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The Law Commission has recommended a series of reforms to the law governing third party rights over land. If implemented, many of the recommendations would be of particular assistance to developers.

The Commission's report, which follows a 2008 consultation paper, contains its final recommendations to Parliament, together with a draft Bill.

**Key points**

- The Law Commission has recommended a series of reforms to the law governing third party rights over land (principally easements and covenants)
- If implemented, many of the recommendations would be of particular assistance to developers

**Background**

In 2008, the Law Commission published a consultation paper: "Easements, Covenants and Profits à Prendre". The Law Commission has now published its report. "Making Land Work: Easements, Covenants and Profits à Prendre" contains the Commission's final recommendations to Parliament, together with a draft Bill. There are 64 proposals in total: the most important are considered below.

**Positive obligations / A new kind of third party interest in land**

At present, positive covenants (for example, to repair a boundary structure or a road)
cannot, in and of themselves, bind successors. If it is desired to make a positive obligation bind successive owners, there are a number of legal devices which can be adopted. However, all suffer from drawbacks or are cumbersome to operate.

The Law Commission therefore recommends that it should be possible to create positive obligations which are capable of binding successors. Rather than creating a new interest which was only capable of encompassing positive obligations, the Law Commission proposes that "land obligations" could be both positive and negative. If the proposal is adopted, it would therefore also have an effect on restrictive covenants, because it would not be possible to create new restrictive covenants after the date of reform. Existing restrictive covenants would be unaffected.

However, since positive obligations (unlike restrictive covenants) can involve expending money, it would be necessary to ensure that land cannot be burdened with an open-ended range of obligations. In order to be a land obligation, the Law Commission therefore proposes that an obligation must satisfy both of the criteria below.

1. The proposed obligation must "touch and concern" the land (see below).
2. The proposed obligation must be either:
   a. an obligation not to do something on the burdened land; or
   b. an obligation to do something on the burdened land or on the boundary (or any structure or feature that is treated as marking or lying on the boundary) of the burdened and benefited land; or
   c. an obligation to make a payment in return for the performance of an obligation of the kind mentioned in paragraph (b).

In addition, the obligation must not be one which is made between landlord and tenant and relates to the demised premises.

The requirement that the obligation must "touch and concern" the land means that it must advantage the party with the benefit of the obligation while that person is the owner of the benefited land, but would otherwise be irrelevant to them. "Touching and concerning" is already a requirement for restrictive covenants under the current system. Because of this requirement, an obligation to pay overage would not be capable of existing as a land obligation. Neither would an obligation to do work on a neighbour's land (as opposed to the burdened land).

Criterion 2(a) is designed to be used in circumstances where a restrictive covenant would be created under the present system. 2(b) would encapsulate, for example, an obligation to maintain a drainage pipe. 2(c) would enable the parties to provide for the party
benefiting from the pipe to contribute towards its maintenance.

A restrictive covenant is in many ways a hybrid interest, which shares many of the characteristics of a simple contract, but in other ways behaves like an interest in land. The proposed new land obligation would not take effect as a contract, with the result that the original "promisor" would not remain liable once he or she had parted with the land. This outcome is very similar to that achieved in relation to new leases by the Landlord and Tenant (Covenants) Act 1995.

There is a further distinction between restrictive covenants and land obligations. Currently it is not possible to register the benefit of a restrictive covenant since this is only an equitable, not a legal, interest. Land obligations would however exist at law. One consequence of this is that both the benefit and burden of a land obligation could (and would need to) be registered. This would make it easier to identify those holding the benefit of a land obligation and, if necessary, negotiate with them for its release. It would also put land obligations on a similar footing with easements, which are legal interests.

**Creation of an easement over land in the same ownership**

Currently, in order for a right to exist as an easement, the benefited land and the burdened land must not be owned and occupied by the same person. This can give rise to a number of practical difficulties. The Law Commission therefore proposes that, provided that both parcels of land are registered, it should be possible for a landowner to create an easement over his own land.

This would be a useful tool on the development of large estates, particularly in the residential context. Appropriate rights could be created and attached to each plot before any sales of part occurred.

If implemented, the recommendation would also facilitate the mortgaging of part of a property. Currently some mortgagees are reluctant to accept a charge of part because it is not straightforward to ensure that, if the borrower defaults and the mortgagee takes possession, the charged property can be sold with all the necessary rights over the land retained by the borrower.

The reform would also mean that, unlike at present, an easement would no longer be automatically extinguished if the benefited land and the burdened land came into common ownership (although it would remain possible for the combined owner to release it). Unlike
many of the Law Commission's other proposals, this recommendation would apply to easements created before the proposal was implemented, as well as after it. However, this could potentially result in easements which were thought to have been extinguished being subsequently "revived". It would appear that the owner of the burdened land could in certain circumstances unwittingly find himself subject to an easement again, which would be an unwelcome outcome of reform.

In the consultation paper, the Law Commission proposed that it would only be possible for an owner to create an easement over his own land if the benefited land and the burdened land were registered under separate title numbers. The Commission has dropped this proposal in its final report, meaning that it would not be necessary to split a title before rights were created.

**Car parking easements**

The report recommends a clarification of the test for whether a particular right is capable of being an easement (and, therefore, of passing to successors in title of the benefited and the burdened land).

Case law has given rise to some uncertainty about whether certain easements, which appear to leave the burdened owner without any reasonable use of their land, are valid. The main area in which this can give rise to difficulties is that of a right to park a car; see for example the decisions in Moncrieff v Jamieson, Virdi v Chana, and Safestore v RSN Property Limited.

The Law Commission recommends that an easement should be valid notwithstanding that it prevents the burdened owner from making any reasonable use of their land, as long as it stops short of granting exclusive possession to the benefiting owner (in which case it would typically be a lease rather than an easement). The effect of this would be to put beyond doubt the validity of a potentially wide range of parking easements, which are commonly used in both residential and commercial transactions.

**Reform to the law of prescription and the basis on which rights will be implied**

The law of prescription allows rights to be acquired through long use. However, the law is old and in some instances arbitrary or arcane. The Law Commission therefore proposes the replacement of the three existing methods of prescription with a single, statutory
scheme. The key elements of use for 20 years, without force, stealth or permission would remain.

Similarly, the Commission recommends that the three existing methods by which an easement may be implied (as opposed to created by express grant or prescription) should be replaced by a statutory test. This would simplify the law while still replicating all the useful instances of implication in the current law.

**Presumption of abandonment for easements**

The existence of easements over a site can cause complications if that land comes to be redeveloped. Sometimes the easements are old and do not appear to have been exercised for many years. Although it is in theory possible for an easement to come to an end through abandonment, the courts are currently very reluctant to assume that a right has been abandoned.

The Law Commission recommends that, where an easement has not been used for a continuous period of 20 years, there should be a presumption that it has been abandoned. The presumption is capable of being rebutted. If enacted, this proposal could assist developers whose sites are subject to obsolete easements.

**Powers of the Lands Chamber**

The Lands Chamber of the Upper Tribunal (previously the Lands Tribunal) currently has the power to discharge or modify covenants on certain grounds. The procedure itself is not used routinely, as it can be time-consuming and costly. However, the availability of the mechanism can often serve as a useful "bargaining chip" when developers are negotiating with those holding the benefit of covenants for their release.

The Law Commission recommends that the jurisdiction of the Lands Chamber should be extended to apply to both easements, and the new land obligations. If enacted, this would (for example) allow a developer to apply to re-route an easement to facilitate development on the burdened land, and could also enable developers to apply for the discharge of rights to light. The Commission recommends that the Lands Chamber should only modify an easement if it is satisfied that the modified interest "would not be materially less convenient to the benefited owner" nor "more burdensome to the land affected".

The extension of the jurisdiction of the tribunal to cover easements could impact on negotiations with those holding the benefit of such rights (including rights to light), and so
remove the "sting in the Heaney tail" (see our alert: "Rights to light - a worrying tale for developers"). However, the power would only apply to interests created after the date of reform. This is because part of the benefit of an easement currently includes the freedom to bargain for its release. To bring existing easements within the review of the Lands Chamber could therefore strip value out of existing property rights. (The Commission's proposals in relation to a presumption of abandonment for easements not used for 20 years would, nonetheless, apply to existing easements.)

Under a related proposal, the Lands Chamber would also be given the power to discharge or modify covenants and other rights affecting leasehold, as well as freehold, land. Currently, the tribunal only has this power where the relevant lease was granted for more than 40 years, of which at least 25 have expired. Again, this would only apply to leases granted after the date of reform.

Additional grounds for discharge would be introduced in relation to positive land obligations, as these are potentially more onerous.

The final key recommendation in relation to the power to discharge or modify third party rights could also be of great assistance to developers if it is implemented. A burdened landowner seeking the discharge of, say, a restrictive covenant may be faced with a number of objectors. There are four grounds on which a covenant may be discharged. Under the current law as it has been interpreted by the tribunal, the landowner seeking discharge must establish the same single ground against each and every objector. Where there are five objectors, for example, it would not be sufficient to show that two objectors have agreed to the discharge (ground (b)), while another three would not be injured by the discharge (ground (c)). The Law Commission proposes that it should be enough if the burdened landowner can establish one ground for discharge against each objector (but not necessarily the same one). This would potentially make it much easier to discharge third party rights using this process.

**Next steps**

There are other areas which the Law Commission believes also have scope for further review, such as rights to light, but these were beyond the scope of the most recent project.

While many of the report's recommendations will be welcomed by the property industry, excitement must be reined in...! The proposals will only become law if taken up by the government of the day, and allocated parliamentary time. Previous Law Commission
reports have in some cases languished on the shelves for years. However, others have been followed through and have made a major impact on real estate law and practice. Notably, both the Landlord and Tenant (Covenants) Act 1995 and the Land Registration Act 2002 were the product of Law Commission reports. As an alternative to the implementation of all its recommendations wholesale, the Commission identifies a second option, which would put into effect the proposals in relation to easements, without introducing land obligations.

For now, it is a case of watch this space.

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