

The Law Commission

(LAW COM. No. 199)

TRANSFER OF LAND IMPLIED COVENANTS FOR TITLE

*Laid before Parliament by the Lord High Chancellor pursuant to section 3(2)
of the Law Commissions Act 1965*

*Ordered by The House of Commons to be printed
4 June 1991*

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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Commissioners are—

The Honourable Mr Justice Peter Gibson, *Chairman*

The Trevor M. Aldridge

Mr Jack Beatson

Mr Richard Buxton, Q.C.

Professor Brenda Hoggett, Q.C.

The Secretary of the Law Commission is Mr Michael Collon and its offices are at Conquest House, 37–38 John Street, Theobalds Road, London WC1N 2BQ.

IMPLIED COVENANTS FOR TITLE

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THE LAW COMMISSION

Item 4 of the Fourth Programme: Transfer of Land

IMPLIED COVENANTS FOR TITLE

*To the Right Honourable the Lord Mackay of Clashfern,
Lord High Chancellor of Great Britain*

PART I

INTRODUCTION

1.1 When the owner of land or other property disposes of it, the bargain commonly includes his giving undertakings that the title which he is vesting in the other party is as he represented it to be and offering assistance if further proof is needed in the future. The form of these obligations, known as covenants for title,¹ was largely standardised and enshrined in statute over a hundred years ago. The covenants do not now normally appear on the face of the disposition documents, but are implied by statute. Over the years, the form and substance of the covenants, and some of the rules affecting them, have attracted criticism.

1.2 In this Report, we recommend the replacement of the covenants for title which are at present implied by statute and we recommend changes to the circumstances in which they are implied. Our aims are to make the covenants clearer, to strengthen the guarantees which they provide and to make them more easily enforceable.

Background

1.3 In 1988 we published a Working Paper² in which we examined the statutory implied covenants for title³ in the context of the simplification and modernisation of conveyancing. We concluded that the present covenants, which were put into statutory form in 1881,⁴ are prolix and obscure, and that a number of the ancillary rules are no longer appropriate.

1.4 We put forward five possible options for consideration: to do nothing; to re-draft the statutory covenants in modern language without other amendment; to re-draft them with amendment; to repeal them without replacement; to repeal and replace them with a contractual term as to title similar to that implied on the sale of goods. We expressed a tentative preference for the last option.

1.5 Having considered the views expressed to us on consultation, we are now recommending that the existing system of implying covenants for title into conveyances and other dispositions should be retained, and indeed extended to the grant of any lease. We suggest, however, that the form of the covenants themselves should be modernised, that the number of different covenants should be reduced and that other changes be made to connected rules. The present covenants apply to the disposition of property other than land, and our proposals extend similarly.

1.6 The names of the individuals and organisations who commented on the Working Paper are listed in Appendix C. We are grateful to them for taking the trouble to let us have their views which we took into account in formulating our recommendations.

¹ The word "covenant" is normally applied to a contractual obligation contained in a deed: *Norton on Deeds*, 2nd ed. (1981), p.531. Although the documents into which these statutory covenants are implied most frequently are deeds, this will not necessarily be the case. However, the Acts containing the statutory provisions refer to them as covenants, and we propose to adopt and continue that nomenclature.

² Transfer of Land: Implied Covenants for Title, Working Paper No. 107.

³ The covenants are reproduced in Appendix B.

⁴ Conveyancing and Law of Property Act 1881, s.7.

Structure of this Report

1.7 Part II of this Report sets out the present law, which we analyse and review in Part III. We set out our recommendations for reform in Part IV, and Part V summarises our conclusions and recommendations. A draft Bill to give effect to our recommendations, together with Explanatory Notes, appears in Appendix A. For ease of reference, we reproduce the present forms of statutory covenant in Appendix B.

PART II

PRESENT LAW

2.1 There are two statutory provisions under which covenants for title by grantors can at present be implied into documents disposing of property.¹ Those in the Law of Property Act 1925² are of general application and the covenant in the Land Registration Act 1925³ relates only to registered land. The forms of covenant are set out in Appendix B. We shall first deal with the general provisions, which the parties can decide to adopt in certain circumstances.

General implied covenants

2.2 The covenants can be implied into any conveyance, a word given a wide meaning,⁴ although it does not for this purpose include a lease at a rent.⁵ The “property” which is conveyed is also given an extensive meaning to include “any thing in action, and any interest in real or personal property”.⁶ It is of some importance to note that the provisions are not confined to dealings with land. Some of those who responded to our Working Paper pointed out that the covenants are regularly used in dispositions of property other than land, particularly goodwill and intellectual property.⁷

Contents

2.3 The cases in which covenants for title can be implied are defined according to the circumstances of the disposition and the capacity in which the person disposing of the property is transferring it. The transferor who transfers in a particular capacity and, in the conveyance, is expressed to do so—those being the key words which have to appear on the face of the document to have the effect of implying the statutory covenants—undertakes obligations to the person taking the disposition which are appropriate to a person acting in that capacity. The following is a summary of the cases covered.

Key words

implying covenants

Covenants implied

1. *Conveyance for valuable consideration,⁸ other than a mortgage.*

As beneficial owner

(a) The grantor has (with the concurrence of anyone conveying by his direction) full power to convey (“right to convey”).

(b) The grantee will quietly enjoy the property free from lawful disturbance or interruption by the grantor, or anyone claiming through or in trust for him (“quiet enjoyment”).

(c) The property is conveyed free from incumbrances to which the conveyance is not expressly made subject, or the purchaser is sufficiently indemnified against

¹ The covenants derive from the practice of conveyancers who, until the 19th century, would include lengthy covenants in every conveyance they drew. The covenants were reduced to standard statutory forms, to be implied into instruments by brief key words, to shorten conveyancing documents. See M. J. Russell, *Brevity v. Verbosity, the Growth of Statutory Implied Covenants for Title*, (1962) 26 Conv (N.S.) 45.

² S.76 and Sched. 2, Pts. I–VI. The covenants substantially re-enact those first put into statutory form by the Conveyancing and Law of Property Act 1881. Some of the older cases cited in this Report are concerned with the 1881 Act covenants, but the terms of those covenants did not differ materially from the 1925 Act covenants.

³ S.24(1)(a); para. 2.19 below.

⁴ “‘Conveyance’ includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will”: Law of Property Act 1925, s.205(1)(ii).

⁵ *Ibid.*, s.76(5).

⁶ *Ibid.*, s.205(1)(xx).

⁷ See *Encyclopaedia of Forms and Precedents* (4th ed.): vol. 7 (1966), pp.455 *et seq* (copyright); vol. 9 (1968), pp.712 *et seq* (goodwill); vol. 16A (1983), pp.217 *et seq* (patents); vol. 22 (1973), pp.674 *et seq* (trademarks).

⁸ “[V]aluable consideration’ includes marriage but does not include a nominal consideration in money”: Law of Property Act 1925, s.205(1)(xxi).

them (“freedom from incumbrances”).⁹

(d) To do what the grantee reasonably requires and is necessary further to assure that the property is conveyed to the grantee (“further assurance”).

2. *Additional covenant on a conveyance of leasehold property for valuable consideration, other than a mortgage.*

As beneficial owner The lease is valid and subsisting, all rents have been paid and all tenants’ covenants have been observed and performed (“validity of lease”).

3. *Mortgage.*

As beneficial owner (a) Power to convey.
(b) Quiet enjoyment on taking possession following a default in paying mortgage money or interest.
(c) Freedom from incumbrances.
(d) Further assurance.

4. *Mortgage of freehold property subject to a rent or of leasehold property.*

As beneficial owner (a) Validity of lease or grant reserving the rent.
(b) Mortgagor will pay the rents and observe the covenants and conditions in the lease or grant and indemnify the mortgagee.

5. *Settlement.*

As settlor Further assurance.

6. *Conveyance by a trustee, mortgagee, personal representative or under an order of the court.*

As trustee, as mortgagee, as personal representative, under an order of the court. The grantor has not incumbered the property.

Qualified liability

2.4 The covenants do not impose an absolute liability. Most of them make the grantor responsible only for the acts and omissions of certain specified people.¹⁰ These have been summarised as (i) the vendor himself, (ii) persons through whom he claims otherwise than by purchase for value,¹¹ (iii) persons claiming through him, (iv) persons claiming in trust for him.¹² Accordingly, a plaintiff complaining of a breach of covenant must prove whose actions or omissions¹³ caused the breach and show that that person falls within the class for whom the grantor takes responsibility. Even where the covenantor’s period of responsibility is lengthy, the necessary positive evidence can be difficult to obtain.¹⁴ Exceptionally, the mortgagor’s power to convey covenant, when he is expressed to convey as beneficial owner, is, however, an absolute rather than a qualified covenant.¹⁵

2.5 There is another sense in which the protection offered by the covenants is not comprehensive. Defects in title can arise from causes beyond the control of property owners, and those defaults may not be breaches of the covenants. The covenant

⁹ The interpretation of this covenant is not free from doubt: see Working Paper, paras. 2.12–2.13.

¹⁰ E.g., the beneficial owner’s right to convey covenant is confined to the effects of the actions of “the person who so conveys or any one through whom he derives title otherwise than by purchase for value”: Law of Property Act 1925, Sched. 2, Pt. I.

¹¹ A purchase for value does not include a conveyance in consideration of marriage: *ibid.*

¹² *David v. Sabin* [1893] 1 Ch. 523, 532 *per* Lindley L.J.

¹³ “Omission of a precaution, omission of an act which will assert title and exclude a squatter, are omissions just as much as is omission of a duty to another”: *Eastwood v. Ashton* [1915] A.C. 900, 921 *per* Lord Wrenbury.

¹⁴ *Stoney v. Eastbourne Rural District Council* [1927] 1 Ch. 367. On the facts of that case, the grantor’s responsibility extended from 1782 to 1921.

¹⁵ Law of Property Act 1925, Sched. 2, Pt. III.

guaranteeing freedom from incumbrances relates only to those incumbrances “as . . . have been or shall be made, occasioned or suffered by” the person conveying or certain other people. That does not extend to an incumbrance which no-one can be said to be responsible for creating. There is no protection against a liability imposed by a combination of the common law and statute.¹⁶ A distinction is drawn between, on the one hand, payments required by statute which are charged on the land, which the covenant makes the grantor’s responsibility,¹⁷ and, on the other hand, sums which statute requires the owner for the time being to pay but with which the land is not charged.¹⁸

Further assurance

2.6 There are three separate implied covenants for further assurance.¹⁹ The only material difference between them is that if a mortgagor is called upon to perfect the title which he made, he is obliged to do so at his own expense. The covenants by beneficial owners and settlors only oblige them to make good their titles at the expense of the person requesting them to take action.

Variation

2.7 The parties are free to vary or extend the terms of the statutory covenants, and if they do, the varied covenants apply as if the statute implied them in that form.²⁰ In at least one circumstance, it is common to vary the covenants: on assigning a lease, the assignor frequently excludes liability for any breach of the lease covenants relating to the physical state and condition of the property.²¹ This takes account of the fact that most tenants who undertake repairing and decorating responsibilities are always, at least in minor ways, in breach of those obligations. They therefore modify the covenant which they would otherwise give that “all the covenants . . . in the lease . . . have been . . . performed up to the time of the conveyance”.²²

2.8 In one respect, however, the effect of the covenants is not modified. The freedom from incumbrances covenant does not automatically apply to those incumbrances “subject to which the conveyance is expressly made”.²³ The grantor can be liable for matters to which the covenant was not expressly made subject but of which the grantee was aware at the date of the conveyance. One vendor remained liable for a defect in title arising from the interpretation of a will, even though the will was fully recited in the conveyance²⁴ and another was liable to pay damages because building land which he sold was subject to a right of way, even though the purchaser knew of the existence of the right.²⁵

Directing conveyance

2.9 In some cases the owner of property is directed by another person to convey it to the person entitled.²⁶ If the person directing conveyance by another is expressed to do so as beneficial owner, covenants are implied on his behalf as if he was expressed to convey as beneficial owner.²⁷

¹⁶ *Chivers & Sons Ltd. v. Air Ministry* [1955] Ch. 585, concerning payment for the repair of the chancel of a church, as to which see our Report, *Liability for Chancel Repairs* (1985), Law Com. No. 152.

¹⁷ *Re Bettesworth and Richer* (1888) 37 Ch.D. 535.

¹⁸ *Egg v. Blayney* (1888) 21 Q.B.D. 107.

¹⁹ By beneficial owners: Law of Property Act 1925, Sched. 2, Pt. I; by mortgagors: *ibid.*, Pt. III; by settlors: *ibid.*, Pt. V.

²⁰ Law of Property Act 1925, s.76(7).

²¹ Standard Conditions of Sale (1st ed.), cond. 8.1.5. The superseded National Conditions of Sale (20th ed.), cond. 11(7), and Law Society’s General Conditions of Sale (1984 revision), cond. 8(5), were to the like effect.

²² Law of Property Act 1925, Sched. 2, Pt. II.

²³ Law of Property Act 1925, Sched. 2, Pt. I.

²⁴ *Page v. Midland Railway Company* [1894] 1 Ch. 11.

²⁵ *Great Western Railway Company v. Fisher* [1905] 1 Ch. 316. The decision may have been influenced by the nature of the bargain. “I think they did know [of the right of way]; but I also think that . . . Fisher’s conveyance was, as between himself and the plaintiffs, a conveyance of the land discharged from those rights”: *Ibid.*, per Buckley J. at p.322.

²⁶ E.g., where land is conveyed by a nominee at the direction of the beneficial owner or where a purchaser directs the owner to convey to a subpurchaser.

²⁷ Law of Property Act 1925, s.76(2).

2.10 A special provision, which appears to have become no more than an historical relic, applies where both husband and wife convey as beneficial owner. The wife is deemed to convey and to be expressed to convey by direction of her husband. Two extra covenants by the husband are implied: first, a covenant as the person giving the direction, and secondly a covenant in the same terms as that implied on his wife's part.²⁸

2.11 At common law, a married woman could own land, but it was subject to the rights of her husband, and she could not dispose of it by her own act alone.²⁹ In 1833, a married woman was enabled to dispose of land which she held, by a deed executed with the concurrence of her husband.³⁰ Even if land was limited to a wife directly for her separate use, she still needed her husband's concurrence to dispose of the legal estate.³¹ However, a woman who married after 1882 became entitled to hold and dispose on her own account of all forms of property, whether it belonged to her at the time of her marriage or was acquired later.³² A woman married before 1883 remained subject to the old law in respect of property which she owned on 1 January, 1883 and any which she then owned contingently, in reversion or in remainder, but which vested or fell into possession later.³³

2.12 The special provision about beneficial owner covenants was first enacted in 1881,³⁴ to deal with dispositions of a wife's property in which her husband concurred. The result of the reforms of the law relating to married women's property is that this would only apply in the case of a woman married before 1883, so the provision is now obsolete. It is mistaken to apply it in modern circumstances to a conveyance by husband and wife joint owners, because, as they will necessarily be trustees, it will probably not be appropriate or effective for them to convey as beneficial owners.³⁵

Grantor's capacity

2.13 The key words are not simply used to define what covenants for title are to be implied. They also define the capacity in which the grantor conveys. Indeed, only the appropriate covenants are capable of being implied, because in each case the statute implies "a covenant by a person who conveys and is expressed to convey³⁶ as . . ." beneficial owner or whatever other capacity is specified.³⁷ The requirement is that he must not only be expressed to convey in a particular capacity, but also that he actually has that capacity. This view has been taken in relation to a conveyance as personal representative³⁸ and conveyance as beneficial owner.³⁹ In relation to a proposed conveyance "as trustee", it was said that "... the appropriate covenant is implied by the use of this phrase only if the grantor in fact 'conveys' as trustee, as well as being expressed to convey thus".⁴⁰

2.14 Nevertheless, there was earlier authority in the contrary direction, accepting as valid covenants by grantors not actually conveying in the capacity in which they purported to convey. Trustees sold "as personal representatives" and were held to be liable for breach of the resulting implied covenants.⁴¹ A conveyance "as beneficial owner" by a tenant for life (arguably not a beneficial owner) also gave rise to liability.⁴²

²⁸ Law of Property Act 1925, s.76(3). It has been suggested that the part of this provision relating to the additional covenants is merely an explanation of the effect of the earlier part of the subsection: Hood and Challis, *Conveyancing, Settled Land and Trustee Acts*, 7th ed. (1909), p.47.

²⁹ 1 Black. Comm. 442-444.

³⁰ Fines and Recoveries Act 1833, s.77.

³¹ *Hall v. Waterhouse* (1865) 5 Giff. 64.

³² Married Women's Property Act 1882, s.2.

³³ *Reid v. Reid* (1886) 31 Ch.D. 402.

³⁴ Conveyancing and Law of Property Act 1881, s.7(3).

³⁵ Para. 2.15 below.

³⁶ Or, as the case may be, "charges" and is expressed "to charge as . . .".

³⁷ Law of Property Act 1925, s.76(1)(A)-(F).

³⁸ *Fay v. Miller, Wilkins & Co.* [1941] Ch. 360, 363 per Sir Wilfrid Greene M.R., 366 per Clauson L.J.

³⁹ *Pilkington v. Wood* [1953] Ch. 770, 777 per Harman J.

⁴⁰ *Re Robertson's Application* [1969] 1 W.L.R. 109, 112 per Megarry J.

⁴¹ *Wise v. Whitburn* [1924] 1 Ch. 460.

⁴² *David v. Sabin* [1893] 1 Ch. 523.

2.15 The statutory formula has been described as “inept”⁴³ and it has been suggested that “perhaps it is expedient to give . . . [it] . . . a wide meaning, for its main object was no doubt to prevent the necessity of setting out all these covenants at length”.⁴⁴ Certainly, we are aware that in many cases joint owners of land⁴⁵ convey as beneficial owners. Despite the clear statutory words, there must, in the absence of direct binding authority, remain some doubt about the view which we have taken that the grantor must actually have the capacity in which he is expressed to convey.⁴⁶

Benefit of covenants

2.16 The benefit of the implied covenants runs with the land, so that they are enforceable by whoever then owns the relevant estate or interest.⁴⁷ An owner of land will therefore usually enjoy greater protection than is afforded only by any covenant in the conveyance to him. To take an example: A sells and conveys as beneficial owner to B, who in turn sells and conveys as beneficial owner to C. B’s liability to C under his right to convey covenant does not extend to the results of A’s acts, because A is a person through whom B derives title by purchase for value.⁴⁸ However, C may have a direct right of action against A.

Limitation periods

2.17 The liability of a grantor bound by an implied covenant will last for the limitation period which applies to all contractual obligations, twelve years if the covenant is implied into a deed, otherwise six years.⁴⁹ The date from which the limitation period runs varies from one covenant to another:

- (a) Right to convey: from the date of the conveyance.⁵⁰
- (b) Quiet enjoyment: from the date the enjoyment is disturbed.⁵¹
- (c) Freedom from incumbrances: from the date of the conveyance.⁵²
- (d) Further assurance: from the date of refusal to do what is necessary to perfect the title.⁵³
- (e) Validity of lease: from the date of the conveyance.⁵⁴

Clearly, there will be some cases in which the circumstances result in the breach of more than one covenant—commonly the covenants for quiet enjoyment and freedom from incumbrances—and different limitation periods will then probably apply depending on which covenant is chosen to found the proceedings.

Words of limitation

2.18 We must mention another historical development in land law, to which we shall need to refer later. At common law, the estate being conveyed by a disposition had to be defined by words of limitation.⁵⁵ From the beginning of 1882, simplified forms were made effective in deeds: the word “heirs” no longer had to be used and estates could be described simply as “in fee simple”, “in tail”, “in tail male” or “in tail female”.⁵⁶ Nevertheless, there were still pitfalls: e.g., conveying land “in fee” but omitting the word “simple”.⁵⁷ In 1926 there was therefore a further simplification. Freehold land conveyed without words of limitation passes, unless a contrary intention

⁴³ Megarry and Wade, *The Law of Real Property*, 5th ed. (1984), p.160.

⁴⁴ *Re Ray* [1896] 1 Ch. 468, 475 per Kay L.J.

⁴⁵ Who are trustees for sale: Law of Property Act 1925, s.36.

⁴⁶ Para. 2.13 above.

⁴⁷ Law of Property Act 1925, s.76(6).

⁴⁸ Para. 2.4 above.

⁴⁹ Limitation Act 1980, ss.5, 8. In a few exceptional cases, the periods are longer: *ibid.*, ss.28, 29, 32.

⁵⁰ *Spoor v. Green* (1874) L.R. 9 Ex. 99, 110, per Bramwell B.

⁵¹ *Ibid.*, p.116, per Kelly C.B.

⁵² *Turner v. Moon* [1901] 2 Ch. 825.

⁵³ *Jones v. King* (1815) 4 M. & S. 188.

⁵⁴ Williams and Lightwood, *Vendor and Purchaser*, 4th ed. (1936), p.1078.

⁵⁵ Traditional forms were: (for a fee simple) “to the said A.B. his heirs and assigns forever”, (for a fee tail) “to the said C.D. and the heirs of his body lawfully begotten or to be begotten”: Gardiner, *The Art of Conveyancing Explained*, 2nd ed. (1698).

⁵⁶ Conveyancing and Law of Property Act 1881, s.51.

⁵⁷ *Re Ethel and Mitchells and Butlers’ Contract* [1901] 1 Ch. 945.

appears in the conveyance, the fee simple or the whole of whatever other interest the grantor has.⁵⁸

2.19 The relevance of these provisions to the implied covenants for title lies in the fact that the guarantees provided by those covenants are limited to “the subject-matter . . . expressed to be conveyed”.⁵⁹ That is to say, a person who, e.g., conveys as beneficial owner covenants that he has full power to convey what is expressed to be conveyed, which is wholly satisfactory where the interest is defined. However, if the extent of the interest in the land concerned is not defined, the effect of the conveyance, as a result of the provisions abolishing the need for words of limitation, is that it conveys “the fee simple or other the whole interest which the grantor had power to convey in such land”.⁶⁰ So, in a case where the grantor purported to dispose of the fee simple without describing it as such, but did not own it—just the situation in which the grantee would want to enforce the covenants for title—there would be no effective protection. The implied covenant would appear to take effect to guarantee that the grantor conveyed what he was expressed to convey; but the conveyance would be construed as disposing only of what he could convey, and what was conveyed might be nothing.

Registered land

2.20 The covenants implied by the Law of Property Act 1925, discussed above, can apply to registered land. There is also a covenant applicable only to registered leasehold land.⁶¹ As far as the general covenants are concerned, the prescribed form of Land Registry transfer⁶² makes no provision for inserting the key words, but their use for the purpose of introducing the covenants is expressly authorised.⁶³ We understand that transfers usually include those key words. Although their use may be limited, this appears to be good practice. “Whereas, in the vast majority of transactions, in the final result, they will prove not to have been needed, there will still be the exceptional, and possibly unpredictable, occasions when the turn of events will justify their inclusion”.⁶⁴

2.21 The covenant implied by the Land Registration Act 1925 is to much the same effect as the validity of lease covenant by someone conveying as beneficial owner,⁶⁵ although worded differently,⁶⁶ but with these differences:

- (a) it only applies on a transfer of registered land;
- (b) no key words are required in the transfer;
- (c) it applies to every transfer, whether or not for valuable consideration, unless there is an entry on the register negating the implication;⁶⁷
- (d) there is no provision making it run with the land.

⁵⁸ Law of Property Act 1925, s.60.

⁵⁹ *Ibid.*, s.76(1).

⁶⁰ *Ibid.*, s.60(1).

⁶¹ Land Registration Act 1925, s.24(1)(a). The terms of the covenant are set out in Appendix B.

⁶² Land Registration (Execution of Deeds) Rules 1990, Sched.

⁶³ Land Registration Rules 1925, r.76.

⁶⁴ *Ruoff & Roper on the Law and Practice of Registered Conveyancing*, 5th ed. (1986), p.337. For an analysis of the effect of the covenants in registered conveyancing, see *ibid.*, pp.337–343.

⁶⁵ Para. 2.3 above.

⁶⁶ It guarantees the validity of the lease only against the acts and omissions of the transferor, making no reference to acts and omissions of predecessors in title.

⁶⁷ That entry will necessarily be made after the land is transferred, when the transfer is subsequently registered.

PART III

NEED FOR REFORM

Purpose of covenants for title

Traditional approach

3.1 The Working Paper pointed to fundamental differences between the statutory covenants for title with which we are here concerned and the terms, also implied by statute, which apply on a sale of goods.¹ We referred to the latter as “much simpler and apparently more satisfactory . . . It appears acceptable that they apply to the contract and survive completion and that they are not qualified but absolute.”² Before examining these characteristics it is convenient to consider the purpose which covenants for title should achieve, particularly in relation to land.

3.2 The covenants reinforce the investigation of title which someone who acquires land for value is expected to make. Where that investigation relates to unregistered land it involves the examination of the deeds, and proof of other events, which have together resulted in the property becoming vested in the current owner. There is no way to prove conclusively whether any events followed that vesting which would be significant to someone acquiring the property. As one expert conveyancer who responded to our Working Paper put it, “The gap since the last instrument in the abstract, by which the property devolved on the vendor, and the conveyance to the purchaser is filled by a covenant by the vendor that he has done nothing since he bought the property to encumber the title”.

3.3 These covenants for title build up into a chain of protection. “On each sale the title is investigated, and conveyancers are content with a series of covenants of title each of which covers the time which has elapsed since the last covenant from a vendor in fee”.³ The effect has been explained: “Therefore, although no one vendor gives a full warranty of title, the various covenants added together amount to a comprehensive guarantee to the purchaser, provided that he sues the proper defendant in each case. But this is assuming that the full covenants are given on each sale.”⁴

3.4 We accept that this function of supplementing documentary proof of title continues to be important, but the existing system is not the only way to fulfil this aim and it may be no longer the most appropriate. In particular, there are three major considerations which must be taken into account.

Modern considerations

3.5 First, an increasing number of land titles are registered. One of the principles of land registration is that the register records the current facts about the ownership of the property and the nature of the title to it. It is generally unnecessary to look at the earlier history. Compulsory registration of title applies throughout England and Wales from 1 December 1990,⁵ although it will be a long time before all titles which could be registered are on the register⁶ and some will never be registered.⁷ It is clear, however, that the historical approach to title to land has become less relevant and this trend will continue.

3.6 Secondly, problems experienced in former times in deducing a good title to unregistered land have largely been solved. We commented on them in examining the rule in *Bain v. Fothergill*.⁸ “This rule was laid down for defects in title which lay concealed in title deeds which were often, in the phrase attributed to Lord Westbury,

¹ Section 12 of the Sale of Goods Act 1979 implies the following terms into contracts for the sale of goods: the seller has a right to sell the goods, they are free from charges or incumbrances and the buyer will enjoy undisturbed possession of them.

² Working Paper, para. 3.11.

³ *David v. Sabin* [1893] 1 Ch. 523, 534 per Lindley L.J.

⁴ Megarry and Wade: *The Law of Real Property*, 5th ed. (1984), p.164.

⁵ Registration of Title Order 1989.

⁶ Some property in Central London is still unregistered some 90 years after registration became compulsory there.

⁷ Leases granted for no more than 21 years are not capable of registration: Land Registration Act 1925, s.19(2) proviso (a); Land Registration Act 1986, s.4(3).

⁸ (1874) L.R. 7 H.L. 158; Working Paper No. 98 (1986); the rule has been abolished: Law of Property (Miscellaneous Provisions) Act 1989, s.3.

‘difficult to read, disgusting to touch, and impossible to understand’, and is a quite understandable reaction to the very real difficulties that existed at the time. Given the major reforms effected to substantive land law by the 1925 property legislation, together with the progressive reduction in the length of the title to be deduced, it seems inappropriate to defend the existence of the rule by reference to a state of the law which has long since been altered.’⁹

3.7 Thirdly, the emphasis on the requirements for establishing title to land ignores the fact that the implied covenants are also used in relation to other property.¹⁰ For such other property, it is seldom, if ever, appropriate to establish ownership through a chain of devolution of title.

Options for consideration

Options without support

3.8 In our Working Paper, we put forward five options for consideration.¹¹ Three of these received little or no support from those who responded to the Paper. These options were: first, no change, of which we ourselves said, “Any suggestion that no change should be recommended seems quite untenable”;¹² secondly, redrafting, the aim of which would be clarification without altering the substantive effect of the covenants, so that problems other than the archaic language would remain; and thirdly, abolition, which some of those who responded considered would result in conveyancers adopting their own substitute covenants. It is certainly no part of our policy that conveyancing documents should be made substantially longer by the inclusion of repetitive standard clauses, nor that minor variations to the wording of those clauses should increase the burdens on those dealing with the documents.

3.9 We do not consider that any of these three options properly tackles the problems which have been identified in the present implied covenants, while continuing to provide proper protection for purchasers. Accordingly, we do not recommend their adoption.

Other options

3.10 The two other reform options in the Working Paper, first to amend the covenants¹³ and secondly to substitute a statutory guarantee,¹⁴ both attracted support from those who submitted comments to us. The amendment option involved tackling specific weaknesses and difficulties in the present rules. On the other hand, the statutory guarantee would substitute an entirely new system under which a guarantee of title would be implied into the contract for the sale of land, rather than implying covenants into the conveyance or transfer.

Guarantee in contracts

3.11 One central aspect of the statutory guarantee suggestion, that the obligation should form part of the contract, attracted a number of criticisms from commentators. It was pointed out that not all dispositions are preceded by contracts. There is normally none before an assent or surrender or before a property transfer within a family. Contracts are also frequently dispensed with for sales under statutory obligations and in transactions for a small consideration. Moreover, there would be more such cases if the guarantees were to be extended to leases, as many of them are granted without a formal agreement in advance. In some cases, sales by auction and leases for less than three years, a contract need not be in writing,¹⁵ so evidential difficulties might arise in seeking to establish that a guarantee applied. Finally, it was pointed out to us that, in normal conveyancing transactions, contract documents are frequently not retained with the title deeds.

⁹ Working Paper No. 98, para. 3.8.

¹⁰ Para. 2.2 above.

¹¹ Working Paper, Part III.

¹² Working Paper, para. 3.1.

¹³ Working Paper, paras. 3.3 *et seq.*

¹⁴ Working Paper, paras. 3.11. *et seq.*

¹⁵ Law of Property (Miscellaneous Provisions) Act 1989, s.2(5).

3.12 Accordingly, it seems likely that a statutory guarantee scheme under which guarantees formed part of the contract, rather than being implied into the documents effecting the disposition, would reduce the number of cases in which guarantees were provided. It could be less easy to prove when the guarantee scheme applied and it might add to the inconvenience of conveyancing and the storage of deeds. We do not see these consequences as desirable, and we have therefore abandoned this aspect of the statutory guarantee proposal.

Criticisms of the present scheme

3.13 We now turn the criticisms which we and others have voiced of the present law.

Qualified guarantees

3.14 The qualified nature of the present implied covenants¹⁶ has two consequences which we must consider. First, obviously, it limits the responsibility which the person giving the guarantees undertakes. Secondly, it affects the process of enforcement.

3.15 The extent of any guarantor's responsibility is necessarily a matter affecting the balance between the interests of the parties to the transaction in question. A purchaser wants the maximum continuing protection, while the vendor's interest is best served by shedding all responsibility as soon as the property has been transferred. The covenants which have had statutory form for over one hundred years, and which embodied practice then already well established, accept that vendors will have some continuing responsibility after parting with the property. We can see no justification for altering that; why, after all, should a purchaser not be able to look to the vendor to make good the obligation he undertook to vest ownership in the purchaser? Indeed we found no strong body of opinion urging any such change. The question is, therefore, simply one of the extent and form of the continuing obligation.

3.16 Where an interest in land is acquired for value, the purchaser will see it as only reasonable that he should be assured that he has acquired what he paid for. Earlier uncertainties made it reasonable that his immediate vendor should not accept responsibility for the actions of previous owners. We have already made the point that the weight to be given to this factor is now much reduced.¹⁷ Indeed, for registered land uncertainties are virtually eliminated, and we have reached the conclusion that the overwhelming number of unregistered titles are free from hidden traps.

3.17 Enforcement of breaches of the present covenants depends on the land owner being able to identify who, in a chain of predecessors in title, took the action which resulted in his title being impugned. The difficulties in delving back into history are obvious, and as we have pointed out, the need to obtain positive evidence of the act done can prove fatal to a claim even when the identity of the responsible defendant is obvious.¹⁸ Those enforcement difficulties can make the protection afforded by the present covenants illusory.

3.18 These difficulties would be alleviated by two reforms. First, if the person conveying was the one person to undertake responsibility, that would ensure that if there is a dispute the defendant is immediately identifiable. Secondly, any complaint would focus on the real issue if the form of the covenants concentrated on guaranteeing the results which the person acquiring the property can reasonably expect, rather than looking at the acts done by former owners. This would also mean that the protection could extend to cases where the defects in title were not attributable to anyone's act or default.¹⁹

3.19 We pointed out in the Working Paper that on a sale of goods a seller gives absolute guarantees.²⁰ Assimilating the position as far as possible will help public

¹⁶ Paras. 2.4–2.5 above.

¹⁷ Para. 3.6 above.

¹⁸ Para. 2.4 above.

¹⁹ Para. 2.5 above.

²⁰ Working Paper, para. 1.2.

understanding of the law. More particularly, to drop the emphasis on the chain of title—now no longer relevant for registered land—would also make these covenants more appropriate for property other than land, for which they are also intended.

3.20 There were two arguments against this possible reform. First, we were reminded in the course of our consultation, which generally favoured absolute guarantees, that whether the prospect would be acceptable must depend on the nature of the guarantees offered. It was suggested that there would be a particular problem in putting reasonable limits on a covenant for quiet enjoyment. We accept that that might prove difficult. However, bearing in mind that we are only concerned with matters of title, we have come to the conclusion that the protection provided by this form of implied covenant is not the most appropriate way to deal with matters not covered by the other covenants for title. It seems to us that on an outright disposition, many of the cases for which the vendor should take responsibility will be covered by one of the other usual covenants, either the guarantee of his right to convey or freedom from incumbrances. In other cases protection should take the form of an express restrictive covenant. We see a continuing need for landlords to give their tenants a covenant for quiet enjoyment. Leases commonly include an express covenant to that effect, but even if the lease is silent, one is automatically implied by the relationship of landlord and tenant.²¹

3.21 The second contrary argument is that it might not always be reasonable or appropriate for a person making a disposition to give unqualified guarantees in statutory form. There will always be cases in which any standard form covenant is either inappropriate or needs modification. The present implied covenants can be amended, although this is not frequently done except on assignments of leasehold property.²² Any new implied covenants could be dealt with in the same way, so that users could ensure that their terms were suitable to the transaction in which they were being used.

3.22 For all three reasons, we conclude that those giving covenants for title in future should undertake a responsibility which is comprehensive and not limited to their own actions and those of certain other parties.

Wording

3.23 The wording of the present covenants found only one friend amongst those who responded to the Working Paper. His view was that the covenants caused practitioners no difficulty and that their effect was clear. Other correspondents said the covenants were “archaic and unnecessarily complex”, “would benefit from substantial redrafting”, and were “unacceptable for reasons of obscurity and verbosity”. Judges have described them as “extremely difficult words”,²³ and a “jungle of verbiage”,²⁴ and a leading textbook condemned them as “clumsy and obscure”.²⁵ We contented ourselves with calling them “patently ancient and complicated”.²⁶

3.24 In the light of the responses to the consultation, we adhere to the view that the covenants as presently drawn should not be allowed to stand because their language makes them difficult to understand and they contain a number of obscurities and ambiguities. A modern clarification of these provisions, which are so frequently incorporated into private documents, is long overdue and would be a worthwhile reform in itself. However, as we see important changes that should be made to the whole provision of title guarantees, we are content to let the modernisation of the wording be a welcome by-product of the general overhaul of the system.

Capacity

3.25 The use of the grantors’ capacity as the key words to imply the covenants, and in particular the statutory requirement that they are given by “a person who

²¹ *Budd-Scott v. Daniell* [1902] 2 K.B. 351; *Markham v. Paget* [1908] 1 Ch. 697.

²² Law of Property Act 1925, s.76(7); para. 2.7 above.

²³ *Pilkington v. Wood* [1953] Ch. 770, 777, per Harman J.

²⁴ *Meek v. Clarke* (1982) unreported, per Slade L.J.

²⁵ Megarry and Wade, *Law of Real Property*, 5th ed. (1984) p.163, n.56.

²⁶ Working Paper, para. 3.1.

conveys and is expressed to convey²⁷ as . . .”,²⁸ has produced doubt about their meaning.²⁹ Clearly, even if nothing else were done, any reform should clarify whether trustees who choose to convey as, say, beneficial owners, can successfully imply the covenants expected of beneficial owners, or indeed any statutory covenant at all.

3.26 The link between the grantors’ capacity and the covenants they give does not seem to us to be one which needs to be indissoluble. Clearly, those who sell in a fiduciary capacity and those who sell as mortgagees may wish to undertake less responsibility, and buyers from them will often accept that this is reasonable. Because there will always be an appreciable number of such cases, even if they are in a minority, it is useful to provide an easy facility for them to give some guarantee, albeit a restricted one.

3.27 On the other hand, we can see no reason why those in a fiduciary capacity should not agree to give unrestricted guarantees if they choose to do so. Their trusteeship may be little more than formal, as is the case with joint beneficial owners who hold property for their own benefit. Or, they may consider that they are able to strike a better bargain by giving more comprehensive guarantees, and that they can do so without incurring undue risks. If, as we intend, the implied covenants are to be available for adoption voluntarily as they now are, rather than being obligatory, and are to remain capable of adaptation by agreement, it seems only reasonable to allow the parties to adopt whichever statutory covenants they wish.

3.28 The only additional consideration which this raises is what the key words should be. If there are to be new covenants, it would be as well to adopt new key words so that there is no confusion as to the contents of the covenants which they imply. If there is a free choice of covenants, it would be better to break the link with the grantors’ capacity. Otherwise there could be unnecessary confusion, when, e.g., a beneficial owner is expressed to convey as trustee, which he is patently not.

Applied automatically

3.29 When the Working Paper put forward the suggestion that covenants should be implied into contracts, rather than into disposition documents, it also assumed that they would be implied automatically without the need—as now—for the use of key words. This had the attraction of further assimilating the rules about these covenants with those concerning sale of goods guarantees.³⁰ However, on reconsideration, we see good grounds for retaining the familiar system of employing key words whenever covenants are to be implied.

3.30 There are two principal arguments in favour of retaining the requirement of key words:

- (a) First, the positive need to use the key words should guard against the covenants being implied by mistake where they are inappropriate or unwanted;
- (b) Secondly, separate classes of case can be catered for, each with its own set of covenants introduced by different key words. The only practical alternative would be to rely on express variation of the covenants which would otherwise be employed. Those who make dispositions but are unlikely to agree to give complete guarantees, e.g., owners in a fiduciary capacity, would have the opportunity to modify the implied covenants, an opportunity of which they would have to avail themselves on every occasion. This seems unnecessarily burdensome; it partially defeats the objectives of shortening conveyancing documents and it increases the likelihood of mistakes.

3.31 For these reasons, we support the retention of the system by which statutory covenants are implied if, but only if, specified key words are used. However, if there are to be new covenants it would be sensible to prescribe key words which are different from those now in use, so that there is no confusion as to the covenants which are

²⁷ Or, as the case may be, “charges” and is expressed “to charge as . . .”.

²⁸ Law of Property Act 1925, s.76(1)(A)–(F).

²⁹ Paras. 2.13–2.15 above.

³⁰ Section 12 of the Sale of Goods Act 1979 implies terms as to title into contracts for the sale of goods without the use of key words.

being implied. The purpose of the key words should be only to introduce the covenants, so they do not need to refer to the capacity of the person making the disposition, and those disposing of property should be free to choose the level of guarantee they provide. The misleading link between the present key words introducing the covenants and their reference to the capacity of those making dispositions should be dropped.

Limitation periods

3.32 Another criticism of the present implied covenants scheme relates to the different limitation periods which can apply when covenants are broken.³¹ In the Working Paper, we were inclined to the view that the liability under any implied covenant as to the title of a vendor of land should last twelve years from completion but no longer.³²

3.33 The difficulty to which we had drawn attention was that the same facts may amount to a breach of more than one covenant, in respect of which the limitation periods start at different times. Accordingly, the length of time which a plaintiff has to bring an action based on those facts depends on which covenant he seeks to enforce.³³ However, this situation is not unique and we do not consider that by itself it justifies any amendment to the statutory covenants. As will appear,³⁴ we have come to the conclusion that it is not necessary to imply by statute a covenant for quiet enjoyment. Accordingly, with only one of the two covenants remaining, the apparent anomaly created by choosing which one to enforce disappears.

3.34 There would still be one case of enforcing a covenant for title more than twelve years after the property changes hands. The date of breach of the covenant for further assurance is when that assurance is refused, and therefore the limitation period runs from then.³⁵ There is no limit on the time which may elapse before a request for further assurance is made, and the limitation period follows that request. That, however, is wholly consistent with principle. Until a request for further assurance is made, the covenantor does not have the chance to perform the covenant or to decline to do so, and therefore there cannot be a breach of covenant. To allow a limitation period to start running before there is a cause of action cannot be just to the potential complainant. We therefore accept that a different calculation should apply in this case, and do not regard it as an anomaly.

3.35 Although, for the reasons given above, we do not think that any change to the limitation periods is needed, we must add one further point. The arguments which we put forward in the Working Paper centred on dealings with land, and in particular we pointed to the effect of registration of title.³⁶ However, the statutory implied covenants are intended also to apply to other types of property, and are so used.³⁷ The needs of those employing them in transactions with other property, to which land registration is irrelevant, cannot be ignored. We therefore recommend that the law of limitation should continue to apply to implied covenants for title in the usual way, and that no amendment be made to it.

³¹ Para. 2.17 above.

³² Working Paper, para. 4.4.

³³ Working Paper, para. 2.20.

³⁴ Paras. 4.34–4.36 below.

³⁵ Para. 2.17 above.

³⁶ Working Paper, para. 4.4.

³⁷ Para. 2.2 above.

PART IV

REFORM PROPOSALS

4.1 Having concluded that the present implied covenants for title are unsatisfactory in a number of ways, we are recommending a new scheme to replace it. These proposals are explained in this Part of the Report and draft legislation to implement them is included in the draft Bill set out in Appendix A.

Outline

4.2 It is convenient to summarise our proposals, before considering the details of them. This will make it easier to see where the detailed provisions fit into the new scheme. The main features of our recommendations are:

- (a) Statutory covenants for title will be available to be implied into instruments disposing of property, including the grant of all leases of land, if the appropriate key words are used;
- (b) The person giving the covenant will give a guarantee of the current title, not limiting his responsibility to the result of acts or omissions by specified parties;
- (c) Enforcement will be directly against the person who gave the guarantee. In an appropriate case, he may have a right to indemnity from the person who gave him a guarantee, but, with minor exceptions, it will not be necessary for the benefit of the guaranteees to run with the land;
- (d) Two alternative levels of guarantee will be available:
 - (i) Full guarantee, involving in all cases covenants as to the right to convey, further assurance and freedom from incumbrances;
 - (ii) Limited guarantee, where the freedom from incumbrances covenant will be limited to matters occurring since the date of the last disposition for value;
- (e) The appropriate key words to appear on the face of a disposition document will be “with full guarantee” and “with limited guarantee”.

Extent of guarantees

Property

4.3 We have pointed out that the present implied covenants can be applied to the disposition of any type of property.¹ Although these covenants may most commonly be used on dispositions of land, they are regularly used in other spheres, and this seems to be convenient. We should not wish the new covenants to apply any less widely, and therefore recommend that the definition of the property to which the covenants can apply should remain unchanged.

Leases

4.4 At present, the statutory covenants for title do not apply on the grant of a lease, provided a rent is reserved.² This express exclusion seems to us to be unsatisfactory. The majority of newly-developed flats and some houses are “sold” by means of granting long leases at a premium and reserving the ground rent, and many commercial and industrial properties are also disposed of by lease. So, a material number of disposals of land are made without the benefit of the statutory covenants for title.

4.5 Nevertheless, there has been no strong pressure to extend the statutory scheme of implied covenants for title to include leases. However, the basis of the scheme in all cases is that it is voluntary: covenants are made available for parties to adopt only if they wish to do so. There is accordingly everything to gain and nothing to lose by extending the classes of case in which the covenants may be used, because where they are not wanted the parties can ignore them. We therefore recommend that the statutory covenants should in future be capable of applying on the grant of any lease.

¹ Para. 2.2 above.

² Law of Property Act 1925, s.76(5); para. 2.2 above.

Valuable consideration

4.6 The present covenants by a person who conveys and is expressed to convey as beneficial owner apply only where the conveyance is for valuable consideration.³ On reconsideration, we see no reason why the availability of the full guarantee should be limited in this way, although there will, of course, be many cases where the persons making a disposition not for valuable consideration will not agree to give a full guarantee. That is a matter for negotiation and agreement, but it is convenient to make the guarantee fully available to parties to all forms of disposition if they wish to adopt it. Accordingly, we recommend that valuable consideration should not be a prerequisite for any disposition into which the new covenants are to be implied.

Directing conveyance

4.7 At present, where a conveyance by one person is made by direction of another and that other is expressed to direct as beneficial owner, appropriate statutory covenants for title on his behalf are implied.⁴ There are a number of situations in connection with the disposal of land in which it is appropriate for someone other than the owner of the legal estate to give covenants for title: e.g., where a purchaser directs the owner to convey to a sub-purchaser or where the beneficial owner on whose behalf the property has been held by a nominee directs its disposal. It would therefore be useful that any revised covenant scheme should include provision for covenants by a person directing the disposition. The existing provision recognises, by applying only to those who direct as beneficial owner, that it is in the nature of such cases that someone in a fiduciary capacity is unlikely to direct a conveyance and to need to give guarantees. The new provisions can appropriately proceed on the same basis. Accordingly, we recommend that when someone joins in a conveyance to direct that it be made, covenants for title on his behalf should be implied where he purports to give the direction with a full guarantee.

Enforcement

4.8 We have already concluded that the responsibility of those giving covenants for title should not be limited only to the actions of specified parties.⁵ This will permit a considerable simplification of the process of enforcement. Until now, it has been necessary for the current owner faced with a defect in title to determine which (if any) former owner was responsible, and to commence proceedings against the defaulter or someone claiming through him otherwise than for value. The alternative, which we favour, would permit the current owner always to proceed against the person who covenanted in his favour. In this sense, the covenants offering a full guarantee would impose absolute liability.⁶

4.9 To ensure that the current owner of the property could enforce a covenant by a predecessor in title, other than his immediate predecessor, it has been necessary until now for the benefit of the covenants to be annexed to the land.⁷ The objective of our proposals is not the reverse. The benefit of the covenants will not run with the land. Rather, we recommend that as soon as property is disposed of, the person making that disposition should assume sole responsibility, under any guarantee which he gives. The person to whom property is transferred would therefore only be able to take action against the person who made the disposition to him. Clearly that not only simplifies the task of the current owner in identifying the person against whom he has to take action, but it also limits the possible litigation to a dispute between two parties.

4.10 There would be a limited extension to the class of those who could enforce a statutory guarantee. In accordance with normal contractual rules, the benefit could be assigned, giving the assignee the opportunity to enforce the covenants to the extent that circumstances permitted. Again, if a person with the benefit of a covenant died or became bankrupt, that benefit would pass as part of his estate. Finally, a beneficiary

³ Law of Property Act 1925, s.76(1)(A), (B).

⁴ Law of Property Act 1925, s.76(2); para. 2.8 above.

⁵ Para. 3.22 above.

⁶ The precise extent of the liability would necessarily depend on the form of the covenants, which we deal with below: paras. 4.19 *et seq.*

⁷ Law of Property Act 1925, s.76(6).

who became entitled to property on someone's death, under his will or on his intestacy, would be able to enforce covenants of which that person had enjoyed the benefit.

4.11 However, although there would be a limit on enforcement action, it would not be just, when action is taken against a person who gave a guarantee as a result of a defect in title which arose before he became owner, to prevent his seeking to pass liability back to his predecessor who had provided him with a guarantee. Assume that A sold land to B with full guarantee, and B then sold it to C with full guarantee. C takes action against B, who is the only person with responsibility to C. B will be able to take action against A⁸ if the defect was caused by an act or omission before B purchased. Responsibility could, similarly, be passed further down a chain of owners in an appropriate case.

4.12 One result of restricting an owner, so that he must enforce any guarantee against his immediate predecessor who made the covenant with him, is to ensure that when property is to be transferred the parties are able to negotiate the level and terms of any guarantee. Both the person making the disposition and the person taking the property then know the extent of the responsibility which has been undertaken. The benefit which the person acquiring the property receives depends on the bargain which he himself makes, and is independent of what earlier owners have agreed.

Key words

4.13 We have previously concluded that the statutory covenants should continue to be implied by key words, and only if key words are used, that the key words used for the new covenants should be different from those currently prescribed and that the link between the key words and the capacity of the person making the disposition should be dropped.⁹ It remains to propose what the new key words should be.

4.14 We are recommending two levels of guarantee, a complete guarantee which beneficial owners would normally offer and a restricted guarantee which would be more appropriate for fiduciary owners. It would be useful if the key words to introduce the guarantees reflected the nature of the covenants. We therefore recommend that the key words should, respectively, be "with full guarantee" and "with limited guarantee".

4.15 We envisage that the key words will be used in disposition documents to describe how a disposition is made. For example, "A transfers [the property] to B *with full guarantee*", or "A *with full guarantee* mortgages [the property] to B to secure . . .", or "A, B and C, the personal representatives of X, assent *with limited guarantee* to the vesting of [the property] in D".

Welsh alternatives

4.16 It has been drawn to our attention that a small, but probably increasing, amount of conveyancing is documented in Welsh. A question has been raised whether the current key words—stated as they are in English in the statute—can properly and effectively be used in translation. We offer no view on that question, but accept that if new words are to be introduced, a statutory Welsh alternative should be provided. We therefore recommend that the Welsh equivalents—which are "gyda gwarant llawn" for "with full guarantee" and "gyda gwarant cyfyngedig" for "with limited guarantee"—should have the same effect as the English phrases.

The covenants

Wording

4.17 It is important that any covenants for title which are now introduced should be worded in a way which is modern, clear and straightforward. The covenants give important guarantees, and there should be as little doubt as possible about their meaning. The wording of the present covenants has been subject to much criticism. If

⁸ Provided, necessarily, the limitation period has not expired.

⁹ Para. 3.31 above.

there are to be changes in meaning, as we shall recommend below, so that some alteration in wording is inevitable, we are in no doubt that the wording should be as direct as possible. The draft Bill in Appendix A seeks to achieve that objective.

Contents

4.18 We have reconsidered the nature of the guarantees which the covenants can usefully offer. They fall into three classes. First, there are those which together constitute the full guarantee. Secondly, there are the modifications required where only a limited guarantee is to be given. Thirdly, there are those which apply in special cases. Finally, there are some general provisions to be applied in the interpretation of the covenants.

Full guarantee

Right to convey

4.19 The first covenant which we recommend should be given by someone disposing with full guarantee is that the person making the disposition has the right to dispose of the property in the way in which he purports to do. This is a fundamental guarantee that the disposal takes effect as it is supposed to do, or, looked at the other way round, the person to whom the disposition is made receives what he is told he will receive. It is essential that the covenant be limited to guaranteeing a disposal in the way in which it is purported to be made, because a limit may deliberately be placed on the disposition. For example, if there is a conveyance of land subject to the reservation of a right of way or to existing restrictive covenants, and those incumbrances are expressly referred to, the covenant for title must be limited accordingly. When a freeholder grants a lease, he should covenant that he has the right to make that grant, but need not give any greater guarantee.

4.20 As we have pointed out above,¹⁰ the statutory provision dispensing with the need for words of limitation when conveying land¹¹ can have the effect also of undermining the value of covenants for title. We certainly see no need for the reintroduction of the formal words of limitation, so we do not propose the repeal or reversal of that section. However, its effect on covenants for title is unfortunate, and may well have been unintended. For this purpose alone, a modification of the position is therefore needed, to ensure that, even where no words of limitation are employed, a person making a disposition is not taken to convey only such title as he has in a case where he purports to convey more. Accordingly, we recommend that for this purpose and subject to the express provisions of the disposition document, a person should be taken to be conveying the freehold, the whole of the unexpired term of a lease or the whole of his registered title, as the case may be.

Further assurance

4.21 The second covenant which we recommend as part of the full guarantee is that the person disposing of property should do what he reasonably¹² can to give the person in whose favour the disposition is made such title as he agreed to give. Normally, title will be made when the disposition is completed, and therefore a covenant of this nature in the disposition document will only operate to cure oversights and defects in the proof of title which became apparent later. This is the equivalent of the present covenant for further assurance. It is of particular value in dealings with registered land, or land subject to first registration of title. The legal estate is not vested in the person acquiring the property until he has been registered as proprietor, and the application for registration is necessarily made after completion. This covenant enables him to call for the help of the person who made the disposition in establishing his right to registration.

4.22 There is one aspect of the present arrangements which we have reconsidered. The covenant for further assurance now given by a beneficial owner in a disposition other than a mortgage is on the basis that any action to be taken by the covenantor

¹⁰ Paras. 2.18, 2.19 above.

¹¹ Law of Property Act 1925, s.60.

¹² The present covenant for further assurance only extends to what "shall be reasonably required".

is at the cost of the person in whose favour the covenant is given.¹³ On the other hand, a mortgagor who covenants as beneficial owner agrees to pay the costs as long as the mortgage continues.¹⁴ We can see little justification for anyone who makes a disposition to give a guarantee in relation to a matter so fundamental as title and then to require the person taking the benefit of that guarantee to pay for so doing. That could very substantially reduce the value of the guarantee.

4.23 On the other hand, it would clearly be wrong to involve a person making a disposition in the expense of providing proofs of title which could only be made available at excessive cost. However, there are two safeguards against that. First, the person making the disposition can always require, before the document takes effect, that the terms of the covenant be modified. If he knows that there would be great difficulty in procuring a particular document he can exclude his liability for doing so. Secondly, the covenant only ever imposes liability to take steps which are reasonable.

4.24 We take the view that, in the normal case, the covenant for further assurance is part of the package of guarantees which the person making a disposition provides at his own expense as part of the bargain. As a general rule, anyone who is in breach of covenant would expect to pay the costs of putting the matter right. We see no reason to make this a special case. We therefore recommend that the standard statutory covenant should provide that the covenantor bear the cost of compliance.

Freedom from incumbrances

4.25 The third full guarantee covenant which we recommend is that the property is free from all charges and incumbrances and rights lawfully exercised or capable of being exercised by third parties. We have sought to draw this covenant very widely so that all forms of third party rights will be covered.¹⁵ The intention is that it will not only cover financial claims, but also rights such as easements over the property.

Limited guarantee

4.26 The only difference which we propose between the full guarantee and the limited guarantee is in the covenant for freedom from incumbrances. The first two covenants¹⁶ would apply unaltered. We consider that it is wholly appropriate that even those who only have a fiduciary interest in property should convey what they purport to convey and should do what they can to make good any deficiency in the proof of title. Their limited interest will not normally prejudice the validity of their title, and those dealing with them can properly expect them to vest that title in their successors. Nevertheless, they will always be able to contract to reduce their liability, and that, perfectly properly, would serve to warn anyone taking a disposition from them of the reduction in protection he would receive.

4.27 The limitation which we recommend on the covenant for freedom from incumbrances when a limited guarantee is given is that it should relate only to incumbrances which have arisen since the last disposition for value. This would impose a liability not only for incumbrances created by the person making the disposition, but also for any created by a predecessor for whom he should reasonably take responsibility. When, e.g., trustees sold after a new trustee had been appointed, they would be responsible for incumbrances created before the change of trustees. Similarly, an executor would stand in the deceased's shoes.

Special cases

4.28 The first special case concerns leasehold land. When a lease is being disposed of, it is of primary importance to the person taking the disposition that the lease is both still subsisting and not subject to anything which would give the landlord a right to forfeit it. There may not only be a right to forfeit as a result of a subsisting breach of a tenant's covenant, but also, in some cases, because of a former breach which has

¹³ Law of Property Act 1925, Sched. 2, Pt. I.

¹⁴ *Ibid.*, Part III.

¹⁵ The present covenant excludes some rights because they do not arise by reason of the act or omission of the person making the disposition, or of someone for whom he is responsible: para. 2.5 above.

¹⁶ Paras. 4.19–4.24 above.

since ceased¹⁷ and which it will therefore be less easy for anyone acquiring the lease to detect. Accordingly, we recommend that a person disposing of a lease, with either full or limited guarantee, should covenant that the lease is subsisting and not liable to forfeiture.¹⁸

4.29 The other special case concerns mortgages, where the property being made subject to the mortgage is leasehold land or land subject to a rentcharge. The lease or the instrument reserving the rentcharge will normally impose obligations, and if they are not performed a sanction is forfeiture. The mortgagee's security depends on there being no forfeiture, and therefore on the obligations being performed by the mortgagor whose responsibility they continue to be. In order to bolster the mortgagee's security, we therefore recommend that a mortgagor of this type of property covenant to observe the perform all those obligations.

Defects disclosed

4.30 As we pointed out, one unsatisfactory feature of the present law is that the implied covenants can make a covenantor liable for a defect in title which was known in advance to the person in whose favour the disposal is made.¹⁹ We do not consider that this should continue. If a matter is expressly drawn to the attention of the person with the benefit of the guarantee or he already knows of it, he has the chance to bargain for such protection as he feels is justified. As long as all relevant information is available, no unfairness is involved in limiting the terms of the guarantee. We therefore recommend that the implied covenants for title should not impose any liability for matters actually known to the person in whose favour the covenants are made.

4.31 For this purpose, it is necessary to make clear the status of notice implied by statute. Generally, registration as a local land charge or under the Land Charges Act 1972 constitutes actual notice to all persons.²⁰ However, the registration does not in fact draw the matter to the attention of those concerned, and for this purpose we do not consider that registration should be enough to limit the covenantor's liability. We therefore recommend that, in this context, the provision for statutory implied notice should be ignored.

Covenants not required

Quiet enjoyment

4.32 The present covenants for title include a covenant for quiet enjoyment.²¹ This provides a remedy for interference which results from the lawful acts of the person making the disposition (and certain predecessors and successors in title), including the lawful use of property which he retains. Accordingly, it does not extend to any unlawful use for which tortious remedies such as nuisance or negligence may be available. Having analysed the circumstances in which liability under the covenant may arise, we have come to the conclusion that it should not be retained as one of the implied covenants for title, although the grounds for this conclusion are different in relation, on the one hand, to freehold property and disposals of existing leaseholds and, on the other hand, to the grant of leases.

4.33 The circumstances in which it is likely to be necessary to rely on a covenant for quiet enjoyment are cases of physical interference, or a use of one property which, although it does not amount to a nuisance, is at the very least an inconvenience to the occupier of another. This is itself an anomalous form of protection to be offered by one of a set of covenants whose main purpose is to guarantee title. If what interrupts the quiet enjoyment of the property is lawfully done, it will not be impugning the

¹⁷ *British Petroleum Pension Trust Ltd. v. Behrendt* (1985) 52 P. & C.R. 117.

¹⁸ The equivalent present covenant (Law of Property Act 1925, Sched. 2, Pt. II) is frequently modified, to recognise the fact that tenants are often in breach of repairing covenants. The proposed new covenant could be similarly modified; see para. 4.42 below.

¹⁹ Para. 2.8 above.

²⁰ Law of Property Act 1925, s.198.

²¹ Para. 2.3 above.

owner's title, even though that title does not give him the physical benefit which he expects from the property. In this respect, a covenant for quiet enjoyment also overlaps the function of restrictive covenants, obligations voluntarily undertaken placing specific restraints on the use of one piece of land for the benefit of the owners and occupiers of another. As a senior member of the Judiciary put it to us on consultation, "... if the vendor is retaining adjoining land, it would be much better that the solicitors should work out precise mutual restrictions in fresh covenants fashioned to the situation, instead of placing reliance against the vendor, and not against the purchaser, on the nebulous concept of 'quiet enjoyment'".

4.34 On comparing the present covenant for quiet enjoyment and restrictive covenants, there is a striking difference: the registration provisions which apply to the latter and not to the former. Since 1 January 1926, if a restrictive covenant is to bind the successors in title to the burdened land, it must be registered.²² Statute has by this means ensured that anyone acquiring the burdened land and following normal conveyancing procedure will have the restriction drawn to his attention. By contrast, covenants for title are not registered. In unregistered conveyancing they are readily apparent on the face of the title to the land benefited, but it has never been general practice to retain a corresponding record on the title of any burdened land. The situation can therefore be: A sells part of his land to B, conveying as beneficial owner and in effect agreeing to restrict the use of the property he retains so far as it may interfere with B's enjoyment. A later sells the land which he kept to X. X is equally bound by that covenant, but may have no means of knowing of its existence.

4.35 We know of no case in which this has proved a practical difficulty, but we believe that any enforcement of a covenant for quiet enjoyment, other than one given by a landlord to his tenant, is rare. Nevertheless if, in cases in which protection against the lawful interference is needed, restrictive covenants were used, any possible prejudice to successors in title would be eliminated and the law's treatment of such restrictions would be consistent. The covenants would have to be specially drawn wherever they were needed, but that would both make their terms more precise and draw them to the attention of the land owner whose freedom of action was to be curbed. The objective would therefore be fully achieved, but in a way more calculated to be fair to the person covenanting and to his successors.

4.36 For this reason, we recommend that no covenant for quiet enjoyment be implied on a disposition, other than the creation of a lease. This requires no additional legislation. The provisions relating to restrictive covenants are already in place and are available for use when required.²³

4.37 On the grant of a lease, the situation is different. The relationship between landlord and tenant is a continuing one throughout the lease. The landlord may unjustifiably prejudice the enjoyment of the tenant at any time during the lease, in circumstances in which it is reasonable for the tenant to have a remedy and in ways which will not necessarily relate to the use of other property. The facts may not justify a claim that, e.g., there was an undisclosed incumbrance at the date of the grant of the lease, and even if they do, the prejudice may arise after the expiry of the limitation period if that runs from the date of the grant. There is therefore a need for a covenant for quiet enjoyment in this case. However, it does not have to be included in the implied covenants for title. An express covenant for quiet enjoyment is common in leases, and even where there is none, one will be implied at common law.²⁴ The landlord who gives such a covenant will normally have a counterpart of the lease, and therefore in this case there is no problem about his being aware of the extent of his obligation. Accordingly, it is not necessary for statute to imply a covenant for quiet enjoyment as one of the covenants for title.

4.38 We therefore recommend that no covenant for quiet enjoyment should be implied on the grant of a lease as part of the guarantee of title.

²² Land Charges Act 1972, s.4(6); Land Registration Act 1925, ss.20(1), 23(1).

²³ We have, however, previously recommended that the rules be reformed and replaced: *The Law of Positive and Restrictive Covenants* (1984), Law Com. No. 127.

²⁴ *Budd-Scott v. Daniell* [1902] 2 K.B. 351; *Markham v. Paget* [1908] 1 Ch. 699.

Registered land

4.39 The covenant at present automatically implied into the transfer of leasehold land with registered title²⁵ substantially overlaps the covenant implied by the use of the key words “as beneficial owner”.²⁶ There are, however, two ways in which it applies more widely: first, unlike the beneficial owner covenant it applies when there is no valuable consideration for the disposition, and secondly, it applies even though no key words are used. It may have been the original intention that, for registered land, this covenant should supersede the beneficial owner covenants,²⁷ but in practice it has not done so. Clearly, the chance to remove this duplication offers the possibility of a small simplification of the law.

4.40 The covenant which we are recommending should be implied into a disposition of leasehold land²⁸ would apply even when there was no valuable consideration.²⁹ That particular distinction between the two present covenants therefore ceases to be relevant. There remains the question whether there should, in this one case, be an automatic implied covenant which does not depend upon the use of key words. The continued use of the beneficial owner covenants, even in the case of dispositions of registered land, suggests that using key words is not seen as a burden even where there is an alternative, so there is little reason to depart from the standard scheme. Having opted for the continued use of key words,³⁰ we see positive advantages in consistency: it helps the understanding of the law and makes it likely that the implied covenants will be used consistently whenever needed.

4.41 Accordingly, we recommend that the implied covenant relating only to registered leasehold land should be repealed without replacement.

Variation

4.42 Under the existing law parties who agree that covenants for title are to be implied into their disposition documents have been free to vary the statutory terms, to fit the circumstances of a particular case.³¹ Bearing in mind that implying the covenants is voluntary, it seems to us appropriate that the parties should be at liberty to change the standard formulation; the alternative would be to ignore the statute completely and to set out their chosen form of covenant verbatim in the instrument giving effect to the disposition. This would often result in increasing the length of the document, and the time and trouble spent in producing it, without achieving any greater legal effect. That is something which the system of implied covenants is designed to avoid. We consider that it would be helpful to continue to allow amendments to the statutory covenants, and we recommend accordingly.

Interpretation

4.43 In interpreting the present covenants, there are two helpful provisions in the Law of Property Act 1925 which apply to them. First, a covenant in favour of two or more people jointly includes an obligation to the same effect for the benefit of the survivor or survivors of them.³² Secondly, singular words may be read to include the plural, and vice versa, and words of masculine gender may be read to extend to females.³³ We recommend that the effect of these two provisions be extended to the new implied covenants.

²⁵ Land Registration Act 1925, s.24(1)(a); paras. 2.20–2.21 above.

²⁶ Para. 2.21 above.

²⁷ None of the forms prescribed by the Land Registration Rules 1925 contains words implying Law of Property Act 1925 covenants.

²⁸ Para. 4.28 above.

²⁹ Para. 4.6 above.

³⁰ Para. 3.31 above.

³¹ Law of Property Act 1925, s.76(7).

³² *Ibid.*, s.81.

³³ *Ibid.*, s.83.

Transitional provisions

4.44 Transitional provisions between the old and the new implied covenant schemes will only be needed for certain special cases.³⁴ The general rule will be that all dispositions before the new Act comes into force will be governed by the old law, and the covenants implied by the existing key words will not be prejudiced by the new law. Those old covenants will not, however, run with the land in favour of anyone taking under a disposition governed by the new law. In dispositions after the date of the new Act, only new forms of implied covenant, introduced by the new key words, will be available. So that there is a smooth transition to the new scheme, we recommend that the purported use of the old forms of covenant should be ineffective after the new Act comes into force, except in exceptional circumstances.

Statutory precedents

4.45 The change in key words will need to be reflected in documents of which the form has either been prescribed or suggested by illustrations in statutes or statutory instruments,³⁵ because the present key words will cease to have effect. Where those forms of documents have suggested, or accommodated the possibility of, the use of the Law of Property Act 1925 key words, it will now have to be possible to use the new key words. As the choice of which words to use is to be a matter for the parties' choice, it is not necessary or indeed possible to substitute precise words in the case of each form of document. We recommend simply that the new Act should make it clear that the new key words can be used instead of the old ones which they replace.

Pre-Act contracts

4.46 There will be cases in which an owner of property contracts to dispose of it before the new scheme becomes law, but that contract is completed and the property transferred after the commencement date. Similarly, an option may be granted before the Act comes into force but exercised after its commencement; the transfer of the property would then, necessarily, take place when the new scheme was operating. The contract and the option, drawn under the existing law, will necessarily use the present key words referring to the current implied covenants. Unless special circumstances exist, we recommend that that type of contract should be completed as it always would have been, unaffected by the change in the law and that pre-Act options should be treated similarly. This would be an exception to the rule which we earlier proposed,³⁶ that from the commencement date only the new forms of covenant should be used. The reason is simply stated: we see no justification for imposing upon parties to a contract liabilities different from those which they agreed to undertake. That would be an unnecessary, and therefore unacceptable, form of retrospective legislation.

4.47 However, there are circumstances in which a different rule will be needed. This is where there is a pre-commencement contract or option referring to the old implied covenants, followed by a disposition of the land after the commencement date incorporating the new covenants, after which the contract comes to be completed or the option is exercised and completed. The situation could arise in this way. Before the new legislation comes into force, A, as owner of Blackacre, grants a lease of it to T. That lease contains an option under which T can claim to buy the reversion, which A agrees to transfer as beneficial owner. After the legislation comes into force, A sells Blackacre to B, transferring it, subject to T's lease, with full guarantee. T then exercises his option to buy the reversion.

4.48 In this situation, it is not appropriate for the transfer (in our example, from B to T) to imply the old-style covenants. As the new system would have begun to apply to that property, B already enjoys the benefit of a full guarantee from A and there is no reason why he should not give a similar guarantee to T.

4.49 We therefore recommend, that where a contract made before the new legislation comes into force, or an option granted before that and exercised after it is in

³⁴ Paras. 4.46 *et seq* below.

³⁵ E.g., Law of Property Act 1925, Schedules 3–5; Settled Land Act 1925, Schedule 1.

³⁶ Para. 4.44 above.

force, is completed after commencement, in circumstances where the property has already been disposed of with full guarantee, any contractual provisions for implying the former covenants should be implemented by implying new ones. Where the contract was for a disposal as beneficial owner, the transfer would be with full guarantee. A contract for a disposal as settlor, trustee, mortgagee or personal representative, would be implemented by a disposal with limited guarantee. A disposal of registered leasehold land, which would have attracted the covenant implied by section 24(1)(a) of the Land Registration Act 1925, would operate as a transfer with full guarantee. These arrangements would involve modifications of the contractual obligations. However, in the relatively rare cases in which the circumstances would arise, this does not seem to us to be unreasonable, because the greater guarantees would be being given by someone who had already received the benefit of the new statutory covenants.

Crown

4.50 The present legislation for implied covenants for title binds the Crown.³⁷ Although the new scheme involves guarantees which are more comprehensive, and therefore liabilities which are more onerous, we see no reason why this position should change. It must always be borne in mind that the covenants are only implied if the parties to a disposition so agree and include the key words in the instrument. The guarantees are therefore voluntarily given. We have not carried out any specific consultations concerning the application of the terms of our proposed Bill to the Crown. But we consider that, subject to any points which might arise on the consultation which is customarily conducted at a later stage, it is appropriate to recommend that the Bill should bind the Crown.

³⁷ Law of Property Act 1925, s.208.

PART V

SUMMARY OF RECOMMENDATIONS

5.1 In this Part of the Report we summarise our conclusions and our recommendations for reform. Where appropriate, we identify the clauses in the draft Law of Property (Implied Covenants for Title) Bill, printed in Appendix A, which give effect to the particular recommendations.

5.2 Having examined the present scheme of implied covenants for title, we conclude that:

- (i) Some system for supplementing documentary proof of title remains important [paragraph 3.4].
- (ii) Three of the options put forward in our Working Paper—no change, redrafting and abolition—should be rejected [paragraph 3.9].
- (iii) Covenants for title should continue to be implied into disposition documents, and should not form part of the contract for dispositions [paragraph 3.12].
- (iv) In future, liability under covenants should not be limited to the consequences of the actions of a specified class of persons [paragraph 3.22].
- (v) The wording of the implied covenants should be modernised [paragraph 3.24].
- (vi) The limited form of guarantee should be available for those disposing in a fiduciary capacity, but the parties should be able to choose what level of guarantee is given in a particular case [paragraph 3.27].
- (vii) There should not be a direct link between the key words, introducing implied covenants, and the capacity in which the disposition is made [paragraph 3.28].
- (viii) The system of implying covenants by the use of key words in the document should continue [paragraph 3.31].
- (ix) No change should be made to the way in which the law of limitation applies to implied covenants [paragraph 3.35].

5.3 Our recommendations for a revised scheme of implied covenants for title are:

- (i) The covenants should be available to be implied into dispositions of any type of property [paragraph 4.3; clause 1].
- (ii) It should be possible to imply the covenants on the grant of a lease [paragraph 4.5; clause 1].
- (iii) It should be possible for covenants to be implied whether or not the disposition is for valuable consideration [paragraph 4.6; clause 2(1)].
- (iv) Covenants should be implied on the part of a person who joins in a disposition to direct that it be made, and who gives the direction with full guarantee [paragraph 4.7; clause 2(2)].
- (v) The covenants should not run with the land, but should only be enforceable by the person in whose favour they were given, by anyone to whom the benefit passed by assignment or on death or bankruptcy or by a beneficiary taking property under the will or on an intestacy [paragraphs 4.9, 4.10; clause 2(5)].
- (vi) The key words, to imply the statutory covenants, should be “with full guarantee” and “with limited guarantee” [paragraph 4.14; clause 2(1)].
- (vii) Alternative key words, in Welsh, should be available and should have the same effect [paragraph 4.16; clause 3].
- (viii) The covenants to be implied on the part of a person disposing with full guarantee should be:
 - (a) That he has the right to dispose of the property in the way in which he purports to do [paragraph 4.19; clause 2(1)(a)(i), Schedule 1, paragraph 1]. A person is, for this purpose and subject to the express terms of the document, to be taken to convey the freehold, the unexpired portion of the lease term or the whole of the registered title as the case may be [paragraph 4.20; clause 2(6)].

- (b) That he should, at his own expense, do what he reasonably can to vest in the person to whom the disposition is made the title he agreed to give, including satisfying the requirements for registration [paragraph 4.21; clause 2(1)(a)(i), Schedule 1, paragraphs 2, 8].
- (c) That the property is free from incumbrances [paragraph 4.25; clause 2(1)(a)(i), Schedule 1, paragraph 3].
- (ix) The covenants to be implied on the part of a person disposing with limited guarantee should be:
 - (a) The same covenants as to his right to dispose of the property and for further assurance [paragraph 4.26; clause 2(1)(a)(ii), Schedule 1, paragraphs 1, 2].
 - (b) That the property is free from incumbrances created since the last disposition for value [paragraph 4.27; clause 2(1)(a)(ii), Schedule 1, paragraph 4].
- (x) A covenant should be implied on the part of a person disposing of leasehold land that the lease is subsisting and not subject to forfeiture [paragraph 4.28; clause 2(1)(b), Schedule 1, paragraph 5].
- (xi) When leasehold land or land subject to a rentcharge is mortgaged, a covenant should be implied on the part of the mortgagor that he will observe and perform the covenants in the lease or the grant of the rentcharge [paragraph 4.29; clause 2(1)(c), Schedule 1, paragraph 6].
- (xii) The implied covenants for title should not impose liability for any matters known in advance to the person taking the disposition, disregarding statutory implied notice [paragraphs 4.30, 4.31; Schedule 1, paragraph 7].
- (xiii) No covenant for quiet enjoyment should be implied by statute [paragraph 4.36].
- (xiv) There should no longer be any separate covenant implied on a disposition of leasehold land with a registered title [paragraph 4.41].
- (xv) The parties should be free to amend the form of the implied covenants [paragraph 4.42; clause 2(4)].
- (xvi) Statutory rules, concerning the benefit of covenants in favour of more than one person and interpretation, should apply to the implied covenants [paragraph 4.43; clause 2(3)].
- (xvii) As a general rule, the introduction of the new rules should not prejudice any covenant already implied under the old law, but the former key words should have no effect if used in dispositions after the commencement of the new provisions [paragraph 4.44; clause 6(1)].
- (xviii) Where any previous Act prescribed or suggested forms of document into which covenants for title could be implied under the old law, those forms should be read as allowing the new covenants to be implied [paragraph 4.45; clause 5].
- (xix) Where a contract was entered into before the commencement date, or an option was granted before that date and exercised after it, and was to be completed by a disposition into which the old-style covenants would have been implied, and it is to be completed after that date:
 - (a) Generally, it should be completed as it would previously have been, and the old law should apply [paragraph 4.46; clauses 6(2), (3), 8].
 - (b) But if, since the commencement date, the property has been disposed of with full guarantee outside the terms of that contract, the new covenants should be implied [paragraph 4.49; clauses 7, 8].
- (xx) The new legislation should apply to the Crown [paragraph 4.50; clause 9].

(Signed) PETER GIBSON, *Chairman*
 TREVOR M. ALDRIDGE
 JACK BEATSON
 RICHARD BUXTON
 BRENDA HOGGETT

MICHAEL COLLON, *Secretary*
 26 April 1991

APPENDIX A

Law of Property (Implied Covenants for
Title) Bill

ARRANGEMENT OF CLAUSES

Introductory

Clause

1. Meaning of “disposition” and “property”.

Implied covenants for title and their operation

2. Covenants for title.
3. Welsh equivalents.

Amendments, repeals etc.

4. Amendments and repeals.
5. Modification of statutory forms.

Transitional

6. Covenants in old form.
7. Covenants in new form.
8. Options.

Supplementary

9. Application to Crown.
10. Short title, commencement and extent.

SCHEDULES:

Schedule 1 —Implied covenants.

Part I—Covenants.

Part II—Interpretation.

Schedule 2 —Amendments.

Schedule 3 —Enactments Repealed.

DRAFT

OF A

B I L L

INTITULED

An Act to introduce new covenants for title to be implied in dispositions of property, and for connected purposes. A.D. 1991.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

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Introductory

1. In this Act, unless the context otherwise requires—
“disposition” includes the creation of a term of years; and
“property” includes a thing in action, and any interest in real or personal property.

Meaning of “disposition” and “property”.

10

Implied covenants for title and their operation

2.—(1) In an instrument effecting a disposition of property there shall be implied on the part of the person making the disposition the covenants set out in Part I of Schedule 1 to this Act, as follows—

Covenants for title.

15

- (a) whether or not the disposition is for valuable consideration—
 - (i) if it is expressed to be made with full guarantee, the covenants set out in paragraphs 1, 2 and 3; and
 - (ii) if it is expressed to be made with limited guarantee, the covenants set out in paragraphs 1, 2 and 4;
- (b) if the disposition is of leasehold land, whether or not it is for valuable consideration, and is expressed to be made with full guarantee or with limited guarantee, the covenant set out in paragraph 5; and
- (c) if the disposition is a mortgage and is expressed to be made with full guarantee or with limited guarantee, and the property is subject to a rentcharge or is leasehold property, the covenant set out in paragraph 6,

25

Part II of the Schedule having effect for its interpretation.

EXPLANATORY NOTES

Clause 1

This clause gives extended meanings to two terms which are fundamental to the meaning of the Bill. "Disposition" includes the grant of a lease, so that the statutory covenants will in future be implied into all leases granted in writing as recommended in paragraph 4.4 of the report. "Property" is given a wide meaning so that the covenants can be implied into dispositions of all forms of property, not only interests in land. This implements the recommendation in paragraph 4.3 of the report.

Clause 2

1. This clause defines the nature and effect of statutory covenants for title and when they will be implied.

Subsection (1)

2. This subsection specifies the circumstances in which the person disposing of property gives covenants for title, the terms of which are set out in Schedule 1 to the Bill, which are implied into an instrument effecting the disposition. It also introduces provisions for interpreting the covenants.

3. The covenants to be implied are:

(a) Whenever a disposition is expressed to be made with full guarantee: those in paragraphs 1 (right to convey the property), 2 (further assurance) and 3 (freedom from incumbrances) of Schedule 1. This implements the recommendation in paragraphs 4.19-4.25 of the report;

(b) Whenever a disposition is expressed to be made with limited guarantee: those in paragraphs 1 (right to convey the property), 2 (further assurance) and 4 (freedom from incumbrances, modified form) of Schedule 1. This implements the recommendations in paragraphs 4.26-4.27 of the report;

(c) Whenever leasehold land is expressed to be disposed of with full or with limited guarantee: the covenant in paragraph 5 of Schedule 1 (validity of lease). This is recommended in paragraph 4.28 of the report;

(d) Whenever a mortgage of property subject to a rentcharge or of leasehold property is expressed to be made with full or with limited guarantee: the covenant in paragraph 6 of Schedule 1 (to observe and perform covenants). This is recommended in paragraph 4.29 of the report.

4. As recommended in paragraph 4.6 of the report, the covenants are implied whether or not the dispositions are for valuable consideration.

5. The terms of the covenants may be limited or extended under subsection (4), and they are implied subject to any such variation.

6. Paragraphs 7 and 8 of Schedule 1 apply in interpreting the covenants which are implied.

(2) Where a person is expressed in the instrument effecting a disposition of property—

- (a) to direct the disposition; and
- (b) to give the direction with full guarantee,

this Act applies to him as if—

- (i) he were the person making the disposition; and
- (ii) the disposition were expressed to be made with full guarantee.

1925 c.20

(3) Sections 81 and 83 of the Law of Property Act 1925 apply to a covenant implied by virtue of this section as they apply to a covenant implied by virtue of that Act.

(4) The instrument effecting a disposition of property may limit or extend the operation of a covenant implied in it by virtue of this section.

(5) The benefit of a covenant implied by virtue of this section in an instrument effecting a disposition of property passes—

- (a) by assignment;
- (b) as part of the estate of any person entitled to that benefit—

1986 c. 45.

(i) under the Insolvency Act 1986; or

(ii) to his personal representatives; and

- (c) on an assent by the personal representatives of any such person vesting the whole or any part of the property in a person entitled under his will or on his intestacy,

but not otherwise.

(6) Subject to the terms of the instrument effecting a disposition, it shall be assumed—

- (a) where—

(i) it is apparent from the instrument that the disposition is of an existing leasehold interest in land; and

(ii) the title to the leasehold interest is not registered, that the person making the disposition is disposing of the property for the unexpired portion of the term of years created by the lease or underlease;

- (b) in any other case of a disposition of an existing interest in land the title to which is not registered, that he is disposing of the fee simple; and

- (c) in any disposition of an existing interest in land where the title to the interest is registered, that he is disposing of the whole of that interest.

Welsh equivalents.

3. This Act has effect—

- (a) where “gyda gwarant llawn” is used instead of “with full guarantee”; and

- (b) where “gyda gwarant cyfyngedig” is used instead of “with limited guarantee”,

as it has effect where the English words are used.

EXPLANATORY NOTES

Subsection (2)

7. This subsection provides for implied covenants to be given by a person who, in an instrument effecting a disposition, directs that the disposition be made by someone else. It follows the recommendation in paragraph 4.7 of the report.

8. If the person who gives the direction is expressed to do so with full guarantee, this subsection puts him in the same position as if he were making the disposition, and being expressed to do so with full guarantee.

Subsection (3)

9. Implementing the recommendation in paragraph 4.43 of the report, this subsection applies to covenants implied under the provisions of two sections of the Law of Property Act 1925. Section 81 (effect of covenant with two or more jointly) gives the benefit of a covenant in favour of more than one person to the survivor or survivors of them. Section 83 (construction of implied covenants) allows singular words to be read as plural, and vice versa, and words of masculine gender to include the feminine.

Subsection (4)

10. As recommended in paragraph 4.42 of the report, this subsection permits the parties to an instrument into which covenants for title are implied to limit or extend their operation.

Subsection (5)

11. The benefit of a covenant implied by the Act can only pass from one person to another in three ways: first, by assignment, secondly, on the death or insolvency of a person entitled to the benefit and thirdly, where property is vested in a beneficiary entitled to it under a will or on an intestacy. Accordingly, a covenant is generally not enforceable by someone interested in the property, merely because of privity of estate. This implements the recommendation in paragraphs 4.9 and 4.10 of the report.

Subsection (6)

12. This subsection makes presumptions about the extent of interests in land disposed of by an instrument effecting a disposition in various cases, but those presumptions are subject to the terms of the instrument in question. The subsection prevents section 60 of the Law of Property Act 1925 (abolition of technicalities in regard to conveyances and deeds) having effect to reduce the guarantee offered by the statutory implied covenants for title. The need for this provision is explained in paragraph 4.20 of the report.

13. The presumptions of the extent of the interest disposed of are:

- (a) By a disposition of unregistered leasehold land, the unexpired portion of the term of years;
- (b) By a disposition of other unregistered land, the fee simple;
- (c) By a disposition of registered land, the whole of the registered interest.

Clause 3

This clause allows the use of Welsh language equivalents for "with full guarantee" and "with limited guarantee": see paragraph 4.16 of the report. They have the same effect as the English phrases. There are no restrictions on the circumstances in which the Welsh phrases can be employed.

Amendments, repeals etc.

4.—(1) The enactments mentioned in Schedule 2 to this Act shall have effect with the amendments there specified. Amendments and repeals.

(2) The enactments mentioned in Schedule 3 to this Act are 5 repealed to the extent specified in the third column of that Schedule.

5. Where a form set out—

(a) in the Settled Land Act 1925;

(b) in the Law of Property Act 1925;

(c) in the Benefices (Purchase of Rights of Patronage) Measure 10 1933; or Modification of statutory forms.

(d) in any other Act of Parliament or measure or in an instrument made under an Act of Parliament,

15 includes words which (in an appropriate case) would have resulted in the implication of a covenant by virtue of section 76 of the Law of Property Act 1925, the form is to be taken to authorise instead the use of the words “with full guarantee” or “with limited guarantee” or their Welsh equivalent.

Transitional

20 6.—(1) A covenant implied in relation to any property by virtue of section 76 of the Law of Property Act 1925 or section 24(1)(a) of the Land Registration Act 1925 may be enforced after this Act comes into force, but the benefit of such a covenant does not pass to a person by reason of the property or any part of it vesting in him by virtue of a disposition made after this Act comes into force unless the case falls 25 within subsection (2), (3) or (4) below. Covenants in old form.
1925 c. 21.

(2) Where—

(a) a contract for the disposition of any property has been entered into before this Act comes into force; and

30 (b) the contract contains a term providing for a conveyance of that property to which section 76 of the Law of Property Act 1925 applies; and

(c) the existence of the contract and of that term is apparent on the face of the instrument effecting the disposition for which the contract provides; and

35 (d) there has been no disposition of the property expressed to be with full guarantee after this Act comes into force but before that disposition,

that section has effect on that disposition as if this Act had not come into force.

40 (3) Where—

(a) a contract for the disposition of a leasehold interest in land has been entered into before this Act comes into force; and

45 (b) the covenant specified in section 24(1)(a) of the Land Registration Act 1925 would have been implied on a transfer in pursuance of the contract made before this Act came into force; and

EXPLANATORY NOTES

Clause 4

This clause introduces Schedule 2 to the Bill, which contains amendments to earlier legislation, and Schedule 3 to the Bill, which lists repeals.

Clause 5

This clause deals with the case of statutes, Measures and statutory instruments which set out forms of document which include words to imply statutory covenants for title under section 76 of the Law of Property Act 1925. It allows the use, instead, of the words "with full guarantee" or "with limited guarantee" in those forms, so that covenants can be implied under the terms of this Bill. This implements the recommendation made by paragraph 4.45 of the report.

Clause 6

1. This clause deals with most of the transitional cases in which statutory covenants for title were implied before the commencement date of this Bill or where contracts for dispositions (and some options: see clause 8), which will involve implying such covenants, were entered into before that date. Some exceptional cases are dealt with in clause 7.

Subsection (1)

2. This subsection states the basic principle as set out in paragraph 4.44 of the report. When this Bill comes into force it does not affect liability under any covenant implied by virtue of section 76 of the Law of Property Act 1925 or section 24(1)(a) of the Land Registration Act 1925.

Subsection (2)

3. This subsection deals with the case, discussed in paragraph 4.46 of the report, where a contract for a disposition was made before the Bill came into force, its terms required a disposition into which section 76 of the Law of Property Act 1925 would imply covenants and there has been no disposition with full guarantee since the Bill came into force.

4. In such a case, the old law applies and covenants are implied under the 1925 Act, provided that it is apparent on the face of the instrument giving effect to the disposition that there was such a contract and that it contained a term which required covenants for title to be implied.

Subsection (3)

5. This subsection deals with the case where a contract for a disposition of registered leasehold land was made before the Bill came into force, it would have resulted in a transfer into which section 24(1)(a) of the Land Registration Act 1925 would have implied a covenant and there has been no disposition with full guarantee since the Bill came into force.

6. In such a case, the old law applies and the covenant is imposed under the 1925 Act, provided that the existence of the contract is apparent on the face of the transfer.

(c) the existence of the contract is apparent on the face of the instrument effecting the disposition for which the contract provides; and

(d) there has been no disposition of the leasehold interest expressed to be with full guarantee after this Act comes into force but before that disposition, 5

1925 c.21

section 24 of the Land Registration Act 1925 has effect on that disposition as if this Act had not come into force.

1925 c. 20.

(4) Where the personal representatives of a person who at his death was entitled in respect of any property to the benefit of a covenant implied by virtue of section 76 of the Law of Property Act 1925 or section 24(1)(a) of the Land Registration Act 1925 assent to the vesting of the whole or any part of the property in a person entitled under his will or on his intestacy, the benefit of the covenant passes to that person. 10 15

Covenants in new form.

7.—(1) Where—

(a) a contract for the disposition of any property has been entered into before this Act comes into force; and

(b) the contract contains a term that the person making the disposition shall do so as beneficial owner; and 20

(c) there has been a disposition of the property expressed to be made with full guarantee between the contract being entered into and the disposition for which it provides,

the contract is to be construed as requiring the person making the disposition for which it provides to do so by an instrument expressed to be made with full guarantee. 25

(2) Where—

(a) the conditions specified in subsection (1)(a) and (c) above are satisfied; and

(b) the contract contains a term that the person making the disposition shall do so— 30

(i) as settlor; or

(ii) as trustee or mortgagee or personal representative,

the contract is to be construed as requiring the person making the disposition for which it provides to do so by an instrument expressed to be made with limited guarantee. 35

(3) Subject to subsection (4) below, where—

(a) a contract for the disposition of a leasehold interest in land has been entered into before this Act comes into force; and

(b) at the date when the contract was entered into the title to the leasehold interest was registered under the Land Registration Act 1925; and 40

(c) there has been a disposition of the land expressed to be made with full guarantee between the contract being entered into and the disposition for which it provides, 45

the contract is to be construed as requiring the person making the disposition for which it provides to do so by an instrument expressed to be made with full guarantee.

EXPLANATORY NOTES

Clause 7

1. This clause deals with other transitional cases, in the circumstances set out in paragraphs 4.47 and 4.48 of the report. It concerns the situation where, before the date the Bill came into force, there was a contract for the disposition of property (or, in some circumstances, an option: see clause 8), since that date the property has been disposed of with full guarantee, but not under the terms of that contract. It implements the recommendation in paragraph 4.49 of the report.

Subsection (1)

2. Where the contract contained a term that the person effecting the disposition would do so as beneficial owner, the contract is to be construed as requiring the instrument effecting the disposition to be expressed to be made with full guarantee.

Subsection (2)

3. This subsection deals with the case of a contract which required the disposition to be made as settlor, trustee, mortgagee or personal representative. This is to be construed as requiring completion by an instrument expressed to be made with limited guarantee.

Subsections (3) and (4)

4. In the case of a contract for the disposition of registered leasehold land, the contract is to be construed as requiring the disposition to be effected by an instrument expressed to be made with full guarantee. But if, under the terms of the contract, the covenant to be implied under the Land Registration Act 1925 was to be modified, the covenants in the new form are to be modified correspondingly.

(4) Where a contract such as is mentioned in subsection (3) above provides that the covenant set out in section 24(1)(a) of the Land Registration Act 1925 shall be implied in a modified form, it is to be construed as requiring a corresponding modification to the covenants implied by the instrument effecting the disposition.

8. In relation to a disposition of property in accordance with an option—

(a) granted before this Act comes into force; and

(b) exercised after it comes into force,

10 for the purposes of sections 6(2)(a) and (3)(a) and 7(1)(a) and (3)(a) above there is a contract for the disposition on the grant of the option.

Supplementary

9. This Act binds the Crown.

Application to Crown.

15 10.—(1) This Act may be cited as the Law of Property (Implied Covenants for Title) Act 1991.

Short title, commencement and extent.

(2) This Act shall come into force at the end of the period of two months beginning with the day it is passed.

(3) This Act extends to England and Wales only.

EXPLANATORY NOTES

Clause 8

This clause deals with the impact of the transitional provisions on options. In certain cases an option is to be treated, for the purposes of clauses 6 and 7, as the equivalent of a contract for the disposition of property entered into before the Bill came into force. This applies where the option was granted before the commencement date but was exercised after it.

Clause 9

The terms of this clause make the Bill bind the Crown. This is discussed in paragraph 4.50 of the report.

SCHEDULES

Section 1

SCHEDULE 1

IMPLIED COVENANTS

PART I

COVENANTS

5

General

1. That the person making the disposition has the right, with the concurrence of every other person, if any, conveying the property, to dispose of the property in the way in which he purports to do so.

2. That the person making the disposition will at his own cost do all that he reasonably can to give the person to whom he disposes of the property such title to it as he agreed. 10

3. That the person making the disposition is disposing of the property free from all charges and incumbrances (whether monetary or not) and from all other rights lawfully exercised or exercisable by third parties. 15

4. That since the date of the last disposition for value the person making the disposition has not charged or incumbered the property or granted third party rights in relation to it, and that he has not suffered the property to be charged, incumbered or subjected to any such rights, and that he is not aware that anyone else has done so. 20

Special cases

5. That the lease is subsisting at the date of the disposition and that there is no subsisting breach of a condition or tenant's obligation, and nothing which at the date of the disposition would render the lease liable to forfeiture. 25

6. That the mortgagor will fully and promptly observe and perform all the obligations imposed by the instrument reserving the rentcharge or by the lease on the person granting the rentcharge or the tenant.

PART II

30

INTERPRETATION

1925 c.20

7. The person making the disposition is not liable under paragraph 1, 3, 4 or 5 above for anything that is the result of facts within the actual knowledge of the person in whose favour it is made at the date of the disposition, section 198 of the Law of Property Act 1925 being disregarded for this purpose. 35

8. The reference in paragraph 2 above to the person making the disposition doing all that he reasonably can to perfect the title to the property of the person to whom he disposes of it includes-

EXPLANATORY NOTES

Schedule 1

Part I

1. This Part of this Schedule contains the text of the covenants for title to be implied on the part of those disposing of property.
2. The covenants in paragraph 1 (right to convey the property) and paragraph 2 (further assurance) are implied in all cases in which the disposition is expressed to be made either with full guarantee or with limited guarantee. The terms of the covenants are recommended in paragraphs 4.19-4.24 of the report. See paragraph 8 as to the interpretation of the covenant in paragraph 2.
3. The covenant in paragraph 3 (freedom from incumbrances) applies to all cases in which a disposition is expressed to be made with full guarantee; see paragraph 4.25 of the report.
4. Where a disposition is made with limited guarantee, the covenant in paragraph 4 (freedom from incumbrances) is implied instead of the covenant in paragraph 3. The difference, as recommended in paragraph 4.27 of the report, is that the covenant in paragraph 4 limits responsibility to charges, incumbrances and third party rights taking effect since the last disposition for value.
5. The covenant in paragraph 5 (validity of lease) is implied into a disposition of leasehold land expressed to be made either with full or with limited guarantee and implements the recommendation in paragraph 4.28 of the report.
6. The covenant in paragraph 6 (observing and performing obligations) is implied into a mortgage expressed to be made with full or limited guarantee. This gives effect to the recommendation in paragraph 4.29 of the report.

Part II

7. Implementing the recommendations in paragraphs 4.27 and 4.28 of the report, no responsibility is implied under the covenants in paragraphs 1, 3, 4 or 5 in respect of facts actually known at the date of the disposition to the person in whose favour it is made. For this purpose section 198 of the Law of Property Act 1925 (registration under the Land Charges Act 1925 to be notice) does not apply, so that the mere fact of registration under the Land Charges Act 1972 or the local land charges register does not fix the person taking the disposition with knowledge.
8. Paragraph 8 expressly includes certain responsibilities within the obligations of a person giving the covenant set out in paragraph 2. If registered land is disposed of, he must do all he reasonably can to ensure that the person to whom the disposition is made is registered as proprietor with at least the class of title with which it was previously registered. Where a disposition leads to first registration, the obligation is to give all reasonable assistance to satisfy the registrar as to the other's right to registration as proprietor.

- (a) in relation to a disposition of land the title to which is registered under the Land Registration Act 1925 a reference to his doing all that he reasonably can to ensure that that person is entitled to be registered as proprietor with at least the class of title registered immediately before the disposition; and
- (b) in relation to a disposition of land required to be registered by virtue of the disposition a reference to giving all reasonable assistance fully to establish to the satisfaction of the registrar his right to registration as proprietor.

SCH. 1
1925 c. 21.

**SCHEDULE 2
AMENDMENTS**

Section 4(1)

Law of Property Act 1925

- 1. In section 77(1) of the Law of Property Act 1925 for the words "the last preceding section" there shall be substituted the words "the Law of Property (Implied Covenants for Title) Act 1991".

1925 c.20

Land Registration Act 1925

- 2. In section 38(2) of the Land Registration Act 1925 after the words "the Law of Property Act 1925" there shall be inserted the words "or a covenant implied by virtue of the Law of Property (Implied Covenants for Title) Act 1991".

1925 c.21

Law of Property (Joint Tenants) Act 1964

- 3. In section 1(1) of the Law of Property (Joint Tenants) Act 1964 the words "he conveys as beneficial owner or" shall cease to have effect.

1964 c.63

Leasehold Reform Act 1967

- 4. In section 10(1) of the Leasehold Reform Act 1967 for the words from "section 76(1)(F)" to the end there shall be substituted the words "the Law of Property (Implied Covenants for Title) Act 1991 is implied in the case of a person expressed to transfer property with limited guarantee".

1967 c.88

Rentcharges Act 1977

- 5. In section 11(2) of the Rentcharges Act 1977 for the words "section 76 of the Law of Property Act 1925" there shall be substituted the words "the Law of Property (Implied Covenants for Title) Act 1991".

1977 c.30

SCH. 2

Housing Act 1985

1985 c.68

6. In paragraph 10 of Part II of Schedule 6 to the Housing Act 1985 for the words from "as" to the end there shall be substituted the words "with full guarantee".

Section 4(2)

SCHEDULE 3

5

ENACTMENTS REPEALED

Chapter	Short title	Extent of repeal
15 & 16 Geo.5 c.20	Law of Property Act 1925	Section 76. In Schedule 2, Parts I to VI.
15 & 16 Geo.5 c.21	Land Registration Act 1925	Section 24(1)(a). 10
1964 c.63	Law of Property (Joint Tenants) Act 1964	In section 1(1) the words "he conveys as beneficial owner or".

APPENDIX B
PRESENT STATUTORY IMPLIED COVENANTS

Law of Property Act 1925

- Covenants for
title
- 5 76. (1) In a conveyance there shall, in the several cases in this section mentioned be deemed to be included, and there shall in those several cases, by virtue of this Act, be implied, a covenant to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject-matter or share of subject-matter expressed to be conveyed by him, with the person, if one, to
10 whom the conveyance is made, or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is (when the law permits) made as tenants in common, that is to say:
- 15 (A) In a conveyance for valuable consideration, other than a mortgage, a covenant by a person who conveys and is expressed to convey as beneficial owner in the terms set out in Part I of the Second Schedule to this Act;
- 20 (B) In a conveyance of leasehold property for valuable consideration, other than a mortgage, a further covenant by a person who conveys and is expressed to convey as beneficial owner in the terms set out in Part II of the Second Schedule to this Act;
- 25 (C) In a conveyance by way of mortgage (including a charge) a covenant by a person who conveys or charges and is expressed to convey or charge as beneficial owner in the terms set out in Part III of the Second Schedule to this Act;
- 30 (D) In a conveyance by way of mortgage (including a charge) of freehold property subject to a rent or of leasehold property, a further covenant by a person who conveys or charges and is expressed to convey or charge as beneficial owner in the terms set out in Part IV of the Second Schedule to this Act;
- (E) In a conveyance by way of settlement, a covenant by a person who conveys and is expressed to convey as settlor in the terms set out in Part V of the Second Schedule to this Act;
- 35 (F) In any conveyance, a covenant by every person who conveys and is expressed to convey as trustee or mortgagee, or as personal representative of a deceased person, . . . or under an order of the court, in the terms set out in Part VI of the Second Schedule to this Act, which covenant shall be deemed
40 to extend to every such person's own acts only, and may be implied in an assent by a personal representative in like manner as in a conveyance by deed.
- (2) Where in a conveyance it is expressed that by direction of a person expressed to direct as beneficial owner another person conveys,
45 then, for the purposes of this section, the person giving the direction, whether he conveys and is expressed to convey as beneficial owner or not shall be deemed to convey and to be expressed to convey as beneficial owner the subject-matter so conveyed by his direction; and a covenant on his part shall be implied accordingly.
- 50 (3) Where a wife conveys and is expressed to convey as beneficial owner, and the husband also conveys and is expressed to convey as

beneficial owner, then, for the purposes of this section, the wife shall be deemed to convey and to be expressed to convey by direction of the husband, as beneficial owner; and, in addition to the covenant implied on the part of the wife, there shall also be implied, first, a covenant on the part of the husband as the person giving that direction, and secondly, a covenant on the part of the husband in the same terms as the covenant implied on the part of the wife. 5

(4) Where in a conveyance a person conveying is not expressed to convey as beneficial owner, or as settlor, or as trustee, or as mortgagee, or as personal representative of a deceased person, . . . or under an order of the court, or by direction of a person as beneficial owner, no covenant on the part of the person conveying shall be, by virtue of this section, implied in the conveyance. 10

(5) In this section a conveyance does not include a demise by way of lease at a rent, but does include a charge and "convey" has a corresponding meaning. 15

(6) The benefit of a covenant implied as aforesaid shall be annexed and incident to, and shall go with, the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is, for the whole or any part thereof, from time to time vested. 20

(7) A covenant implied as aforesaid may be varied or extended by a deed or an assent, and, as so varied or extended, shall, as far as may be, operate in the like manner, and with all the like incidents, effects, and consequences, as if such variations or extensions were directed in this section to be implied. 25

(8) This section applies to conveyances made after the thirty-first day of December, eighteen hundred and eighty-one, but only to assents by a personal representative made after the commencement of this Act. 30

NOTE

Sub-ss(1),(4): words omitted repealed by the Mental Health Act 1959, s. 149(2), Sch. 8, Part I. 35

**SECOND SCHEDULE
IMPLIED COVENANTS**

Sections 76, 77

PART I

**COVENANT IMPLIED IN A CONVEYANCE FOR VALUABLE
5 CONSIDERATION, OTHER THAN A MORTGAGE, BY A PERSON
WHO CONVEYS AND IS EXPRESSED TO CONVEY AS
BENEFICIAL OWNER**

That, notwithstanding anything by the person who so conveys or
any one through whom he derives title otherwise than by purchase for
10 value, made, done, executed, or omitted, or knowingly suffered, the
person who so conveys has, with the concurrence of every other
person, if any, conveying by his direction, full power to convey the
subject-matter expressed to and be conveyed, subject as, if so
expressed, and in the manner in which, it is expressed to be
15 conveyed, and that, notwithstanding anything as aforesaid, that
subject-matter shall remain to and be quietly entered upon, received,
and held, occupied, enjoyed, and taken by the person to whom the
conveyance is expressed to be made, and any person deriving title
under him, and the benefit thereof shall be received and taken
20 accordingly, without any lawful interruption or disturbance by the
person who so conveys or any person conveying by his direction, or
rightfully claiming or to claim by, through, under, or in trust for the
person who so conveys or any person conveying by his direction, or
by, through, or under any one (not being a person claiming in respect
25 of an estate or interest subject whereto the conveyance is expressly
made), through whom the person who so conveys, derives title,
otherwise than by purchase for value:

And that, freed and discharged from, or otherwise by the person
who so conveys sufficiently indemnified against, all such estates,
30 incumbrances, claims, and demands, other than those subject to which
the conveyance is expressly made, as, either before or after the date
of the conveyance, have been or shall be made, occasioned, or
suffered by that person or by any person conveying by his direction,
or by any person rightfully claiming by, through, under or in trust for
35 the person who so conveys, or by, through, or under any person
conveying by his direction, by, through, or under any one through
whom the person who so conveys derives title, otherwise than by
purchase for value:

And further, that the person who so conveys, and any person
40 conveying by his direction, and every other person having or
rightfully claiming any estate or interest in the subject-matter or
conveyance, other than an estate or interest subject whereto the
conveyance is expressly made, by, through, under, or in trust for the
person who so conveys, or by, through, or under any person
45 conveying by his direction, or by, through, or under any one through
whom the person who so conveys derives title, otherwise than by
purchase for value, will, from time to time and at all times after the
date of the conveyance, on the request and at the cost of any person
to whom the conveyance is expressed to be made, or of any person
50 deriving title under him, execute and do all such lawful assurances
and things for further or more perfectly assuring the subject-matter

of the conveyance to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required.

In the above covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage. 5

PART II

FURTHER COVENANT IMPLIED IN A CONVEYANCE OF LEASEHOLD PROPERTY FOR VALUABLE CONSIDERATION, OTHER THAN A MORTGAGE, BY A PERSON WHO CONVEYS 10 AND IS EXPRESSED TO CONVEY AS BENEFICIAL OWNER

That, notwithstanding anything by the person who so conveys, or any one through whom he derives title, otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the lease or grant creating the term or estate for which the land is conveyed is, at the time of conveyance, a good, valid, and effectual lease or grant of the property conveyed, and is in full force, unforfeited, unsurrendered, and has in nowise become void or voidable, and that, notwithstanding anything as aforesaid, all the rents reserved by, and all the covenants, conditions, and agreements contained in the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance. 15 20

In the above covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage. 25

PART III

COVENANT IMPLIED IN A CONVEYANCE BY WAY OF MORTGAGE BY A PERSON WHO CONVEYS AND IS EXPRESSED TO CONVEY AS BENEFICIAL OWNER

That the person who so conveys, has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed by him, subject as, if so expressed, and in the manner in which it is expressed to be conveyed. 30

And also that, if default is made in payment of the money intended to be secured by the conveyance, or any interest thereon, or any part of that money or interest, contrary to any provision in the conveyance, it shall be lawful for the person to whom the conveyance is expressed to be made, and the persons deriving title under him, to enter into and upon, or receive, and thenceforth quietly hold, occupy, and enjoy or take and have, the subject-matter expressed to be conveyed, or any part thereof, without any lawful interruption or disturbance by the person who so conveys, or any person conveying by his direction, or any other person (not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made): 35 40 45

And that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all estates, incumbrances, claims, and demands whatever, other than those subject whereto the conveyance is expressly made:

5 And further, that the person who so conveys and every person conveying by his direction, and every person deriving title under any of them, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, or any part thereof, other than an estate or interest subject whereto the conveyance is expressly made, will from time to time and at all times, on 10 the request of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, but as long as any right of redemption exists under the conveyance, at the cost of the person so conveying, or of those deriving title under him, and 15 afterwards at the cost of the person making the request, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of conveyance and every part thereof to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in 20 which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required.

The above covenant in the case of a charge shall have effect as if for references to "conveys", "conveyed" and "conveyance" there were substituted respectively references to "charges", "charged" and 25 "charge".

PART IV

COVENANT IMPLIED IN A CONVEYANCE BY WAY OF MORTGAGE OF FREEHOLD PROPERTY SUBJECT TO A RENT OR OF LEASEHOLD PROPERTY BY A PERSON WHO CONVEYS 30 AND IS EXPRESSED TO CONVEY AS BENEFICIAL OWNER

That the lease or grant creating the term or estate for which the land is held is, at the time of conveyance a good, valid, and effectual lease or grant of the land conveyed and is in full force, unforfeited, and unsurrendered and has in nowise become void or voidable, and 35 that all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance:

40 And also that the person so conveying, or the persons deriving title under him, will at all times, as long as any money remains owing on the security of the conveyance, pay, observe, and perform, or cause to be paid, observed, and performed all the rents reserved by, and all the covenants conditions and agreements contained in, the lease or 45 grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, and will keep the person to whom the conveyance is made, and those deriving title under him, indemnified against all actions, proceedings, costs, charges, damages, claims and demands, if any, to be incurred or 50 sustained by him or them by reason of the non-payment of such rent

PART IV

or the non-observance or non-performance of such covenants, conditions, and agreements, or any of them.

The above covenant in the case of a charge shall effect as if for references to "conveys", "conveyed" and "conveyance" there were substituted respectively references to "charges", "charged" and "charge". 5

PART V

COVENANT IMPLIED IN A CONVEYANCE BY WAY OF SETTLEMENT, BY A PERSON WHO CONVEYS AND IS EXPRESSED TO CONVEY AS SETTLOR 10

That the person so conveying, and every person deriving title under him by deed or act or operation of law in his lifetime subsequent to that conveyance, or by testamentary disposition or devolution in law, on his death, will, from time to time, and at all times, after the date of that conveyance, at the request and cost of any person deriving title thereunder, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the persons to whom the conveyance is made and those deriving title under them, as by them or any of them shall be reasonably required, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made. 15 20

PART VI

COVENANT IMPLIED IN ANY CONVEYANCE, BY EVERY PERSON WHO CONVEYS AND IS EXPRESSED TO CONVEY AS TRUSTEE OR MORTGAGEE, OR AS PERSONAL REPRESENTATIVE OF A DECEASED PERSON, ... OR UNDER AN ORDER OF THE COURT 25

That the person so conveying has not executed or done, or knowingly suffered, or been party or privy to, any deed or things, whereby or by means whereof the subject-matter of the conveyance, or any part thereof, is or may be impeached, charged, affected, or incumbered in title, estate, or otherwise, or whereby or by means whereof the person who so conveys is in anywise hindered from conveying the subject-matter of the conveyance, or any part thereof, in the manner in which it is expressed to be conveyed. 30 35

The foregoing covenant may be implied in an assent in like manner as in a conveyance by deed.

NOTES

Words omitted from heading repealed by the Mental Health Act 1959, s. 149(2), Sch 8, Part I. 40

Land Registration Act 1925

24. (1) On the transfer, otherwise than by way of underlease, of any leasehold interest in land under this Act, unless there be an entry on the register negating such implication, there shall be implied:

Implied
covenants on
transfers of
leaseholds.

5 (a) on the part of the transferor, a covenant with the transferee that, notwithstanding anything by such transferor done, omitted, or knowingly suffered, the rent, covenants, and conditions reserved and contained by and in the registered lease, and on the part of the lessee to be paid, performed,
10 and observed, have been so paid, performed, and observed up to the date of the transfer; and

(b) on the part of the transferee, a covenant with the transferor, that during the residue of the term the transferee and the persons deriving title under him will pay, perform, and
15 observe the rent, covenants, and conditions by and in the registered lease reserved and contained, and on the part of the lessee to be paid, performed, and observed, and will keep the transferor and the persons deriving title under him indemnified against all actions, expenses, and claims on
20 account of the non-payment of the said rent or any part thereof, or the breach of the said covenants or conditions, or any of them.

(2) On a transfer of part of the land held under a lease, the covenant implied on the part of the transferee by this section shall be
25 limited to the payment of the apportioned rent, if any, and the performance and observance of the covenants by the lessee and conditions in the registered lease so far only as they affect the part transferred. Where the transferor remains owner of part of the land comprised in the lease, there shall also be implied on his part, as
30 respects the part retained, a covenant with the transferee similar to that implied on the part of the transferee under this subsection.

APPENDIX C

Individuals and Organisations who Responded to Working Paper No 107

Professor J N Adams
British Property Federation
Building Employers Confederation
Building Societies Association
Chancery Bar Association
Chief Land Registrar
Committee of London and Scottish Bankers
Conveyancing Standing Committee
Country Landowners Association
Professor F R Crane
The Rt Hon Lord Justice Dillon
General Council of the Bar
Halifax Building Society
House Owners Conveyancers Ltd
Institute of Legal Executives (Law Reform Committee)
The Law Society
London Chamber of Commerce (Commercial Law Committee)
Mr E G Nugee, QC
Royal Institution of Chartered Surveyors
Dr M J Russell
Mr R N Sexton
Withers Crossman Block, solicitors

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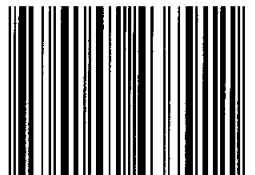
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