in relation to vertical transmissions as we discuss above. Therefore we make no provision in the Report or draft Bill to allow the parties to “hold back” the benefit of a land obligation on transfer of the entire estate, although of course it may be expressly released by agreement with the servient owner. See the Report at paragraph 6.92, footnote 65. We also recommend that the express release of an interest be a registrable disposition; see paragraph 4.57 of the Report.

**We provisionally propose that a Land Obligation should attach to an estate in the servient land (“the burdened estate”).**

**[paragraphs 9.19 and 16.61]**

9.15 The CP provisionally proposed that a land obligation would be appurtenant to an estate in the dominant land, and attach to an estate in the servient land. The former point has already been dealt with in this analysis (see paragraphs 9.1 to 9.5 above, which deal with consultees’ responses to paragraph 9.5 of the CP); consultees endorsed that provisional proposal.

9.16 26 consultees responded to the additional provisional proposal and, as with the related question at paragraph 9.5 of the CP, the majority agreed with what we proposed.

***The responses***

9.17 The majority of consultees, including the London Property Support Lawyers Group, Land Registry, and Michael Croker, Miriam Brown and Kevin Marsh simply agreed with our proposals.

9.18 The following represents a sample of the most substantive responses received from consultees. Gerald Moran (Hunters, Solicitors; City of Westminster and Holborn Law Society) said:

Agreed. Burden should be appurtenant to a freehold or leasehold estate.

Jeffrey Shaw (Nether Edge Law) noted:

I agree that the burden of a land obligation should attach to a specific estate, for just the same reasons as concerning the benefit.

The Agricultural Law Association said:

We agree with this proposal. The burden should attach to a servient freehold or leasehold.

9.19 However, Martin Pasek raised an objection:

This would appear to mean, (in the conventional view) that an adverse possessor, say, could take free, at least for a while. I do not agree.

The CP made specific provisional proposals in relation to whether squatters should be bound by land obligations at paragraphs 9.36 and 9.41 of the CP; see paragraphs 9.79 to 9.93 below for further detail. In brief, we agree with this concern and therefore recommend in the Report at paragraph 6.144 that a squatter should be bound by any land obligation burdening the land.

**Conclusion**

- 9.20 As we note in the analysis of responses to paragraph 9.5 of the CP, our provisional proposal is important for ensuring that land obligations remain conceptually consistent with interests in land, and therefore are appurtenant to estates. We therefore recommend in the Report, at paragraph 5.69, that the burden of a land obligation must attach to an estate in land.

**We invite the views of consultees on the following three alternatives for the class of persons who should be bound by a positive obligation or a reciprocal payment obligation:**

- (1) Option 1: Should the class encompass:**
  - (a) those with a freehold interest in the servient land or any part of it, provided they have a right to possession;**
  - (b) those who have long leases (terms of more than 21 years) of the servient land or any part of it, provided they have a right to possession;**
  - (c) mortgagees of the servient land or any part of it; or**
  - (d) owners of the burdened estate which do not fall within any of the above three categories, where the interest is clearly intended to be bound?**
- (2) Option 2: Should the class be restricted to the owner for the time being of the burdened estate or any part of it? Or**
- (3) Option 3: Should the class encompass:**
  - (a) the owner for the time being of the burdened estate or any part of it; and**
  - (b) any person who has an estate derived out of the burdened estate or any part of it for a term of which at least a certain number of years are unexpired at the time of enforcement? We invite consultees' views on what minimum unexpired term they believe would be most appropriate.**

**[paragraphs 9.20 and 16.62]**

- 9.21 This question asked which persons, of those who hold an estate or interest deriving out of the burdened land, should be bound by the burden of a positive land obligation. The class cannot be without limit as some obligations may impose a heavy burden, and there may be cases where it would be unfair to require a person who holds an insubstantial interest to perform that obligation; see also paragraph 6.103 and following of the Report. The question sought to establish where the line should be drawn.
- 9.22 The question received 40 responses; each of the 3 options drew some support but there was no overall "winner". Some consultees selected portions of each option to produce a composite class. Many consultees commented on the transmission of the burden of a positive covenant without expressing any preference for any of the options put forward.

### ***The responses***

- 9.23 HHJ David Hodge QC (Civil Committee of the Council of Circuit Judges) drew upon option 1 and option 3, suggesting that the burdened class should comprise the owner for the time being, and leases for a term of which a certain number of years – seven years was suggested – remained unexpired at the time of enforcement. Mortgagees of the servient land who had actually taken possession of the servient land or appointed a receiver also should be bound.
- 9.24 Jeffrey Shaw (Nether Edge Law) supported the first option:
- I agree with option 1, except that the lessees – class (b) – should be those who have a registrable leasehold interest (ie term of more than seven years, as the 2002 Act currently stands).
- 9.25 DLA Piper UK LLP agreed with option 1 but commented that it should not be treated as an exhaustive list “but rather as a suggestion to the drafter” of the land obligation. They also commented that:
- We fear that mortgagees will strongly resist being automatically bound by positive obligations unless they take enforcement action under the security created. This could affect the mortgageability of property and dissuade people from entering into what would otherwise be sensible land obligations. The position of mortgagees should be analogous to their position in relation to leasehold obligations when they take a charge over a lease.
- 9.26 Addleshaw Goddard LLP supported option 1, but suggested that a mortgagee should not be bound unless they have gone into possession of the burdened land.
- 9.27 The National Trust favoured option 1 and stated that:
- It seems to us to be the option which is most consistent with the philosophical basis of land obligations, whilst respecting the pragmatic need not to place a disproportionate burden on tenants under short leases. So long as proposal 16.71(1) is accepted, we see no reason why mortgagees should not be bound, so long as the obligation predates their involvement, or was assumed with their consent.
- 9.28 Gregory Hill preferred option 1 but suggested a variation of option 1(b) so that it was extended “to include tenants under leases for more than 7 years who *either* have a right to possession *or* are subject to a lease or leases for less than that period; alternatively tenants with leases for more than 21 years with the right to possession or subject to shorter leases”.
- 9.29 Option 2 was the narrowest proposed class of those bound by a positive land obligation; it would rule out transmission of the burden to estates and interests derived out of the burdened land. Roger Pickett (Diocese of Southwark) expressed his support:

We take the view in the interests of simplicity that option 2 pursues the interests of reform although we wonder whether there may be cases where specific performance may not be possible for external reasons and therefore believe this possibility should be permitted.

9.30 Wragge & Co LLP supported option 2 on similar grounds:

Our preference, option 2, would simplify matters considerably, since it would eradicate the problem of those with short term interests being bound to pay disproportionate amounts of money. A landlord would be free to provide in the lease for a proportion of the cost to be passed through to the tenant eg as part of the service charge.

9.31 Herbert Smith LLP made comments on all three options and noted in relation to option 2 that it “has the advantages of clarity and simplicity”.

9.32 Those consultees who supported option 3 made a number of suggestions as to what the unexpired term should be for a leasehold interest to be bound by a positive obligation.

9.33 Andrew Francis (Barrister, Serle Court Chambers) suggested a term of at least 40 years unexpired. The responses of Gerald Moran (Hunters, Solicitors; the City of Westminster and Holborn Law Society), Rohit Radia, M I Cunha, Tony Kaye, Chorleywood Station Estate Conservation Group and Churchfields Avenue Residents Association put forward a term of seven years and said that all periodic tenancies should be excluded.

9.34 The Council for Licensed Conveyancers suggested 21 years unexpired, as did Richard Coleman (Clifford Chance LLP) and the Chancery Bar Association. Mangala Murali thought the minimum unexpired term should be ten years as it “provides a healthy balance”.

9.35 Currey & Co thought that only those leaseholds that were “freehold-equivalent leases for terms of upwards of say five hundred years” should be bound.

9.36 The Chancery Bar Association favoured option 3 overall, and in the case of leaseholds, suggested an unexpired term of 21 years. The Association also considered that the class should be enlarged to include those who are mortgagees of the servient land who have taken possession of it.

9.37 Dr Nicholas Roberts (Oxford Brookes University) said:

It is difficult to answer this question, as this must surely depend on the nature and extent of the positive obligation ... . It is very probably unfair to enforce a requirement that someone contribute to the cost of repairing a roof (eg as in *Rhone v Stephens*) against a lessee if the lease were only granted for less than, say, 21 years (with perhaps an additional requirement that there be no less than 7 years outstanding). But if the transfer of a freehold maisonette contains the requirement that windows be cleaned or the relevant part of the garden be kept tidy it would not be unreasonable to allow such requirements to be enforced against short-term tenants (or possibly occupiers).

9.38 Herbert Smith LLP made a similar point:

Option 3: The difficulty we see with this option is there is no realistic way of gauging an appropriate unexpired term which is proportionate to the relevant obligations. A term that might be appropriate to one obligation could be inappropriate for another.

***Other comments***

9.39 Richard Coleman (Clifford Chance LLP) commented:

When a land obligation is created it should be open to the parties to make their own provisions on the class of persons “who should be bound by a positive or reciprocal payment obligation”. For example, they may wish to provide that lessees for terms of less than 99 years should not be bound. It will probably be sensible to have default provisions which would apply if the parties leave open the question of how the class of persons to be bound is determined.

9.40 Martin Pasek said:

The list of types of obligations, circumstances and the combinations of classes of person it would be proper to bind is effectively limitless it seems to me. Perhaps it should be a requirement that the classes of person to be bound should be clearly identified in the instrument of creation, and that no person not in at least one such class would be bound.

9.41 Dr Nicholas Roberts (Oxford Brookes University) identified a significant drawback in severely restricting the class of who is bound by a positive land obligation:

If a land obligation were enforceable only against a freehold owner, the danger would surely be that if the freeholder owner resided abroad, and it would therefore be difficult to enforce any obligation against him which could be enforced only with injunctive relief; or, in the case of an obligation which was financially onerous, that the freeholder was “a man of straw” and the value in the servient tenement was now contained in a very long leasehold interest.

**We invite consultees to state whether they consider that any other persons with interests in or derived out of the burdened estate should be bound by a positive obligation or a reciprocal payment obligation, and if so which persons.**

**[paragraphs 9.21 and 16.63]**

9.42 We received 23 responses to this supplemental question. The majority of consultees stated that there were no other persons to include within the class of who should be bound. Many others responses reiterated the views already expressed to us in regard to the previous question. Two consultees suggested that mere occupiers should be bound.



### ***The responses***

9.43 The Treasury Solicitor's Bona Vacantia Division considered that:

Generally a covenant should be binding upon all persons who are acting in contravention of the covenant, and who own any estate or interest in the burdened land or any part of it, or who are in occupation of the burdened land or any part of it, unless the covenant expressly provides otherwise.

9.44 Dr Nicholas Roberts (Oxford Brookes University) also felt that there might be circumstances where an occupier should be bound by a positive land obligation. He gave the example of a shared right of way which for security reasons is barred by a gate at one end. Where the easement was backed by a positive obligation to close the gate after using the right of way over the passage, he took the view that a good case could be made for requiring an occupier to be bound.

9.45 In contrast, the Council for Licensed Conveyancers did not believe any other persons should be bound "as adequate contractual provisions can be agreed between owners and other interested parties".

### ***Conclusion***

9.46 The responses made to the three options ranged widely, but it is possible to extract some common themes. Although option 2 found favour with a few consultees for its simplicity, it can be ruled out as it is capable of producing an unfair result. Dr Nicholas Roberts discussed this possibility in his response and identified a risk that might arise if the class of who is bound is too narrow.

9.47 Some consultees picked out elements of options 1 and 3 and expressed their support for these rather than the whole of the proposed class. Both of these options included the owner of the servient land within the class of those who are bound, but option 1(a) added the qualification that this is only where he or she has a right to possession, while option 3(b) restricted the class to the owner for the time being.

9.48 It goes without saying that the owner of the burdened estate should be bound, but we have not proceeded with the qualification in option 1(a). It would enable an owner of the freehold to avoid being bound by a positive covenant through the simple expedient of granting the land away under a long lease on terms that it did not include a right to possession.

9.49 We explain in the Report, at paragraph 6.110 and following, that we have concluded that the burden of a positive obligation should bind an equitable estate that derives out of the burdened land where it confers an immediate right to possession. We make the relevant recommendation at paragraph 6.115 of the Report, and see clauses 1 and 5 of the draft Bill.

9.50 There was a lot of support among consultees for the principle that the class of those burdened by a positive land obligation should extend to leaseholds granted out of the servient estate. There was also support for the principle that there should be a cut-off point below which leases of a short duration would be excluded. However, there was very little agreement on where that point should be and so we were unable to derive much guidance on this from the responses.

- 9.51 At paragraph 6.109 and following of the Report we explain that after a review of comparable common law jurisdictions, and further discussion with Land Registry, we recommend that the burden of a positive land obligation will not pass to a lease for seven years or less and that those leaseholds for a term greater than seven years will only come within the burdened class where they confer a right to immediate possession. See paragraphs 6.109 to 6.117 of the Report and clauses 5(1)(b), 5(2)(b) and 6(3) of the draft Bill.
- 9.52 Where the burdened land is subject to a leasehold estate that comes within the class of interests bound by the burden of a positive obligation, it is open to the landlord and tenant to make whatever arrangements they wish to deal with the allocation of the burden as between themselves. However, both landlord and tenant will be liable to perform the obligation so in the absence of an express arrangement the default rule will be that the landlord should indemnify the tenant for any loss caused by the landlord's breach of the positive land obligation. See the Report at paragraphs 6.114 and 6.116 and paragraph 3 of schedule 1 to the draft Bill.
- 9.53 There was support for view that the class of those bound by a positive obligation should include a mortgagee of the servient land; however, for many consultees, this was on the basis that it should be only where the mortgagee has taken possession of the burdened estate and we make a recommendation in those terms. See paragraph 6.115(2) of the Report, and see clauses 5(1)(b) and 6(3) of the draft Bill.
- 9.54 The National Trust made the point that mortgagees should not be bound where their security predates the grant of the positive obligation. This must also apply in the case of leaseholds granted out of the servient estate. Clearly, the transmission of the burden of a positive obligation to estates and interests that could come within the burdened class will be subject to the normal rules governing the priorities of interest in land; estates and interests that were created before the positive obligation is granted will not be bound. See clause 5(2)(a) of the draft Bill.
- 9.55 We do not recommend that the burden of positive obligations should extend to mere occupiers. The burden will not extend to leaseholds of less than a seven year term, and so it would be unprincipled to include occupiers within the burdened class; we concur with the view of the Council for Licensed Conveyancers that this is a matter for contract. However, adverse possessors, who hold an estate in land by virtue of their possession, are a different matter; see paragraph 6.134 and following of the Report.

**We provisionally propose that restrictive obligations should be binding upon all persons:**

- (1) with any estate or interest in the servient land or any part of it; or**
- (2) in occupation of the servient land or any part of it.**

**[paragraphs 9.23 and 16.64]**

- 9.56 Restrictive covenants require that something is not done. Compliance is a straightforward matter that does not involve effort or expenditure on the part of the owner of the estate or interest that is bound, and the class of those bound is broad. The proposal replicates the provisions of the current law in relation to restrictive covenants.
- 9.57 The proposal received 34 responses; it proved to be uncontroversial with 33 responses in agreement.

### ***The responses***

- 9.58 Most responses simply expressed agreement with the proposal. Amy Goymour (Downing College, University of Cambridge) commented:

Everyone who has an interest, even just a license (such as a casual visitor) which derives from the burdened estate, should be bound. This is because the burdened owner cannot (subject to exceptions in s 29 LRA) grant a right to enjoy the land greater than he himself has. His interest is inherently burdened by the restriction imposed by the LO which “eats into” his proprietary entitlement.

- 9.59 Disagreement was expressed by one consultee who opposed land obligations entirely.

### ***Conclusion***

- 9.60 We make a recommendation in terms similar to the proposal at paragraph 6.104 of the Report, and see also paragraph 6.103. Clause 4(1) of the draft Bill puts the recommendation into effect.

**We provisionally propose that the owner of an interest in the servient land should not be bound:**

**(1) if his or her interest has priority over the Land Obligation; or**

**(2) if there is contrary provision in the instrument which creates the Land Obligation.**

**Do consultees consider that any other exceptions be made to the class of persons who should be bound by a Land Obligation?**

**[paragraphs 9.29 and 16.65]**

- 9.61 The first limb of this provisional proposal simply reflects the general law: estates and interests in the relevant land that have priority to a land obligation will not be bound by it.
- 9.62 The second limb raises the issue of whether it should be possible to exclude, through the express terms of the grant, certain persons from the liability to perform the obligation. The final part of the proposal seeks views on whether there should be any other exceptions to the obligation to perform.
- 9.63 The proposal received 35 responses. A very small number of responses addressed each of the composite parts of the proposal; most simply expressed overall support.

#### ***The responses***

- 9.64 Amy Goymour (Downing College, University of Cambridge) said:

Priority: I agree – this is a wholly natural consequence of what it means to have priority. I am not convinced it needs to be stated expressly in legislation.

Contrary provision: I agree.

- 9.65 Herbert Smith LLP commented:

First, we believe that the issue of priority under paragraph 9.27 should be governed by sections 28 and 29 LRA 2002. The land obligation would be a registrable disposition.

Second, we do not consider that any other exceptions should be made to the class of persons who should be bound by a land obligation.

- 9.66 Network Rail considered that “the category of persons bound should be as wide as possible”.
- 9.67 The group response of Gerald Moran (Hunters, Solicitors, the City of Westminster and Holborn Law Society), Rohit Radia, M I Cunha, Tony Kaye, Chorleywood Station Estate Conservation Group and Churchfields Avenue Residents Association contained the following comment:

Agreed. These exclusions should extend to mortgagees not in actual possession (9.48). Persons with priority should be able to contract into being bound.

- 9.68 The City of London Law Society, the London Property Support Lawyers Group, Norton Rose LLP and Nabarro in their responses said:

We agree with (1) so long as the question of whether the interest has priority is judged by the normal application of s 27 LRA 2002. Since we have selected option 2 above [see paragraph 9.21 and following above] as the default position, (2) is not applicable. It should not be possible to exclude liability of successors in title to the original contracting party. However, if one of the other options is chosen we agree with (2) so long as only owners of subsidiary interests/mortgagees of the servient land (not successors in title to the original contracting party) that are excluded from liability.

- 9.69 DLA Piper UK LLP expressed cautious support for the proposal:

Whilst we agree with the sentiment, we consider that the approach set out in the consultation paper would not lead to good drafting. It is better to express the category of persons bound by an obligation positively rather than to set out a wide definition and then carve out exceptions. This can lead to parties being bound unexpectedly if the nature of their interest is not anticipated by the drafter but does not fall within an exception.

### **Conclusion**

- 9.70 The proposal enjoyed wide support and we recommend that land obligations should be subject to the general priority rules and the specific requirements of the land registration systems.
- 9.71 It would be unusual, we think, for those creating a land obligation to choose to specify that certain interests in the land (necessarily future interests, since existing interests will have priority to a land obligation about to be created) would not be bound by it. But if it is desired to create an obligation that binds, say, the freeholder but not future lessees, it would be open to the parties to draft the obligation in terms that bind only the freeholder.
- 9.72 There were no further exclusions suggested by consultees, and we make no other recommendations in this regard. See the Report at paragraph 6.103 and following; see also clauses 4(2), 5(2)(a) and 6 of the draft Bill.
- 9.73 We have considered the concern expressed by DLA Piper UK LLP. We have recommended that the burden of a land obligation should be transmitted to a specified class of estates and interests; see paragraphs 6.104, 6.115 and 6.116 of the Report.

**We provisionally propose that a squatter who is in adverse possession of the dominant land but who has not made a successful application to be registered as proprietor, should not be entitled to enforce any Land Obligations.**

**[paragraphs 9.34 and 16.66]**

9.74 In the CP we looked at the position of a squatter in adverse possession of registered land and provisionally proposed that, prior to making an application to be registered as proprietor of the land, a squatter should not be entitled to enforce any land obligations.

9.75 Of the 28 consultees who responded, the majority were in favour of the provisional proposal.

### ***The responses***

9.76 The majority of consultees simply offered their agreement to the provisional proposal.

9.77 The Chancery Bar Association said:

We agree. Until the squatter has made a successful application to be registered as proprietor he will not be a successor in title of the owner of the benefiting estate, and should not be able to enforce any land obligations.

Land Registry added:

We agree that such a squatter has not acquired the estate to which the land obligation is appurtenant, and so there is no basis on which they should be able to enforce the land obligation.

Michael Croker, Miriam Brown and Kevin Marsh commented:

We agree. This is consistent and coherent.

### ***Conclusion***

9.78 The policy embodied in the provisional proposal is incorporated in the scheme that we recommend; since the benefit of a land obligation attaches to an estate in land, the squatter whose title is not yet registered cannot take the benefit of the land obligation unless we so recommend, and we do not. We have made a recommendation that corresponds to this provisional proposal at paragraph 6.144 of the Report.

**We provisionally propose that a squatter, who is in adverse possession of the servient land but who has not made a successful application to be registered as proprietor, should be bound by a restrictive obligation.**

**[paragraphs 9.36 and 16.67]**

**We invite the views of consultees as to whether such a squatter should be bound by a positive or reciprocal payment obligation.**

**[paragraphs 9.37 and 16.68]**

- 9.79 Prior to making a successful application to be registered as proprietor of the dispossessed proprietor's estate, a squatter in adverse possession holds a fee simple in the land generated by his or her possession of it. We asked consultees in the CP whether a squatter should be bound by land obligations that burden the estate of the dispossessed proprietor – as do restrictive covenants under the current law (*Re Nisbet & Potts' Contract* [1905] 1 Ch 391); we noted the need for consistency with paragraph 9.23 of the CP, where we provisionally proposed that restrictive obligations should be binding upon all persons with any estate or interest in the servient land, or who are in occupation of it.
- 9.80 Of the 28 consultees who responded, the majority were in favour of a squatter being bound by land obligations that burden the estate of the dispossessed proprietor.

***The responses: restrictive obligations***

- 9.81 The majority of consultees simply offered their agreement to the provisional proposal.
- 9.82 The Conveyancing and Land Law Committee of the Law Society also agreed:
- We agree. Why should an unregistered squatter not be bound by a restrictive obligation? Take the example of two adjacent fields, the owner of one being entitled to the benefit of a restriction on the other limiting its use to agricultural purposes. The burdened field is occupied by a squatter who puts it to a very different use. If the owner of the benefited field could not enforce the obligation, he would be powerless ... .
- 9.83 The Chancery Bar Association commented:
- We agree. It would indeed be hard to make an express exclusion in favour of those for whom occupation is lawful.
- 9.84 Gerald Moran (Hunters, Solicitors; City of Westminster and Holborn Law Society) said:
- We agree the proposals at 9.34 & 9.36. Squatters should not benefit but should be bound by obligations of persons whose interests they supplant.
- 9.85 Amy Goymour (Downing College, University of Cambridge) said:

I tentatively agree as a matter of policy. However, in terms of legal principle, this is more difficult to justify because, until registration, the squatter has his own freehold possessory title, which does not derive in any sense from the real owner of the land. It would therefore be a policy decision, rather than one of legal logical necessity, I think, to render the squatter burdened by restrictive land obligations. I would support such a policy.

- 9.86 A small minority of consultees disagreed with our provisional proposal. Jeffrey Shaw (Nether Edge Law) said:

I do not agree with the provisional proposal. By definition, a person in adverse possession is not yet the proprietor so he should not yet be bound by any obligations which bind the proprietor.

***The responses: positive or reciprocal payment obligations***

- 9.87 Roger Pickett (Diocese of Southwark) said:

We can see no reason why a squatter should not be bound by a positive or reciprocal payment obligation.

- 9.88 Gregory Hill (Barrister, Ten Old Square Chambers) said that squatters should be bound by positive and reciprocal payment obligations:

The person entitled to enforce those obligations should not be deprived of a remedy because the land is being squatted and everyone with a paper title has disappeared ... .

- 9.89 Addleshaw Goddard LLP agreed:

We think that a squatter should be bound by these obligations. If the squatter is 'exercising' the rights as a matter of fact, he should pay.

- 9.90 The Agricultural Law Association also offered its support:

We agree these proposals. Squatters should not take the benefit of a land obligation but should be bound by any affecting the land of which they take possession.

- 9.91 Herbert Smith LLP said:

We consider that such a squatter should be so bound.

***Conclusion***

- 9.92 Consultees were in favour of our provisional proposal that a squatter should be bound by a restrictive obligation, and we so recommend in the Report at paragraph 6.144. As well as providing consistency with the recommendation we make in relation to occupiers of land (see paragraph 6.104 of the Report), this replicates the position under the current law; the decision in *Re Nisbet & Potts' Contract* [1905] 1 Ch 391 established that a squatter holds his or her title subject to any third party rights which run with the land, including restrictive covenants.



9.93 Consultees were also strongly in favour of a squatter being bound by positive and reciprocal payment obligations, which we recommend accordingly in the Report (see paragraph 6.144). Whilst under the current law there is no analogy with a *positive* obligation binding a squatter, we make this recommendation for reasons of consistency and fairness; we do not think it right for a squatter to be able to take land free of obligations which bound the former proprietor, the effect of which could potentially leave the benefited owner without a person against whom the obligation could be enforced. This injustice could be compounded further in the case of a reciprocal payment obligation, where the squatter is in receipt of the benefit of an obligation without being obliged to contribute towards it.

**We provisionally propose that a restrictive obligation should be enforceable against any person bound by it in respect of any conduct by that person which amounts to doing the prohibited act (or to permitting or suffering it to be done by another person).**

**[paragraphs 9.41 and 16.69]**

- 9.94 The CP made the provisional proposal that a person would be liable for breach of a restrictive obligation if that person breached the obligation, or “permitted or suffered” the breach to be done by another person.
- 9.95 27 consultees responded to the provisional proposal. All were broadly in favour of it, although a few consultees sought clarification on a minor point of detail, which we discuss below.

### ***The responses***

- 9.96 The majority of consultees agreed with the provisional proposal without making substantive comments. Those who did offer their views focused mainly on the effect of contrary wording in the instrument creating the land obligation. For example, Gerald Moran (Hunters, Solicitors; City of Westminster and Holborn Law Society) said:

Agreed. Subject to contrary wording, breach need not be committed personally by the person bound.

Richard Coleman (Clifford Chance LLP) stated:

Agreed; unless the restrictive obligation contains provisions to the contrary.

The Agricultural Law Association offered:

We agree that liability should attach to the permitting or suffering of conduct in breach, subject to the rights of parties to contract otherwise.

The London Property Support Lawyers Group said:

We agree that it would be preferable to have this implied (to save the proliferation of words needed to achieve this expressly). It should be possible for the land obligation to expressly indicate if this interpretation is not to apply.

We appreciate the views of consultees on this point. If the parties do not want for a land obligation to be enforceable against a particular party, this can be accommodated within the terms of the land obligation as granted.

- 9.97 The Chancery Bar Association offered their views on the use of the terms “permitting” and “suffering” in their response:

We agree that a restrictive obligation should be enforceable against any person bound by it in respect of any conduct by that person which amounts to doing the prohibited act, save that we would not favour extending the obligation to “suffering”, as opposed to “permitting”, something to be done by another person. We say this because there is no certainty in the case law as to what is intended to be covered by the expression “suffering”.

***Conclusion***

- 9.98 On the whole, consultees agreed with our provisional proposal, and so we make the corresponding recommendation in the Report at paragraph 6.154. We note the comments of the Chancery Bar Association, but have retained reference to “permitting” and “suffering” in the draft Bill. There is indeed a difference between the two words – permitting being a more deliberate action, we think, than allowing – and we took the view that both points were important in the context of restrictive obligations.

**We provisionally propose that a positive or reciprocal payment obligation should be enforceable, in respect of any breach, against every person bound by the obligation at the time the breach occurs.**

**[paragraphs 9.43 and 16.70]**

- 9.99 In the CP, at paragraph 9.42, we explained that because a positive land obligation requires some positive action to be taken by the party bound by it, a breach will occur if none of those bound by the land obligation does what the obligation requires.
- 9.100 The obligation can be performed by any party bound by it, and provided that at least one person performs it there is no breach; but the obligation will be breached where none of those bound by the burden performs the obligation. The provisional proposal at 9.43 makes clear that where more than one person is bound to perform a positive obligation, each is jointly and severally liable, and so the obligation may be enforced against any or all of them.
- 9.101 The proposal received 34 responses; all but 3 consultees were in favour.

### ***The responses***

- 9.102 The responses made by Andrew Francis (Barrister, Serle Court Chambers), Roger Pickett (Diocese of Southwark), the City of London Law Society, the London Property Support Lawyers Group, Norton Rose LLP and Nabarro simply expressed support for the principle that liability should be joint and several.
- 9.103 Currey & Co thought that it should only be possible to enforce a positive obligation against a freeholder who could then make appropriate arrangements with his tenants.
- 9.104 Two consultees considered how liability as between the burdened owners should be regulated. DLA Piper UK LLP thought that there should be a “statutory right of indemnity” between those liable at the point of demand rather the point of enforcement. The Agricultural Law Association said:

We agree that a positive or reciprocal payment obligation should bind all those on whom liability rests at the time of breach. It would be for the parties liable to agree any apportionment of liability amongst themselves.

### ***Conclusion***

- 9.105 The proposal was well supported on consultation, and we explain in the Report at paragraph 6.153 that for positive obligations all those who are bound by the burden of a positive obligation should be jointly and severally liable on the obligation since all are responsible for performing the obligation. We make a recommendation to this effect at paragraph 6.126 which is put into effect by clause 6(4) of the draft Bill.
- 9.106 We confirm what comprises a breach of a positive obligation by recommending that a positive obligation is breached if the obligation is not performed, see paragraph 6.154 of the Report and clause 6(2) of the draft Bill.

9.107 The point made by DLA Piper UK LLP and the Agricultural Law Association on how liability should be apportioned between the owners of land that is burdened by a positive obligation is dealt with in the Report at paragraph 6.125. It is addressed by a recommendation made at paragraph 6.126 of the Report, and see schedule 1 to the draft Bill.

**We provisionally propose two exceptions to the class of persons liable for a particular breach of a Land Obligation:**

**(1) a mortgagee should not be liable unless, at the relevant time, he has actually taken possession of the land or has appointed a receiver; and**

**(2) a person should not be liable where contrary provision has been made in the instrument which creates the Land Obligation.**

**[paragraphs 9.48 and 16.71]**

- 9.108 At paragraph 9.20 of the CP we put forward three options for the classes of estates and interests to which the burden of a positive or reciprocal payment obligation should be transmitted. At paragraph 9.23 we proposed that the burden of a restrictive obligation should be binding on all persons with an estate in the burdened land or who were in occupation of it.
- 9.109 The proposal at 9.29 of the CP qualified those proposals by suggesting that in any event two classes of people should not be liable for breach of a land obligation.
- 9.110 The first limb of the proposal at paragraph 9.48 received 33 responses; four of those did not agree with the proposal and 6 made other comments. The second limb received 31 responses; all consultees were in agreement except for two.
- 9.111 The proposal at 9.48(2) has been dealt with in substance in relation to paragraph 9.29(2) of the CP (see paragraph 9.61 and following above), and we note that the terms of a land obligation may exclude particular persons from liability to perform an obligation. So the analysis below addresses what consultees said about 9.29(1).

### ***The responses***

- 9.112 Richard Coleman (Clifford Chance LLP) said:

If a mortgagee has actually taken possession then the mortgagee should be liable; but the mortgagee should not be liable if it has merely appointed a receiver, I suggest.

The City of London Law Society, the London Property Support Lawyers Group, Norton Rose LLP, Nabarro and Trowers & Hamblins made a similar comment.

- 9.113 DLA Piper UK LLP argued that imposing liability on a mortgagee who had appointed a receiver “could severely affect the willingness and/or ability of banks to lend on the security of property subject to positive land obligations”.
- 9.114 Addleshaw Goddard LLP commented that a mortgagee should not be liable where a receiver has been appointed, as the receiver is the agent of the mortgagor.

**Conclusion**

- 9.115 We recognise the concerns of consultees who felt that that a mortgagee who has appointed a receiver should not be liable for the breach of a land obligation affecting the burdened land. This is addressed by the recommendations we make at paragraphs 6.104 and 6.115 of the Report on the vertical and horizontal transmission of the burden of a land obligation; the burden will only pass to mortgages in possession of the land. See also clause 6(3) of the draft Bill.

# **PART 10**

## **LAND OBLIGATIONS: VARIATION OR EXTINGUISHMENT**

**We provisionally propose that Land Obligations should be capable of variation and extinguishment:**

- (1) expressly; and**
- (2) by operation of statute.**

**[paragraphs 10.9 and 16.72]**

- 10.1 In the CP we provisionally proposed that land obligations should be capable of variation and extinguishment by express agreement between the owners of the benefited and burdened estates and by operation of statute; by contrast, easements and profits can also be extinguished by abandonment. The proposal should be read alongside our proposals later in Part 14 of the CP in relation to the jurisdiction of the Lands Chamber of the Upper Tribunal.
- 10.2 8 consultees responded to the proposal, all of whom endorsed it, with one exception.

### ***The responses***

- 10.3 Some consultees simply agreed with what we had proposed.
- 10.4 Other consultees linked their support to other provisional proposals in the CP. Jeffrey Shaw (Nether Edge Law) stated:

I agree with the provisional proposals although ... it should be declared that implied extinguishment of a land obligation (on unification of the dominant tenement and servient tenement) should be abolished.

- 10.5 Michael Croker, Miriam Brown and Kevin Marsh were also content with the provisional proposal:

We agree with this overall principle. We also agree that ... the extinguishment should not be automatic as this would be off the register of title ... .

- 10.6 Gregory Hill (Barrister, Ten Old Square Chambers) offered similar support:

I agree that express releases of land obligations would need to be completed on the register ie by removing the entries. I also agree that compulsory purchase and other statutory powers to discharge burdens on land should apply.

- 10.7 The London Property Support Lawyers Group also offered its approval:



We believe that variation should be possible by both methods and extinguishment should be possible expressly, or by the operation of specific statutes ... .

- 10.8 The Country Land and Business Association Ltd disagreed with the provisional proposal on the basis of its wider disagreement with our proposal to introduce land obligations.

***Conclusion***

- 10.9 The point of our proposal was to restrict the ways in which land obligations could be varied or extinguished (outside, of course, of the jurisdiction of the Lands Chamber of the Upper Tribunal). Land obligations would be able to be varied or extinguished expressly between the parties, or of course by statute; there is no question of their being able to be extinguished by abandonment.
- 10.10 We have also recommended that the release or variation of a registered interest will be a registrable disposition (see paragraph 4.57 of the Report), so as to ensure the accuracy of the register; this will avoid the situation where an interest has been expressly released yet remains guaranteed by the register of title.

**We provisionally propose that Land Obligations should be automatically extinguished on the termination of the estate in land to which they are attached.**

**[paragraphs 10.10 and 16.73]**

- 10.11 In the CP we provisionally proposed that land obligations should be automatically extinguished on the termination of the estate to which they are attached. This naturally followed on from our provisional proposals made in relation to easements at paragraph 5.86 in the CP; that where an easement is attached to a leasehold estate, the easement should be automatically extinguished on termination of that estate.
- 10.12 One preliminary point must be noted, however. The provisional proposals in the CP at paragraphs 5.86 (in relation to easements) and 10.10 (in relation to land obligations), were made in relation to the *benefit* of these appurtenant rights, rather than the *burden*. It is well-established that, with the exception of forfeiture, surrender and merger cannot operate to extinguish the burden of an easement. Our provisional proposal would not have prevented that principle being applied to land obligations, since it related to the benefit of land obligations and not to the burden. However, this issue caused some confusion in consultees' responses.
- 10.13 27 consultees responded to the proposal, with a range of views broadly consistent with our provisional proposal.

### ***The responses***

- 10.14 Some consultees, including Amy Goymour (Downing College, University of Cambridge), Dr Nicholas Roberts (Oxford Brookes University), and the Chancery Bar Association, simply agreed with what we had proposed.
- 10.15 Some consultees rightly emphasised the need for consistency with the approach in relation to easements and the provisional proposal contained at paragraph 5.86 of the CP. Gregory Hill (Barrister, Ten Old Square Chambers) stated:
- The issue raised by *Wall v Collins* should be dealt with in whichever way is adopted in relation to easements.
- 10.16 The National Trust agreed with our provisional proposal, subject to the suggestion they also made in relation to easements: that in the case of merger of leasehold and freehold estates, it could be useful to allow the holder of those estates to exercise an option to expressly preserve the appurtenant right (in this case, the land obligation).
- 10.17 Addleshaw Goddard LLP also agreed, but flagged up the issue of whether this would allow a tenant to defeat a land obligation attached to a leasehold estate by acquisition of the freehold and subsequent merger of the estates.
- 10.18 The majority of consultees who disagreed with our provisional proposal did so because of the perceived injustice in allowing leaseholders to extinguish their obligations through merger and surrender (which, as noted above, was not what we proposed). For example, The Conveyancing and Land Law Committee of the Law Society said:

We think this would be unjust. Consider a tenant under a long lease who entered into a land obligation with the owner of the adjoining land. Should he be able to get out of the land obligation by buying the freehold reversion to his land and then merging his lease with the freehold?

- 10.19 Similar concerns were expressed by The London Property Support Lawyers Group, Wragge & Co LLP and The Agricultural Law Association.

**Conclusion**

- 10.20 Our provisional proposal followed the position we adopted in relation to easements. In the Report at paragraph 3.255 we recommend the statutory reversal of *Wall v Collins* [2007] EWCA Civ 444, [2007] Ch 390, restoring the orthodoxy that interests appurtenant to a lease must be extinguished upon merger or surrender of that leasehold estate, subject to a statutory power to elect to keep the benefit of such appurtenant interests for the benefit of the superior estate (or, in the case of a surrender and re-grant, the new leasehold estate). We share the view of consultees that our position in relation to easements must be the same in relation to land obligations, and therefore the same rules must apply to both legal interests. This policy is put into effect by clause 26 of the draft Bill.

**We provisionally propose that on a sub-division of the servient land, the burden of a positive or reciprocal payment obligation should run with each and every part of the land. The owners of each part bound by the obligation would therefore be jointly and severally liable in the event of a breach of the Land Obligation.**

**[paragraphs 10.26 and 16.74]**

10.21 In the CP we provisionally proposed that, where an area of land burdened by a positive land obligation or reciprocal payment obligation is sub-divided, the burden of the obligation should run with each and every part of the land. We expressed the view that that was essential to avoid the situation where the owner of land burdened by a land obligation could simply transfer the part of the land on which the obligation was to be performed (for instance, the land on which the fence lies, in the case of a land obligation to maintain a fence) in order to release him or herself from liability.

10.22 30 consultees responded to the provisional proposal. With the exception of three consultees (only one of whom offered reasoning), all agreed with our proposal.

***The responses***

10.23 Many consultees focused on the need to prevent servient owners escaping liability by selling off part of the burdened land. As the London Property Support Lawyers Group put it:

We agree. Otherwise it would be very easy for the original owner to apportion liability to a part of the land which was then transferred to a company with no assets.

10.24 Gregory Hill (Barrister, Ten Old Square Chambers) responded in similar terms:

I agree that the starting-point should be that the burdened owner should not be able unilaterally to prejudice the benefited owner by subdividing the land, so continuing joint and several liability of the succeeding owners should be the starting point.

10.25 In offering its support for the provisional proposal, Land Registry focused on the practical benefits in terms of land registration:

This would assist Land Registry, in that it would mean we could automatically enter notice in the new individual register following the sub-division.

10.26 However, alongside offering their support, some consultees also felt that the parties to the original deed creating the land obligation should be able to make express provision for sub-division of the land. For instance, Roger Pickett (Diocese of Southwark) stated:

We take the view that any reform should strive to avoid ambiguity and difficulties. There is therefore much to be said for endorsing the proposal that on a sub-division of the servient land, the burden of a positive or reciprocal payment obligation should run with each and every part of the land *unless the subdivision is foreseen and accommodated within the original deed*. (emphasis added)

Similar sentiments were expressed by Currey & Co, who stated that our provisional proposal should not be the “automatic” default position, and that “the parties to any transaction should be able to deal with the issue in whatever way seems appropriate”.

**Conclusion**

- 10.27 Our provisional proposal was based on the necessity of preventing owners of burdened land from transferring part of their land to a “straw man” in order to escape from liability to perform a positive or reciprocal payment obligation. We remain of that view; see paragraph 6.118 and following of the Report.
- 10.28 It is important to note that a land obligation may be drafted so as to burden some or all of the grantor’s land. We note in the Report that it will be important to consider possible future sub-division when land obligations are created; restricting the burdened area at the point of creation may prevent difficulties in the future.

**We ask consultees whether they consider that there should be a variation procedure which can be invoked by an owner of part following a sub-division. Such a procedure would enable the court or Lands Tribunal, on application being made, to order that a variation of liability between the servient owners bound by the application should be binding on those entitled to enforce the land obligation.**

**[paragraphs 10.27 and 16.75]**

- 10.29 The effect of our provisional proposal at paragraph 10.26 would be that, following sub-division of land burdened by a positive obligation, the owner of the benefited land would be able to enforce the obligation against two (or more, depending on the amount of sub-divisions) parties, rather than one, and that they would be jointly and severally liable to the dominant owner.
- 10.30 Therefore the CP asked consultees whether a variation procedure should be introduced: if the owners of the sub-divided land could agree on an apportionment of liability between them, they could serve on the dominant owner notice of the sub-division and request his or her agreement to the proposed apportionment. If the benefited owner objected, an application could be made to a court or the Lands Chamber of the Upper Tribunal (“Lands Chamber”) to order a variation of liability between the servient owners, which would be binding on the owner of the benefited land.
- 10.31 30 consultees responded to the consultation question, with only five consultees disagreeing with the idea of a variation procedure.

### ***The responses***

- 10.32 Many consultees, including Network Rail, Addleshaw Goddard LLP, and the Council for Licensed Conveyancers, agreed with the idea of a variation procedure. Some drew on comparisons with similar provisions in other areas of the law. Andrew Francis (Barrister, Serle Court Chambers) stated:

There should be such a variation; compare the apportionment of rent charges.

- 10.33 Dr Nicholas Roberts (Oxford Brookes University) said:

Some apportionment procedure ... would seem appropriate. It would be undesirable if apportionment were made too difficult or expensive, as then [the owners of the newly partitioned land] would be tempted to rely on indemnity covenants, which would replicate the problems of the current law ... .

There are two points to make in relation to this response. First, in the Report we recommend the extension of the jurisdiction of the Lands Chamber of the Upper Tribunal to discharge or modify positive or reciprocal payment obligations in certain defined situations. As the Lands Chamber's jurisdiction under section 84 of the Law of Property 1925 is well established, we predict that a reasonable balance will be struck between ease of access to the tribunal without allowing variation in too wide a circumstance, to the disadvantage of the owner of the benefited land. Second, even if the owners of the sub-divided land were not minded to go to the Lands Chamber for a modification of the land obligation, our recommendations mean that they would be perfectly free to agree an apportionment between themselves. Such agreements will take effect as land obligations by clause 1(3) of the draft Bill, without affecting their joint and several liability vis-à-vis the owner of the benefited land.

- 10.34 In supporting the idea of a variation procedure, Herbert Smith LLP rightly emphasised the fact that the variation of a land obligation, as a property right, should, and must, be binding on successors in title:

We consider there should be a variation procedure along the lines proposed. We also consider that any such procedure should be binding not only on those entitled to enforce the land obligation but also on all parties' successors in title.

- 10.35 However, other consultees took a different view. The London Property Support Lawyers Group stated that:

We disagree that the parties entitled to enforce the land obligation should be bound [by the decision of the Lands Chamber of the Upper Tribunal] ... . It should merely affect the liability as between the various owners of part. If the redivision of liability were to be binding on all benefited owners it would be essential that they received adequate notice of the ... hearing, so that they could put in representations. Not all such owners will be easily identifiable ... . It would be unfair to deprive them of the benefit of the land obligation ... without giving them the opportunity to object.

We appreciate these concerns. However, the recommendations we make in the Report in relation to land obligations, specifically the requirement that the benefit and burden be registered (in registered land), will obviate the difficulties in serving adequate notice on affected parties, albeit to a lesser extent in the case of unregistered land. Moreover, as noted above, following our recommendations in the Report the owners of the sub-divided land would also be able to reapportion liability as between themselves, without binding the owner of the benefited land.

- 10.36 The Agricultural Law Association offered the following comments:

We agree that a procedure might be made available for liability to be varied on a sub-division. We are wary, however, of the effect of such a procedure on the viability of deals for sub-division. We expect that parties would wish to see the result of any notice procedure before committing themselves to buy and the delay and cost occasioned by an application to the Lands Tribunal ... might well torpedo the transaction.

In the Report we discuss the arguments for and against the introduction of positive obligations, noting the potential for the overburdening of land and for impeding development. A jurisdiction to modify and discharge positive land obligations is vital in addressing these concerns. While it is possible that some parties would prefer to see the result of the variation procedure before the agreement to sub-divide the land is entered into, there is nothing to stop the owner of the burdened land and a prospective purchaser of part of that land from entering into an agreement to apportion liability in accordance with their wishes. As we note above and discuss in the Report (see paragraph 6.32), such agreements will take effect as land obligations.

### ***Conclusion***

- 10.37 Consultees broadly supported the idea of a variation procedure, and we make recommendations to that effect in the Report.
- 10.38 However, we have not recommended the scheme envisaged in the CP, to the effect that an agreement between the servient owners would bind the dominant owner unless he or she objected.
- 10.39 We have recommended that the servient owners (following a sub-division) should remain jointly and severally liable to the dominant owner; see paragraph 6.126 of the Report. Between themselves, the servient owners' liability is governed by a default rule of apportionment by area which the servient owners could vary by agreement (see paragraph 6.128 and following of the Report) or by an application to the Lands Chamber (see paragraph 7.73 and following of the Report). Their liability to the dominant owner could also be varied by agreement, and it would also be possible to apply to the Lands Chamber for variation or modification of that liability, subject to the grounds discussed in Part 7 of the Report.



**We provisionally propose that on a sub-division of the servient land, the burden of a restrictive obligation should run with each and every part of the land. Do consultees agree?**

**[paragraphs 10.31 and 16.76]**

10.40 This follows on from the provisional proposal made at paragraph 10.26 of the CP in relation to positive and reciprocal payment obligations. The differences in the nature of the obligation are readily apparent; a positive obligation obliges the burdened owner to do some positive action, whereas a negative obligation simply requires the burdened owner to refrain from doing something. Thus liability under a restrictive land obligation is likely to be less onerous than that under a positive land obligation.

10.41 30 consultees responded to the provisional proposal, all of whom agreed with it, with one exception.

***The responses***

10.42 Almost all of the consultees simply agreed with our proposals. Of the few who offered substantive comments to the question in the provisional proposal, Land Registry stated:

We do: it makes it clear that any notice in the individual register for the servient land needs to be “carried forward” to the new individual registers.

10.43 Andrew Francis (Barrister, Serle Court Chambers) said:

Yes, but this should be subject to an express agreement to the contrary with the owner of the benefited land.

10.44 The London Property Support Lawyers Group added:

We agree unless the land obligation expressly indicates otherwise.

10.45 Another consultee who replied in similar terms was the Conveyancing and Land Law Committee of the Law Society, who noted:

We agree with this provided the land obligation itself does not provide otherwise.

10.46 The Country Land and Business Association Ltd disagreed with the provisional proposal on the basis of wider disagreement with our proposals in relation to the introduction of land obligations generally.

***Conclusion***

10.47 This was a straightforward provisional proposal, which is reflected in the content of consultees’ responses. Of those who offered substantive comment, the main focus was on whether the land obligation itself should be able to provide that the burden should not run with each and every part of land upon sub-division.

10.48 It is important to note that a land obligation can be drafted in a way which burdens the entire plot of land to which the estate relates, or a small plot of land within the estate. Therefore, on sub-division the burden of a restrictive land obligation will pass to each and every part of the land which was formerly burdened by the land obligation. In other words, dividing up land burdened by a land obligation cannot be used as method of escaping liability under that obligation.

**We provisionally propose that on sub-division of the benefited land, the benefit of a land obligation should run with each and every part of it unless:**

- (1) the Land Obligation does not “relate to” or benefit that part of the benefited land;**
- (2) the sub-division increases the scope of the obligations owed by the burdened owner to an extent beyond that contemplated in the Land Obligation deed; or**
- (3) express provision has been made for the benefit of the Land Obligation not to pass.**

**Do consultees agree?**

**[paragraphs 10.44 and 16.77]**

**We provisionally propose that a question should be included on the Land Registry form for transfer of part asking whether the title number out of which the part is transferred is benefited by any restrictive, positive or reciprocal payment obligations. If so, it would be a requirement to indicate on the form whether any of the parts will not be capable of benefiting from the obligations or whether apportionment would be required. Do consultees agree?**

**[paragraphs 10.45 and 16.78]**

- 10.49 These provisional proposals, relating to the subdivision of land benefited by a land obligation, follow from those made at 9.10 of the CP relating to the transfer of the whole of the benefited land.

### ***The responses***

- 10.50 Consultees’ responses indicated concern about a number of issues in this context.
- 10.51 Gregory Hill (Barrister, Ten Old Square Chambers) commented:

I suggest that it would be desirable, at least if there is to be a prescribed form, to ensure that the instrument *creating* a restrictive land obligation expressly states whether it is for the benefit of the relevant land as a whole only, or is to be enforceable also by owners of parts.

We agree with the need for certainty in this area. We explain at paragraph 6.120 of the Report the need for land obligations to be drafted with precision as to the benefited and burdened land, so as to prevent unforeseen future problems. Land Registry would in any event require an application to register a land obligation to state – with reference to a plan if necessary – the extent of the land involved (see paragraph 6.49 and following of the Report).

- 10.52 The London Property Support Lawyers Group noted, in relation to paragraph 10.44 of the CP:

We agree in general terms, but believe there will be a number of tricky questions to be catered for: how will a transferee of part prove that the obligation does “relate to or affect” his land such that he should be able to enforce the land obligation? Will the test be objective or subjective? The landowner that has the benefit of the obligation may take a very different view of which land that obligation relates to.

10.53 Land Registry replied in the following terms:

The proposal ... concerns us. Whilst we are happy that the benefit should not pass if there is express provision for it not to, it may well not be apparent to us whether the land obligation benefits a particular part of the original benefited land, or whether the sub-division increases the scope of the obligation. This is important because we would need to know whether we could properly “carry forward” any entries to the new individual registers.

10.54 The National Trust stated:

We can see the attraction in such an approach. But we have concerns about how effective it would be. Will not most practitioners be reluctant expressly to state ... whether the land has relinquished all claim to the benefit of a covenant? And what would be the sanction for an incorrect statement on the Land Registry form?

10.55 The London Property Support Lawyers Group offered a strong response to paragraph 10.45 of the CP:

On balance, we think the proposal may be dangerous and deserves further thought. There may be varied views on whether all or only (and if so which) parts of the benefited land are actually intended to benefit. What would be the consequence if the statement on the form were made honestly, but incorrectly. Would the resultant part lose the benefit of the land obligation or would the benefit still attach to it, but would not be recorded on its register of title?

**Conclusion**

10.56 At paragraph 9.10 of the CP we made provisional proposals in relation to the transmission of the benefit of a land obligation on the transfer of the estate to which it is appurtenant (“horizontal transmission”); we proposed that the benefit of a land obligation should pass to a successor in title of the original owner or any part of it, which was supported by consultees. That provisional proposal was, however, subject to the provisional proposals we made at paragraphs 10.44 and 10.45 of the CP, which addressed the case where land benefited by a land obligation is sub-divided.

- 10.57 In our discussion of the provisional proposal at 9.10 of the CP we explained why we do not recommend that it be possible for the parties to a horizontal transmission to “hold back” the benefit of a land obligation by simply providing in the transfer that the benefit shall not pass (see paragraph 9.6 and following above). If that is the effect to be achieved, the land obligation must instead be expressly released, in the interests of certainty. The same reasoning applies to transfers of part of land benefited by a land obligation. So, again, we do not recommend that it be possible for parties to a transfer of part to make express provision for the benefit of a land obligation not to pass.
- 10.58 Accordingly, on the transfer of land benefited by a land obligation, in whole or in part, the benefit will pass with the land. We do not recommend that any test be applied as envisaged at paragraph 10.44(1) of the CP above, since that would be something that Land Registry staff would be unable to assess. As to the test at paragraph 10.44(2) of the CP, the effect of subdivision is addressed in clause 10 of the draft Bill which controls liability to more than one estate owner in those cases where liability is likely to be complicated by sub-division, namely where the obligation is a reciprocal payment obligation (and see paragraph 6.92 and following of the Report).

# **PART 11**

## **LAND OBLIGATIONS: RELATIONSHIP WITH COMMONHOLD**

**We are of the provisional view that the use of Land Obligations should not be prohibited in defined circumstances. However, we consider that it would be useful to provide guidance for developers as to the relative suitability of different forms of land-holding. We invite the views of consultees on the suitability of this general approach.**

**[paragraphs 11.22 and 16.79]**

- 11.1 Part 11 of the CP discussed the relationship between commonhold and land obligations. The approach taken there was that land obligations would be suitable for imposing positive and negative obligations on adjoining pieces of land (for example, maintaining a fence), or on pieces of land with access to a communal feature (such as a shared driveway), but not suitable for imposing obligations between units in the same building (such the payment of maintenance costs in a community of freehold flats). The latter would be more suited to a commonhold development, which allows for the exercise of management functions. However, the CP did not provisionally propose that commonhold and land obligations be mutually exclusive. We took the provisional view that the use of land obligations should not be prohibited in defined circumstances. We invited consultees' views on this, and on the usefulness of providing guidance for developers as to the relative suitability of land obligations and commonhold in various scenarios.
- 11.2 26 responded to the consultation question. Of these, almost all were in favour of our provisional approach in not prohibiting the use of land obligations in certain circumstances. On the issue of the usefulness of guidance, consultees' responses were balanced; many did not directly address the issue.

### ***The responses***

- 11.3 The majority of consultees said that the use of land obligations should not be prohibited in certain circumstances, and simply agreed with what we said. For example, The National Trust commented:

We agree that it is not necessary to limit the use of land obligations by reference to situations in which commonhold might be used.

Land Registry agreed:

We believe this is a sensible approach.

Roger Pickett (Diocese of Southwark) said:

We agree with the provisional view that the use of land obligations should not be prohibited in defined circumstances.

- 11.4 In contrast, Andrew Francis (Barrister, Serle Court Chambers) argued:

I agree that land obligations are unlikely to be needed in commonhold cases ... . My general view is that land obligations should be prohibited as they have little to add to the general principles of commonhold and the commonhold community statement under section 26 of the CLRA 2002.

- 11.5 In relation to whether guidance would be useful for developers, some consultees thought such an approach would be helpful. The Agricultural Law Association said:

We would not support too prescriptive an approach. Guidance, on the other hand, would be welcomed.

Amy Goymour (Downing College, University of Cambridge) added:

This sounds like an eminently sensible approach.

- 11.6 However, other consultees questioned whether developers would actually make use of such guidance in practice. Farrer & Co LLP argued:

We believe developers will obtain their own guidance. They will rely on the advice of their professional teams and we doubt if any official public guidance would add to that. Either it simply states the law (which the professionals will know) or it does not (in which case the professionals may advise their clients to depart from it).

Gregory Hill (Barrister, Ten Old Square Chambers) agreed:

The range of possible developments is an enormously wide one, and the choice of leasehold or freehold and in either case of what land obligations to include, or whether alternatively to set up a commonhold, can only be made by those involved in each particular case ... I think it likely that a developer will obtain greater help from specific advice by his solicitors and surveyors than from guidance in the Commission's report or from a "schedule of examples" in the reforming legislation.

The Chancery Bar Association's response submitted:

We are bound to say, however, given the wholesale reluctance to use commonhold ... that it is highly questionable whether developers would find any use at all for any "guidance" as to the relative suitability of different forms of land-holding. In our experience they are well able to decide that for themselves with the benefit of their own professional advice.

Herbert Smith LLP said:

We suppose some guidance for developers might be helpful to some but, on the whole, we are doubtful.

**Conclusion**

- 11.7 We discuss the relationship between land obligations and commonhold in the Report at paragraphs 5.90 and 5.91. Our policy remains that land obligations should not be specifically prohibited in certain circumstances. However, it follows from the simplicity of the scheme we recommend that land obligations are not suitable for use in all circumstances. For example, our scheme makes no provision for management functions, or financial structures; where such arrangements are required then commonhold would be a more suitable choice of land-holding.



## **PART 12**

# **LAND OBLIGATIONS: SUPPLEMENTARY PROVISIONS**

We provisionally propose that there should be supplementary provisions which may be included in the instrument creating a Land Obligation as follows:

(1) A provision relating to the keeping of a fund out of which expenditure on the carrying out of works, or the provision of services, is to be met.

(2) A provision requiring the payment of interest if default is made in complying with a reciprocal payment obligation.

(3) A provision enabling any person entitled to enforce a Land Obligation to inspect the servient land in order to see whether it has been complied with.

[paragraphs 12.16 and 16.80]

We invite the views of consultees as to whether there should be any further supplementary provisions available to those creating a Land Obligation and if so what they should be.

[paragraphs 12.17 and 16.81]

- 12.1 In the CP we asked consultees for their views on “supplementary provisions”, by which we meant provisions included in the instrument creating the land obligation so as to create ancillary obligations, if the parties chose to do so. Provided that the land obligation was valid, the ancillary obligation would run with the land (see paragraph 12.2 of the CP), even if it would otherwise fall outside the definition of a land obligation.
- 12.2 We provisionally proposed three types of supplementary provisions. We also asked consultees about whether there should be any further supplementary provisions, and what these might be.
- 12.3 16 consultees responded to the proposal containing the three types of supplementary provisions. All broadly agreed with the idea of supplementary provisions, with the only differences of opinion occurring in relation to content. These are discussed in more detail below.
- 12.4 15 consultees responded to the question of whether there should be any further supplementary provisions. Of these, four consultees thought a self-help provision would be useful and two consultees thought a supplementary charge provision was worthwhile. The rest of the consultees generally approved of further supplementary provisions, without providing further details. Three consultees thought that no further supplementary provisions were necessary.

### ***The responses***

- 12.5 Many consultees simply expressed broad agreement; for example, the Chancery Bar Association responded in the following terms:

We agree that there should be supplementary provisions which may be included in the instrument creating the land obligation ... .

12.6 The National Trust stated that:

We regard the power to inspect servient land ... as being one of the key benefits of the proposed new land obligations scheme.

12.7 Two consultees raised issues about the keeping of a fund. One raised the issue of who would look after the fund, while Andrew Francis (Barrister, Serle Court Chambers) suggested:

Should there not be statutory information as to who maintains the fund etc? ... People need to know who to contact. If the names and addresses etc are all on disclosed lists available to the Land Registry there should be contacts. I can see that there may be a problem with unregistered titles ... .

12.8 Other consultees, however, specifically approved of the keeping of a fund. Trowers & Hamlins noted:

Subject to tests of reasonableness and the protection and tax treatment of the fund, we agree.

12.9 Consultees were generally enthusiastic about the possibility of further supplementary provisions. Of particular interest was a self-help provision, which attracted warm response from consultees. HHJ David Hodge QC (Civil Committee of the Council of Circuit Judges) stated:

In addition, we favour the availability of a further supplementary self-help provision along the lines, and subject to the limitations, outlined [in the CP] ... .

12.10 Whilst still supporting self-help supplementary provisions, Richard Coleman (Clifford Chance LLP) took a slightly different view in relation to the limitations we proposed in the CP:

I think it would be sensible to permit self-help provisions on such terms as may be agreed between the parties, free of the limitations [contained in the CP] ... .

12.11 Currey & Co said:

We think it would be helpful if there were a statutorily imposed obligation on the servient owner to allow the dominant owner to enter on the servient land and carry out works which are the servient owners' duty to undertake on default by the servient owner for over, say three months ... . We do not consider the other suggestions necessary and they can be safely left to the parties to any transaction to arrange between them.

- 12.12 Two consultees took a specific interest in the supplementary charge provision, which we discussed in the CP. Amy Goymour (Downing College, University of Cambridge) said:

Although I do not hold a strong view on this, I would be inclined to suggest that it should be possible for the imposition of a charge (upon default of a land obligation) to be capable of being expressly bargained for by the parties.

- 12.13 Herbert Smith LLP responded in similar terms:

We are in favour ... of a provision which confirms that the dominant owner may require the servient estate to be charged ie, there should be no need to specify the form.

- 12.14 The majority of consultees called for further supplementary provisions to be open-ended. Gregory Hill (Barrister, Ten Old Square Chambers) commented:

The provisions described ... would all be capable of being useful in appropriate circumstances, and I think no harm would be done by including in the reforming legislation a list of those and any other useful supplementary provisions would could be identified, provided, I suggest, it was expressly stated that the list was not exhaustive ... .

- 12.15 Some consultees envisaged a more formalised scheme than we had in mind. The National Trust took the view that recommended forms of wording for supplementary provisions would be helpful for the parties:

The National Trust would be happy to see recommended forms of wording to deal with situations such as those set out in the question. A key advantage ... is that use of the recommended wording would avoid any argument over whether the obligations were properly the subject of the land obligations regime. However, we would not wish to see any element of compulsion around the use of such standard provisions ... .

- 12.16 Other consultees had concerns regarding restricting supplementary provisions to a certain form. Farrer & Co LLP stated:

Such [supplementary] provisions and no doubt many others may well be desirable in appropriate circumstances. This should, however, be left to those who draft precedents or model forms and should not be prescribed in the legislation.

- 12.17 Similarly, the London Property Support Lawyers Group said:

We agree that all or any of these [supplementary provisions] may be useful ... . However, listing the categories of permitted supplementary provisions (and by implication, excluding others) seems too prescriptive. It will be very difficult to set out exhaustively the variety of issues that may need to be resolved in order to make land obligations work in practice.

12.18 Roger Pickett (Diocese of Southwark) argued:

We see no reason to dissent from the proposal that there should be supplementary provisions which may be included in the instrument creating a land obligation but we incline to the view that these are probably best left to the content of the deed that will be agreed by the parties involved.

12.19 Three consultees did not see a need for further supplementary provisions. One of these, the Country Land and Business Association, was on the basis of disagreement with the reform of covenants generally. The two others simply felt that no other types of obligation were necessary.

### **Conclusion**

12.20 Consultees approached our proposal from a variety of perspectives, which provided us with a diversity of views. There are, however, a number of threads which run clearly through the vast majority of consultees' responses. These are first, that supplementary provisions creating ancillary obligations would be beneficial to the scheme of land obligations we are proposing, and second, that the scope of such obligations should be as wide as possible, with maximum flexibility given to the wishes of the parties.

12.21 Accordingly, we recommend at paragraph 6.36 of the Report that it should be possible for the parties to a land obligation to impose ancillary obligations. We have not prescribed either the wording or the content of such provisions; but they will be effectively limited by the twin requirements that they be "ancillary to the performance of a qualifying obligation" (clause 1(6) of the draft Bill) and that they satisfy the criteria of benefiting an estate in land and touching and concerning the land in which the benefited estate subsists.

12.22 We therefore have not commented in the Report at any length upon the substance of ancillary obligations, leaving these to the discretion of the parties and, indeed, to the market. We have emphasised in the Report (paragraph 5.90) that we envisage that positive land obligations will be used for simple bilateral agreements and shared obligations among very few properties. The types of ancillary obligations that would be appropriate would be provision for the timing of payments, for interest on late payments, and for rights to enter and inspect.

12.23 Another useful provision in cases where it is practicable would be to facilitate self-help; for example, an obligation might provide that where the covenantor does not carry out an obligation to mend a fence, the covenantee (and his or her successors) would be able to do the work. Clause 8 of the draft Bill then makes provision for the recovery of costs in such cases, provided that the self-help work is carried out to a reasonable standard.

12.24 We have made no recommendations about sinking funds and we doubt that they would be useful in the absence of complex provisions to deal with eventualities such as bankruptcy; land obligations that are sufficiently complex or expensive to require a sinking fund are best dealt with through the existing media of leasehold or commonhold, where the administrative machinery is already available.

***Other related issues***

- 12.25 Some consultees raised concerns about enforcement of the supplementary provisions. Whilst supporting the proposal, Dr Caroline Sawyer (Victoria University of Wellington, New Zealand) suggested:

This appears to suggest the framework for a wide-ranging system for the enforcement of land obligations equivalent to but avoiding court proceedings and injunctions.

- 12.26 Similarly, Andrew Francis (Barrister, Serle Court Chambers) questioned:

Where will enforcement lie? Is it in the county court, or the Land Registry adjudicator, or in the Lands Tribunal ... .

- 12.27 These responses anticipated a more complex scheme of ancillary obligations than we had proposed, and indeed than we recommend. The land obligations proposed in the CP, and the scheme of land obligations we are recommending in the Report, do not require any enforcement mechanism ancillary to the courts. This position is unchanged by the addition of ancillary obligations to the scope of the scheme.

**We provisionally propose that it should be possible for parties to create short-form Land Obligations by reference to a prescribed form of words set out in statute. Where the prescribed form of words is used, a fuller description of the substance of the Land Obligation would be implied into the instrument creating the right.**

**[paragraphs 12.25 and 16.82]**

**We invite the views of consultees as to which Land Obligations should be so dealt with and the extent to which parties should be free to vary the terms of short-form Land Obligations.**

**[paragraphs 12.26 and 16.83]**

The analysis of consultees' responses to paragraphs 12.25 and 12.26 of the CP is dealt with together in the analysis of paragraphs 4.34 and 4.35 of the CP; see paragraphs 4.14 to 4.32 above.

## **PART 13**

# **TRANSITIONAL ARRANGEMENTS AND THE PROBLEM OF OBSOLETE RESTRICTIVE COVENANTS**

**We invite consultees' views on the various options for dealing with existing restrictive covenants in the event of the introduction of Land Obligations.**

**[paragraphs 13.89 and 16.84]**

- 13.1 In Part 13 of the CP we discussed the problems that might arise from the co-existence of land obligations with existing restrictive covenants. We explained that to run two systems alongside each other might be confusing and inefficient. We wanted to find an approach which would preserve useful existing covenants whilst phasing out obsolete or redundant ones. There was, of course, no question of jeopardising useful property rights, whether that usefulness lies in their economic value or in their preservation of amenity.
- 13.2 We asked consultees what should happen to existing restrictive covenants if a new regime of land obligations were introduced. We invited consultees to choose between the following options:
- (1) Automatic extinguishment a specified number of years after creation unless renewed as a land obligation.
  - (2) Automatic extinguishment a set period after specified trigger events unless renewed as a land obligation.
  - (3) Automatic extinguishment after a specified number of years or after specified trigger events unless renewed as a restrictive covenant.
  - (4) Automatic transformation into a land obligation on a specified trigger.
  - (5) Extinguishment on application after a specified number of years.
  - (6) Automatic extinguishment of all restrictive covenants, with provision for compensation.
  - (7) No extinguishment or transformation; existing restrictive covenants to co-exist with any new regime.
- 13.3 55 consultees answered this question. The most popular option, favoured by 28 consultees, was option (7) – do nothing, and allow existing restrictive covenants to coexist with any new regime.

### ***The responses***

- 13.4 The consultees who chose option (7) tended to do so not because they felt it to be an ideal solution, but because of the flaws that we pointed out in the other options available. As Latimer Hinks put it:

Whilst acknowledging the unwelcome complexity of potentially having two separate restrictive covenant regimes (the existing regime and the new land obligation regime) we venture to suggest that this is the lesser evil ... .

Some consultees also warned against overstating the difficulties of running two systems side by side. Gerald Moran said:

Problems in practice are limited and may not justify setting up a new system which may stir up unnecessary arguments about compensation, human rights and so on. The mere creation of a system for new land obligations would not of itself justify a system to convert or replace old restrictive covenants.

13.5 No consultees favoured option (1). Andrew Francis (Barrister, Serle Court Chambers) said that any time period chosen would inevitably be “arbitrary”. Others pointed out the potential unfairness of making dominant owners pay to renew their rights; and indeed, such owners might not even be aware of those rights, and so might lose them inadvertently. Either consequence might infringe Article 1 of Protocol 1 to the European Convention on Human Rights. It was also feared that certain old, valuable rights might not be capable of conversion into land obligations and might thus be lost forever.

13.6 Option (2) also failed to find favour with consultees. The reasons given were similar to those used against option (1). Boodle Hatfield said:

The cost of identifying and registering such [existing] covenants as land obligations could be considerable and we have concern that not all existing covenants would fit the requirements of a land obligation. Should any trigger events other than the transfer of the title be proposed we would remain concerned that extinguishment could be triggered without notice.

13.7 Option (3) was also unpopular, for the same reasons as options (1) and (2).

13.8 Option (4) gained support from one consultee, Roger Pickett (Diocese of Southwark). However, most responses were unfavourable, pointing out the practical problems which might affect the wholesale conversion of restrictive covenants into land obligations. On the subject of cost, Currey & Co said:

To require [restrictive covenants] to be converted into land obligations would entail enormous expense, and property owners simply should not be saddled with it.

13.9 Option (5) was the second most popular after option (7), though it still did not receive much support. Amongst those in favour, the Agricultural Law Association thought “a scheme along the lines of option 5 might be made to work”. However, the London Property Support Lawyers Group expressed some concerns over the practical administration and insurance implications of such a scheme, saying that option (5):



Suffers from the ... problem of not being able to identify all the benefited owners in order to serve notice on them. Moreover, most restrictive title indemnity insurance policies would prohibit this sort of approach in case someone objects, so the owner of the burdened land is more likely to take out insurance instead.

- 13.10 Option (6) received no support from consultees. The reasons given were its implications for human rights and the difficulties which might arise from its practical implication. The National Trust said:

We do not regard option (6) as at all desirable. Apart from its general inappropriateness, as the Commission suggest without compensation it would not be compliant with the Human Rights Act, and we foresee enormous difficulty and expense in producing and administering a fair and workable scheme of compensation.

- 13.11 A number of consultees suggested combinations of different options. The National Trust thought the possibility should be left open for existing covenants to be renewed as restrictive covenants if not capable of being transformed into land obligations:

We would be inclined to favour a combination of option (2) and option (3). In our proposed variant there would be automatic extinguishment after the passage of a (generous) period of time after the occurrence of a trigger event unless either (if capable of being a land obligation) the covenant is renewed as a land obligation, or (if not capable of being a land obligation) the covenant is renewed as a restrictive covenant.

Martin Pasek suggested combining option (1) with a time-limit based on the entry into force of the proposed reforms, and also felt that informing the public of the changes would be important:

I think [restrictive covenants] should expire *either* a fixed period from creation (say 100 years) *or* a fixed period from the coming into force of the proposed reforms (say 40 years) *whichever is the later*, unless renewed as land obligations and provision should be made to facilitate this. There should also be a public information campaign encouraging early renewal on the basis of conveyancing advantages etc. This would mean no one would be placed in a position of urgency, but all such covenants would disappear in the end.

- 13.12 Some consultees put forward ideas which had not been included in the original list in the CP. One suggestion was to extend the jurisdiction of the Lands Chamber under section 84 of the Law of Property Act 1925. Andrew Francis (Barrister, Serle Court Chambers) said:

The preferable course in my view is to have a wider jurisdiction under section 84, so that where a covenant is, for example, over 80 years old; there is a right to get it discharged on a prima facie case being shown. The party with the benefit would be able to object in order to prove that there is still some utility in the covenant; this will protect any HRA concerns under Conventions Arts. 6 or 8, or Art.1 of the First Protocol. There should also be power to convert the covenant from a traditional covenant into a land obligation under the new section 84.

Other consultees questioned the need to phase out restrictive covenants at all. Wragge & Co LLP said:

This question presupposes that any reform of the law should also have as its objective the reduction of existing restrictive covenants. These two objectives do not have to go together. It is possible just to start from here, and make changes going forward.

### **Conclusion**

- 13.13 We share the concerns expressed by consultees about the problems inherent in implementing any of options (1) to (6). Most are problems we discussed in the CP. The Report does not recommend the introduction of any new mechanism for renewing or removing existing restrictive covenants. Instead, existing restrictive covenants will continue to operate alongside land obligations created pursuant to the reforms outlined in Part 6 of the Report. It will still be possible to apply to the Lands Chamber under section 84 of the Law of Property Act 1925 for the discharge or modification of an existing covenant on one of the grounds permitted by that section. We consider the current statutory regime to be sufficient for this task.

**We also invite consultees' views on what steps should be taken to remove obsolete restrictive covenants from the register in the event of no other reform to the law of covenants.**

**[paragraphs 13.90 and 16.85]**

- 13.14 We sought consultees' views on what should happen to obsolete restrictive covenants even if no other reform were made to the law of covenants. We were not countenancing the destruction of valuable existing restrictive covenants, such as those protecting open spaces, but were looking purely at covenants that are obsolete in the sense that they no longer serve any useful purpose.
- 13.15 Of the consultees who answered this question, the vast majority thought we should leave the current law unchanged. A few consultees thought small changes could be made.

### ***The responses***

- 13.16 A number of consultees feared that we were contemplating the removal of valuable restrictive covenants, based purely upon the age of the covenants. For example, Professor Alan Gillett said:

It would be unreasonable and make for bad law if restrictive covenants were deemed to be unenforceable if more than eighty years old.

This was never our plan – at most, one of our tentative suggestions, whose shortcomings we noted, was that age should determine whether a restrictive covenant should fall to be evaluated for potential removal or renewal.

- 13.17 The responses of concerned consultees confirm how important covenants are for many people. Victor Mishiku (The Covenant Movement) said:

In Ealing, most of the houses in Central Ealing dated from 1870s and 1880s, and therefore will be well over 80 years old, the supposed cut-off period where it was suggested that covenants should be regarded as "obsolete". Far from being obsolete, nearly all of these Victorian houses remain and are now in conservation areas, so the covenants protecting them and their gardens are still good. A garden can be appreciated in 2008 as it was in 1895 ... we say please leave well alone.

- 13.18 The majority of consultees thought we should leave the law as it is. The Lands Chamber of the Upper Tribunal currently has jurisdiction under section 84 of the Law of Property Act 1925 to wholly or partially discharge or modify obsolete covenants. This was deemed by many consultees to be an adequate method of dealing with the issue. For example, the London Property Support Lawyers Group said:

It should be for the parties to apply under and obtain a determination under s 84 LPA 1925.

- 13.19 Several of the consultees who advocated retention of the current mechanism also felt that the problem of obsolete covenants was in danger of being overstated. Dr Caroline Sawyer (Victoria University of Wellington, New Zealand) put it this way:

Currently it seems likely that many obsolete restrictive covenants with theoretical nuisance value do not cause a very active problem because one insures against their enforcement, which is a standard procedure as there are so many of them, and relatively inexpensive because they are so rarely enforced. That in turn is often because it is not apparent to the owner of the dominant tenement that they have the benefit of the covenant, as well as because the covenant is irrelevant.

- 13.20 Those consultees who did suggest changes tended to suggest only minor ones, such as the modification of the existing section 84 jurisdiction. The National Trust said:

We do not yet see the presence of obsolete covenants on the register as a major problem. Particularly if there is an enhanced ability on the part of the Lands Tribunal to discharge covenants.

- 13.21 A small minority suggested that those seeking to have covenants removed should be made to cover the potential costs to owners of benefited land. For example, Addleshaw Goddard LLP suggested that:

One possibility would be to require those applying for the removal of covenants (eg after a set period eg 80 years) to pay a 'fee' which would be used to buy an insurance policy against the event that a useful covenant was inadvertently removed.

- 13.22 Currey & Co thought that obsolete covenants could be dealt by Land Registry, in the following way:

Machinery could be set up to enable either the Land Registry or any other person interested to make a request to the Land Registry for cancellation of the covenants of a specified vintage (we suggest no less than 100 years from the date of creation) after which the Land Registry should place local advertisements to identify the owner of the dominant property, if necessary, and otherwise request him to show cause why the covenants should not be cancelled. There should definitely not be any automatic extinguishment or automatic trigger of any such process or conversion into land obligations.

### **Conclusion**

- 13.23 We share the view of the majority of consultees that nothing should be done to alter the existing scheme. Any other option would encounter considerable problems, as we discussed in Part 13 of the CP. The jurisdiction of the Lands Chamber under section 84 of the Law of Property Act 1925 is adequate for the task of eliminating obsolete restrictive covenants.

**We welcome the views of consultees as to whether there should be any mechanism for the automatic or triggered expiry of Land Obligations.**

**[paragraphs 13.99 and 16.86]**

- 13.24 Part 13 of the CP also considered the potential, in the decades following reform, for obsolete or redundant land obligations to overburden land in the same way that some restrictive covenants do at present. We therefore sought consultees' views on whether there should be some mechanism for the automatic or triggered expiry of land obligations.
- 13.25 27 consultees offered their views, with the vast majority against such a mechanism.

### ***The responses***

- 13.26 Most consultees felt an automatic or triggered expiry of land obligations was unnecessary. Amy Goymour (Downing College, University of Cambridge) said:

I do not consider automatic expiry to be appropriate. For example, a "no-building" covenant/land obligation could be just as valid now as it was in the past. Expiry on the basis of the obligation being obsolete would instead be covered by one of your proposed amendments to the grounds for discharge in s 84 LPA.

Currey & Co responded in similar terms:

There should definitely not be any automatic extinguishment or automatic trigger of any such process ... .

Dr Nicholas Roberts (Oxford Brookes University) stated:

I do not see any need for an automatic or triggered expiry of land obligations. As it will be generally be clearer who has the benefit of them, it should be easier to negotiate a release where necessary; and there will be the option of an application to the Lands Tribunal.

The London Property Support Lawyers Group said:

We dislike the idea of any automatic expiry rule based on passage of a minimum period of time. If the rule on perpetuities is not to apply to land obligations, then why should they lapse after a particular specified period – the effect is very similar. Section 84 LPA 1925 provides a perfectly workable alternative for those that wish to have a land obligation removed from their title.

Gregory Hill (Barrister, Ten Old Square Chambers) added:

It seems to me that land obligations, just like restrictive covenants, will be capable of remaining relevant for extended periods; the appropriate mechanisms for getting rid of them, when appropriate, will be either the parties' agreement – if everyone can agree – or an application to the Lands Tribunal under a ground which allows the burdened owner to say the no longer serve any useful purpose.

- 13.27 However, a handful of consultees were in favour of automatic or triggered expiry. Martin Pasek said:

I consider that perhaps the relevant benefiting proprietors should be notified every 40 years say, and invited to renew the obligation. There should be a presumption of entitlement to renew, but the obligation should perhaps otherwise lapse in the event of non-renewal.

DLA Piper UK LLP commented:

We believe that there should be a mechanism for the automatic or triggered expiry of land obligations. Failing such a mechanism the issues with restrictive covenants currently being experienced will be repeated over time.

### ***Conclusion***

- 13.28 We agree with consultees that an automatic or triggered expiry for land obligations would be undesirable; an important reason for the difficulties with obsolete covenants under the present law is the fact that the benefit of a covenant cannot be registered, making it difficult to identify the dominant owner and secure a release. This issue will arise much less frequently in relation to land obligations which, as a legal interest, will be registered as appurtenant to the benefited title in registered land, although the same problem may arise in relation to unregistered land (see paragraphs 6.54 to 6.58 of the Report). However, in this situation section 84 of the Law of Property Act 1925 provides an important way in which obsolete land obligations can be removed from title through the Lands Chamber of the Upper Tribunal.

## **PART 14**

# **SECTION 84 OF THE LAW OF PROPERTY ACT 1925: DISCHARGE AND MODIFICATION**

**We invite the views of consultees on the compensation provisions contained in section 84(1) of the Law of Property Act 1925.**

**[paragraphs 14.15 and 16.87]**

- 14.1 Where an application for the discharge or modification of a restriction affecting land under section 84(1) of the Law of Property Act 1925 is successful, the Lands Chamber of the Upper Tribunal (formerly called the Lands Tribunal) may direct that the applicant pay to any person entitled to the benefit such sum by way of compensation as is thought fit. It is currently provided that the payment may be under either, but not both, of the following limbs:
- (1) a sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge or modification; or
  - (2) 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.
- 14.2 The CP did not deal with compensation issues in any great detail. However, given the proposal to extend the jurisdiction under section 84 to discharge or modify to easements, profits and positive land obligations, we wanted to hear the views of consultees as to whether any amendments to the current compensation provisions were necessary or desirable.

### ***The responses***

- 14.3 There was some comment from consultees as to what the appropriate measure of damages should be under the first limb of section 84, and whether there was any need to retain the second limb. The first limb gives damages to the benefited party to compensate for loss caused by the release of the restriction. On what basis should it be calculated? It can be taken to mean either loss in value of the land as a result of the release of the benefit, or the loss of the chance to bargain for the release. The amount awarded as damages could vary considerably depending on which basis is used for the calculation.
- 14.4 The majority of consultees who responded on this point were adamant that it should be the former, and this reflects the current practice of the Lands Chamber. Andrew Francis (Barrister, Serle Court Chambers) said:

The clear objective under the new regime should be to make plain under what basis compensation is to be awarded. I suggest that this should be based on diminution in value only.

The Chancery Bar Association said something very similar:

The present provisions and case law as to compensation are clearly unsatisfactory and we do not think that reform can avoid this issue.

[...]

As to the broad basis on which compensation is presently awarded, namely “a sum to make up for any loss or disadvantage suffered by that person [the respondent] in consequence of discharge or modification”, we suggest that any compensation should be plainly based on diminution in value only.

We consider that the right to seek compensation based on a “release fee” or “profit related” measure is unsatisfactory and inconsistent with this jurisdiction and should not be applicable in applications under any reformed section 84. The recent Court of Appeal decision in *Winter v Traditional & Contemporary Contracts* [2007] EWCA Civ 1088 shows how unsatisfactory the present position is and why any “release fee” or “profit related”, measure of compensation should not be appropriate in cases where the applicant is seeking to discharge or modify an existing covenant or (in the future) land obligation.

- 14.5 Those consultees who argued for damages to be based on the loss of bargaining power, or as a share of the enhanced value of the servient land, did so mainly on the grounds that it would produce a higher award. The Country Land and Business Association Ltd said that:

Anecdotal evidence from members appears to be that the current levels of compensation are on the modest side and do not always fully reflect the scale of blight to the dominant land where modification is allowed for development to take place on the servient land.

- 14.6 The Royal Institution of Chartered Surveyors (RICS) in its response noted that some decisions made under section 84(1) had assessed compensation at a level that took account of the bargaining power of the obligee, but also stated that loss of bargaining power is not a compensatable matter. It argued strongly that loss of bargaining power should be the basis of compensation and that the very purpose of imposing a restriction on land may be to ensure that when a buyer who wishes to develop will have to seek a release and pay adequate consideration in return. It also pointed to the fact that in an action for breach of covenant the court, in assessing damages in lieu of an injunction, would look at the cost of a release.

- 14.7 The second limb of section 84(1) was criticised by consultees because it could result in a very meagre award of compensation. This comment by HHJ David Hodge QC (Civil Committee of the Council of Circuit Judges) is typical of the views expressed as to how the second limb could operate unfairly:

By restricting compensation by reference to the consideration received for the land at the time the relevant restriction was imposed, it fails to take account of the inflation in property values since that date.

- 14.8 Both the Chancery Bar Association and the RICS felt that the second limb should be abolished; the RICS did so on the basis that there is no satisfactory means by which to make an historical valuation and of then updating it.



- 14.9 A few consultees in responding to the question commented that the current law could be made clearer. For example, Addleshaw Goddard LLP said that:

The compensation provisions are currently very confusing. Clarification would be welcome.

The Conveyancing and Land Law Committee of the Law Society said:

We propose that the compensation rules should be clarified as the present position is confusing.

### ***Conclusion***

- 14.10 As to the first limb of section 84 of the Law of Property Act 1925, we are satisfied that the measure of compensation must be straightforward loss/damage, and not a loss of bargain or of a share in profits arising out of the enhanced value of the servient land when released from the obligation.
- 14.11 After careful consideration we have rejected the arguments put to us in support of the view that either the measure of damages currently available does not produce an adequate sum, or that damages should reflect the cost of release. It is not a function of an application for the discharge or modification under section 84 to enforce the bargain struck between the owners of the dominant and servient land. If the obligation is not obsolete, still confers a benefit, and does not otherwise fall within the grounds for discharge; it will not be discharged under the section and the applicant for a discharge will have to negotiate for a release. Only in those circumstances can a commercial release fee be appropriate.
- 14.12 Clearly in some cases a seller may wish to retain a stake in the development value of land sold; the appropriate mechanism for that is a charge, or possibly an overage provision. If, instead, a restrictive obligation is used for that purpose, such an arrangement is vulnerable precisely because the obligation may be discharged if the grounds in what is currently section 84(1) of the Law of Property Act 1925 are made out.
- 14.13 Turning to the second limb of the section, although there was some support for abolition this was restricted to a few consultees, which would not be sufficient to support a recommendation for the outright abolition of this head of compensation. Therefore, save for some consequential amendment to take into account the extended scope of the section we do not recommend any further reform.

**We provisionally propose that the statutory jurisdiction to discharge or modify restrictions on land contained in section 84(1) of the Law of Property Act 1925 should be extended to include:**

- (1) easements**
- (2) profits; and**
- (3) Land Obligations.**

**[paragraphs 14.41 and 16.88]**

**We invite the views of consultees as to whether they consider that there should be a jurisdiction to discharge and modify each of the above interests.**

**[paragraphs 14.42 and 16.89]**

- 14.14 The two proposals are taken together as they are concerned with closely related issues, and they were dealt with in a single response by the majority of consultees.
- 14.15 Currently, the power to discharge or modify interests affecting land under section 84(1) of the LPA 1925 is confined to restrictions affecting land. The proposal at paragraph 14.41 looks at whether, as a general principle, the jurisdiction should be extended so that it applies to other interests. If that much is accepted, paragraph 14.42 seeks views about which of those interests listed should be covered by the extended jurisdiction.
- 14.16 43 consultees responded to the question at paragraph 14.41 and 40 responded to the question at paragraph 14.42. 37 were in support of the proposal to extend the jurisdiction of section 84(1) to other interests, although some expressed particular reservations, and two expressed opposition to extending the jurisdiction at all. 32 consultees thought that the extended jurisdiction should include easements, profits and land obligations, and only one thought it should be extended to land obligations solely.

### ***The responses***

- 14.17 Of those responses received that supported an extension of the jurisdiction to other interests in land the comments made by HHJ David Hodge QC (Civil Committee of the Council of Circuit Judges) are typical:
- We consider that there should be a jurisdiction to discharge and modify each of the three property interests: easements, profits and land obligations. The inability to secure the modification of easements, in particular, has, for too long been a blot upon the law of English and Welsh real property.
- 14.18 Dr Joshua Getzler (St Hugh's College, University of Oxford) expressed strong support for the proposal, and he suggested there was a good socio-economic argument for reforming the law as proposed. He said:

I would strongly endorse these proposals, again looking at the need for neighbours in sub-divided developments to reorganise their interests once the profit-making developer is off the scene – or to allow a group of residents to defeat the hostile interests of a developer who wants to enhance market value at the expenses of individual consumer surplus as residents.

- 14.19 The Charities' Property Association urged great caution in giving any body such as the Lands Tribunal (now the Lands Chamber) the power to overturn or vary interests affecting land. It was concerned that a third party might be given power to overturn or vary rights that had been known and enjoyed by their members sometimes for many centuries. It was particularly concerned that the proposed reform might introduce the possibility of the compulsory enlargement of an easement over such land and that this might have a detrimental effect for their members.
- 14.20 The Country Land and Business Association Ltd did not agree that the jurisdiction should be extended to include easements. It made a similar point to that made by the Charities' Property Association that extending the jurisdiction to easements might result in an application to modify being used to increase the intensity of use of, for example, a track or other right of way without the consent of the servient owner.
- 14.21 Currey & Co supported an extended jurisdiction but was less certain that it should extend to profits. On the other hand it was not completely against that reform as it did see that there might be a situation, for example where land over which there are sporting rights is to be developed for housing, when there might be a need to cancel those rights.
- 14.22 The Church Commissioners for England pointed out that section 62(3) of the Pastoral Measures Act 1983 excludes the jurisdiction of the Lands Chamber from discharging or modifying the conditions and requirements imposed under section 62(1) of that Act and asked that this protection not be weakened by the proposed reform.

### ***Conclusion***

- 14.23 We are not convinced that easements should be excluded from the extended jurisdiction as has been suggested by the Country Land and Business Association. The Lands Chamber will only be able to modify or discharge an easement where at least one specific statutory ground has been proved to its satisfaction and only in cases where the easement or profits has been created after the new scheme has been enacted. We also make a recommendation, in relation to the modification of easement or profit, which will ensure that the modified interest will be no more burdensome to the servient owner and no less convenient to the dominant owner. We think that therefore the concerns of the Country Land and Business Association Ltd and of the Charities' Property Association will be met.
- 14.24 We have taken account of the concerns of the Church Commissioners; the current protection provided by the Pastoral Measures Act 1983 will be preserved by the consequential amendment of that Act; see Minor and Consequential Amendments, schedule 3, paragraph 13 in the draft Bill.

14.25 Given the very strong support expressed by consultees in response to paragraphs 14.41 and 14.42 of the CP, we have recommended that the section 84 jurisdiction should be extended to easements, profits and land obligations. However, only easements and profits created after the date of reform will be subject to that jurisdiction; existing rights will be unaffected. This is discussed further in the Report, at paragraph 7.30 and following.

**We provisionally propose that:**

**(1) the Tribunal in exercising its jurisdiction should seek to give effect to the “purpose” for which the restriction or other interest in land was imposed; and**

**(2) the Tribunal should be able to discharge or modify where it is satisfied of one of the statutory grounds and where it is reasonable in all the circumstances to discharge or modify the restriction or interest.**

**[paragraphs 14.70 and 16.90]**

**We provisionally propose that it should be a ground for discharge or modification that the discharge or modification:**

**(1) would not cause substantial injury to the person entitled to the benefit of the restriction or other interest in land; or**

**(2) would enable the land to be put to a use that is in the public interest and that could not reasonably be accommodated on other land; and**

**(3) that in either case money would provide adequate compensation to the person entitled to the benefit of the restriction or other interest in land.**

**[paragraphs 14.71 and 16.91]**

**We provisionally propose that obsolescence should cease to be a ground for discharge or modification.**

**[paragraphs 14.72 and 16.92]**

14.26 We address these three proposals together as collectively they are concerned with the reform of the current grounds in section 84 of the Law of Property Act 1925 for the discharge or modification of interests that fall within the jurisdiction of that section. Many consultees dealt with the three proposals in a single response.

14.27 The current provisions of section 84 of the LPA 1925 are complex and lack transparency. This is partly due to the legislative history of the section. Although the current jurisdiction has been in place since 1926, it has been subject to piecemeal amendment, most notably by the Law of Property Act 1969. The 1969 Act introduced a declaratory power for the court, contained in section 84(2), and a new ground on which a restrictive covenant could be discharged or modified where not to do so would impede reasonable use of land, provided certain conditions were met. That Act also introduced a power to add further restrictions on use where this appeared reasonable to the Lands Tribunal (now Lands Chamber). An unfortunate result of the various amendments is that the section is not user-friendly, and so is difficult for lawyers and, even more so, for the public.

- 14.28 The practice of the Lands Tribunal (now the Lands Chamber) in applying the section 84 grounds has evolved over the years and is not readily discernable from the section itself. One aim of the CP's proposals was to make it clearer how the Lands Chamber would apply the grounds in the section when deciding an application for the discharge or modification of an interest. We also felt that the extension of the jurisdiction to discharge or modify to easements, profits and land obligations would of itself necessitate some modification of the current section 84.
- 14.29 A number of the decisions of the Lands Chamber have emphasised the usefulness of assessing the purpose of a restriction and whether that purpose can still be fulfilled. The first limb of the proposal at 14.70 of the CP put that examination of purpose into statutory form, while the second limb set out a requirement that, even where grounds are made out, the Lands Chamber must also be satisfied that it would be reasonable to discharge or modify the restriction or other interest.
- 14.30 The proposal at 14.71 of the CP set out the grounds for the discharge or modification of an interest; the intention was that it would be a clearer and more concise recasting of the majority of the existing grounds. The final proposal at 14.72 of the CP was a departure from the current law. It would abolish the existing ground for the discharge or modification of an interest on the basis that it was obsolete. It was felt that this ground could be subsumed into the CP's first proposed ground (CP para 14.71(1): where the discharge or modification of an interest would cause no substantial injury to anyone entitled to the benefit then it must be obsolete).
- 14.31 Each of the CP's proposals generated a large amount of critical comment, and there was clear evidence of unease among consultees. The proposal at 14.70 attracted 37 responses, with many heavily qualified in their support and a significant number being neither for nor against reform. The proposal at CP 14.71 received the same number of responses, split fairly evenly between those in support and those against, and, as with the first proposal, support was often qualified. The final proposal at 14.72 received 33 responses and enjoyed the most support. However, most of that support was on the basis that the requirement to examine "purpose" would replicate the current grounds.

### ***The responses***

- 14.32 There was some support from consultees, for example the Chancery Bar Association, the Treasury Solicitor's Bona Vacantia Division and the Agricultural Law Association who agreed with "the general sense" or the "general approach" we were taking. However, support was rarely expressed without some form of qualification.
- 14.33 In response to the proposal at the first limb of paragraph 14.70 of the CP, most consultees were unhappy with an explicit "purpose" test. There was uncertainty about how the "purpose" of a restriction would be determined by the Lands Chamber and concern about the evidential difficulty of proving the purpose of a restriction that may have been entered into many decades before. Gregory Hill (Barrister, Ten Old Square Chambers), who felt that in principle a clear restatement of the basis of the jurisdiction was "desirable", continued:

If “purpose” means something more than what can be ascertained simply from the terms of the instrument imposing the restriction (or from what has been actually done, in the case of an implied or prescriptive easement), it is likely to be difficult in cases in which the relevant transaction took place many years ago, to ascertain its detailed circumstances and the original parties’ actual objectives.

14.34 In a similar vein, Addleshaw Goddard LLP said:

We are not at all sure as to how the Tribunal will divine the “purpose” of a restriction. The parties do not usually state their purpose, and we think that trying to impute intention is an exercise which is fraught with difficulty.

14.35 Other consultees queried what was meant by giving “effect” to the original purpose. Gerald Moran (Hunters, Solicitors; the City of Westminster and Holborn Law Society), Rohit Radia, M I Cunha, Dr A L Kaye, Chorley Station Estate Conservation Group and the Churchfields Avenue Residents Association felt that although the Lands Chamber should take account of the purposes for which the right was originally created, it should also give effect to the practical benefits, current at the time of the application that were not directly related to the original purposes of the obligation. For example, they argued, it may have been originally envisaged that a right of way was for use by agricultural wagons but its current use might extend to all motorised vehicles.

14.36 The Agricultural Law Association was also uncertain about what was meant, commenting:

What of an easement – for example a right of way – which may have been granted for a stated purpose but which has been converted by statute or other legal authority to a wider purpose? Would the Tribunal be empowered to reimpose the former limitation?

14.37 The second limb of the proposal at paragraph 14.70 of the CP – that where a ground was made out an order might be made only where it was reasonable to do so – was not enthusiastically received, save by DLA Piper UK LLP. It felt that the second limb should be the only ground for discharge or modification, subject to the payment of compensation where this would make the order reasonable.

14.38 The new grounds for the discharge or modification of an interest at paragraph 14.71 of the CP met with much stiffer opposition.

14.39 There was outright opposition; Dr Caroline Sawyer (Victoria University of Wellington, New Zealand) felt that what was being proposed “looks like a very broad power for the state to modify private rights”.

- 14.40 Victor Mishiku (The Covenant Movement) and the Churchfields Avenue Residents Association argued that the benefit of an obligation is wide ranging and may be of a differing nature over time. They felt that the proposals would have the effect of limiting benefits and took the view that this would be “against long established case law and practice.” They pointed out that as currently worded, section 84(1A)(b) requires the Lands Chamber to consider whether there is “any practical benefit” to the persons entitled to the benefit; this is not replicated in the proposal. They felt that the effect of this would be to weaken the current protection of those who hold the benefit of an interest.
- 14.41 Gerald Moran (Hunters, Solicitors; the City of Westminster and Holborn Law Society), Rohit Radia, M I Cunha, Victor Mishiku (The Covenant Movement), Chorleywood Station Estate Conservation Group and Churchfields Avenue Residents Association also queried whether the proposed grounds would provide the same standard of protection as under the current law. They were unhappy that a discharge or modification could be ordered where this would not cause *substantial* injury to the person entitled to the benefit. This differs from the current law where the current ground at section 84(1)(c) does not qualify injury in this way and instead requires that the Lands Chamber is satisfied the proposed discharge or modification does not injure the person entitled to the benefit.
- 14.42 The proposal at paragraph 14.72 of the CP – that obsolescence should no longer be a ground for discharge or modification – did receive support, but mainly on the basis that the remaining grounds for modification or discharge of an interest would have to take up any residual role the ground may have. This was the view of the Country Land and Business Association, the London Property Support Lawyers Group, Norton Rose LLP and Nabarro.
- 14.43 On the other hand, the Conveyancing and Land Law Committee of the Law Society argued that obsolescence should be retained as a ground because:

The fact that a covenant is obsolete seems an excellent, even irrefutable, reason for discharge.

### **Conclusion**

- 14.44 We acknowledge that this is a sensitive area. It was our intention that any change in the wording of section 84(1) should not be interpreted as altering the existing delicate balance between those who want to preserve the benefit of an interest and those who would see it removed or modified.
- 14.45 It has been made abundantly clear from consultees’ responses that changes to the existing wording of the grounds in section 84 would arouse considerable concern about the meaning and effect of those changes. A theme that we can distil from consultation is, generally, the very high importance placed upon the non-monetary value of covenants. As a result, any amendment to the grounds must have a conclusive mandate; we have therefore not pursued the provisional proposals at paragraphs 14.70, 14.71 and 14.72 of the CP. We discuss the issues further in the Report at paragraph 7.14 and following.



14.46 What we recommend in relation to redrafting the section is of necessity more modest than originally proposed and takes the form only of a simplification and modernisation of the layout of the section, together with some additional provisions to take into account the extension of the jurisdiction to discharge or modify easements, profits and land obligations both negative and positive.

**We provisionally propose that where a number of persons are entitled to the benefit of a restriction or any other interest within the ambit of section 84, it should not be necessary for the applicant to establish that the ground or grounds for discharge or modification relied upon apply to each and every one of the persons entitled.**

**[paragraphs 14.74 and 16.93]**

- 14.47 Under the current law, for an application to discharge or modify an interest under section 84(1) to succeed, all the grounds relied on in the application must be proved against all objectors to the application. It is not possible to tailor the application so that different grounds are employed against different individual objectors. This may cause difficulties where, say, some of those entitled to the benefit of the restriction have consented to its discharge, while others do not obtain any benefit from it. This makes the current procedure inflexible and, arguably, illogical.
- 14.48 The proposal received 35 responses, the vast majority in support. Of the four consultation responses objecting to the proposal, two were based on a misinterpretation of what was intended. They took the proposal to mean that an application against multiple objectors should succeed where the applicant proved at least one ground against one objector (rather than at least one against each objector).

#### ***The responses***

- 14.49 The group response submitted by the City of London Law Society, the London Property Support Lawyers Group, Norton Rose LLP and Nabarro identified the ambiguity at the heart of this proposal, and agreed with it as it was intended to be understood:
- We are unclear what this question is suggesting. Is it that the applicant should be able to rely on different grounds for discharge/modification against each of the persons entitled to enforce the obligation? We would support this. Or is the Commission suggesting the applicant need only succeed against one beneficiary and that decision will bind all beneficiaries who were notified of the proceedings? The latter might pose some problems under the Human Rights Act.
- 14.50 Roger Pickett (Diocese of Southwark) thought the proposal had “considerable merit” and Amy Goymour (Downing College, University of Cambridge) thought it “sensible”.
- 14.51 Gregory Hill (Barrister, Ten Old Square Chambers), agreed with the proposal but was not persuaded that it was such a problem in practice, a view echoed by the Agricultural Law Association.

### **Conclusion**

- 14.52 As we no longer intend to make a recommendation in line with the proposals at paragraph 14.71 of the CP for the reform of the general grounds for discharge and modification, nor with the proposal at paragraph 14.72 of the CP that obsolescence should cease to be a ground, the CP's proposal at paragraph 14.74 must be slightly amended.
- 14.53 Clearly an interest in land that falls within the jurisdiction for discharge or modification by the Lands Chamber cannot be obsolete as against one objector but not another; the interest must be obsolete for all.
- 14.54 Similarly the ground for discharge or modification under the current law that an order may be made where the Lands Chamber is satisfied that the persons of full age and capacity entitled to the benefit of the interests have by their actions or omissions expressly or impliedly agreed to the proposed discharge or modification, which will be retained, must be proved against all such persons.
- 14.55 Subject to these points, we are satisfied that there is strong support for the proposal at paragraph 14.74 of the CP.
- 14.56 How the recommendation might work in practice is best illustrated by an example:

An application is made by the owner of a nursing home specialising in the care of the elderly and infirm. The property is burdened by a negative obligation that restricts the plot to one building only, and the owner wishes to add another building to form part of the nursing home. The benefit is held by four properties; the first is next door to the home, and between the home and the other three benefited properties is a large park. One of these benefited owners has indicated that he will not object to the application and wishes to take no part.

The ground of the application as against the neighbouring property is that, unless modified, the continued existence of the obligation would impede some reasonable use of the land for public or private purposes, that in impeding the use the interest is contrary to the public interest, and that money will be an adequate compensation for any loss or disadvantage suffered from the proposed modification. The ground relied on for two of the other benefited owners is the same save that in impeding the use it does not secure to them any practical benefits of substantial value or advantage. The ground relied upon against the remaining owner is that by action or omission he has expressly or impliedly agreed to the proposed modification.

- 14.57 In the example given the applicant will have to prove as against each benefited owner the particular ground relied on. If the applicant cannot do so the application will fail. However, altering the facts a little, if the applicant wants to rely on the ground that the obligation was obsolete, that ground would have to be proved against each and every benefited owner.

14.58 We make a recommendation to this effect at paragraph 7.87 of the Report, and see paragraph 3 of schedule 1 to the draft Bill.

**We provisionally propose that the Lands Tribunal should have the power to add new restrictions on the discharge or modification of a restrictive covenant, easement or profit, if the Tribunal considers it reasonable in view of the relaxation of the existing provisions and if the applicant agrees.**

**[paragraphs 14.82 and 16.94]**

- 14.59 The power to modify or discharge an interest conferred on the Lands Chamber by section 84(1) includes a power to add further restrictions on the use of, or the building on, land that is subject to the interest where this is reasonable in view of the relaxation of the existing interest; section 84(1C). This can only be done if the applicant consents, but the Lands Chamber may refuse to modify the interest without the new restriction. The requirement of consent referred to in the proposal is the consent of the applicant for the discharge or modification of an interest and of anyone else to be burdened by it.
- 14.60 The proposal at paragraph 14.82 of the CP was for an extension of the power currently contained in section 84 to easements and profits; it would not alter the law in relation to restrictive covenants.
- 14.61 The proposal at paragraph 14.83 of the CP concerned a power in similar terms but in relation to land obligations.

**We provisionally propose that on the discharge or modification of a Land Obligation:**

**(1) the Lands Tribunal should have the power to add new provisions to an existing Land Obligation or to substitute a new Land Obligation for one which has been discharged, if the Tribunal considers it reasonable in view of the relaxation of existing provisions and if the applicant agrees; and**

**(2) the Lands Tribunal should have discretion to dispense with a person's consent in adding new provisions or in substituting a new Land Obligation, but only where the Tribunal is satisfied that any prejudice which the new provisions or new Land Obligation cause that person does not substantially outweigh the benefits which will accrue to that person from the remainder of the order.**

**[paragraphs 14.83 and 16.95]**

- 14.62 The first limb of the proposal is intended to provide the Lands Chamber with a power in relation to land obligations that is similar to that available under current law in relation to restrictive obligations. However, the proposed power would be more extensive; it would give the Lands Chamber a power to substitute a new obligation for one that has been discharged. In either case the Lands Chamber must consider it reasonable to make addition or substitution in view of the relaxation it is proposed to make, and the applicant must agree.

- 14.63 The second limb is also concerned with the requirement of consent to a discharge or modification, but is much broader in its reach. The consent that can be dispensed with is not restricted to the applicant but is of “a person” who is burdened by the interest subject to the application and will be affected by an order to discharge or modify, or who would become burdened if the order is made. The reason for that proposal was that we envisaged that land obligations might be used to regulate the maintenance, for example, of a shared facility.
- 14.64 It might be that the Lands Chamber was satisfied that an order for the discharge or modification of an interest should be made, but only with additional or substituted provisions, where this would be for the common good of all those affected by the proposed changes; and that the order should not be prevented by one or more persons unreasonably withholding consent. The Lands Chamber would have to be satisfied that the prejudice which it caused the person withholding consent did not substantially outweigh the benefits which would accrue to that person from the remainder of the order.

### ***The responses***

- 14.65 The proposal at paragraph 14.82 of the CP proved to be entirely uncontroversial. We received 34 responses in support. Dr Caroline Sawyer (Victoria University of Wellington, New Zealand) suggested that in place of the proposed power the parties should be sent for compulsory mediation.
- 14.66 In relation to both limbs of the proposal at paragraph 14.83 of the CP, Roger Pickett (Diocese of Southwark), the Country Land and Business Association Ltd and the Agricultural Law Association stressed that their support for the proposal was heavily dependant on the requirement that the applicant consented to the proposed order. On the other hand, Farrer & Co LLP felt that the Lands Chamber should have the power to impose the new restriction regardless of whether the applicant consented or not:

If the applicant submits to the decision of the Tribunal it should be prepared to accept that decision in its fullness.

- 14.67 Many consultees responded to each of the two limbs very differently; the first limb received broad support but the responses to the second limb were more muted and some consultees expressed disapproval.
- 14.68 In regard to the first limb, Dr Joshua Getzler (St Hugh’s College, University of Oxford) commented:

I would strongly endorse these proposals, again looking at the need for neighbours in sub-divided developments to reorganise their interests once the profit-making developer is off the scene – or to allow a group of residents to defeat the hostile interests of a developer who wants to enhance market value at the expense of individual consumer surplus as residents.

- 14.69 As to the second limb, the City of London Law Society, the London Property Support Lawyers Group, Norton Rose LLP and Nabarro felt that the consent of a mortgagee should never be dispensed with, no doubt because of the detrimental effect this may have on the security.

- 14.70 Network Rail said that their consent should never be dispensed with where the proposed order of the Lands Chamber would affect railway land. This raises the important issue of whether it should ever be possible to dispense with the consent of a body that undertakes a public function or where a body is under some form of statutory duty towards the public given the risk of a conflict between private rights over land and the greater public good.
- 14.71 Dr Caroline Sawyer (Victoria University of Wellington, New Zealand) did not agree with either limb of the proposal and thought that they looked:

... quite wide as a centralised power for the modification of private rights.

### **Conclusion**

- 14.72 The proposal at paragraph 14.82 of the CP, which extends to negative obligations, easements and profits the existing power under section 84, enjoyed clear support. We are satisfied that there is a mandate for the proposed reform. We are also satisfied that the approval expressed by consultees for the first limb of the proposal at 14.83 of the CP was such that we may confidently recommend the extension of that power to positive land obligations.
- 14.73 Therefore we recommend that, as with restrictive covenants under the current law, the Lands Chamber should have a power to add further provisions to land obligations, easements and profits where the Lands Chamber is satisfied that it is reasonable to do so in view of any relaxation of the existing provisions, and where this is accepted by the applicant.
- 14.74 However, the effect of the exercise of the power on land obligations, easements and profits is not uniform. The addition of further provisions under the extended power to a land obligation will not change the underlying nature of that interest; an obligation is either negative or positive and even with the addition of a new provision will retain that central characteristic. That is not the case with an easement or profit.
- 14.75 An order adding a provision to an easement or profit may change how the right is enjoyed so that it would take effect as a different kind of easement. For example, the Lands Chamber may think it reasonable to modify the route of a right of way used by vehicles and pedestrians so that it runs closer to a populated area, but only if a provision is added restricting the right to pedestrian traffic.
- 14.76 Therefore we make a supplementary recommendation. The Lands Chamber may exercise the power in relation to an easement or profit where to do so means that the interest takes effect as a different kind of easement or profit, where it appears reasonable in the circumstances and where it is accepted by the applicant. The recommendations appear in the Report at paragraphs 7.80 and 7.83; and see clauses 32(1) and 32(2) of the draft Bill.
- 14.77 We have not made a recommendation in relation to the second limb of the proposal at 14.83 of the CP, given the unease expressed to us about the power to dispense with consent.

**We provisionally propose that there should be a further ground of discharge or modification in relation to a positive obligation to the effect that as a result of changes in circumstances the performance of the obligation either ceases to be reasonably practicable or has become unreasonably expensive when compared to the benefits it gives.**

**[paragraphs 14.93 and 16.96]**

- 14.78 This proposal is for a further ground, specifically for the discharge or modification of positive obligations.
- 14.79 Over time, the circumstances that prevailed when a positive obligation was imposed may change, and it may be that the burden is increased to an unacceptably onerous degree, or has become unreasonably expensive when compared to the benefit it brings. For these cases we have proposed that the Lands Chamber should have a power to discharge or modify the positive obligation.
- 14.80 We analyse the responses to this proposal together with that which follows, as both deal with related matters.

**We provisionally propose that a reciprocal payment obligation may only be discharged or modified where an obligation to which it relates (that is, a positive obligation) has been modified or discharged.**

**[paragraphs 14.94 and 16.97]**

- 14.81 The performance of a positive obligation will often result in the burdened owner incurring a cost. That cost can be shared, by the imposition of a reciprocal payment obligation. A reciprocal payment obligation is an obligation to meet or contribute towards the cost of performing the positive obligation; the amount to be contributed can be a fixed sum or it can be expressed as a proportion of the overall cost. Not all positive obligations will be associated with a reciprocal payment obligation in this way but all reciprocal payment obligations must be associated, or paired, with a positive obligation.
- 14.82 The modification of a positive obligation for which there is an associated reciprocal payment obligation may necessitate a consequential modification of the associated obligation. The simplest such case is where the positive obligation is itself discharged; the Lands Chamber has to have power to discharge the corresponding reciprocal payment obligation even if no application is made for its discharge.
- 14.83 The proposal at paragraph 14.93 of the CP received 38 responses, two of which were against. The great majority expressed outright support for the proposal; 10 responses were in general agreement but also voiced specific concerns.
- 14.84 The proposal at paragraph 14.94 of the CP received 35 responses. The majority supported the general principle that the Lands Chamber should have the power as proposed. A few consultees agreed but were concerned by the proposal that reciprocal payment obligations could be modified only when the associated positive obligation was modified. We examine this concern in more detail below.



### ***The responses***

- 14.85 In relation to the proposal at paragraph 14.93 of the CP, the National Trust agreed with the need for a ground to modify or discharge a positive obligation as circumstances changed and said:
- We anticipate that because of the potentially diverse and more transient nature of positive covenants, as time progresses this ground may become a very substantial part of the Lands Tribunal's work.
- 14.86 The Country Land and Business Association, which was opposed to the reform of positive obligations in general, felt that should such reform proceed then there should be a power to discharge or modify a positive obligation; this was "essential". Amy Goymour (Downing College, University of Cambridge) thought the proposal "sensible".
- 14.87 Trowers & Hamblins, one of the consultees which opposed the proposal, did so on the basis that the rules for the discharge or modification of positive obligations should not be any different to those for any other agreement as this would introduce uncertainty, and therefore a uniform law of frustration should apply. Network Rail did not agree on the basis that in most cases obligations will have been imposed for the safety of the railway or for operational reasons. It is unclear if this objection is in relation to the general principle that had been proposed or only in relation to those positive obligations that concern the railway.
- 14.88 The proposal at paragraph 14.94 of the CP proved to be uncontroversial and, by some, was seen as necessary in the light of the preceding proposal. Andrew Francis (Barrister, Serle Court Chambers) thought it "logically correct". Similarly, Currey & Co thought it "logically followed" the proposal at paragraph 14.93 of the CP. However, Trowers & Hamblins thought the proposal would make land obligations much less attractive than covenants.
- 14.89 Some consultees, while expressing general support for the proposal at paragraph 14.93 of the CP were troubled about what was meant by "unreasonably expensive" and "not reasonably practicable". The Charities' Property Association thought the terms should be defined. It was concerned about how the proposal might work in practice in that proper regard might not be given to an underlying reason why an expensive option should be preferred over one that was cheaper. For example, an amenity charity that held the benefit of a positive obligation that obliged the burdened owner to use an expensive living hedge should not be modified so that a cheaper alternative could be used solely on the ground of cost of performance. The Chancery Bar Association expressed similar reservations.
- 14.90 A few consultees thought the proposal at CP paragraph 14.94 was unduly restrictive in operation.
- 14.91 Herbert Smith LLP made the following comment:

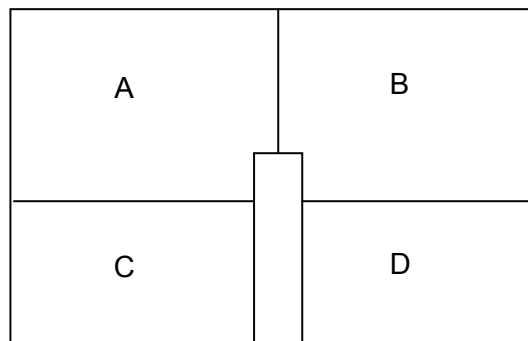
We do not think that paragraphs 14.88 – 14-91 make out the case for saying that, in all the circumstances, there should be some corresponding discharge or modification of the related positive obligation. For example, a positive obligation may be owed to several dominant owners each of whom undertakes a reciprocal payment obligation. The several payments may have been assessed on some proportionate basis, applying to the overall extent of land benefited by the positive obligation, such as net internal area or rateable value. Subsequently, circumstances might change rendering such apportionment unreasonable. In such circumstances, it seems appropriate to be able to modify the reciprocal payment obligation as even though there has been no modification or discharge of the related positive obligation.

- 14.92 The National Trust thought that restriction of the use of the ground to cases where the associated positive obligation was modified or discharged might introduce “inflexibility”.

### **Conclusion**

- 14.93 The proposal at paragraph 14.93 of the CP received broad support and, subject to one clarification explained below, we recommend that there should be a ground for the discharge or modification of a positive obligation in those terms. We have rejected the suggestion that the general law of frustration should determine whether a positive obligation is discharge or modified, since land obligations will not be contractual rights but interests in land. In any event, the law of frustration is too blunt an instrument for what is required.
- 14.94 Nor are we persuaded that the terms “reasonably practicable” or “unreasonably expensive” could be defined without prejudicing the Lands Chamber’s practical and fact-sensitive approach to the applications that come before it for decision, and we think that that approach will address the concern raised by the Charities’ Property Association.
- 14.95 The cost of performance must have become disproportionately expensive relative to the benefit by reason of a change of circumstances. In the example used by the Charities’ Property Association, the benefit is wide in that it ensures the living hedge is maintained and that a particular amenity is preserved; performance was always going to be more expensive than that under a simple fencing obligation. The applicant must persuade the Lands Chamber that the circumstances have changed so much that the relationship between the cost of performance and the benefit is no longer proportionate; this leads us to a further point of detail.
- 14.96 The change in circumstances must be sufficiently permanent to justify the discharge or modification of an interest in land, and must be connected to the land. Therefore it will not include a change in personal circumstances. The impecuniosity or lack of mental capacity of the burdened owner will not do.
- 14.97 Therefore we have made a recommendation in line with the proposal at CP paragraph 14.93 (at paragraphs 7.69 to 7.71 of the Report) and this is dealt with further at paragraphs 7.61 and following of the Report and schedule 2, paragraph 8 of the draft Bill.

- 14.98 The proposal at CP paragraph 14.94, that a reciprocal payment obligation may be discharged or modified only where the positive obligation to which it relates is discharged or modified, would give the Lands Chamber a power to make consequential amendments to a reciprocal payment obligation where this has become necessary because there is already an application to discharge or modify the positive obligation to which it relates before the Lands Chamber. As worded in the CP it would not work the other way around so that an application could be by the burdened owner under a reciprocal payment obligation which would, if successful, necessitate the discharge or modification of the positive obligation to which it relates.
- 14.99 In the light of the comments made by consultees we agree that we should recommend a wider power enabling the Lands Chamber to take the converse step of adjusting a positive obligation where there is an application to discharge or modify the corresponding reciprocal payment obligation.
- 14.100 We therefore recommend that whenever a positive obligation is modified or discharged, there should be a power to modify or discharge a reciprocal payment obligation, and vice versa. See paragraphs 7.69 to 7.71 of the Report and clauses 32(5) and 32(6) of the draft Bill.
- 14.101 We also see a further situation requiring special provision. The cost of performing a positive obligation might be met by several reciprocal payment obligations, so that modification of one requires the Lands Chamber to have power to modify the others even if no application has been made (for example because the other parties, although on notice of the proceedings, have chosen not to participate).
- 14.102 Consider a small group of properties that share a driveway.



- 14.103 One property, A, is under a positive obligation to maintain the driveway. Each of the other properties, B, C and D, is under a reciprocal payment obligations to pay a fixed share, 25%, of the cost incurred by A in performing the positive obligation.
- 14.104 An application is made by B to modify the reciprocal payment obligation, because circumstances have changed so as to make 25% disproportionately onerous for the owner of B, for a reason relating to the land rather than to B's own circumstances. Perhaps the owner of plot C has converted his house into flats whose tenants use the driveway far more than does the owner of B.

- 14.105 The Lands Chamber might make an order reducing B's share of the cost to 10%. This will result in a shortfall in the amount that A can recoup under the linked reciprocal payment obligations – 25% each from C and D but only 10% from B. In such circumstances the Lands Chamber should have a power to modify the burdens under the linked reciprocal payment obligations to appropriately redistribute the cost of performance between A, C and D.
- 14.106 This is likely to be an unusual scenario, but we have recommended that where the Lands Chamber makes an order to discharge or modify a reciprocal payment obligation it will have a power to modify other reciprocal payment obligations to which it is related to ensure that the costs of performance of a positive obligation are appropriately distributed. We explain this in the Report at paragraph 7.67 and see also clause 32(7) of the draft Bill.

**We invite the views of consultees as to whether any other amendments to the section 84 jurisdiction, in particular the grounds of discharge or modification, should be effected on the basis that it has an extended application to easement, profits and Land Obligations.**

**[paragraphs 14.95 and 16.98]**

- 14.107 Consultees did not suggest specific amendments, but a few did make more general observations.

***The responses***

- 14.108 Gregory Hill (Barrister, Ten Old Square Chambers) advised that:

The best course is to have wide grounds for discharge or modification enabling the Tribunal to make sure that covenants, easements and land obligations are used for their proper functions (and not instruments of extortion), and to modify them to strike a sensible balance between the right of the dominant owner to rely on them if and so far as they still matter, and the right of the servient owner to use his land to what he decides is his best advantage.

***Conclusion***

- 14.109 This important point must be right; and that a fair balance must be reached between the competing interests of the dominant and servient owner should be an overarching concern whenever an order for the discharge or modification of an interest that comes within the extended jurisdiction of the Lands Chamber is made. In the light of this we think that it is necessary to make two additional recommendations.
- 14.110 The first is in relation to an order that modifies an easement or profit. We consider it vital that there should be a guiding principle at work where the Lands Chamber has concluded that an order should be made that materially alters some characteristic of an existing right. The order made must ensure that the modified interest is no more burdensome to the servient owner and is not materially less convenient to the dominant owner. See paragraphs 7.58 to 7.60 of the Report, and clause 31(1)(3) of the draft Bill.
- 14.111 The second recommendation concerns what should happen to the burden of a positive obligation where the burdened land is subsequently sub-divided. We recommend that the servient owners of the newly sub-divided burdened plots should be jointly and severally liable to the dominant owner. This provides an important protection for the dominant owner who will have no control over whether or how often the servient land is sub-divided; the dominant owner may call upon any one of the owners of the sub-divided plots to perform the whole of the obligation under the positive obligation.
- 14.112 As between the owners of the sub-divided servient land they may by agreement settle what their respective contributions are to be to each other where the dominant owner calls upon less than their total number to perform the positive obligation. Where there is no express agreement we recommend that there should be a default rule that apportionment is by the respective areas of the sub plots.

14.113 However, the operation of the default rule may in some cases be inappropriate, resulting in disproportionate contributions by the owners of the sub plots. Where this is thought to be the case the affected party can apply to the Lands Chamber for the default rule to be displaced and for a fresh determination of the apportionment of the burden to be made; see paragraphs 7.73 to 7.76 of the Report and schedule 2, paragraph 9 of the draft Bill.

**We provisionally propose that where an application is proceeding before the Lands Tribunal under section 84(1) of the Law of Property Act 1925, an application may be made to the court for a declaration under section 84(2) only with permission of the Lands Tribunal or the Court. Such application should not operate without more to stay the section 84(1) proceedings.**

**[paragraphs 14.101 and 16.99]**

- 14.114 Under the current law, any person interested in freehold land may apply to the court under section 84(2) for a declaration to determine whether or not that land is affected by a restrictive covenant or what the nature and extent of the obligation is. The application can be made by “any person interested” in the land and so may be brought by either the party burdened by the restrictive obligation or the party who benefits from it.
- 14.115 The proposal at 14.101 of the CP is concerned with a procedural matter which was provided for, at the time the CP was published, by the Lands Tribunal Rules 1996. Rule 16 of the 1996 Rules provided that where an application for the discharge or modification of a restrictive covenant under section 84(1) is ongoing and an application is made under section 84(2), then the section 84(1) application must be stayed. Where the Tribunal itself initiates a referral of an issue to the court under section 84(2) then the imposition of a stay is discretionary.
- 14.116 The 1996 Rules have been superseded by the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, when the Lands Tribunal was incorporated into the new two-tier tribunal system and became the Lands Chamber of the Upper Tribunal in June 2009. We discuss below the effect of these changes on our final recommendation.
- 14.117 The mischief the proposal is aimed at is this: an application under section 84(2) may be made at any point up until the section 84(1) application has been finally disposed of by the Lands Chamber. As a result, delay and additional cost can result because the court and Lands Chamber deal with different aspects of the same issue. Indeed, the lack of any restriction on timing for an application and the stay of the Lands Chamber proceedings pending the court application can be used tactically in order to stall proceedings under section 84(1) or to otherwise exert pressure on the applicant seeking the discharge or modification of an interest. Our proposal would have introduced a procedural change: a section 84(2) application would only be brought with leave, and there would be no automatic stay of the Lands Chamber proceedings although the applicant could apply to the Lands Chamber for a stay.
- 14.118 We also suggested in the CP, at paragraph 14.100, that an alternative option would be to confer on the Lands Chamber a jurisdiction to make declarations concurrent with that exercised by the court. Although we did not expressly seek views on this a significant number of consultees took the opportunity of addressing this issue when responding to the proposal.

14.119 Finally, an issue was raised during consultation about section 84(3A), which is concerned with the Lands Chamber's case management powers. It provides that where an application is made, the Lands Chamber will make any necessary directions as to the persons who are or are not to be admitted as objectors depending on whether they appear to hold the benefit of the restrictive covenant or not. There is no right of appeal from the decision made by the Lands Chamber. Instead, a party aggrieved by the decision may apply under section 84(2) for a declaration, and should he or she choose to take that route, the main application under section 84(1) will be stayed until the issue is determined by the court.

14.120 The proposal at paragraph 14.101 of the CP received 34 responses.

***The responses***

14.121 The proposal at paragraph 14.101 of the CP was well supported by consultees, although there was some sharp dissent.

14.122 Gregory Hill (Barrister, Ten Old Square Chambers) said:

I agree with this proposal, which is an adaptation of the "effective case management" provisions of the CPR.

14.123 The Treasury Solicitor's Bona Vacantia Division and the Chancery Bar Association were both in broad agreement with the proposal, while the Agricultural Law Association accepted "the logic of the proposed modification".

14.124 Trowers & Hamblins did not agree with the proposal on the basis "that recourse to the court is of great practical advantage".

14.125 Victor Mishiku (The Covenant Movement) strongly objected to the proposal. This was on the basis that a party refused admission as an objector under section 84(3A) to an application for discharge or modification would in future be required to obtain the permission of the Lands Chamber before they could make an application under section 84(2). And, even where permission was given, with no automatic stay the main application for discharge or modification might continue and be concluded before the admissibility issue had been determined by the court. He said:

So, it seems ridiculous to now suggest as in 14.101 that proceedings should in fact continue in the Lands Tribunal whilst such an application is made to the High Court.

14.126 On a related topic, the suggestion in the CP that the Lands Chamber should have concurrent jurisdiction with the court to make declarations struck a chord with a number of consultees.

14.127 Andrew Francis (Barrister, Serle Court Chambers) asked:



Would there be any prospect of reform so that where is still an effective application to modify in the Lands Tribunal; the declaration should also be heard in front of the same body? At present there is duplicity of proceedings with attendant delays ... . I see no reason why the jurisdiction to deal with all issues in one forum should not be widened so that the newly constituted Lands Tribunal (in the new Lands Chamber) can deal with both declarations and injunctions as well as modifying or discharging the obligation in the application.

14.128 On a similar note the Chancery Bar Association said:

We wonder whether there should not be a reform of this aspect of the law. Whilst there is an effective application to modify or discharge in the Lands Tribunal, should not the declaration be heard by the same body? At present, there is a multiplicity of proceedings between the High Court and the Lands Tribunal with attendant delay ... . We consider that the existence of parallel but distinct jurisdictions is unhelpful and we wonder in particular whether or not the reform under the Tribunals Courts and Enforcement Act 2007 might be able to accommodate this point.

14.129 The Agricultural Law Association said that “we consider that there may be a case for vesting the jurisdiction under subsection (2) in the Lands Tribunal rather than the court”.

14.130 Herbert Smith LLP also preferred the suggestion in the CP to give the Lands Chamber a concurrent jurisdiction with the court over the proposal we had made, while Jeffrey Shaw (Nether Edge Law) said:

It would seem most suitable that the Lands Tribunal dealing with an application should itself have jurisdiction to make a declaration. This is suggested in 14.100. I can see no good reason to involve a separate Court when a declaration is sought: otherwise, why not simply confer the section 84 jurisdiction on a court instead of the Lands Tribunal?

### **Conclusion**

14.131 It is clear from the consultation responses that there are genuine concerns about the interaction of applications under section 84(1) and section 84(2) and some of the procedural aspects around them and that there is support for reform. It is also clear that the current position can cause delay and increase the costs of applications made to the Lands Chamber.

- 14.132 The recent changes to the tribunal structure and the transfer of the Lands Tribunal to the ranks of the Upper Tribunals are highly significant events. The effect of section 6 of the Tribunals Courts and Enforcement Act 2007 is that all judges including High Court judges are also now judges of the Upper Tribunal. The judges currently assigned to the Lands Chamber include a Chancery Division judge and a number of circuit judges who also sit as High Court judges. So the legal expertise within the Lands Chamber is greater and there is the ability to call both on judges currently assigned to the Chamber and on other judges with such expertise as may be needed. In particular the availability of High Court judges should be noted.
- 14.133 Another striking change is that the new 2010 Rules of the Upper Tribunal do not replicate in its entirety the requirement for a mandatory stay where an application is brought under section 84(2). The power for the Lands Chamber to impose a stay where an application under sections 84(1) or 84(2) has been made is now contained in Rule 5, which sets out the case management powers of the Upper Tribunal. The power to impose a stay is discretionary, except where Rule 35 of the 2010 Rules applies. This Rule is concerned with the admission of objectors.
- 14.134 Where an objector has been refused admission to oppose an application under section 84(3A), he or she may apply to the court under section 84(2) for a declaration – just as under the current law – and where that happens the Lands Chamber must stay the section 84(1) application until the application for a declaration is determined or withdrawn.
- 14.135 The diversion of proceedings from the Lands Chamber to the court is no longer appropriate in view of the greater availability of judges in the Lands Chamber. We have concluded that there is no longer any persuasive reason for, or useful purpose served by denying the Lands Chamber the power to make declarations alongside the court's power. The power should not be general but be restricted to cases where there an application for a declaration arises during an application under section 84(1) for the discharge or modification of an interest or to determine an issue arising under section 84(3A) on the admissibility or otherwise of an objector. As a consequence of our recommendation for reform it may be necessary for the Lands Chamber to amend its Rules. We make recommendations to this effect in the Report at paragraphs 7.49 and 7.51 and see clause 29(1) of the draft Bill.

**We provisionally propose that the class of persons who may apply under sections 84(1) and 84(2) of the Law of Property Act 1925 should be the same and should include any person interested in either the benefited or burdened land.**

**[paragraphs 14.106 and 16.100]**

- 14.136 Under the current law, entitlement to apply for the discharge or modification of a restriction is restricted to any person interested in freehold land that is burdened by it. Entitlement to apply for a declaration under section 84(2) is not restricted in this way; anyone interested in the burdened or the benefited land may make an application. We explained in the CP that we did not think that the distinction served any particular purpose and that there might be circumstances, albeit rare, where an owner of land with the benefit of an interest might want to apply for its discharge or modification. So we proposed that they be permitted to do so.
- 14.137 Entitlement to apply is also governed by section 84(12); an application may be made by any person interested in leasehold land provided that the term of the lease granted was in excess of 40 years and that at least 25 years of that term have expired. In the CP we explained that, while we accepted that the length of the term of a lease should be a material consideration where an application is being considered, it was questionable whether it should be an absolute bar for those leases that did not satisfy the requirements of section 84(12). We sought the views of consultees on this.
- 14.138 We received 35 responses but very few addressed the proposal itself.

### ***The responses***

- 14.139 The majority of responses expressed views solely in relation to the restriction in the current law as to which leaseholders may apply under section 84. Very few responses commented on the proposal that the classes of applicant in respect to sections 84(1) and 84(2) should be the same. The responses did not reveal any strongly held views either for or against the proposal.
- 14.140 What support there was for the proposal tended to be qualified. For example, the responses submitted by the City of London Law Society, the London Property Support Lawyers Group, Norton Rose LLP and Nabarro said:
- We agree that beneficiaries should be able to apply under section 84(1), but they would need to get the consent of the burdened land's owner to any modification.
- 14.141 The joint response from Gerald Moran (Hunters, Solicitors; the City of Westminster and Holborn Law Society), Rohit Radia, M I Cunha, Tony Kaye, Chorleywood Station Estate Conservation Group and Churchfields Avenue Residents Association raised an important issue:

There may be circumstances in which someone with the benefit may wish to apply for modification of the right but this needs to be thought through as there may be necessary adaptations required to the statutory grounds and also to the procedures (currently driven by applicants affected by the burden, not always with equal information given to objectors as to the progress of the case).

14.142 There was much more agreement expressed for the suggestion that the class of applicant should be extended to leasehold owners no matter what the length of the term of the lease, but there was concern about whether this should only extend to, as Currey & Co put it, persons who were “substantially interested”. This they defined as a lessee holding a term of 10 years or more.

14.143 Roger Pickett (Diocese of Southwark) expressed this doubt:

We do have some concern that a party with a small interest but with deep pockets could unreasonably drag the other party into unreasonable and costly litigation they are unable to afford.

14.144 Gregory Hill (Barrister, Ten Old Square Chambers) felt the question of who should be permitted to apply should be left to the Lands Chamber:

I agree with the proposal: “any person interested” is a wide class, but I agree that the extent of an applicant’s interest should be relevant at the stage of substantive result, rather than that of entitlement to start proceedings. The Tribunal and the court will be able to keep busybodies under control by case management orders and orders for costs.

### **Conclusion**

14.145 The proposal at paragraph 14.106 of the CP enjoyed little support. We agree with the comment made in the joint response from Gerald Moran (Hunters, Solicitors; the City of Westminster and Holborn Law Society) and others that as a result of permitting benefited owners to apply under section 84(1) the statutory grounds would require extensive reworking as would the procedural rules and practice directions of the Lands Chamber. The outcome that a burdened owner naturally desires is that where an interest in land is discharged or modified the burden is either entirely removed or its effect is relaxed. A benefited owner on the other hand will probably want the opposite: an increase in the burden. The current grounds in section 84 cannot be relied upon to achieve both of these aims. As a result it would be necessary to have different grounds for the exercise of the Lands Chamber’s powers depending on who the applicant is. That would be a dramatic change.

14.146 Nor do we consider that there is much to be gained by making a recommendation in the terms of the proposal but subject to the qualification, suggested in the responses of the City of London Law Society and others, that the burdened owner should consent to any proposed discharge or modification under section 84(1). If a burdened owner consents the matter can be dealt with by agreement between the parties without any need to trouble the Lands Chamber or court.

14.147 Therefore, in the absence of clear support for the assimilation of the two classes of applicants under section 84(1) and 84(2) we do not intend to proceed with the proposal, subject to one exception.

- 14.148 The exception arises from the Lands Chamber's powers to discharge or modify positive obligations and reciprocal payment obligations. We discussed above at paragraphs 14.102 to 14.106 the situation where an obligation is matched by a number of reciprocal payment obligations, so that the modification of one of those linked payment obligations requires the modification of the others. In the example we gave (at paragraph 14.102 above), application for that further modification might be made by C and D, both burdened by the payment obligation, or it might be made by A, who has the benefit of the reciprocal payment obligations. This is the one case where a benefited owner can apply to modify an obligation, as we note in the Report at paragraph 7.66; see the draft Bill, clause 32(7).
- 14.149 Finally, we turn to the proposal that the restriction on who may apply in the case of leasehold land should be removed. This was well received by consultees. We note the concerns behind the suggestion made by some consultees that someone who is a tenant under a periodic tenancy or a fixed term tenancy of short duration should not be eligible to make an application to the Lands Chamber.
- 14.150 We are satisfied that the Lands Chamber has sufficiently robust case management powers in place to weed out at an early stage those applicants whose motivation is to cause inconvenience and delay, and we consider that the spectre of the applicant with "a small interest but with deep pockets" will be rarely seen.
- 14.151 Accordingly we recommend that the restriction contained in section 84(12) on applicants who are leaseholders is not replicated in the new scheme. The recommendation is at paragraph 7.38 of the Report. The restriction will continue to apply for leases granted before the new scheme comes into effect. Leases granted before that time for a term of less than 40 years may have been entered into on the understanding that the leaseholder would not be able to apply to discharge or modify a restrictive covenant to which the lease was subject, and that should remain the case.

# **PART 15**

## **MAINTAINING THE DISTINCTION BETWEEN EASEMENTS, PROFITS AND LAND OBLIGATIONS**

**We invite the views of consultees as to whether the overlap between negative easements and restrictive Land Obligations should be:**

**(1) eliminated by abolishing all of the rights capable of existing as negative easements, with prospective effect; or**

**(2) reduced by abolishing some of the rights capable of existing as negative easements, with prospective effect. If consultees favour this approach, could they please specify which negative easements should be abolished.**

**[paragraphs 15.42 and 16.101]**

- 15.1 The draft Bill gives owners of land the power to burden it with a land obligation; that is, an obligation either to do or refrain from doing something on one's own land. As we note in the Report, generally speaking an easement is a right to do something on the land of another, and therefore such easements are clearly distinguishable from land obligations. However, negative easements, being rights to receive something from another's land, such as light or support, are the exception to this general rule. There is therefore an overlap with land obligations, and the CP asked for consultees' views on how this issue should be dealt with. We offered two options; prospectively abolish all negative easements, or prospectively abolish only some of the negative easements.
- 15.2 27 consultees responded to the question, with a strong majority favouring the retention of all categories of the negative easements.

### ***The responses***

- 15.3 Some consultees emphasised the fact that, despite the conceptual difficulties associated with negative easements and the overlap with land obligations, there are no practical problems currently experienced with the overlap between negative easements and restrictive covenants. HHJ David Hodge QC (Civil Committee of the Council of Circuit Judges) said:

We consider that the proposed distinction between negative easements and restrictive land obligations does not cause confusion or problems in practice and we therefore see no need to abolish or reduce the category of negative easements with prospective effect.

Gerald Moran (Hunters, Solicitors; City of Westminster and Holborn Law Society) stated:

It is academic that there may be areas of overlap between different types of rights such as negative easements. The mere classification of rights does not seem to be of much importance in actual practice. Reforms in this respect do not appear to be a priority for clients and their advisers.

Similarly, The Agricultural Law Association added:

We are not aware that the overlap between negative easements and restrictive covenants causes any practical difficulties and see no reason why the introduction of restrictive land obligations should alter that position. There would appear to be no case for reform.

The Country Land and Business Association Ltd said:

Negative easements are a well established concept and we see little merit in them being abolished either partially or totally.

- 15.4 Many consultees drew attention to a key distinction between negative easements and restrictive covenants or land obligations: the former can arise by prescription and implication, whereas the latter cannot. Amy Goymour (Downing College, University of Cambridge) said:

From an academic perspective, I consider abolition of negative easements to be a very desirable move ... . My only slight concern is the impact that this might have on prescription of negative rights.

Similarly, Herbert Smith LLP argued:

We believe there remains a useful and important social function of negative easements being created by prescription and implication. Consequently we consider the overlap should not be eliminated or reduced.

Currey & Co stated:

We do not agree with the proposed abolition of negative easements ... if they could only be constituted by land obligations, they would on every occasion need to be brought into effect by express grant, and could not be the subject of implication or prescription as easements. The four rights concerned are far too important to be meddled with.

- 15.5 However, a minority of consultees were in favour of either total or partial prospective abolition of negative easements. Roger Pickett (Diocese of Southwark) said:

We take the view that there is considerable merit, in the interest of simplicity, in eliminating the overlap between negative easements and restrictive land obligations by abolishing all of the rights capable of existing as negative easements.

The London Property Support Lawyers Group added:

We believe that many land developers would be delighted if most negative easements arising by prescription or implication were abolished, leaving only the option of creating them by land obligation. One possible exception would be the right to support. An alternative to outright abolition would be to provide that certain negative easements (eg rights to light) should no longer be capable of prescriptive acquisition ... .

### **Conclusion**

- 15.6 The abolition of the categories of negative easements would tidy up the conceptual divide between easements and land obligations. However, as the majority of consultees point out, the ability to acquire easements of support or light by prescription or implication serves an important social function, and the overlap between negative easements and restrictive covenants presents no practical problems at present. We therefore make no recommendations in the Report for the abolition of negative easements.
- 15.7 However, because of the terms of clause 1 of the draft Bill, the express creation (following implementation) of a right of support, or indeed of any of the rights classified as negative easements, is likely to take effect as a land obligation. See paragraph 6.37 and following of the draft Report.

### **Other related issues**

- 15.8 In response to our consultation question, Dr Caroline Sawyer (Victoria University of Wellington, New Zealand) said:

This seems to cover, without mentioning it specifically, the spurious easement of fencing and the general need for responsibility for fences to be dealt with. This is probably the largest and most socially relevant issue that a general reform of easements and covenants should deal with. It also appears to be the most awkward, but therefore most appropriate to the Law Commission.

An easement of fencing is an anomalous easement. It does not fall within the categories of negative easements, but we do agree that it occupies an awkward position within the law. As we note in the Report, the ability for an easement of fencing to arise by prescription is as contrary to principle as the prescription of a covenant or land obligation. We therefore make a recommendation in the Report that an obligation to fence must take effect as a land obligation and not as an easement. See the Report at paragraph 5.94.