Response to The Law Commission Consultation
Paper No. 186,
Easements, Covenants and Profits à Prendre

1 FORMAT OF THIS RESPONSE

This response is in the following format:

- Firms on behalf of which this response is given;
- Introductory comments
- Detailed responses to selected questions in the consultation paper
- Contact details.

2 FIRMS ON BEHALF OF WHICH THIS RESPONSE IS GIVEN

This response has been prepared by Berwin Leighton Paisner LLP on behalf of the following firms that are currently represented in the London Property Support Lawyers Group:

- Allen & Overy LLP
- Ashurst LLP
- Berwin Leighton Paisner LLP
- Clifford Chance LLP
- CMS Cameron McKenna LLP
- Denton Wilde Sapte LLP
- Eversheds LLP
- Linklaters LLP
- Lovells LLP
- Slaughter and May

In addition, the response has been endorsed by the following firms who are members of the Association of Property Support Lawyers:

- Wragge & Co LLP
- Olswang
- Pannone LLP

- Baker & McKenzie LLP
- Charles Russell LLP
- Stephenson Harwood
- Pinsent Masons LLP
- DWF LLP
- Mayer Brown International LLP

3 INTRODUCTORY COMMENTS

We welcome the opportunity to comment on the Law Commission's proposals. Our response naturally reflects the predominantly commercial real estate and real estate finance practices of our respective firms, but we have also given some consideration to the impact of the proposals on domestic property owners.

We would be happy to provide further feedback whether on a formal or informal basis once the responses to this Consultation have been fully assessed.

The current law on easements and covenants is a difficult, untidy, irrational and unhelpful mess which causes practical problems to property owners, whether of dominant or servient tenements and whether they are subject to or benefit from easements and covenants. We welcome the Law Commission's attempt to create a single, coherent, body of law in this field.

In particular, we support:

- the proposed reform of the rules for the creation of implied easements;
- the proposed extension of the statutory jurisdiction to discharge or modify restrictions on land contained in s 84(1) of the Law of Property Act 1925 to include easements.

However, we are concerned that sufficient consideration is given in the new scheme to land the title to which is not registered.

We also consider that the following related areas should be covered by the new scheme:

- Infrastructure projects;
- Flying freeholds;
- Perpetuities.

4 RESPONSES TO QUESTIONS

4.1 Human rights

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

[paragraph 1.29]

4.2 Assessment of the impact of reform

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

[paragraph 1.34]

4.3 Characteristics of an easement

4.3.1 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?

[paragraph 3.18]

In general we agree that easements in gross should not be recognised as they may cause problems in identifying who is entitled to their benefit, whether this benefit can be assigned to more than one person, and if so, how to avoid impermissible levels of intensification of use.

However, there are two circumstances where legitimate commercial and public objectives are prejudiced by the need for easements to have a dominant estate in land to be effective. In these cases, we think some improvement is needed. We would welcome discussion on whether this is best achieved by permitting easements in gross or by other means.

If such easements in gross were permitted, we think they should be capable of creation only by way of express grant, and that consideration is given to limiting the freedom of alienation of the benefit of the easement.

The first circumstance is where infrastructure projects depend upon effective easements (often across hundreds of miles of land, all owned by different people) for pipes, wires or cables which connect a distribution point (eg a power station) with the consumer network. At present, it is necessary to acquire the easements in sequence moving away from the power station so that (relying on Re Salvin's Indenture [1938] 2 All ER 498) each easement can be said to benefit both the power station and all the previously granted easement land This is impractical. It is often impossible to complete the various deeds of easement in the necessary sequence. Moreover, where the land over which the easement is granted is a very long distance from the power station (or other terminal equipment), the Land Registry sometimes queries whether the right accommodates the distant dominant tenement.

This uncertainty can prejudice the viability or speed of implementation of valuable public services works. We consider it would be preferable to set such 'easements' on a statutory basis, perhaps allowing limited easements in gross for cables, pipes and drainage undertaken as part of major infrastructure works. The definition of major infrastructure will require careful consideration, as would the breadth of potential alienation by the dominant owner of the benefit of that easement in gross. Perhaps one way to avoid fragmentation of the easement would be, in those

circumstances, to allow alienation of the pipeline easement only at the same time and to the same party as was acquiring the power station/distribution facility.

The second circumstance is in the context of mortgages of part (or release back to the borrower of part of a mortgaged property, leaving in charge land which is not self-contained)). In either case the mortgagee needs to be sure that, should it ever have to enforce its security and sell the mortgaged property, it will have (and be able to offer to its buyer) the necessary easements over the balance of the borrowers land. Otherwise the value of the mortgaged property may be prejudiced. This is a genuine difficulty that occurs frequently in practice and is likely to become more of an issue as Registered Social Landlords (RSLs) acquire larger developments and wish to mortgage only part of them.

It is doubtful whether the mortgagee has a qualifying estate in the mortgaged land to act as a dominant tenement.. The mortgagee holds neither a freehold nor a leasehold interest. Moreover, even if it is held to have an estate/interest which qualifies as a dominant tenement, that estate or interest is essentially short term. It ceases when the mortgage ceases. Thus, on exercise by the mortgagee of its power of sale, the dominant estate/interest will terminate. At that point, do the easements also terminate? If they did so, this would compromise the position of the purchaser from the mortgagee and thus reduce the consideration that the purchaser will pay.

It would be helpful if the express grant to a mortgagee of such easements (and the ability of the mortgagee to pass on the benefit of those easements to a purchaser of the mortgaged land) were given statutory recognition.

It may be that the Commission intended that, to cater for the needs of the mortgagee, the owner would, before granting the mortgage, grant (to himself) the necessary rights for the intended mortgaged property over the intended retained land (see paragraph 3.66). Those rights would attach to the land over which the security was taken and would pass to a purchaser of it from the mortgagee. This will, however, suffer from the drawback (under the Commission's proposals) that the owner must split the title first, so that the land to be mortgaged and the land to be retained are in separate title numbers. We believe that this "solution" runs the risk of fragmenting the register. These easements for the mortgagee may never need to be exercised – the loan may be repaid as expected and no power of sale is ever exercised. To split the titles at the outset in order to preserve the viability of easements which the mortgagee may never need seems unnecessary. It would be preferable for the parties not to have to settle the routes of the easements at the outset but to leave them to be ascertained as and when needed, for the same reason - they may never be needed.

4.3.2 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.

[paragraph 3.33]

We agree with these as the basic requirements (except in the case of easements in gross such as those discussed in 4.3.1). However, 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.

The legal difficulties encountered in binding successors in title in these circumstances are analogous to the problems posed in ensuring that positive covenants are enforceable against a successor in title to the original covenantor. One possible way of overcoming this difficulty was suggested in "A developer's problem" EG 19/10/1993:

"For practical purposes, let us assume that a developer wishes to acquire from a landowner a site ("Whiteacre"), with the landowner retaining some land in its ownership ("the retained land"). The developer is granted rights over the retained land in the transfer of Whiteacre. The developer is also granted rights over the retained land for the benefit of additional land lying to the rear of the retained land which the developer contemplates that it may acquire in the future. A possible scheme for protecting the rights (which cannot as yet exist as easements) would be as follows:

(1) The developer should attempt to define the extent of the "additional land". This could be done by annexing a second plan to the transfer of Whiteacre identifying the maximum extent of the additional land which the developer contemplates may be acquired for his development in the future.

(2) The transfer of Whiteacre should include a separate schedule containing an option in favour of the developer to grant further easements for the benefit of the additional land. The option should be exercisable by the developer within a specified period of time (but not exceeding 21 years) by service of a notice with a plan attached identifying any part of the additional land as the dominant tenement. The developer's notice should require the landowner to enter into a formal deed of grant specifically granting the necessary easements for that part of the additional land identified as the dominant tenement.

(3) At the time of the transfer of Whiteacre to the developer there should be annexed to that transfer a draft deed of grant to be entered into by the parties following the exercise by the developer of the developer's option.

(4) It should be remembered that in London & Blenheim the judge held that there could not be a contract to grant an easement binding on successors in title until the dominant tenement had been identified. Accordingly, to protect the developer's position in the case of unregistered land the landowner should be required to enter into a restrictive covenant with the developer not to dispose of its interest in the retained land without first procuring that any future purchaser enters into a new option directly with the developer in the identical form to the one entered into between the developer and the landowner. That covenant should be protected by registration as a D(ii) land charge.

(5) If both Whiteacre and the retained land are registered, similar arrangements should be entered into, except that, in that case, the parties should apply to enter a restriction on the landowner's title to the effect that there should be no disposition of the whole or any part of the retained land unless there shall have been produced to the Land Registry a certified copy of the option entered into between the purchaser of the retained land and the developer."

Arrangements like this are unduly complex to create and administer, and from a layman's view are inconvenient and incomprehensible. 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. We accept that it would be necessary to closely define the enlarged site that would be able to benefit from the easement. It would be unacceptable to allow the grant of an easement to benefit any land the dominant owner might choose, but it should be possible to define a dominant site to be benefited in terms which are specific enough to protect the servient owner from excessive exploitation but wide enough to serve the dominant owner's needs.

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

(a) 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

(b) 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.

[paragraph 3.55]

PROPOSAL (a)

We agree with the proposal that both the nature of the right and the land over which it is exercisable must be clearly defined or be capable of clear definition.

However, this requirement should not preclude any of the following:

- *the grant of an easement over a particular route, but with express power for the servient owner to vary that route to another pre agreed route on giving suitable notice to the dominant owner*

- *the grant of an easement over a particular route, but with express power for the servient owner to vary that route to some alternative on the servient owner's land (ie that owned by the servient owner at the date of the grant of the original easement), on giving suitable notice to the dominant owner. This might include (if car parking in a designated space is considered to be capable of being an easement – see later) the right for the servient owner to vary that designated car parking space.*

- *the grant of an easement over a particular route, but with express power for the servient owner to vary that route to some alternative on the servient owner's land (ie that owned by the servient owner at the date of notification of the alternative- this could include land acquired by it after the date of the grant of the original easement), on giving suitable notice to the dominant owner*

- *the grant of an easement over a generic description of areas eg a right of way (in a transfer of a plot on a new estate) over the "estate roads from time to time"Developers will often not have an exact layout at the earliest stages when they might wish or need to grant the easements. Similarly, the right to use conduits from time to time on the servient land – where the easement is granted in fee simple, it is highly likely that the services network on the servient land will change. New pipes and cables will be laid, not necessarily in precisely the same*

location and the dominant owner will wish to be able to use whatever network is in place.

- *the grant of an easement over a defined route, with a contractual obligation on the dominant owner to release that easement on request of the servient owner, so long as the servient owner first grants to the dominant owner a suitable alternative easement (typically known as "lift and shift" provisions).*

It would be appreciated if any statutory scheme could specifically confirm

° that all of these types of easement are legitimate and create legal interests in land

° that registration of each (against dominant and servient land) is possible without the need (as some, but not all, Land Registry offices require, since Greenwich Healthcare NHS Trust v London and Quadrant Housing Trust) to identify at the outset the whole of the area over which the easement can be relocated.. This may not be possible in the case of land not yet acquired by the servient owner.

° what needs to be done if the alternative route is triggered by the servient owner. Should the new route be re-registered? If it is the intention that the register should be as complete a picture as possible of the state of the title, there should arguably be a means to record the relocation of easements. However, in reality such relocation may be agreed informally and (particularly in the case of a right to relocate parking spaces) may occur too frequently for registration to be practical. This gives rise to difficulties when the register does not reflect the position on the ground and currently may result in the creation of an unprotected equitable easement, unknown to the parties - another example of the law currently imposing requirements of which lay people will be unaware.

PROPOSAL (b)

There is a considerable tension inherent in the two statements in this proposal.

We agree that an easement must be different from a lease and it must be possible to tell easily into which category a right falls (since important consequences such as potential business security of tenure under Landlord and Tenant Act 1954 will attach to a lease, but not an easement; and the registration formalities for each are different).

We also agree that it is very difficult to apply exclusive user as the determinant of whether a lease or an easement for a term of years (permitted by section 1(2) (a) LPA 1925) has been created (the "ouster principle"). In practical terms, either a lease or an easement for a term of years may apparently give the beneficiary exclusive user and the current nuances used to distinguish between them are very difficult to apply or predict.

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.

It would be no more appropriate to distinguish between a lease and an easement on grounds of whether the grantee is given only restricted use of the land. Certainly an easement is generally granted for very limited purposes, and other use of the land is not permitted. However, a lease also usually restricts the types of use which the grantee may make of the land.

Nor will it be appropriate to distinguish between an easement and a lease on grounds that the full depth and height of the land is comprised in the arrangement. Whilst it is true that an easement (eg to use a particular drain) will not confer the right to use the rest of the surface of the land, or its subsoil or airspace, a lease may also grant the right to use only a particular horizontal "slice" of the land, reserving the subsoil, or airspace, to the landlord to do as it likes with.

To illustrate the problem:

- *A residential leasehold flat in a block is allocated, in the lease of the flat, a right to park in a specific car parking space (not one space from time to time allocated, or one space wherever one happens to be free from time to time). No other tenant of the block is allowed to park in that designated space. However, because the landlord wishes to remain responsible for repair and maintenance of the car park as a whole (especially, for example, for resurfacing), it does not include the car parking space in the demise. It merely grants the exclusive right to use it. The landlord retains the subsoil beneath it, any retaining wall around it, and the structure above it. The use of the space is solely for parking. The landlord has residual rights of access to the car parking space (eg to make repairs, inspect, access its land on the other side of the space). The flat tenant has effectively exclusive use of the designated car parking space and can keep everyone, including the landlord in all but very limited circumstances, out.. The landlord will want this classified and registered as an easement. We strongly support that view, and believe that the flat tenant would be equally happy if it were registered as an easement appurtenant to their lease. However, there is great confusion at present as evidenced by the judgements of the House of Lords in Moncrieff v Jamieson [2007] UK HL42 as to whether it should be classified technically as such and hence accepted by Land Registry as registrable as an easement (unlike a right to park in a "roving" single space, which is accepted as an easement and can be registered as such). This confusion needs to be resolved.*

- *A commercial tenant, with a lease of offices in one building (that has no car park) is granted, in its lease or separately, a right to park 3 cars in designated spaces in the landlord's car park in an adjacent building. That right to park confers just the same exclusive possession as the residential example above. Here it will be critical for the landlord to be sure that the arrangement sets up only an easement. He would wish to avoid any suggestion that it sets up a lease of the 3 spaces, as that would attract LTA 1954 security of tenure.*

- *A café tenant is given the right (commonly called a "table and chairs" licence to put furniture on a designated area of mall outside its premises, to extend its trading area. Effectively, when that furniture is in place, the café tenant has exclusive possession of the area of mall. At night (in some cases) the furniture is pushed back, so the area occupied is smaller. Would this right now be classed as an easement, not a licence? There would be significant consequences in that the benefit of the easement passes*

automatically to successors in title to the dominant land (here the café lease) whereas the benefit of a licence needs to be expressly assigned. Similarly, any new owner of the mall needs to know if it is bound by the arrangement (yes if an easement; no if a licence). Moreover, as an easement, the arrangement would need to be recorded at the Land Registry, whereas the licence need not be.

- *A commercial tenant is given the right to put up a satellite dish on a designated part of the roof. This is done after the start of the lease, so is documented by a separate agreement. No other occupant of the building is permitted to erect machinery on that part of the roof. The landlord cannot move the equipment round, but can access the area for inspection purposes and emergency maintenance. It is conventional to treat this as the grant of an easement for a term of years (in the same way as the lease will have granted a right of way through the common parts, or rights to use the common services). Yet it effectively grants exclusive possession. Does this turn it into a lease? That is not what the landlord would want or, we suggest, what the tenant would expect.*

4.3.4 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.

[paragraph 3.66]

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 easement 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, (although this does not take into account mortgages of part (see paragraph 4.3.1 above for discussion of the case for special treatment in such instances)).

We all agree that a property owner should have a choice about whether unity of seisin extinguishes easements. This could be dealt with by a tick box on the relevant application forms, which would itself encourage more transferees to consider the issue and clear unnecessary entries off the title. We do not agree with the Commission's recommendation that a choice over the effect of unity of seisin should only apply to easements created after the change in the law. By definition the properties have come into one ownership, so only the owner is affected by the decision whether or not to extinguish the old easements. Obviously the change should only apply where there is unity of seisin after the date of reform.

5 CREATION OF EASEMENTS

5.1 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.

[paragraph 4.24]

We believe that it is the normal "contra proferentem" rule which underpins the decision in the St Edmundsbury case. That rule is not that any ambiguity in the terms of a grant is construed against the party "drafting the document" (as stated in paragraph 3.15 of the consultation paper), but that it is construed against the "grantor". Where a fresh reservation is created, it is viewed as a grant by the purchaser, and hence ambiguity is construed against the purchaser and in favour of the seller.

However, we agree that this should be changed. For reservations after the date of reform, there should be no automatic interpretation of ambiguity in favour of the seller. It is for him to decide how to word the reservations with clarity or take his chance in court.

Whilst this does not require the repeal of s65(1) LPA 1925, we wonder whether it will require statutory abrogation of the contra proferentem rule in this limited regard.

Some firms would go further and reverse the normal rule, such that ambiguity in a reservation was construed against the seller. Whilst this has some appeal, it would not assist sellers who act without legal advice. If the regime for implied easements were to apply to reservations as well as grants, this might not matter so much, as the seller could perhaps look to the minimum implied easements to ensure that its retained land were selfcontained.

5.2 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.

[paragraph 4.34]

We support the introduction of short form easements as an option for the parties to use. However, we would not support them as the only way of creating easements. Parties should be free to continue to use bespoke drafting, including variations of any statutory short form easements. The prescribed wording of the short forms should have to be incorporated in such a way as to show that it is that wording, eg by requiring a reference to 'prescribed right x' in the drafting in the same way that the Land Registry currently requires standard form restrictions to be identified.

Thought would need to be given, as to whether short form easements should also be capable of use in leases and other documents.

We would welcome the opportunity to provide feedback on the proposed wording of any short form easements before they are brought into effect. In fact, it is vital that there is a consultation on the wording.

5.3 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.

[paragraph 4.35]

We suggest that rights of way, rights of support, rights to use services, rights to develop and rights of light could be in standard form. They would need to be drafted in such a way as to be applied to the property concerned, eg 'the prescribed right of way is granted to the transferee over the road coloured brown', or with appropriate blanks (again see some of the standard form restrictions).

As stated above, the parties should be free to use bespoke drafting instead of the prescribed forms and also to be able to amend the prescribed forms. The model might be the title guarantees under the Law of Property (Miscellaneous Provisions) Act 1994 which are sometimes incorporated wholesale and which are sometimes incorporated with amendments. Although a number of 'standard' amendments are used, on particular transactions additional or other amendments are sometimes made.

Flying freeholds are generally regarded as notoriously unsatisfactory, particularly because of the inability of one freeholder to enforce positive covenants against another. To cite Lord Goodhart (Hansard 20 Feb 2001 : Column CWH822):

"To some extent, albeit limited, the role of positive covenants can be replaced by easements. Flying freeholds can offer the benefit of a right of support - an easement of support - from the freehold underneath them. In this way, the lower freeholder cannot knock down the walls and leave the upper part of the building to float in the air. Unfortunately, however, there is no corresponding easement of shelter which would entitle the owner of the lower part of the property to insist that the owner of the upper part maintains the roof and stops the water dripping through."

The decision in Abbahall Ltd v Smee [2002] EWCA Civ 1831 offers some partial relief for landowners in this situation. However, we would welcome a statutory standard (comprising both easements & land obligations) to put paid to problems with flying freeholds in cases where the parties have failed to cater expressly for this.

5.4 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.

[paragraph 4.53]

We agree with your proposal provided it relates to transactions after the date of reform. However, there is also 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.

5.5 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?

[paragraph 4.104]

We agree but transitional provisions would need to make it clear that s.62 LPA 1925 could continue to operate in its current form after the date of the change in law where a contract or option was in place on that date.

5.6 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?

[paragraph 4.106]

We have no comments.

5.7 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;

(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; and

(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.

[paragraph 4.149]

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.

However, we agree that there ought to be a statutory "safety net" for those landowners who, perhaps without legal advice, buy land without help from a qualified conveyancer, and fail to create expressly all the easements that they need to make their property self-contained. A similar outcome may arise where it is the ill-advised seller of part who fails to reserve the necessary easements for his retained land to remain self-contained. For both such parties, a limited range of implied easements would provide protection.

First, we would restrict implied easements to those of limited classes – access, use of conduits and support. We would not want to extend the implied easements to interests such as car parking or rights of light. In the case of access we would (see below) extend this to vehicular as well as pedestrian access, unless the quality of the land over which the right of way were exercised were such as to prohibit clearly vehicular use.

As to the circumstances when implication would arise, there are a wide range of views.

Almost all share the views expressed in paragraph 4.110 of the Consultation Paper and reject option (2)(a), on grounds that ascertaining the ***actual*** *intentions of the parties years after the event would be very difficult, and in some cases, the parties will not have addressed their minds to what they intended in the circumstances that have come about.*

The differences between (2)(b) and (3) are subtle. We believe they amount to:

● as it is based on presumptions, route (2)(b) would allow the parties to rebut those presumptions by factual evidence. Route (3) would not.

● the need to define the presumptions for route (2)(b) will prompt vigorous and lengthy debate. This may delay implementation of the change.

● route (3) is a narrower test. It requires the easement to be both necessary and for "reasonable" use of the land. There would be debate about what is "necessary" and which user was "reasonable" from time to time.

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). It would be appropriate to indicate, in route (3), that the time at which "necessary and reasonable use" is assessed, is at the date of implied grant (not the date the extent or existence of the implied easement is being challenged in court. Moreover, we think it would be highly desirable to state, in route (3), that a vehicular right of way (as opposed merely to a pedestrian one) will fall within the category of "necessity", unless the nature of the land over which the right of way is implied is very clearly such as to make vehicular use impossible.

Whichever route were recommended, we would want it made clear that the parties can expressly contract out of the rules for implication of easements, such that the transfer were the only determinant of easements granted.

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

[paragraph 4.150]

Although the Consultation Paper seems to suggest that statutory codification of the rules of implied easements would be an alternative to the methods outlined in the immediately preceding question, we anticipate that any change would have to be achieved by statute. Thus, if change is to be made, there will be an inevitable codification.

5.9 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.

[paragraph 4.174]

We agree, but appropriate protection for those in the course of acquiring rights should be included in any transitional provisions.

5.10 We invite the views of consultees as to:

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

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

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

[paragraph 4.193]

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. Proprietary estoppel etc would not be sufficient to fill the gap, since it is difficult for the parties to ascertain their rights without recourse to the courts.

5.11 We provisionally propose:

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

(b) 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;

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

(d) 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.

[paragraph 4.221]

We disagree with proposal (b). It exposes innocent dominant owners to the loss of a legal easement in circumstances that they may not have been able to avoid or where the easement is inherently exercisable only infrequently.. Where, after expiry of the 20 year period, the servient landowner does not change, there is no reason to deprive the dominant owner of the easement acquired just because it has not been exercised for a 12 month period. Where, after expiry of the 20 year period, the servient landowner changes, the existing rules on overriding interests will protect that new owner from being bound by easements that are not readily apparent, or have not been exercised within 12 months. For example:

- *an elderly householder gives up her car, so no longer uses the shared drive, over which she has been driving for 30 years, to her garage. A couple of years later she goes into a nursing home. Her house is put on the market in a housing recession. It is not sold for another year. It is only at that point, realistically, that anyone will seek to establish the right of way. Prescriptive rights, by definition, arise informally and it is only when there*

is a dispute or a sale/charge that there is a trigger for considering registration. The elderly householder in this example will never think that giving up driving is a prompt to take legal advice about the rights enjoyed by her property.

- *one house has acquired the right to use services under another by 20 years use. The owner does not consider that it is necessary to register these (indeed they are probably ignorant of the fact that a formal easement was never granted). The house is then left empty for a year. No-one flushes the toilet or turns on the tap. The house is then sold/reoccupied. Why should the original servient owner escape the burden of those easements – he had long enough to object whilst they were being acquired.*

but otherwise agree with the proposals, subject to the following comments.

- *"Continuous" use will need to be defined with care to cover those rights which, by their nature, are only exercised intermittently (eg a right to go onto neighbouring land to repair or redevelop or inspect).*

- *Careful consideration needs to be given as to how past use (ie before implementation of the changes) should be treated*

- *Where would 'obstruction' notices be registered? We would be concerned if they opened the door to including other things which are not interests in land on the register.*

- *The Crown should be subject to the same 20 year rule*

5.12 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.

[paragraph 4.231]

We are unclear about the meaning of this question.

If it is asking whether the putative servient owner should be notified of the application before the right is registered, we would agree with the suggestion. The servient owner should have the opportunity to challenge the evidence given in support of the right. We consider that any dispute over the facts is, ultimately, a matter for the court, not the Land Registry.

However, we believe that the question may be asking what the status of the 'right' is prior to registration – is it inchoate or substantive? If that is the question, then we believe that the right 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.

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

[paragraph 4.232]

We strongly disagree with the servient owner having a right of veto. By definition, he is likely to be a near neighbour of the dominant owner and will have had at least 20 years within which to terminate or formalise the rights. His only right of challenge should be to the facts (eg the use is pursuant to a consent, or the use has not been for 20 years).

5.14 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.

[paragraph 4.245]

Although there are some attractions in the idea of relaxing the rules, particularly where long leases are involved, on balance we consider that to do so would add to, rather than reduce, the complexity of the law on prescription. There are already difficult unresolved questions about the status of easements that benefit leasehold interests – see response in paragraph 6.6.

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

[paragraph 4.247]

Adverse possessors should not be treated any differently.

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

[paragraph 4.250]

Most firms agree that the issue of capacity of the owners should be ignored when deciding whether a prescriptive right has arisen on the basis that in practice the dominant owner may have no knowledge of either the identity or the capacity of the servient owner, so it seems unreasonable to treat the position differently. Some still take the purer view that, if an express grant of the easement would have been impossible, due to lack of capacity, so should the implied easement arising by prescription.

5.17 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.

[paragraph 4.256]

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. If the new scheme is brought in for unregistered land, it will be necessary to consider how it applies in each of three different situations:

- *where neither property is registered;*
- *where the dominant land only is registered;*
- *where the servient land only is registered.*

At present, if the servient tenement is unregistered, the dominant owner can register a caution against first registration of that servient land, so that, when and if it comes to first registration, he will get the chance to present evidence of the implied/prescriptive easement and (if successful in proving it) have it reflected in the register entries for the servient land. If the dominant land is registered, then a note can be made in the register of that title of the existence of the easement as benefiting the dominant land.

Some have suggested the invention of a new class of land charge, to protect a legal easement arising by prescription This would automatically result in the burden of that easement being noted on the register of the servient land on first registration. However, we see several drawbacks:

- it may be impossible to identify the current proprietor of the unregistered land so as to register the landcharge against their name.

- the dominant owner who acquires an easement by prescription is unlikely to have realised they have done so (until challenged) so is unlikely to take the initiative to register the landcharge.

- if a new landcharge were invented, then a dominant owner who failed to register the landcharge would find (as with other landcharges) that he lost the benefit of his legal easement when the unregistered servient land was disposed of, even if the disponee was aware of the easement.

Accordingly we believe that sufficient protection is given by the existing system of cautions against first registration.

6 EXTINGUISHMENT OF EASEMENTS

6.1 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.

[paragraph 5.30]

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.

6.2 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.

[paragraph 5.31]

We think it will be difficult to prove non-use. Subject to that caveat, we could only support the proposal if:

- it applied only to easements (whether express or implied) if they were ***created/arose after the date the changes came into force*** *and had not been registered. For easements granted before that date, it would be necessary for the*

servient owner to apply under the amended s84 LPA 1925 to have them extinguished.

- 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.

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

(a) the dominant land is altered in such a way that it undergoes a radical change in character or a change in identity; and

(b) the changed use of the dominant land will lead to a substantial increase or alteration in the burden over the servient land.

[paragraph 5.51]

As these are always questions of fact and degree, we wonder whether this codification of the current judge-made law will make any difference in practice.

We would favour:

- it being made clear that an easement can be granted so as to benefit after-acquired dominant land AND

- (in the case of an express grant) no determination of excessive use would apply where such alteration in dominant land character or change in use had been clearly contemplated at the time of the grant.

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

(a) extinguish the easement;

(b) suspend the easement on terms;

(c) where the excessive use can be severed, order that the excessive use should cease but permit the easement to be otherwise exercised; or

(d) award damages in substitution for any of the above.

[paragraph 5.63]

We suspect that this will not make any difference in practice and suggest the present position is retained. However, the proposals in paragraphs (a) and (b) of paragraph 5.63 (and a power to award damages as a consequence of an order extinguishing or suspending an easement) may be useful to cover cases where works that are incompatible with the continued existence of an easement are required by statute and the consequent physical alterations to the servient land render use of the easement impossible. See, for example, the contrasting decisions in Jones v Cleanthi [2006] PLSCS 257 (CA) and in Yarmouth Corporation v Simmonds (1878) 10 Ch D 518.

6.5 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.

[paragraph 5.71]

As discussed at paragraph 4.3.2 above, we believe that it is important that an express easement at least should be capable of being granted so as to benefit after-acquired dominant land. This would need proper definition (so that it was not just any land acquired by the dominant owner), but having done so, the intention of the parties should not be upset by an argument that the resultant wider use is "excessive" and thus wider use of the easement is not possible. For other easements (including express easements which are not specifically expressed to benefit after-acquired land), the second test of excessive use as outlined in paragraph 5.51 of the Consultation Paper (substantial increase or alteration in burden) is more appropriate (the first test – a radical change in character or identity of the dominant land – is not easily applied to a situation where, by definition, the dominant land has been added to by after-acquired property).

6.6 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.

[paragraph 5.86]

Many firms support the statutory repeal, ideally retrospectively, of Wall v Collins. Some do not.

Whatever the position is on termination of the leasehold estate by effluxion of time, a different position may be appropriate where the same person comes to own both freehold and leasehold interests.

Where a leasehold interest (with appurtenant easements) becomes vested in the freeholder or superior leaseholder this is called ***surrender****.*

Where an existing tenant (with easements appurtenant to his lease) acquires the freehold interest this is called ***merger****.*

Surrender is a matter of fact, not intent, so the leasehold interest (and the appurtenant easements) will terminate. This may not be the intention of the parties.

Merger is a matter of intent -, the leasehold interest will not terminate unless the tenant chooses to merge it in the newly acquired freehold. In many cases they will not so choose, for reasons that are nothing to do with the preservation of the easements attached to that leasehold interest (eg rent review or service charge provisions). However, where there are no such other reasons, they might now choose not to merge, just to preserve their ability to continue to use the easements from which that leasehold interest benefits, until expiry of the lease term. This will encourage the proliferation of essentially dead titles.

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 easement for the residue of the term of the lease. On completion of that process, the leasehold title could be closed.

If this proposal were taken forward it would be necessary for there to be provision for the following cases:

(1) So as to meet the point decided in Rymer v. McIlroy [1897] 1 Ch. 528. The present law is summarised in paragraph 55 of Halsbury's Laws Volume 16 (2) (Re-issue), though Counsel for the Plaintiff, and also the Judge, in Rymer v. McIlroy appear to have misunderstood the facts in the case of Smeteborn v. Holt (1347) YB21Edw3fo.2, pl5 (because as one of the translators of the report from the Norman French has it "in the case here the Plaintiff had had the freehold to which he claimed the right of way from as early a time as the right of way was claimed by him").

(2) So as to accord with and give effect to, the law as presently stated in section 139(1) and section 150 of the Law of Property Act 1925.

(3) Perhaps (to resolve the point mentioned in paragraph 5.85 by enabling parties to give effect to their intentions) by permitting the grant of an easement that benefits "such title or interest" as the dominant owner has in the land from time to time. Then, if at the time of the grant B holds a leasehold interest in the dominant land the easement would be for the benefit of that leasehold interest. If B (or B's successor) subsequently acquired some other leasehold interest, or the freehold, in the dominant land then the easement would be for the benefit that other leasehold interest or the freehold and any extinguishment of the initial leasehold interest held by B would be irrelevant.

7 PROFITS À PRENDRE

7.1 We provisionally propose that:

(a) profits should only be created by express grant or reservation and by statute; and

(b) 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.

[paragraph 6.30]

We agree.

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

(a) by express release;

(b) by termination of the estate to which the profit is attached;

(c) by statute; and

(d) by abandonment, but only where the profit is not entered on the register of title.

Do consultees agree?

[paragraph 6.54]

We agree. Please clarify the inconsistent statements at paragraphs 6.33 and 6.35 of the Consultation Paper regarding release of a profit of common by one person – does it release the profit in its entirety?

8 COVENANTS: THE CASE FOR REFORM

8.1 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?

[paragraph 7.59]

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

[paragraph 7.66]

Yes.

8.3 We provisionally propose:

(a) that there should be reform of the law of positive covenants;

(b) that there should be reform of the law of restrictive covenants; and

(c) 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?

[paragraph 7.79]

Yes, although we have concerns that the proposed regime of Land Obligations will replicate some of the existing difficulties and defects.

8.4 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.

[paragraph 7.80]

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.

9 LAND OBLIGATIONS: CHARACTERISTICS AND CREATION

9.1 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:

(a) 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; and

(b) an obligation of a positive nature could be a positive obligation or a reciprocal payment obligation:

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

(A) 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;

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

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

(ii) 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.

[paragraph 8.23]

We agree that there should not be separate types of Land Obligation, but believe that it is not necessary to be as prescriptive as this proposal.

9.2 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.

[paragraph 8.24]

We agree with the Law Commission's proposals.

We believe it will be helpful to make it clear why overage payments are not to be capable of being Land Obligations (on grounds that they are a personal benefit, rather than something which accommodates the dominant land), as at first sight they would seem to be like other reciprocal payment/performance obligations.

9.3 We provisionally propose that a Land Obligation must be expressly labelled as a "Land Obligation" in the instrument creating it. Do consultees agree?

[paragraph 8.28]

Yes.

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

[paragraph 8.38]

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. The proposal in paragraph 8.36 of the Consultation Paper that, in the case of unregistered land awaiting first registration, the document creating the Land Obligation should not give rise to an equitable obligation pending registration might cause difficulties. The covenantee has no control over the registration by the covenantor, who might allow a registration to lapse deliberately in order to avoid the obligation. Or, less culpably, there might be a sale of the covenantor's land before the Land Obligation is registered.

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

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

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

[paragraph 8.40]

We agree, provided the prescribed form is flexible enough. 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. Is it intended that the Land Obligation regime should apply to leasehold covenants which do not relate to the demise (eg a landlord's non-competition covenant)?

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

[paragraph 8.41]

The parties should be able to correct the document.

9.7 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.

[paragraph 8.47]

We think that it should require notice on the burdened estate, but that entry of the benefit on the benefited land register should not be compulsory.(In practice, Land Registry will note the benefit).

9.8 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.

[paragraph 8.54]

Of the examples quoted in paragraph 8.52 of the Consultation Paper, we think that the first is not relevant to Land Obligations.

9.9 We are provisionally of the view that only the holder of a registered title should able to create a Land Obligation. Do consultees agree?

[paragraph 8.55]

Plus a person who is "entitled to be registered …" (s.24 Land Registration Act 2002). We also consider that a registered leaseholder should be able to create a Land Obligation which binds/benefits the leasehold interest (but does not bind/benefit the reversion, in accordance with the proposal at paragraph. 9.29(1) of the Consultation Paper).

9.10 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.

[paragraph 8.61]

We believe that an equitable Land Obligation should bind successors in title only if it is noted on the register.

9.11 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:

(a) the interest would have to be registered only against the title number of the estate burdened by the equitable Land Obligation; or

(b) the interest would have to be registered against the title numbers of the estate benefited and the estate burdened by the equitable Land Obligation.

[paragraph 8.62]

To avoid unnecessary complexity, we would adopt option (a) and they should be protected in the same way as legal Land Obligations.

9.12 Our provisional view is that it should not be possible to create Land Obligations in gross. Do consultees agree?

[paragraph 8.65]

We agree that this should not be possible save in very restricted circumstances, and, if permitted at all, 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.

As an example – where a development has communal areas which are repaired and cleaned by a management company, but those areas are not vested in the management company (instead they are vested in each of the owners of the adjoining units). Here, the management company has no land to which to attach

the benefit, but it needs to be able to enforce the obligations that each of the units has to contribute to costs. Currently it would have to use an estate rentcharge or commonhold to achieve this enforceability (or in leasehold situations s13 Landlord and Tenant (Covenants) Act 1995 may be used).

9.13 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:

(a) 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;

(b) a Land Obligation affects the nature, quality, mode of user or value of the land of the dominant owner;

(c) 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.

[paragraph 8.80]

We agree with these proposals. Where there are cross obligations in a Land Obligation document, the dominant land for one covenant may be the servient land for the next, so it will be necessary to use great care in how each is defined for each covenant/easement/obligation.

9.14 We provisionally propose that, in order to create a valid Land Obligation:

(a) there would have to be separate title numbers for the benefited and the burdened estates; but

(b) there would be no need for the benefited and the burdened estates in the land to be owned and possessed by different persons.

[paragraph 8.88]

It is not clear if the Land Obligations are extinguished if the two titles are amalgamated. By analogy with the proposals for easements, we would argue not. We also think that these ideas should be tested with advisers to housebuilders: will they work if the development is carried out in phases, will owners of phase 1 be able to ask owners of phase 2 to contribute to the maintenance costs of roads crossing phase 1.

9.15 We provisionally propose that:

(a) 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

(b) 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:

(i) an injunction;

(ii) specific performance;

(iii) damages; or

(iv) an order that the defendant pay a specified sum of money to the claimant.

[paragraph 8.97]

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 right for the dominant owner to go onto the servient land and exercise self-help, with the costs to be payable by the servient landowner.

9.16 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.

[paragraph 8.109]

We agree, but there would need to be transitional arrangements to cover covenants imposed by a form of transfer agreed before the changes come into effect, but actually implemented and completed after they come into effect. Either these covenants will need to be automatically converted (and without change of language in the transfer) into Land Obligations, or the old regime will apply to them, and a statement will need to be put in the transfer to the effect that it is entered into pursuant to a pre-change agreement (thus signalling to later readers that it is governed by the old regime).

9.17 We seek consultees' views as to whether this prohibition should also apply to <u>new</u> covenants running with the land where either the benefited or burdened estates in land, or both are unregistered.

[paragraph 8.110]

The prohibition should not apply in these circumstances. However, if the parties wish to take advantage of the wider benefits of the new Land Obligations scheme, they may only do so by registering their land.

Effectively this will encourage the first registration of the land affected by a Land Obligation, so that it is properly protected and binding against successors in title.

9.18 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.

[paragraph 8.111]

We agree that you should not, in these reforms, upset the application of the Landlord and Tenant (Covenants) Act 1995 (which applies not only to covenants in the lease itself, but also to ancillary and supplemental documents). 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 but in relation to land other than that demised.

9.19 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.

[paragraph 8.112]

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.

9.20 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?

[paragraph 8.113]

We agree that the old regime should continue to apply in these circumstances.

9.21 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.

[paragraph 8.119]

We agree that new estate rentcharges should not be possible (post introduction of Land Obligations) in ***Registered land.*** *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).*

9.22 We provisionally propose that the rule against perpetuities should not apply to Land Obligations. Do consultees agree?

[paragraph 8.122]

Yes

10 LAND OBLIGATIONS: ENFORCEABILITY

10.1 We provisionally propose that a Land Obligation would be appurtenant to an estate in the dominant land (the "benefited estate").

[paragraph 9.5]

Yes, but thought will need to be given to the effect of the termination of that estate (where it is leasehold) by effluxion of time, by surrender or by merger. See our earlier comments on this at paragraph 6.6 in the case of easements.

10.2 Subject to our proposals on sub-division, we provisionally propose that the benefit of a Land Obligation should pass to any person who:

(a) is a successor in title of the original owner of the benefited estate or any part of it; or

(b) 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.

[paragraph 9.10]

We agree.

10.3 We provisionally propose that a Land Obligation should attach to an estate in the servient land ("the burdened estate").

[paragraph 9.19]

See our comments at paragraph. 10.1 above, responding to paragraph. 9.5 of the Consultation Paper.

10.4 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.

10.4.1 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?

10.4.2 Option 2: Should the class be restricted to the owner for the time being of the burdened estate or any part of it? or

10.4.3 Option 3: Should the class encompass:

(a) the owner for the time being of the burdened estate or any part of it;

(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.

[paragraph 9.20]

The starting position should be that the deed which creates the Land Obligation can set out the persons who will be liable. Whatever is chosen under this proposal should therefore be the "fall-back" position, if the parties fail to specify. Of the options suggested., we think that Option 2 is the best.

If Option 1 is chosen, we think (d) is too vague.

10.5 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.

[paragraph 9.21]

See our response at paragraph 10.4 above. The parties should be able to make their own provision as to who is bound. If they do not, Option 2 should apply.

10.6 We provisionally propose that restrictive obligations should be binding upon all persons:

(a) with any estate or interest in the servient land or any part of it; or

(b) in occupation of the servient land or any part of it.

[paragraph 9.23]

We agree

10.7 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 whether any other exceptions be made to the class of persons who should be bound by a Land Obligation?

[paragraph 9.29]

We agree with (1) so long as the question of whether the interest has priority is judged by the normal application of s27 LRA 2002. Since we have selected Option 2 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 it is only owners of subsidiary interests/mortgagees of the servient land (not successors in title to the original contracting party) that are excluded from liability.

On the basis that we have selected Option 2, we do not think there should be other exceptions made to the class of persons who should be bound by a Land Obligation.

10.8 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.

[paragraph 9.34]

We agree

10.9 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.

[paragraph 9.36]

We agree (although the squatter would be bound anyway under the proposal at paragraph 9.23 of the Consultation Paper)

10.10 We invite the views of consultees as to whether such a squatter should be bound by a positive or reciprocal payment obligation.

[paragraph 9.37]

It would be possible to provide in the instrument creating the Land Obligation that such squatters should be bound. Alternatively, notwithstanding that such a squatter would not fall within any of the options 1-3, we agree that the squatter should be bound – this can be justified on a Halsell v Brizell basis.

10.11 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).

[paragraph 9.41]

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.

10.12 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 when the breach occurs.

[paragraph 9.43]

We agree that liability should be joint and several.

10.13 We provisionally propose two exceptions to the class of persons liable for a particular breach of a Land Obligation:

(a) 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

(b) a person should not be liable where contrary provision has been made in the instrument which creates the Land Obligation.

[paragraph 9.48]

We agree with (b).

We would also agree with (a) if Option 1 were selected in our paragraph 10.4, but with the reference to "appointing a receiver" omitted. (It would be inappropriate for a mortgagee to be bound just because they had appointed a receiver, since the receiver is the agent of the Mortgagor). However, as we prefer Option 2, the need to exclude a mortgagee would not arise.

11 LAND OBLIGATIONS: VARIATION OR EXTINGUISHMENT

11.1 We provisionally propose that Land Obligations should be capable of variation and extinguishment:

(a) expressly; and

(b) by operation of statute.

[paragraph 10.9]

We believe that variation should be possible by both methods and extinguishment should be possible expressly, or by operation of specific statutes (again it would be preferable to have a list of those that can do this) including s84 LPA 1925. They should not be capable of extinguishment by abandonment as this is too hard to prove and will lead to unpredictable results. Section 84 LPA 1925 can be used instead.

11.2 We provisionally propose that Land Obligations should be automatically extinguished on the termination of the estate in land to which they are attached.

[paragraph 10.10]

We disagree. Whilst it would be reasonable to expect automatic extinguishment on termination of a lease by effluxion of time, or its early termination by forfeiture or exercise of a break clause, it would be unjust if a tenant who has entered into a Land Obligation with a neighbouring owner should escape from it by buying in the freehold of his leasehold land and merging the lease into the freehold. Similarly it would be unjust if the Land Obligation were to be extinguished where the freeholder acquired the lease and the lease thus terminated by surrender. Currently the Land Registry (see Practice Guide 26) will normally carry forward easements and restrictive covenants forward onto the reversionary title.

11.3 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.

[paragraph 10.26]

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 company with no assets. It may be necessary to amend the Civil Liability (Contribution) Act 1978 to deal expressly with positive Land Obligations.

We do not understand the suggestion at paragraph 10.20 of the Consultation Paper that an agreement between B2 and B3 cannot be binding on their successors in title, if registered on their titles.

The analogy with the Landlord and Tenant (Covenants) Act 1995 (paragraph 10.23 of the Consultation Paper) is flawed. Leases with substantial covenants (eg a significant rent) are generally capable of assignment only with landlord's consent, so that the landlord retains the ability to control the identity of its obligor.

11.4 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.

[paragraph 10.27]

We agree that there should be the opportunity for owners of parts of the servient land to redistribute the burden of liability between them, but we disagree that the parties entitled to enforce the Land Obligation should be bound by that decision. It should merely affect the liability as between the various owners of part.

If the redivision of liability were to be binding on all benefitted owners it would be essential that they received adequate notice of the court/lands tribunal hearing, so that they could put in representations. Not all such owners will be easily identifiable, so giving them notice will be impossible (eg holders of short, unregistered leases). It would be unfair to deprive them of the benefit of the Land Obligation (at least against some originally liable people) without giving them the opportunity to object.

11.5 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?

[paragraph 10.31]

We agree unless the Land Obligation expressly indicates otherwise.

11.6 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:

(a) the Land Obligation does not "relate to" or benefit that part of the benefited land;

(b) 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

(c) express provision has been made for the benefit of the Land Obligation not to pass.

Do consultees agree?

[paragraph 10.44]

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.

- there must be no prospect of double recovery – the amount for which the defaulting obligee is responsible by way of damages should be no greater than if the benefitted land had not been sub-divided.

- will benefit of a Land Obligation pass to the holder of a subsidiary short-term interest in part of the benefited land eg the grantee of an unregistrable lease?

11.7 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?

[paragraph 10.45]

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?

12 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.

[paragraph 11.22]

Commonhold is not an area of law in which any of the firms on whose behalf this response is given have extensive practical expertise. Thus there may be nuances that are achievable through commonhold that are not achievable through Land Obligations (though we do not understand the statement in paragraph 11.19 of the Consultation Paper that owners of flats in a communal block with common parts would be disadvantaged by use of Land Obligations). We agree that it would be helpful for developers to receive guidance on which may be best suited to which situation.

13 LAND OBLIGATIONS: SUPPLEMENTARY PROVISIONS

13.1 We provisionally propose that there should be supplementary provisions which may be included in the instrument creating a Land Obligation as follows:

(a) 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;

(b) a provision requiring the payment of interest if default is made in complying with a reciprocal payment obligation; and

(c) 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.

[paragraph 12.16]

We agree that all or any of these may be useful. It is also commonplace to give the benefited landowner the right of entry onto the servient land to carry out the work (if the servient owner does not) – a "self-help" provision. 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. The Landlord and Tenant (Covenants) Act 1995 does not attempt to do this for covenants in leases (see wide definition of "covenant" and the circumstances in which a landlord or tenant covenant will run).

13.2 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.

[paragraph 12.17]

We do not think that the range of provisions should be limited. See our reply at paragraph 13.1 above.

13.3 We provisionally propose that it should be possible for parties to create shortform 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.

[paragraph 12.25]

We support the idea of short form Land Obligations as an option that the parties may select. However see our reply to proposal 4.34 at our paragraph 5.2 in the context of short form easements as to the method of their incorporation and an opportunity to comment further on their detailed wording. In particular we would not, as with easements, support short form Land Obligations as the only way of creating Land Obligations in the new regime.

13.4 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.

[paragraph 12.26]

We believe that the parties should always be free to vary the terms of short form Land Obligations, should they choose to use those, rather than drafting their own express obligations.

14 TRANSITIONAL ARRANGEMENTS AND THE PROBLEM OF OBSOLETE RESTRICTIVE LAND OBLIGATIONS

14.1 We invite consultees' views on the various options for dealing with existing restrictive covenants in the event of the introduction of Land Obligations.

[paragraph 13.89]

On balance we favour Option 7 (old restrictive covenants continue to be bound by the old system, whilst those created after the changes have to conform to the Land Obligations regime). Many beneficiaries of restrictive covenants do not actually know that they have that benefit, so it is unrealistic to expect them to take positive action to protect them by registration. There may also be compelling Human Rights arguments against adversely affecting old-style restrictive covenants.

Option 1 suffers from the major difficulty identified at paragraph 13.31 of the Consultation Paper.

Option 2 seems to be unworkable within current Land Registry practice. The benefit of restrictive covenants is not automatically noted on the dominant estate title. The buyer may therefore be ignorant of the fact that the land bought benefits from a restrictive covenant, and therefore may not apply for it to be renewed as a Land Obligation. The buyer may only be prompted to make relevant checks when development is threatened, which may be too late.

Option 3 suffers from a combination of problems inherent in Options 1 and 2 (see above).

Option 4 is not practicable since, as identified at paragraph 13.50, in most cases it is not possible to identify comprehensively the benefited land.

Option 5 seems to be the one favoured by the Commission (see paras 13.63 and 13.88) but suffers from the same 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.

Option 6 is not appealing, but if used, would need very long time periods – eg 50 years from date of legislation or 150 years from the date of imposition, whichever is longer. This avoids the risk that some old covenants disappear immediately. With such long time periods it seems unlikely that landowners would wait this long. They would probably rather apply under section 84 LPA 1925 for it to be extinguished or modified as being obsolete.

14.2 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.

[paragraph 13.90]

No such steps should be taken. It should be for the parties to apply under and obtain a determination under s84 LPA 1925. Anything else runs the risk of potentially still useful restrictive covenants (which just happen not to have been enforced for some time) being removed.

14.3 We welcome the views of consultees as to whether there should be any mechanism for the automatic or triggered expiry of Land Obligations.

[paragraph 13.99]

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.

S84 LPA 1925 provides a perfectly workable alternative for those that wish to have a Land Obligation removed from their title.

If it is determined that some sort of automatic expiry system should apply then only Options 1,2 and 5 (of the options suggested for restrictive covenants – see our paragraph 14.1) could be used for Land Obligations.

Option 1 is not suitable for the same reasons as outline in paragraph 14.1.

Option 2 would work, but application would be likely to be made automatically to renew the Land Obligation so as to avoid any suggestion of negligence – this wholesale preservation of the status quo would only be avoided if it were necessary, in that application for renewal, to show that the Land Obligation still served a useful purpose. This may be difficult to do and give rise to uncertainties as to what evidence would be sufficient.

Option 5 would work, but there would be similar objections from any title indemnity insurance company – see our paragraph 14.1 above.

15 SECTION 84 OF THE LAW OF PROPERTY ACT 1925: DISCHARGE AND MODIFICATION

15.1 We invite the views of consultees on the compensation provisions contained in section 84(1) of the Law of Property Act 1925.

[paragraph 14.15]

We agree that it would be useful if the compensation rules were clarified. The current law is very confused so far as the basis of compensation is concerned (see Winter v Traditional and Contemporary Contracts (2007))

15.2 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:

(a) easements;

(b) profits; and

(c) Land Obligations.

[paragraph 14.41]

We agree, particularly if s84 procedures are reformed so as to be more efficient and quick. Perhaps it should also be made clear that applications for modification or discharge should be made ONLY to the Lands Tribunal (rather than the court)

(see Turner v Pryce (2008)). Consideration needs to be given as to the effect of the Tribunals, Courts and Enforcement Act 2007.

15.3 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.

[paragraph 14.42]

We are confused by this question. It seems to overlap considerably with the immediately preceding question.

15.4 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.

[paragraph 14.70]

We agree with proposal (2). In relation to proposal 1, clarification will be needed as to "purpose". In paragraph 14.46 of the Consultation Paper it is stated that purpose refers to the scope of the right (not, as might conventionally be interpreted, the reason why the right was created). However, at paragraph 14.52 it would seem that purpose is used in its more conventional way.

15.5 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.

[paragraph 14.71]

We agree that these should be grounds for discharge or modification. However, we wonder why the second half of s84(1) (aa) has been dropped (the test that the covenant continues to secure a practical benefit of substantial value or advantage). Is this intended to be subsumed in new test (1). Where also is the detailed proposal for replacing s84(1)(b). Both of these are useful circumstances in which discharge or modification should be possible.

It would make sense also for section 610 Housing Act 1985 (see Lawntown Ltd v Camenzuli [2007] EWCA Civ 949) to be accommodated within the revised legislation, so that the Lands Tribunal retains sole jurisdiction over the modification or discharge of restrictive covenants.

15.6 We provisionally propose that obsoleteness should cease to be a ground for discharge or modification.

[paragraph 14.72]

We agree. The circumstances where a covenant has been considered obsolete would now be covered by one of the limbs proposed in paragraph 15.5.

15.7 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.

[paragraph 14.74]

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 that the applicant need only succeed against one beneficiary and that decision will bind all beneficiaries who were notified of proceedings? The latter might pose some problems under the Human Rights Act.

15.8 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.

[paragraph 14.82]

We agree

15.9 We provisionally propose that 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 the 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.

[paragraph 14.83]

We agree with (1).

We are unclear as to the ambit of proposal (2). Does it relate to the applicant's consent (ie, on current rules, the owner of the burdened land) or the consent of the beneficiaries. Does the Lands Tribunal currently insist on the consent of all persons benefited in order to modify the covenant? We do not think that the consent of a mortgagee should ever be dispensed with.

15.10 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.

[paragraph 14.93]

We think this should be embraced only with extreme caution, as what qualifies as "unreasonably expensive" depends on which party you are. Moreover, the burdened owner probably paid less for the land as a result of the obligation binding the land, and it would be an unfair windfall if he was subsequently able to get that obligation discharged or modified.

15.11 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.

[paragraph 14.94]

We agree.

15.12 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 easements, profits and Land Obligations.

[paragraph 14.95]

15.13 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.

[paragraph 14.101]

We agree that reference to court should be possible only with leave (to speed up proceedings and prevent abuse).

We would go further and suggest that only the Lands Tribunal should be able to hear applications under s84(1), whilst only a court could make declarations under s84(2).

15.14 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.

[paragraph 14.106]

We agree that beneficiaries should be able to apply under s84(1), but they would need to get the consent of the burdened land's owner to any modification. The suggestion that s84(1) should be extended to leasehold covenants, regardless of the length of the lease, requires further debate.

15.15 We invite the views of consultees as to whether the overlap between negative easements and restrictive Land Obligations should be:

(a) eliminated by abolishing all of the rights capable of existing as negative easements, with prospective effect; or

(b) 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.

[paragraph 15.42]

We believe that many land developers would be delighted if most negative easements arising by prescription or impliedly 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 (e.g. right to light) should no longer be capable of prescriptive acquisition (proposal 4.193(2) of the Consultation Paper).

Contact details:

Any comments on this response should be sent to:

Elizabeth Thompson
Berwin Leighton Paisner LLP
Tele: 020 760 1000
Email: Elizabeth.Thompson@blplaw.com

30 June 2008