



## **CITY OF WESTMINSTER AND HOLBORN LAW SOCIETY**

### **RESPONSE TO LAW COMMISSION CONSULTATION PAPER NO. 186**

### **EASEMENTS, COVENANTS AND PROFITS À PRENDRE**

**This is the response of the City of Westminster and Holborn Law Society to the Law Commission's Consultation Paper 186. The Society represents nearly 1,000 solicitors, mostly working in the area of its name. The principal author of this paper is Gerald Moran of Messrs Hunters.**

**The numbering of the consultation questions corresponds with that in the summary in Part 16 of the Consultation Paper.**

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## PARTS 1 & 2 INTRODUCTION, GENERAL AIMS

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

[paragraph 1.29]

**1. Human rights (1.29) Steps must be taken to notify persons affected by applications affecting property rights, with recourse to judicial procedure for disputes and including compensation where applicable.**

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

[paragraph 1.34]

**2. Impact (1.34) Changes of law should not be made which make complications for practitioners and clients where this detriment is not justified by clear benefits as distinct from academic tidiness. Prohibitions on continued use of familiar rights, such as restrictive covenants would be resented as a means of foisting a system of Land Obligations upon owners and their advisers.**

## PART 3 CHARACTERISTICS OF AN EASEMENT

16.4 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]

**3. Easements in Gross Agreed. Easements should be attached to a freehold or leasehold estate rather than be in gross.**

16.5 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]

**4. Nature These proposals are agreed. Easements should accommodate and serve the benefited land and be related to the burdened land (better expressions than dominant and servient). A right to park should be an easement, whether on a defined space or one out of a number of spaces according to availability etc.**

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

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

use of the servient land; and

(2) the right must not be a lease or tenancy, but the fact that the dominant owner obtains exclusive possession of the servient land should not, without more, preclude the right from being an easement.  
[paragraph 3.55]

16.7 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]

**5. Different persons (3.66) Agreed. The same persons could hold land in different titles but in different capacities. It would also be helpful to create separate titles with easements etc in advance of a disposition although we wonder how much use would be made of that facility.**

#### **PART 4 CREATION OF EASEMENTS**

16.8 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]

**6. Interpretation (4.24) We agree that there should be no automatic presumption in favour of the person making a reservation (or his successors) in cases of ambiguity. Presumably this will not be formulated as at 4.14 (read literally).**

16.9 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]

16.10 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]

**7. Short forms (4.34 & 35) Word-saving statutory formulations may be helpful for rights of way, drainage, utilities, light and air, support/shelter etc – but parties should be entirely free to decide what formulations they require for the particular circumstances. We wonder how much use would be made of short forms requiring reference to another document, such as a statute.**

16.11 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]

**8. Implied easements (4.53) We agree that in the case of new dispositions, it should not matter whether implication is for grant or reservation, provided that the parties are free to negate implication by express provision.**

16.12 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]

**9. Precarious benefits (4.104) Agreed. There seems to be no justification for licences to be transformed into easements when benefited land is conveyed.**

16.13 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]

**10. Non-derogation (4.106) Whether or not an easement is implied should depend upon evidence of what was stated or reasonably implicit from the circumstances without need for any particular doctrine.**

16.14 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.

(3) Whether they consider that it would be 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]

**11. Tests for implication (4.149 & 150) There is some merit in having a statutory formulation but circumstances very widely and no single factor can always be determinative, such as the view taken on what is necessary for reasonable use of land of either party where that is contrary to evidence of actual statements of intention between the parties. Presumptions as stated may be of some use in reducing uncertainty.**

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

[paragraph 4.150]

16.16 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]

16.17 We invite the views of consultees as to:

- (1) whether prescriptive acquisition of easements should be abolished without replacement;
- (2) whether certain easements (such as negative easements) should no longer be capable of prescriptive acquisition, and, if so, which; and
- (3) whether existing principles (for example, proprietary estoppel) sufficiently serve the function of prescriptive acquisition.

[paragraph 4.193]

16.18 We provisionally propose:

- (1) that it should be possible to claim an easement by prescription on proof of 20 years' continuous qualifying use;
- (2) that qualifying use shall continue to within 12 months of application being made to the registrar for entry of a notice on the register of title;
- (3) that qualifying use shall be use without force, without stealth and without consent; and
- (4) that qualifying use shall not be use which is contrary to law, unless such use can be rendered lawful by the dispensation of the servient owner.

[paragraph 4.221]

**12. Prescription (4.174, 193 & 221) We agree the proposals at 4.174 and 4.221 rather than 4.193(1), (2) & (3). Abolition of existing prescription rules should be in conjunction with a simpler system along the lines proposed, based on 20 years continuous qualifying use (regardless of how the use originally commenced previously).**

16.19 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]

16.20 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]

**13. Registration of prescriptive easement (4.231 & 232) Plainly the owner of land alleged to be subject to a prescriptive easement ought to be notified of an application for notice of it to be registered on his title and an opportunity to dispute whether or not the easement has arisen on the facts but not a veto.**

16.21 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]

**14. Tenants (4.245) Prescriptive acquisition of an easement should be for the benefited land regardless of the various interests in the land. If a tenant can pass the benefit of a prescriptive easement to his assignees it is difficult to see why he should not pass it on to his landlord when he goes (or to himself if he enfranchises). On the other hand, if a tenant is to be able to acquire an easement over other land of his landlord it is difficult to see that his landlord should be able to sell the burdened land and later take over the tenant's easement inconsistently with the terms of the sale.**

16.22 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]

**15. Adverse possessions (4.247) Someone acquiring land by adverse possession should not be treated more favourably than anyone else as regards the need for 20 years qualifying use for a prescriptive easement.**

16.23 We invite the views of consultees on the issue of the capacity of both servient and dominant owners.  
[paragraph 4.250]

**16. Capacity (4.250) As with limitation of actions, time should not run against incapable persons - but that should not stop it running so as to benefit such persons.**

16.24 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]

**17. Unregistered land (4.256) We agree with the proposal at 4.254. Aside from registration not being required, the new rules for prescription should apply equally to unregistered land.**

## **PART 5 EXTINGUISHMENT OF EASEMENTS**

16.25 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]

16.26 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]

**18. Abandonment (5.30 & 31) We do not agree with the proposal at 5.30 but there should be a statutory procedure to clear off abandoned rights noted on a registered title. It may be best for that also to apply to unregistered rights rather than have different rules, bearing in mind increasing coverage of registration of title.**

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

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

[paragraph 5.51]

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

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

[paragraph 5.63]

**19. Excessive Use (5.51 & 63)**

**a. We agree with the proposal at 5.51 save where it is shown that the possibility of change, even substantially increasing the nature and degree of burden, was expressly envisaged by the parties.**

**b. We agree with the proposal at 5.63 but there would then be the question of the approach to be taken when deciding which remedy to apply in a particular type of case. It also seems odd that excessive use may quickly terminate the easement but obstruction for many years might not do so by way of abandonment where the right was entered on the title years ago.**

16.29 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]

**20. Extending the benefited land (5.71)** We do not agree with the proposal at 5.71. If an easement is stated to be for the benefit of specified land it is difficult to see why that should be altered to extend to other land as well merely because there is little detriment to the burdened land because it has spare capacity. The question is whether the additional land should acquire a free right by “piggyback” rather than by actual grant or prescriptive use.

16.30 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]

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

## PART 6 PROFITS À PRENDRE

16.31 We provisionally propose that:

- (1) profits should only be created by express grant or reservation and by statute; and
- (2) a profit which is expressly reserved in the terms of a conveyance should not be interpreted in cases of ambiguity in favour of the person making the reservation.

[paragraph 6.30]

**22. Creation (6.30)** Agreed. Profits shall be created expressly by deed or statute. There should be no automatic presumption in favour of a person making a reservation (or his successor) in cases of ambiguity.

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

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

Do consultees agree?

[paragraph 6.54]

**23. Extinguishment (6.54)** We agree with the proposals at 6.54 but presumably (with increasing land registration) a statutory procedure will be needed to deal with abandoned profits noted on the title. It may be sensible if that procedure also applies to abandonment of unregistered profits.

## **PART 7 COVENANTS: THE CASE FOR REFORM**

16.33 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]

### **24. Defects in current law (7.59)**

**a.** The main defects are as identified in Part 7. It is correct that there is often great difficulty in ascertaining who may benefit from old restrictive covenants, for example merely for benefit of “adjoining or neighbouring land of the Vendor” at the date of a Conveyance. The old rules are too complicated. To some extent, the problems may have diminished, for example with the increased ambit of land registration. Identifying whether land is burdened with covenants is therefore not such a problem. These days, it is often possible to obtain historical versions of registered titles for example to see what land remained in a registered title at the date of a Transfer reserving easements or imposing covenants.

**b.** For new covenants, the benefit can pass by virtue of the Contracts (Rights of Third Parties) Act 1999.

**c.** It is also correct that the burden of a positive covenant generally does not run. This is sometimes more of a theoretical problem. For example, if a neighbour refuses to maintain his fence it is simpler for me to erect a fence on my side of the boundary. Party walls are covered by statutory provisions. Owners of a shared side accessway may well co-operate when it is in serious need of upkeep. A private street can be made up and adopted by the highway authority. Similarly as regards private sewers. It is useful if positive obligations can be directly enforced but, as indicated by the low take up of commonhold, this is not of overriding importance to the exclusion of factors such as practicability.

**d.** The topics do not exist in a vacuum. It is worth noting that in law the benefit could pass for all types of negative land covenants as well as positive land covenants and regardless of whether any land was burdened.

16.34 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]

16.35 We provisionally propose:

- (1) that there should be reform of the law of positive covenants;
- (2) that there should be reform of the law of restrictive covenants; and

(3) that there should be a new legislative scheme of Land Obligations to govern the future use and enforcement of positive and restrictive obligations.

Do consultees agree?  
[paragraph 7.79]

16.36 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]

**25. How much reform? (7.66, 79 & 80)**

**a. We agree with the proposals at 7.66 and at (1) and (2) of 7.79 but not (3). There should be some reform of the law as regards both positive and restrictive covenants. It does not follow that this must involve the entire new system of Land Obligations proposed in 1984 but which did not find favour. Reform should be directed at specific needs for practitioners and clients rather than as an academic exercise.**

**b. The commonhold system became too complicated so that this “cure” was worse than the illness. The position would have been worse if new leasehold flats had been prohibited as was at one stage canvassed.**

**c. If “Land Obligations” are merely covenants with a few changes of law (such as suggested below) then there seems to be no need for new terminology. However, if Land Obligations would involve an entire new system with scheme registrations etc then the need for such sweeping change must be questioned, especially with practitioners and their staff having to get to grips with the full operation of e-conveyancing proposed for 2010.**

**d. There are statutory provisions which in certain cases make the burden of positive covenants run with the land, for example in favour of a local planning authority. It would be possible to have a general enabling provision. This could be limited for example to obligations for upkeep and insurance and obligations to pay reasonable contributions for performance of obligations for upkeep etc, rather than for example obligations to pay large sums merely because a planning permission is granted (so-called overage or clawback obligations entered into by a predecessor and perhaps secured in some way).**

**e. There could be a need for wording to make clear that the burden would run to bind legal owners. It should not directly bind persons with periodic tenancies or lettings for up to seven years. Mortgagees should not be directly bound (unless they take physical possession) but they should only be able to make dispositions subject to any such obligations which had priority to their security or to which they have consented. The interests of equitable owners should be subject to any enforcement against the property by charging order to recover damages or unpaid contributions and so on.**

**f. Subject to any indication to the contrary, the benefit of restrictive covenants ought to run automatically. There should be a requirement that new restrictive**

covenants be expressed to benefit land identified by reference to a scale plan or Land Registry title number. There should be an entry on the title of the benefited land as well as an entry on the title of the burdened land

## **PART 8 LAND OBLIGATIONS: CHARACTERISTICS AND CREATION**

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

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

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

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

- (i) an obligation requiring the carrying out on the servient land or the dominant land of works which benefit the whole or any part of the dominant land;
- (ii) an obligation requiring the provision of services for the benefit of the whole or any part of the dominant land; or
- (iii) an obligation requiring the servient land to be used in a particular way which benefits the whole or part of the dominant land.

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

[paragraph 8.23]

16.38 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]

**26. Classification (8.23 & 24) Agreed. If Land Obligations are introduced they should be of one basic type which can then be restrictive, positive, monetary etc according to the circumstances.**

16.39 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]

**27. Labelling (8.28) Agreed. Land Obligations should be expressly designated when created so that all concerned know that the new system applies.**

16.40 We provisionally propose that Land Obligations should only be able to be created expressly over registered title. Do consultees agree?  
[paragraph 8.38]

**28. Creation (8.38) Agreed. Land Obligations should only be created expressly and only over registered land with a title that anyone may inspect.**

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

- (1) containing a plan clearly identifying all land benefiting from and burdened by the Land Obligation; and
- (2) identifying the benefited and burdened estates in the land for each Land Obligation.

[paragraph 8.40]

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

[paragraph 8.41]

**29. Prescribed information (8.40 & 41) Agreed. Valid creation should involve prescribed information to identify the lands respectively burdened and intended to benefit. Presumably in most cases it would be in a Transfer but there could be a prescribed form for use in stand-alone instances.**

16.43 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]

**30. Registration (8.47) Agreed. Creation should be completed by registration against the burdened land and with notice on the register of title to the land intended to benefit.**

16.44 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]

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

[paragraph 8.55]

**31. Who may create? (8.55) Agreed. Creation should be by the proprietor (including one becoming proprietor) of a legal estate.**

16.46 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]

16.47 If consultees answer this question in the affirmative, we seek consultees' views as to which of the following options they consider should be used to protect an equitable Land Obligation (not capable of being a legal interest) on the register:

- (1) the interest would have to be registered only against the title number of the estate burdened by the equitable Land Obligation; or
- (2) the interest would have to be registered against the title numbers of the estate benefited and the estate burdened by the equitable Land Obligation.

[paragraph 8.62]

**32. Equitable Land Obligations (8.54, 61 & 62) The need for equitable Land Obligations is unclear. Insofar as they exist as contractual rights it would be best not to refer to them as if they were Land Obligations running with the land. They should not bind successors in title and therefore 8.62 ought not to arise.**

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

[paragraph 8.65]

**33. In Gross (8.65) Agreed. There should be no Land Obligations in gross.**

16.49 We provisionally propose that a Land Obligation must "relate to" or be for the benefit of dominant land. A Land Obligation would "relate to" or be for the benefit of dominant land where:

- (1) a Land Obligation benefits only the dominant owner for the time being, and if separated from the dominant tenement ceases to be of benefit to the dominant owner for the time being;
- (2) a Land Obligation affects the nature, quality, mode of user or value of the land of the dominant owner;
- (3) a Land Obligation is not expressed to be personal (that is to say it is not given to a specific dominant owner nor in respect of obligations only of a specific servient owner); and

the fact that a Land Obligation is to pay a sum of money will not prevent it from relating to the land so long as the three foregoing conditions are satisfied and the obligation is connected with something to be done on, to or in relation to the land.

We seek consultees' views on this proposal.

[paragraph 8.80]

**34. Relating to land (8.80) Agreed. Land Obligations should "relate" to land (including ones involving payment for upkeep etc but not obligations for overage/clawback payments).**

16.50 We provisionally propose that, in order to create a valid Land Obligation:  
(1) there would have to be separate title numbers for the benefited and the burdened estates; but  
(2) there would be no need for the benefited and the burdened estates in the land to be owned and possessed by different persons.

[paragraph 8.88]

**35. Different owners (8.88) Agreed. There should be lands in different titles but there could be the same owners where they hold in different capacities or if an owner is creating rights prior to dispositions (8.85, 86 & 87).**

16.51 We provisionally propose that:

(1) in order to establish breach of a Land Obligation, a person entitled to enforce the Land Obligation must prove that a person bound by the Land Obligation has, whether by act or omission, contravened its terms; and  
(2) on proof of breach of a Land Obligation, the court should be entitled, in the exercise of its discretion, to grant such of the following remedies as it thinks fit: (a) an injunction; (b) specific performance; (c) damages; or (d) an order that the defendant pay a specified sum of money to the claimant.

[paragraph 8.97]

**36. Breach and remedies (8.97) Agreed. The remedies are not be mutually exclusive. A declaration may also be useful, perhaps with remedies to follow, for example damages to be assessed.**

16.52 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]

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

[paragraph 8.110]

**37. New restrictive covenants (8.109 & 110)**

**a. This depends upon the nature of Land Obligations (see response to 7.66, 7.79 & 7.80). If Land Obligations are merely covenants under a new name and with a few changes of law then the new rules would replace the previous law. If Land Obligations would be a new system even remotely as complicated as commonhold then we would need to see whether the new system operates well before there can be any question of prohibiting continued use of what is familiar to practitioners.**

**b. If there are to be Land Obligations involving major changes of law then they should be on a voluntary basis. Parties that want to use restrictive covenants should be free to do so (subject to any specific changes such as the method of identification of land intended to benefit).**

16.54 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]

16.55 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]

16.56 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]

**38. Exceptions (8.111, 112 & 113) Agreed. The Land Obligations system should not affect covenants in leases or covenants under statutory provisions.**

16.57 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]

**39. Estate rentcharges (8.119) Not agreed. Those wishing to create estate rentcharges should be free to do so.**

16.58 We provisionally propose that the rule against perpetuities should not apply to Land Obligations. Do consultees agree?  
[paragraph 8.122]

**40. Perpetuities (8.122) Agreed. The rule against perpetuities should not apply to Land Obligations, easements etc.**

## **PART 9 LAND OBLIGATIONS: ENFORCEABILITY**

16.59 We provisionally propose that a Land Obligation would be appurtenant to an estate in the dominant land ("the benefited estate").  
[paragraph 9.5]

**41. Benefit (9.5) Agreed. Benefit should be appurtenant to a freehold or leasehold estate.**

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

- (1) is a successor in title of the original owner of the benefited estate or any part of it; or
  - (2) who has an estate derived out of the benefited estate or any part of it; unless express provision has been made for the benefit of the Land
- Obligation not to pass.

[paragraph 9.10]

**42. Passing of benefit (9.10) Agreed. Benefit should pass as proposed at 9.10**

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

[paragraph 9.19]

**43. Burden (9.19) Agreed. Burden should be appurtenant to a freehold or leasehold estate.**

16.62 We invite the views of consultees on the following three alternatives for the class of persons who should be bound by a positive obligation or a reciprocal payment obligation:

(1) Option 1: Should the class encompass:

- (a) those with a freehold interest in the servient land or any part of it, provided they have a right to possession;
- (b) those who have long leases (terms of more than 21 years) of the servient land or any part of it, provided they have a right to possession;
- (c) mortgagees of the servient land or any part of it; or
- (d) owners of the burdened estate which do not fall within any of the above three categories, where the interest is clearly intended to be bound?

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

(3) Option 3: Should the class encompass:

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

16.63 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]

**44. Positive obligations and reciprocal payment obligations (9.20 & 21) These should be binding within the persons in Option 3 but not on tenants under**

**periodic tenancies or with leases created for no more than seven years – and subject to any exclusions agreed.**

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

- (1) with any estate or interest in the servient land or any part of it; or
- (2) in occupation of the servient land or any part of it.

[paragraph 9.23]

**45. Restrictive obligations (9.23) Agreed. These should be binding as proposed at 9.23 but subject to any exclusions expressly stated.**

16.65 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]

**46. Exclusions (9.29) Agreed. These exclusions should extend to mortgagees not in actual possession (9.48). Persons with priority should be able to contract into being bound.**

16.66 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]

16.67 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]

16.68 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]

**47. Adverse possession (9.34, 36 & 37) We agree the proposals at 9.34 & 9.36. Squatters should not benefit but should be bound by obligations of persons whose interests they supplant.**

16.69 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]

**48. Allowing breaches of restrictions (9.41) Agreed. Subject to contrary wording, breach need not be committed personally by the person bound.**

16.70 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]

**49. Liability (9.43) Agreed. Liability to do work, pay etc should be on the persons bound.**

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

- (1) a mortgagee should not be liable unless, at the relevant time, he has actually taken possession of the land or has appointed a receiver; and
- (2) a person should not be liable where contrary provision has been made in the instrument which creates the Land Obligation.

[paragraph 9.48]

**50. Mortgagees and express exclusions (9.48) Agreed.**

## **PART 10 LAND OBLIGATIONS: VARIATION OR EXTINGUISHMENT**

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

- (1) expressly; and
- (2) by operation of statute.

[paragraph 10.9]

16.73 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]

**51. Variation and extinguishment (10.9 & 10) We agree with the proposal at 10.9 but not with 10.10. Variation and extinguishment may be express or under statute. There should only be automatic extinguishment on termination of a burdened leasehold if no derivative or superseding interest remains (including an extended lease or from enfranchisement).**

16.74 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]

16.75 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]

16.76 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]

**52. Subdivision of burdened land (10.26, 27 & 31) We agree with the proposals at 10.26 and 10.31. Subject to any contrary agreement of those benefiting, subdivision should not prevent the burden running with each part of the land. Normally the division would include arrangements between those parts. There should be a statutory procedure for variation on a discretionary basis. The person benefiting may wish to object to having to enforce on a basis of liability being apportioned between various burdened parts. Presumably restrictions ought to be enforced in relation to whatever land has a breach, but an owner should not be free to hive off valuable parts free from obligations relating to valueless parts of the burdened land.**

16.77 We provisionally propose that on sub-division of the benefited land, the benefit of a Land Obligation should run with each and every part of it unless:

- (1) the Land Obligation does not “relate to” or benefit that part of the benefited land;
- (2) the sub-division increases the scope of the obligations owed by the burdened owner to an extent beyond that contemplated in the Land Obligation deed; or
- (3) express provision has been made for the benefit of the Land Obligation not to pass.

Do consultees agree?

[paragraph 10.44]

16.78 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]

**53. Subdivision of land benefiting (10.44 & 45) We agree with the initial part of 10.44 and with (3) but otherwise this should be for a variation procedure. It may not always be clear whether or not a particular part of land may benefit nor to what extent liability was contemplated. The position is best left to be dealt with expressly if subdivided parts are to be without benefit. The views which**

may be expressed about benefit of rights when subdividing may not be agreed by those preferring not to be bound to them.

**54. Land Registry views (10.46)<sup>1</sup>** The views of Land Registry staff regarding (1) and(2) of 10.44 may not be shared by all the various owners of burdened and benefiting lands. Presumably the function of staff would be limited to recording what has been determined by the court or tribunal.

## **PART 11 LAND OBLIGATIONS: RELATIONSHIP WITH COMMONHOLD**

16.79 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]

**55. Commonholds (11.22)** Agreed. Being overly prescriptive is counter-productive. Guidance is always welcome if it is helpful in practice.

## **PART 12 LAND OBLIGATIONS: SUPPLEMENTARY PROVISIONS**

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

- (1) A provision relating to the keeping of a fund out of which expenditure on the carrying out of works, or the provision of services, is to be met.
- (2) A provision requiring the payment of interest if default is made in complying with a reciprocal payment obligation.
- (3) A provision enabling any person entitled to enforce a Land Obligation to inspect the servient land in order to see whether it has been complied with.

[paragraph 12.16]

16.81 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]

16.82 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

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<sup>1</sup> Paragraph 10.46 reads: “**Register entries:** Finally, it is a characteristic of Land Obligations that the entry on the register for the burdened land should provide details of the land benefited by the Land Obligation and vice versa. It therefore follows that, where necessary, the Registrar should have the power, on a transfer of part of the benefited land to amend the title of the burdened land and on a transfer of part of the burdened land, to amend the title of the benefited land. See Title Conditions (Scotland) Act 2003, s 105 for a similar power in Scotland.”

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]

16.83 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]

**56. Supplementary provisions (12.16, 17, 25 and 26)**

**a. We agree with the proposals at 12.16.**

**b. We agree with the proposal at 12.25 as regards the types of obligations referred to at 12.23 and 12.24 but the parties should be free to vary the model provisions or set them out in full so as to avoid the need to refer to another document, such as a statute**

## **PART 13 TRANSITIONAL ARRANGEMENTS AND THE PROBLEM OF OBSOLETE RESTRICTIVE LAND OBLIGATIONS**

16.84 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]

16.85 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]

**57. Obsolete restrictive covenants (13.89 & 90)**

**a. Even if Land Obligations are introduced and whether or not new restrictive covenants are prohibited, there is a question whether it is worth setting up a new procedure for dealing with old restrictive covenants bearing in mind the difficulties.**

**b. Often those having benefit of a restrictive covenant may be unaware of it until some problem arises so that they investigate the title to the burdened land. If there is no substantial infringement of the particular restriction many years can go by without anyone actively asserting benefit or even investigating what rights exist and for whose benefit.**

**c. It is a minor irritation, when investigating title, to have to look through old restrictive covenants and other rights. These vary in detail but are often along common lines restricting use, density of development and so on. Normally there is no problem as it is not intended to infringe the restrictions (for example, ones prohibiting offensive trades, annoyances etc) or there is little risk of complaint of trivial breaches (for example, prohibitions of hanging out washing). If it comes**

to light that, for instance, approval was not obtained of plans of a garage or extension but years pass without a complaint it is easy to obtain indemnity insurance at modest cost if so required. Such insurance can also be obtained where development is proposed with nobody being likely to be able and willing to take enforcement action.

d. Sometimes it is preferred to send letters inviting neighbouring owners to confirm that they do not claim or propose to enforce rights against a proposed development. If necessary, a party can apply to the Court for a declaration that nobody can enforce easements or covenants by injunction to impede a development. A party may instead make application to the Lands Tribunal for discharge or modification of a restriction under section 84(1) of the Law of Property Act 1925 or to the Court in cases covered by section 610 of the Housing Act 1985. These procedures involve expense. Sometimes there is no opposition. Often a deal is made with persons claiming benefit.

e. Developments in the public interest may involve a local planning authority and adverse rights being overridden under statutory authority, subject to possible compensation claims for injurious affection.

f. No doubt the various procedures could be improved. There should be greater effort to encourage alternative dispute resolution. Whilst some matters depend upon subjective views, there are cases which could end sooner if unrealistic expectations of payments could be addressed with professional guidance.

g. This backdrop indicates that problems in practice are limited and may not justify setting up a new system which may stir up unnecessary arguments about compensation, human rights and so on. The mere creation of a system for new Land Obligations would not of itself justify a system to convert or replace old restrictive covenants.

h. There would be merit in having a simple system just to clear off “dead wood”. The Scots law system referred to at 13.55 starts with a time limit of 100 years. However, there are cases in which a right over 100 years old is still of value. Blanket abolition of rights that are old would include the valuable ones so that there would have to be compensation either from owners of the burdened land (who may not have wanted termination of the rights at their expense) or at public expense (unpopular). It would instead be better to follow the Scots law system so that the procedure would have to be initiated by the owner of the burdened land with notice being given to all who may potentially have the benefit of the rights. The old rights would then be regarded as obsolete if nobody objects to these being removed from the title. Anything beyond that would involve judicial overview and compensation which we already have with the Lands Tribunal. It would be important to ensure that notice has been given to all potential claimants to the benefit of the rights.

16.86 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]

**58. Obsolete Land Obligations (13.99)** A similar triggered expiry system could apply to obsolete Land Obligations (or other rights).

## **PART 14 SECTION 84 OF THE LAW OF PROPERTY ACT 1925: DISCHARGE AND MODIFICATION**

16.87 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]

### **59. Compensation for discharge or modification (14.15)**

**a. Any extension of the jurisdiction under section 84(1) of the Law of Property Act 1925 would highlight questions as to compensation, for example for removal of an easement or profit. If in the open market a right of way has monetary value on the basis that removal would increase the value of the servient land, allowing development to occur, it is difficult to see why a release fee should not be payable. If there is compulsory purchase of land with a ransom strip value then that aspect is taken into account in assessing the compensation.**

**b. For restrictive covenants the compensation for discharge or modification is normally the loss or disadvantage suffered by the owner of benefited land, generally not extending to any release fee that the Court would award in lieu of an injunction. The alternative is based on the extra consideration that might have been obtained at the date when the restriction was imposed which can be difficult to assess if the present proposals were not in contemplation years ago and in different circumstances.**

**c. If it is reasonable for rights to be removed or reduced then it should be reasonable for the applicant to pay the fair value of what is involved.**

16.88 We provisionally propose that the statutory jurisdiction to discharge or modify restrictions on land contained in section 84(1) of the Law of Property Act 1925 should be extended to include:

- (1) easements;
- (2) profits; and
- (3) Land Obligations.

[paragraph 14.41]

16.89 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]

**60. Extension of the section 84(1) jurisdiction (14.41, 42 & 95)** In principle, the statutory jurisdiction for discharge or modification ought to be extended to easements, profits and (if we have them) Land Obligations, including the terms of any Order (14.76). However, it is likely that this would require reconsideration of the statutory grounds that are geared to restrictions. The

**powers need to be clarified, for example so as to provide for a substituted route for an easement.**

16.90 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]

**61. Alteration of section 84(1)(aa) (14.70)**

**a. No doubt the Tribunal should take account of the purposes for which a right was originally created, but it is unclear what is meant by requiring the Tribunal to “give effect” to the original purpose. For example, it may have originally been envisaged that a right of way would be for agricultural wagons but as a matter of law it may be that the right extends to all types of motor vehicles for all uses of the dominant land.**

**b. Shephard v Turner did not decide that the only practical benefits to be considered are those directly related to the original purpose of a covenant. The quotation at 14.56 is truncated, giving that impression, but the paragraph quoted continued:**

**“That does not mean that such a benefit is irrelevant. It does however mean that it is a factor which the Tribunal is entitled to give less weight in the overall judgment of substantiality”.**

**c. The case is also referred to at 14.65 as if it concerned ground 84(1)(c) (no injury). The question was of the substantiality of the practical benefit of not having temporary disturbance during building works. In the context of a restriction merely on use and density this would normally not be substantial. The specific restriction against nuisance and annoyance would not have been infringed by normal building work for a temporary period.**

**d. A restriction may have multiple purposes. For example, the view from the seat in Gilbert v Spoor [1983] Ch 27(CA) would not have been the only or main purpose of the covenant in that case. Even a restriction requiring approval of plans etc would be influenced by questions of disturbance if what had been envisaged included control of siting so that a new building would be some distance from the nearby existing home of the covenantee.**

**e. The original purposes are relevant as regards peripheral supposed benefits which may or may not be secured by the particular restriction but that is not the same as only taking account of practical benefits from preventing the particular sort of infringement originally contemplated.**

16.91 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]

16.92 We provisionally propose that obsolescence should cease to be a ground for discharge or modification.

[paragraph 14.72]

**62. Section 84(1) grounds (14.71 & 72)**

**a. The current section 84(1)(c) only applies if the discharge or modification would cause no injury to persons with benefit. The most common contested ground in practice relies upon there being no practical benefits of substantial value or advantage to those having the benefit. These benefits need not be financial in nature. It is not clear that the proposed test of “no substantial injury” would give the same protection. Possibly the requirement for money to be adequate compensation might protect restrictions imposed for sincere reasonable personal convictions, for example about sale of alcohol, but that already applies to ground (aa) as well as the case law on practical benefits.**

**b. The proposed ground that the proposed use is “in the public interest” is plainly different from the current test whether enforcement of a restriction would be contrary to the public interest. That is not necessarily satisfied mere because of difficulty in having the desired use at some other location.**

**c. It seems likely that there would be no injury from discharge of a restriction which is no longer capable of serving its purpose, therefore the current ground (a) can be abolished as proposed.**

16.93 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]

**63. Multiple grounds (14.74)**

**a. We have not encountered this theoretical difficulty in practice. An application to discharge or modify a restriction will either succeed or fail. The proposed grounds relate to substantial injury, public benefit and presumably (from 14.62) lack of objection (although 50 years toleration of one type of breach does not amount to acceptance of a new and different breach). Leaving aside those who have agreed to give up rights, it is difficult to see the relevance of proving lack of injury to some objectors if the application anyway succeeds on**

**the public interest ground (which either is made out or it is not). Even if someone debarred from enforcing a covenant were to become an objector he would be one of the objectors not having substantial benefit secured by the restriction or not injured by discharge or modification.**

**b. Moreover, some potential objectors rely upon an application failing because of objection by those worst affected. If it is suggested that an application can succeed against some but not other persons, then that would mean more persons objecting simply to protect their interests.**

16.94 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]

16.95 We provisionally propose that on the discharge or modification of a Land Obligation:

(1) the Lands Tribunal should have the power to add new provisions to an existing Land Obligation or to substitute a new Land Obligation for one which has been discharged, if the Tribunal considers it reasonable in view of the relaxation of 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]

**64. Power to add new restrictions etc (14.82 & 83) Agreed. It remains to be seen whether Land Obligations will be favoured.**

16.96 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]

16.97 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]

**65. Positive and reciprocal payment obligations (14.93 & 94) Agreed. These provisional proposals about Land Obligations (if introduced) appear to be sensible.**

16.98 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]

16.99 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]

**66. Two jurisdictions (14.101)**

**a. The provisional proposals should only apply if there is also abolition of the bar on appeal against entitlement rulings under section 84(3A).**

**b. Although Tribunal Members may have much experience, even the legally qualified President will not get every legal question right first time (for example as found after having the benefit of argument by Counsel in a subsequent case). Indeed Chancery judges can be reversed by the Court of Appeal, therefore the same should apply if a Member rules on entitlement and as a result the application is supposedly unopposed.**

**It has also been known for legal interpretations to be sprung upon unrepresented objectors at the hearing and for a non-legal Member not to appreciate the desirability of such a point going to the High Court (rather than, as happened, there being a successful appeal on the relevant point). It has also been known that for an applicant's barrister to suggest, towards the end of the hearing, that on interpretation the proposed development might not even need the proposed modification or discharge sought by his client.**

**c. If entitlement needs to be dealt with in the High Court it would be wrong for the Lands Tribunal proceedings to go ahead without the participation of an objector that is not admitted but who should be admitted. Likewise, if a question of interpretation is so important that it goes to the High Court there seems little sense in the Tribunal going ahead on the basis of an important interpretation that may prove to be wrong and so there is an appeal.**

**d. Although it would be normal for section 84(1) applications to be dealt with by the Tribunal, there may be cases where it would be sensible if the jurisdiction could be exercised by the High Court at the same time as dealing with applications for injunctions and/or damages, declarations and so on, rather than having cases perhaps going to and fro. The court has jurisdiction in cases under the Housing Act 1985 section 610 as in a recent widely reported case – Lawntown Ltd v Camenzuli [2007] EWCA Civ 949. If that jurisdiction is to remain then perhaps it should also be dealt with in the Lands Tribunal, but perhaps it should be subsumed into a revised section 84(1).**

**e. If the Lands Tribunal is to make legal rulings (14.101) then it should review its procedures. In a Court it is expected that copies of the statement of claim and supporting documentation will be served upon the defendants. However, in a section 84(1) application there is no duty to serve these even on solicitors already acting for an objector (from having dealt with the matter in litigation). There are no defendants to the application when made and so no service of the application as such and therefore at this stage no equivalent to CPR rule 6.4(2) and rule 6.13(2) (solicitors authorised to accept service). The Registrar merely makes directions about giving publicity notices, by advertisement or otherwise. A client may receive a skimpy publicity notice. He may have to go along to some estate agent or conveyancers who supposedly have the papers giving the detailed grounds etc for the application to take away rights of the client, perhaps already upheld in litigation. Copies may be purchased which can then be passed on to the client's solicitors. This is not a sensible procedure for what amounts to private compulsory purchase of rights.**

**f. The Tribunal should have power to consent to applications to amend applications. However, if the amendment involves addition of other restrictions not covered by the publicity etc then the publicity process should be repeated as other objectors may come forward. Likewise if the publicised application was for one sort of modification and the proposal is for a significantly different modification or for a discharge.**

16.100 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]

**67. Classes of applicants (14.106)**

**a. Agreed. There may be circumstances in which someone with the benefit may wish to apply for modification of the right but this needs to be thought through as there may be necessary adaptations required to the statutory grounds and also the procedures (currently driven by applicants affected by the burden, not always with equal information given to objectors as to the progress of the case).**

**b. If anyone can apply merely on the basis of a temporary interest (a short term option or conditional contract) then one difficulty arises with applicants that are companies which may promptly be wound up if the application fails. The Tribunal should have power to require security for costs.**

**c. There have also been applications for discharge or modification for the purposes of a development requiring a planning permission that never is obtained even upon appeal, so that the legal costs are wasted. Moreover, in the absence of definite proposals covered by planning permission there is often uncertainty as to the layout, what pieces of land and covenants are involved and what may be the impact on particular owners (depending upon the positions and who has the benefit of which restrictions). Given that the development plan may be difficult to interpret without a planning permission having been granted,**

there is sense in requiring consent of the Tribunal for an application which depends upon a planning permission that has yet to be obtained.

d. There would also be sense in protecting owners from repeated applications for broadly similar proposals. If proposed discharge or modification has been successfully resisted (with much cost and bother) it is strange that much the same application can, without any need for consent from the Tribunal, be made very soon in an attempt to grind owners into submission.

e. A factor of importance is that objectors generally want to preserve the status quo but do not have the profit incentive of an applicant. This means that objectors may be unrepresented and they suppose that it is like a planning appeal. That can in practice result in problems as technical issues may well arise which Tribunal staff may not be able to resolve. The “overriding objective” looks for a level playing field which in reality may not exist. Indeed, represented applicants sometimes make Calderbank offers even before an application has been made as if this were litigation rather than a process to take away undisputed rights. Sometimes the threat to go to the Tribunal is made over several years and so owners may be unsure if there ever will be an application at all. Owners should not be penalised in costs for wanting to see what is actually said in any eventual application and its supporting evidence before spending money in taking advice from barristers and surveyors.

## **PART 15 MAINTAINING THE DISTINCTION BETWEEN EASEMENTS, PROFITS AND LAND OBLIGATIONS**

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

- (1) eliminated by abolishing all of the rights capable of existing as negative easements, with prospective effect; or
- (2) reduced by abolishing some of the rights capable of existing as negative easements, with prospective effect. If consultees favour this approach, could they please specify which negative easements should be abolished.

[paragraph 15.42]

**68. Maintaining Distinctions** As regards 15.42, it is academic that there may be areas of overlap between different types of rights such as negative easements. The mere classification of rights does not seem to be of much importance in actual practice. Reforms in this respect do not appear to be a priority for clients and their advisers.

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[End]