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Jonathan Djanogly MP
Ministry of Justice
102 Petty France
London SW1H 9AJ

6 June 2012

Dear Mr Djanogly

Re: Law Commission's report "Making Land Work: Easements, covenants and profits à prendre" ("Report")

I am writing as Chair to the Land Law committee of the City of London Law Society. The City of London Law Society ("CLLS") represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS Land Law committee has considered the Report and would like to congratulate and express its thanks to the Law Commission for an excellent, erudite and thorough analysis of this crucial area of property law, which we hope will have a positive impact on the operation of easements, covenants and profits à prendre in the future. Although we are a little disappointed that the report did not provide detailed coverage of the law relating to rights to light (which is of critical importance to the City of London), we are pleased to note that the Law Commission proposes to look at this very important topic in the near future.

We do believe that the Law Commission's proposed reforms to modernise and simplify the law on easements and profits will prove beneficial and add clarity, particularly, in streamlining the ways in which an easement or profit can be acquired by long use (known as prescription) or created by implication. This will have a benefit across all parts of the legal system. We welcome the simplicity of the new statutory scheme for prescription, which does not encourage litigation to preserve the easement and sensible transitional provisions are proposed. Clarification of the validity of the "exclusive right to park" easement (provided the servient owner can access the land, even if such access is very limited) is helpful.

We welcome the proposal that a registered easement or profit would no longer be extinguished when the registered dominant and servient tenements fall into common ownership. This will help to reduce uncertainty in this area, as will the proposals providing precision on the continuous period of non-use of an easement or profit required to raise the rebuttable presumption that it has been abandoned. The proposed solution to the issues raised by *Wall v Collins* is pragmatic and sensible.

We consider that the most beneficial aspect of the Report relates to the proposed reforms to the law on freehold positive covenants. The fact that, currently, the burden of freehold positive covenants does not "run with the land" (namely, the land is not burdened by the positive covenant) is regarded as a major problem in dealing with freehold land in England and Wales. To take a simple but common example. Freehold house owner A is obliged to keep a wall in repair and his/her neighbour, freehold house owner B, has the benefit of that obligation. If A sells his/her house to C, the obligation to repair the wall will not pass to C. The obligation remains with A, who has probably moved away (and B's rights against A are only likely to lie in damages) and B is not entitled to enforce against C directly, if the wall falls into disrepair. By contrast, the burden of freehold restrictive covenants does "run with the land" so that house owner B can enforce the burden of a freehold restrictive covenant against the current house owner C (who is not the original covenantor), directly, for any breach, since C's land is burdened by the restrictive covenant (assuming registration requirements have been complied with).

The discrepancy in legal treatment between freehold restrictive and freehold positive covenants is illogical and causes conveyancers inconvenience and practical difficulties on property transactions. For example, it causes complexities in the enforcement of positive covenants between freehold owners in the ubiquitous situation of the maintenance of a shared driveway and also between freehold owners of separate buildings on, for example, industrial estates. While there is a method by which the buyer of a property can directly take on the liability for a freehold positive covenant, this will entail the buyer having to provide an equivalent obligation in a new deed of covenant to the benefiting party, which requirement is protected by the entry of a restriction on the burdened land. This complexity adds to the time and expense of conveyancing transactions and other possible solutions like "chains of indemnity" are not foolproof and may create uncertainty, all to the detriment of the public.

It should be emphasised that this issue impacts on residential conveyancing at all price points, as well as commercial transactions affecting individuals, small businesses and large corporations alike. Commonhold has failed, primarily because of its complexity, in providing a way round the problems of freehold positive covenants. We, therefore, strongly welcome resolution of this issue in the form suggested by the Law Commission through the creation of the new legal interest in land, the "land obligation" (positive and negative), which will be enforceable against successors in title to the original obligor. We consider that this reform will simplify conveyancing for the benefit of the public generally.

The proposed reforms address other problems with the current law on covenants, which have a serious impact on conveyancing transactions of all types. The uncertainty of which land benefits from covenants causes great uncertainty on a regular basis in conveyancing transactions. This often leads to consumers, as borrowers at the behest of lenders, having to bear the sometimes heavy expense of taking out title insurance

policies for a theoretical but not high risk. There is also the problem of the everlasting liability of the landowner for a restrictive covenant, even though he or she has sold the relevant land and, therefore, cannot practically comply with the covenant. The new land obligations seek to resolve those problems and we welcome this for helping to create greater certainty in the conveyancing process. Also of great help (for example, in a mortgage of part situation) is the proposal that the creation or existence of land obligations (as well as easements and profits) is not prevented by the registered benefiting and burdened land being in common ownership and possession. This will simplify and facilitate the conveyancing process, particularly, in relation to the creation by developers of large residential estates followed by multiple sales of part.

We also welcome the proposed changes to the Lands Chamber's jurisdiction under section 84 of the Law of Property Act 1925 and, in particular, the proposed extension of the Lands Chamber's jurisdiction to enable it to make orders to discharge or modify, not only restrictive covenants, but also easements and profits created after reform (as well as the proposed land obligations). We believe this will be very helpful in removing easements or profits that are obsolete or no longer benefit anybody and may, therefore, facilitate the development of land that may otherwise have been stymied by such interests.

The law relating to "land obligations", as that expression is used in the Report, is antique and might be described as a patchwork of common law and equitable concepts, which over a long history has developed piecemeal with statutory intervention, which in some cases is equally antique (the Prescription Act 1832, for example). In the context of modern business conditions, this area of the law needs to be brought up-to-date with a clear code which the Bill attached to the Report would achieve. It would run in parallel with the updating of leasehold covenants effected by the Landlord and Tenant (Covenants) Act 1995 and contain important consistent concepts. This would lead in due course to a reduction in litigation particularly in relation to disputes over easements. The changes would be therapeutic and, in a complex area, lead to much greater understanding. The aid to efficiency would surely be marked.

In times when overseas investment in the UK property market is so prevalent, would it not be preferable to have a clear code, freed from historical anomalies, capable of easier comprehension to articulate businessmen? Much of the law in this area is quaint. There is of course the rider that the old law in the case of established rights would remain, but that is surely not an argument for doing nothing to modernise its future application. We hear this complaint from a number of overseas businessmen.

In summary, we have found the Report and the proposed legislation to be clear, sensible and of potentially great benefit to all those involved in the property industry and the large part of the population with some interest in land.

Yours sincerely

Jackie Newstead
Chair, Land Law Committee

cc. Lord McNally, P. Hughes