



**Law
Commission**
Reforming the law

Making Land Work: Easements, Covenants and Profits à Prendre Executive Summary

**Law Com No 327 (Summary)
8 June 2011**

MAKING LAND WORK: THE LAW COMMISSION'S RECOMMENDATIONS ON EASEMENTS, COVENANTS AND PROFITS À PRENDRE

EXECUTIVE SUMMARY

- 1.1 On 8 June 2011 the Law Commission published its Report "Making Land Work: Easements, Covenants and Profits à Prendre" (2011) Law Com No 327, following a comprehensive review of the general law of easements, covenants and profits à prendre ("profits"). The full Report (accompanied by a draft Bill with Explanatory Notes), as well as this Executive Summary, can be downloaded from our website (www.justice.gov.uk/lawcommission/easements.htm).
- 1.2 The recommendations we make in the Report address a difficult area of law, developed over centuries and long overdue for reform. We have built upon our earlier recommendations for the law of land registration (see our joint Report with HM Land Registry, "Land Registration for the Twenty-First Century: A Conveyancing Revolution" (2001) Law Com No 271)) which were enacted as the Land Registration Act 2002; whilst the land registration project was concerned primarily with title to land, this Report is concerned with the subsidiary rights that govern the relationships between plots of land in different ownership, and in particular:
 - (1) Easements: rights for one landowner to make use of another's land.
 - (2) Profits: the right to take something from another's land.
 - (3) Covenants: obligations relating to the use of land.
- 1.3 The project focused on the general law of easements, profits and freehold (not leasehold) covenants. We did not consider public law rights, such as public rights of way; nor did we undertake a review of specific private rights, such as rights to light – our Report points to the need for further work to be done in this area.
- 1.4 Our principal recommendations are:
 - (1) The simplification of the law relating to the creation of easements and profits, sweeping away the many and complex ways in which these can arise without being created expressly.
 - (2) The introduction of a new way to attach obligations to land, replacing (for the future) the law relating to restrictive covenants and enabling positive as well as negative obligations to be directly enforceable against successors in title.
 - (3) The streamlining of a number of land registration procedures that will simplify the creation and extinguishment of interests in land.
 - (4) The extension of the jurisdiction of the Lands Chamber of the Upper Tribunal that will enable it to make orders modifying or discharging land obligations, and easements and profits created post-reform.

- 1.5 In all of our recommendations we have aimed to simplify the law, remove contradictions and anomalies, and minimise the need for litigation. Land law is necessarily a technical area, but our reforms will make it easier for people to know what obligations attach to their land, and make it easier to create, modify and extinguish those rights. Another important aim is to maximise the effective use of land. Easements, profits and obligations are vital in making land work. Land can be worthless without access, or with inadequate service media. Obligations can protect the character of land and enhance its amenity or financial value.

Background to the Report

- 1.6 The Law Commission published a Consultation Paper in 2008 (Law Com Consultation Paper No 186), to which we received 89 responses. Following consultation we have worked closely with a Land Registry working group in order to devise recommendations that are in harmony with – and will improve – land registration principles and practice. Similarly, we have worked closely with the President and Registrars of the Lands Chamber of the Upper Tribunal in formulating recommendations that relate to the Lands Chamber. We are grateful to everyone who has assisted with our work.

Navigating the Report and supporting documents

- 1.7 The Report is published along with a number of other documents; the full portfolio of material can be found on the project page of our website at www.justice.gov.uk/lawcommission/easements.htm. It includes an Analysis of Responses to our Consultation Paper and an Impact Assessment, as well as the Consultation Paper and other material produced during the currency of this project. We would stress the importance of the Analysis of Responses, which summarises what consultees said, draws out themes that we found in the responses, and sets out some of our reactions.
- 1.8 The Report itself is in eight Parts. Parts 1 and 2 of the Report are introductory; Part 2 sets out the legal background to the project, and also addresses briefly a number of proposals made provisionally in the Consultation Paper that we have not pursued, generally in response to concerns raised by consultees. The detailed reasoning on those points is to be found in the Analysis of Responses
- 1.9 Part 3 recommends reform to the law of easements and profits. Part 4 relates to the law of land registration. In Parts 5 and 6 we explain our recommendations for the law relating to covenants and, more broadly, to obligations attached to land. In Part 7 we make recommendations that relate to the Lands Chamber of the Upper Tribunal. Finally, Part 8 contains a list of all of the recommendations that we make in Parts 1 to 7.
- 1.10 Appendix A to the Report is a draft Bill and Explanatory Notes; these are an important component of our work, translating our recommendations into clauses ready for the attention of Parliament.

Our recommendations in more detail

The law relating to easements and profits

- 1.11 Easements and profits are ancient rights; the details of the law have been worked out over centuries, in contexts far removed from the life of the twenty-first century.
- 1.12 An easement can be acquired by prescription (that is, acquisition by long use) through three different methods; common law (which requires enjoyment of the right claimed since 1189), “lost modern grant” (requiring 20 years’ use of the purported easement) and under the Prescription Act 1832 (which created a number of different rules for use in a variety of circumstances and has been labelled as “one of the worst drafted Acts on the statute books”). The three methods are commonly claimed in the alternative. The multiplicity of possible bases of claim is a burden to legal professionals, litigants, to the courts, and to Land Registry.
- 1.13 We recommend the simplification of the law relating to the prescription of easements so as to create a single statutory scheme in place of the many methods of prescription currently available. Our objectives have been to make the law relating to prescription simpler, without extending the range of circumstances in which easements can be created in this way, and to minimise the need for recourse to litigation where possible.
- 1.14 Easements can also be created through implication, whereby the law reads the grant of an easement into a document (such as a transfer of land) even though no grant was expressly made. Again, there are many bases on which the law can do this; the law relating to implication is, as a result, complex, and can be arbitrary in its operation; whether an easement will be implied into a transfer might depend on whether the easement would take effect as a grant or reservation, or upon whether it is “continuous and apparent”, and suchlike.
- 1.15 We have recommended the replacement of the current methods of implication with a single statutory principle that easements will be implied where they are necessary for the reasonable use of the land at the time of the transaction (unless the parties have expressly excluded its operation). What is necessary for the reasonable use of the land is to be determined through five factors that incorporate the most useful features of the current law:
 - (1) The use of the land at the time of the grant.
 - (2) The presence on the servient land of any relevant physical features.
 - (3) Any intention for the future use of the land, known to both parties at the time of the grant.
 - (4) So far as relevant, the available routes for the easement sought.
 - (5) The potential interference with the servient land or inconvenience to the servient owner.

- 1.16 The benefits of our proposed scheme for implication mirror those in relation to prescription; simplifying the law would reduce the need for complex advice and litigation and make the process of dealing with land less costly.
- 1.17 We also address section 62 of the Law of Property Act 1925, which can create new easements and profits when the parties to a transaction did not do so expressly, and so is often discussed in the textbooks under the law of implication. It may on occasions transform a licence into an easement. The section is widely regarded as a trap for the unwary, and is routinely disapplied or modified by the terms of the transfer of land. We recommend that section 62 should no longer operate to transform precarious benefits, such as licences, into new easements.
- 1.18 We have recommended that it should no longer be possible for a profit to arise by prescription or implication; given the commercial nature of most profits, we take the view that it is appropriate for these rights to have to be created by express bargain.
- 1.19 The Report also deals with some other specific issues relating to easements. We recommend reform to facilitate the creation of rights to park vehicles and other similar easements, but without enabling the grant of an easement that gives a right to exclusive possession. We address the law relating to abandonment and propose the raising of a presumption of an intention to abandon a right following 20 years' non-use of an easement or profit; and we make a recommendation to clarify what should happen on the termination of a leasehold estate to which a right is appurtenant, in the aftermath of the decision in *Wall v Collins* [2007] EWCA Civ 444.

Reform of the law of covenants

- 1.20 Currently it is possible to attach to land an obligation not to do something on it, in such a way that that obligation extends to future owners. This is done by the imposition of a restrictive covenant. However, the law of freehold covenants suffers from serious defects. Covenants take effect primarily as contracts, meaning that liability between the original parties persists, even when one or both of them has parted with the land to which the covenant relates. And whilst the benefit and burden of a restrictive covenant can pass to future owners upon the sale of the land to which it relates (according to complex rules), the burden of positive covenants cannot. Owing to the nature of land registration in England and Wales, the benefit of a restrictive covenant cannot be registered, meaning that it can be difficult to establish the identity of the person (or, as is commonly the case because land becomes fragmented over time, persons) entitled to sue on a covenant.
- 1.21 We address these problems by recommending in the Report the introduction of a new legal interest in land (which we refer to as a land obligation). The land obligation would function within the land registration system in the same way as does an easement, with the benefit and burden capable of registration so that there would be no difficulty in identifying the benefiting parties. The original parties to the land obligation would not be liable for breaches of it occurring after they parted with the land.

- 1.22 A land obligation would exist for the benefit of an estate in land, subject to some conditions as to the nature of the obligation. It could either be negative or positive; the former would restrict the burdened owner from doing something on his own land; the latter would oblige the burdened owner to do something in relation to his own land.
- 1.23 Because a land obligation can be a positive obligation, conveyancers will no longer have to use devices such as chains of indemnity covenants or estate rentcharges, to secure the performance of positive obligations (for example, maintaining a fence or shared driveway). Positive obligations could also be “reciprocal payment” obligations – to make a contribution towards the cost of work on, say, a shared driveway – and ancillary obligations, which would enable the imposition of administrative provisions such as the manner and timing of payment.
- 1.24 Land obligations have the potential to facilitate the sharing of facilities and obligations between neighbours, bilaterally or in small groups. They would not be suitable for truly interdependent properties such as flats where a management arrangement is needed; in such cases commonhold or leasehold will continue to be appropriate.
- 1.25 Our consultation confirmed that the introduction of land obligations would be both beneficial and widely welcomed. Our recommendations allow considerable consistency with current practice; we have designed the new right so that it could still be drafted as a “covenant”. Conveyancing practice would remain largely unchanged – except that complicated workarounds would become a thing of the past. In providing a new right which is in tune with what conveyancers need to achieve, with what the land registration system is designed to offer and with the existing law of easements, this reform has the potential to benefit a great many people.
- 1.26 Existing restrictive covenants would be unaffected by reform, and there would be no need for them to be converted into the new interest.

Land registration reforms

- 1.27 We recommend reform, in the context of registered title only, to the rule that prevents a person having an easement over his or her own land. This rule causes problems in the context of mortgages of part, where the plot to be mortgaged cannot be sold as an independent unit without rights over the borrower’s other land (and therefore may mean that it cannot be accepted as a security by a mortgagee). It also hinders the planning of large estates by developers, where there is a need to create a web of interrelating easements and obligations between the various plots; the volume of transactions involved means that there is the potential for rights to be created in the wrong order (such as plot X being sold subject to rights that have not yet been reserved for the benefit of plot Y).
- 1.28 We recommend that the fact that two plots of land are in common ownership and possession should not preclude the creation of an easement or, in the future, a land obligation, provided that title to both is registered,

- 1.29 We also recommend a clarification of Land Registry's guarantee of the validity of registered interests; and that the express variation and release of registered interests should constitute a registrable disposition under the Land Registration Act 2002. In addition, we recommend that Land Registry should consider devising and consulting upon short-form easements and land obligations, reflecting practice in a number of other jurisdictions whereby a short form of words used in the grant of an easement will import further detail specified in statute or elsewhere in the law.

Extension of the jurisdiction of the Lands Chamber of the Upper Tribunal

- 1.30 Currently the Lands Chamber of the Upper Tribunal (formerly the Lands Tribunal) has jurisdiction under section 84 of the Law of Property Act 1925 to discharge and modify restrictive covenants. The Report notes that if positive obligations are to be able to be attached to land, so as to bind future owners, it would be essential for there to be a jurisdiction to vary or modify such obligations. Otherwise land might become overburdened by obligations that could change in their nature over time, so becoming obsolete or impracticable to perform.
- 1.31 We therefore recommend the extension of the jurisdiction of the Lands Chamber under section 84 to discharge and modify positive and negative land obligations.
- 1.32 Moreover, there have long been calls to extend the scope of this jurisdiction to easements and profits; a number of other countries (such as Northern Ireland, Scotland, and New Zealand) have introduced such a jurisdiction, and so we recommend that the Lands Chamber should be able to make orders for the modification and discharge of easements and profits created following the implementation of the Law Commission's recommendations.