The Law Commission

(LAW COM. No. 201)

TRANSFER OF LAND

OBSOLETE RESTRICTIVE COVENANTS

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 16 July 1991*

LONDON: HMSO

HC 546

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*
Mr 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.

OBSOLETE RESTRICTIVE COVENANTS

CONTENTS

	Paragraph	*Page*
PART I: INTRODUCTION	1.1	1
Restrictive Covenants	1.2	1
Present Law	1.5	1
Defects in the Present Law	1.8	2
Land Obligations and Commonhold	1.10	3
Obsolete Restrictive Covenants	1.15	4
Structure of this Report	1.17	4
PART II: CONTINUING PROBLEMS: A SOLUTION	2.1	5
Continuing Restrictive Covenants	2.3	5
Obsolete Restrictive Covenants	2.6	5
Lost Covenants	2.12	7
Outline of our Proposals	2.13	7
PART III: OUR RECOMMENDATIONS	3.1	10
A. LAPSE OF COVENANTS	3.2	10
Covenants Affected	3.2	10
Covenants in Leases	3.3	10
Planning Agreements	3.10	11
Covenants in the Public Interest	3.14	12
Period Before Lapse	3.18	13
Commencement of Period	3.22	14
Extensions	3.28	14
Effect of Lapse	3.30	15
B. REPLACEMENT OF COVENANTS	3.34	16
Obsolete Covenants	3.37	16
Discharge or Modification of Covenants	3.38	17
Grounds of Application	3.41	17
Building Scheme	3.45	18
Replacement Applications	3.50	19
Applicant	3.50	19
Respondent	3.53	20
Time	3.56	20
Registration	3.60	21
Form of Land Obligation	3.63	21
Unsuccessful Application	3.65	22
Costs	3.72	23
Procedure	3.75	24

		Paragraph	*Page*
PART IV: SUMMARY OF RECOMMENDATIONS		4.1	25
APPENDIX A:	Summary of the Present Law: Extracts from the Report on *The Law of Positive and Restrictive Covenants* (Law Com. No. 127)		27
APPENDIX B:	Section 84 of the Law of Property Act 1925, as Amended		34
APPENDIX C:	Individuals and Organisations who Responded to Consultations		37

THE LAW COMMISSION

Item 4 of the Fourth Programme: Transfer of Land

OBSOLETE RESTRICTIVE COVENANTS

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

PART I

INTRODUCTION

1.1 In this Report we make proposals to phase out most existing restrictive covenants after the introduction of a land obligations scheme.

Restrictive Covenants

1.2 Restrictive covenants, in the sense used in this Report, have been described as "agreements restricting the user of land belonging at the date of the agreement to the covenantor, whether or not they are created by deed. Agreements are primarily enforceable between the original contracting parties. But, if such an agreement is made for the benefit of land belonging at the date of the agreement to the original covenantee, it may also be enforceable, despite the absence of privity of contract by future owners of that land and against future owners of the land of the covenantor".[1]

1.3 Some restrictive covenants are imposed in common form, sometimes as a matter of routine; others are expressly worded to take account of the circumstances of particular parties. In the latter category, there are regularly cases of the vendor of a commercial property requiring the purchaser to covenant not to use it to compete with the vendor's business, whether conducted on the remainder of that property or elsewhere. Most commonly, however, restrictive covenants are now, as in the past, entered into in standard forms adopted by individual vendors in two situations: either where an area is laid out for development as a residential, commercial or industrial estate and sold as separate plots subject to restrictions for mutual benefit, or in other cases, where parts of a large landowner's estate are sold off and restrictive covenants are entered into for the benefit of property he retains. In these two cases, a series of covenants will usually be entered into on each sale, running perhaps to 500 words,[2] and frequently the parties do not consider in detail how appropriate each covenant is to their particular circumstances.

1.4 When we refer to this Report to a single restrictive covenant, we mean an individual restriction not the comprehensive set of restrictions which one document may have contained.

Present Law

1.5 It is because of the dual nature of restrictive covenants that they have become a significant feature of our land law which requires separate consideration. They can, as already mentioned,[3] constitute not only a bargain between the original contracting parties, but also a permanent burden affecting one piece of land, whoever owns it, for the benefit of the owner for the time being of another parcel of land. The rules governing the circumstances in which these covenants are enforceable between the owners of the two pieces of land, after the original parties have parted with their interests, have been developed over the years to form a

[1] Preston & Newsom's *Restrictive Covenants Affecting Freehold Land* (8th ed.) (1991), para. 1–01.
[2] For an example, see Cawthorn, *Residential Estate Conveyancing* (1983), p. 381.
[3] Para. 1.2 above.

complex code.[4] We summarised the position when we last reported this topic,[5] and so that the information is now readily available without overburdening the text of this Report, we reproduce the relevant passages from our previous report in Appendix A.

1.6 Although, when a restrictive covenant is created, its duration is normally indefinite there has, since 1925, been a procedure under section 84 of the Law of Property Act 1925 for modifying or discharging it in certain cicumstances.[6] As this now operates, the Lands Tribunal has power to modify or discharge a covenant in whole or part on one of four grounds which may be briefly summarised:

(a) The covenant is obsolete by reasons of changes in the character of the property or the neighbourhood or other material circumstances;
(b) The continued existence of the covenant, or its continuation without modification, would impede some reasonable use of the property for public or private purposes;
(c) Those of full age and capacity entitled to the benefit of the covenant have agreed; or
(d) Those entitled to the benefit would not be injured by the discharge or modification.

The Tribunal also has jurisdiction to order the payment of compensation to a person entitled to the benefit of a covenant and, when exercising its power of modification, to add further restrictions. We shall have occasion to refer to the provisions of section 84 in the course of what follows in this Report; for the convenience of readers we have therefore reprinted the section, in the amended form in which it now applies, in Appendix B.

1.7 Section 84 applies to "any restriction arising under covenant or otherwise as to the user of [any freehold land] or the building thereon".[7] It has been suggested that the section may extend to the modification or discharge of restrictions imposed by local Act of Parliament, although the Lands Tribunal left that question open.[8] In this Report we are exclusively concerned with restrictions imposed by agreement.

Defects in the Present Law

1.8 The Law Commission has reported twice on the law relating to restrictive covenants, first in 1967[9] and again in 1984,[10] when the study extended to positive covenants. On both occasions we identified defects in the law which we considered merited reform.

1.9 We initially summarised the principal defects as, "First, that although a covenant may have been referred to in every conveyance of the burdened land since it was imposed there may be real doubt as to whether it can be enforced: and, secondly, that the procedure for discharge or modification of outdated covenants is, at present, inadequate".[11] Later we said that the law on restrictive covenants "must ... be condemned on two main grounds: complexity and uncertainty".[12] Briefly, these difficulties were identified:

(a) "The burden of a restrictive covenant does not run at all at law, but it does run in equity if certain complicated criteria are met. The benefit, by contrast, runs both at law and in equity, but according to rules which are different";[13]

---

[4] Or, indeed, two codes, one governing the position at law and the other in equity.
[5] *The Law of Positive and Restrictive Covenants* (1984), Law Com. No. 127.
[6] There is also a separate power for the county court to vary a restrictive covenant which prohibits the conversion of a dwelling-house into two or more dwelling-houses: Housing Act 1985, s. 610.
[7] Law of Property Act 1925, s. 84(1).
[8] *Re Elaen & Co. Ltd.'s Application* (1962) 14 P. & C.R. 230, which was concerned with a restriction imposed by section 26 of the Nottingham Corporation Act 1883.
[9] *Report on Restrictive Covenants* (1967), Law Com. No. 11.
[10] *The Law of Positive and Restrictive Covenants* (1984), Law Com. No. 127.
[11] Law Com. No. 11, para. 20.
[12] Law Com. No. 127, para. 4.8.
[13] *Ibid.*, para. 4.9.

(b) "As to uncertainty ... Particularly striking examples come from two topics: the *Federated Homes* case[14] has made radical and controversial changes in what was thought to be the law about annexation, and successive court decisions in recent years have altered the conditions thought to be essential for the establishment of a building scheme";[15]

(c) "There is at present no requirement that the instrument creating the covenant shall describe the benefited land clearly enough to be identified without extrinsic evidence";[16]

(d) "Since [in relation to covenants not drafted to refer to the benefited land by reference to a plan] no one can be certain of the exact identity of the land for whose benefit [the covenants] were imposed, no one can be sure who (if anyone) is currently entitled to enforce them. It is moreover impossible for an owner of the burdened land to seek a negotiated release from such covenants because he does not know with whom to negotiate".[17]

Land Obligations and Commonhold

1.10 The solution which we proposed to these problems was that restrictive covenants[18] should be replaced by a system of land obligations. In general outline this would involve:[19]

(a) A new interest in land, known as a land obligation, capable of subsisting as a legal interest so that it bound whoever was for the time being the owner of the land intended to be burdened, and similarly benefited the owner for the time being of the land intended to be benefited;

(b) The content of land obligations and how they could be created would be regulated, and in particular it would be necessary accurately to identify the benefited land and the burdened land;

(c) The person who created a land obligation would not have any liability after parting with all interest in the land affected.[20]

1.11 The Report envisaged that when the new scheme was introduced, the present rules under which the benefit and burden of restrictive covenants run with the land would cease to apply.[21] The result would be to render restrictive covenants unsuitable for creating indefinite restrictions on land use, as they would only constitute personal obligations between the original contracting parties. Accordingly, the assumption was that restrictive covenants would be superseded by land obligations.

1.12 One aspect of our land obligations scheme, "development obligations",[22] has since that Report been subject to suggestions for modification. Development obligations were intended to be a type of land obligation for use in cases where a substantial area of land was or was to be divided into a number of separately owned but inter-dependent units.[23] They would have been used as a replacement for the present building schemes.

1.13 Different proposals, based on overseas condominium laws, were subsequently put forward expressly for regulating separately owned properties within specified boundaries, each such development being called a commonhold.[24]. To

---

[14] *Federated Homes Ltd.* v *Mill Lodge Properties Ltd.* [1980] 1 W.L.R. 594; see Appendix A, para. 3.27.
[15] *The Law of Positive and Restrictive Covenants* (1984), Law Com. No. 127, para. 4.10.
[16] *Ibid.*, para. 4.12.
[17] *Ibid.*, para. 4.12.
[18] And also positive covenants relating to land.
[19] *The Law of Positive and Restrictive Covenants* (1984), Law Com. No. 127, Part XXVII.
[20] *Ibid.*, para. 11.33.
[21] *Ibid.*, paras. 24.8 and 24.9.
[22] *Ibid.*, paras. 6.7–6.14.
[23] *Ibid.*, para. 6.7.
[24] *Commonhold: Freehold Flats and Freehold Ownership of Other Inter-dependent Buildings* (1987), Cm. 179. The proposals included, but extended beyond, regulating land use within a commonhold.

prevent unnecessary overlap, it was suggested that development obligations would not be needed for such cases, so that the land obligations scheme could be simplified.[25]

1.14 Last year, the Lord Chancellor's Department issued a Consultation Paper[26] seeking views on the form of legislation to implement the commonhold proposals and suggesting that the Bill to implement the land obligations scheme would constitute Part II of any Bill relating to commonholds.[27] Any such Bill could usefully be extended to include the further recommendations in this Report, which supplement the land obligations scheme. As that would offer an appropriate opportunity to give effect to these recommendations, we have departed from our usual practice and have not appended an independent draft Bill to this Report.

Obsolete Restrictive Covenants

1.15 In proposing the land obligations scheme, we did not make any recommendations in relation to the restrictive covenants which would be in existence when the scheme was introduced. However, as a result of concern expressed over a number of years, the Conveyancing Standing Committee undertook consideration of the problem posed by obsolete restrictive covenants. The Committee saw them as a material impediment to conveyancing, both by increasing the time taken for and the expense of property transfer and by hampering the registration of unregistered titles.

1.16 The Committee issued a Consultation Paper[28] suggesting five options (A: do nothing; B: abolish restrictive covenants; C: limit their lives; D: cancel them after a fixed period unless renewed; E: discretionary cancellation plus compensation). There was no clear consensus in favour of any one option, but the need to do something was accepted by the majority of those who responded. Option D, or some variation of it, appeared to be the most acceptable solution. The Committee referred the matter to us. We subsequently carried out a specialist consultation on a possible scheme for tackling the problem. We are grateful to all those who responded to the two consultations for the help which they gave.

Structure of this Report

1.17 Part II of this Report identifies the problems which restrictive covenants will continue to present after the introduction of the land obligations scheme and outlines a solution. Part III presents our recommendations in detail and they are summarised in Part IV. Appendix A reproduces the summary of the present law from our 1984 Report; section 84 of the Law of Property Act 1925, as it currently applies, is reprinted in Appendix B. The names of the individuals and organisations who responded to the Committee's Consultation Paper are listed in Part I of Appendix C and Part II of that Appendix lists those who responded to our specialist consultation.

---

[25] *Ibid.*, Part XVII.
[26] *Commonhold – a Consultation Paper* (1990), Cm. 1345.
[27] *Ibid.*, para. 2.7.
[28] *What Should We Do About Obsolete Restrictive Covenants?* (1986).

PART II

CONTINUING PROBLEMS: A SOLUTION

2.1 The implementation of our recommendations for a land obligations scheme would be most welcome. We regard this as an important measure of land law reform. However, three related and associated problem areas would remain. First, there would be no machinery for converting existing restrictive covenants into land obligations. Secondly, there would still be no effective way to tackle the considerable residue of restrictive covenants which have become obsolete. Thirdly, there would still be covenants which were binding indefinitely even though the details of them had been lost, so that no-one knew the nature of the obligations they imposed.

2.2 We consider that it is now appropriate to tackle these problems and propose a solution which could conveniently be enacted as part of the land obligations scheme or could be implemented later. In outline, our proposal is that all restrictive covenants should lapse eighty years after they were first created. But anyone entitled to the benefit of a covenant which was not then obsolete would have the right to replace it with a land obligation to the like effect.

Continuing Restrictive Covenants

2.3 Provided that a restrictive covenant is validly entered into, the burden of it annexed to the servient tenement and the benefit to the dominant tenement, and, if appropriate, it has been registered,[1] its effect, unless limited by its terms, is indefinite. Assuming that the restriction remains of value to the owner of the land which benefits, this is in no way objectionable. Indeed, it is desirable that it should be possible to create permanent restrictions on land use where they are appropriate.

2.4 What is not satisfactory about leaving matters as they stand in relation to restrictions imposed before the inauguration of the land obligations scheme, even where those restrictions remain useful, is that they perpetuate a set of legal rules which has been subject to considerable criticism. Also, it creates the position where we have two systems of law regulating substantially the same field of activity and possibly each imposing restrictions on the owner of the same piece of land, and we would have that duplication indefinitely. That is not a satisfactory prospect for the general understanding of the law nor for ease of administering it. Clearly, the simplification of the law, which is one of the objectives of law reform, requires that so far as possible there should only be one set of rules governing such matters.

2.5 An immediate conversion of all restrictive covenants into land obligations would probably be impractical and we doubt whether it would be desirable. On the other hand, there should be the clear aim of switching to a single system, with a manageable programme for doing so over a pre-determined period.

Obsolete Restrictive Covenants

2.6 The case against permitting the continued existence of all old restrictive covenants rests on the view that they hamper conveyancing without offering compensating benefit.[2] Those with experience of dealings in land know well that

---

[1] Land Registration Act 1925, s.50; Land Charges Act 1972, s.2(5), Class D(ii).

[2] The radical view of the Royal Commission on Legal Services was: "Many thousands of words of restrictive covenants clutter the titles of house property and bedevil modern conveyancing. In many cases these covenants are difficult to construe and there is doubt as to whether they are enforceable or whether anyone has power to release them. The restrictions imposed by such covenants constitute separate obligations to which a purchaser must have regard in addition to his general duty to comply with planning legislation. It is doubtful whether estate schemes, in particular, are necessary under modern planning law. The time may have come to make past and present restrictive covenants unenforceable except as between the parties to the original agreement, and perhaps excepting also restrictions necessary to secure privacy provided they are in a suitable standard form authorised by statute and not capable of variation": *Report* (1979) Cmnd. 7648, Annex 21.1, para. 14.

many properties are subject to extensive restrictive covenants and that after some years have passed since they were imposed some of them cease to have any real effect[3] or serve any useful purpose.[4]

2.7 Although for convenience we have entitled this Report *Obsolete Restrictive Covenants,* and we use the term "obsolete" in our discussion, we do not propose to rely on it to define those covenants which should cease to have effect after eighty years. Rather, we suggest that the primary question should be whether, at the end of that period, it secures "any practical benefits of substantial value or advantage"[5] to the owners of the dominant tenement. This wording is capable of a wide interpretation.[6]

2.8 Covenants which are obsolete in this sense do not usually cause any substantial impediment to disposing of the property affected, or even to developing it. Nevertheless, there are two good reasons for dispensing with them.

2.9 First, every time property which is subject to such covenants is acquired the prospective new owner or his professional adviser must consider and advise upon the covenants in detail.[7] He may conclude that they are of no importance, but the need for that work adds time and expense to the conveyancing process and that need arises whether or not the title is registered. With covenants continuing indefinitely, that inconvenience recurs regularly in relation to the same covenants.[8] Owner-occupied homes, e.g., are known to change hands on average a little more frequently than once every seven years.[9]

2.10 Secondly, the process of the first registration of title to land – when the land is initially brought onto the register, so that title is no longer established merely by reference to title deeds – is impeded and unnecessarily made more expensive by the need for obsolete covenants to be noted or recorded on the register. If the covenants appear to be valid, the Registrar has no discretion to omit them. The objective of universal registration of title is now accepted as a major plank in modernising our system of dealing with property and it cannot be sensible that it should be impeded by the need to record obsolete covenants which, by definition, are often valueless.[10]

2.11 The law offers well-established machinery for discharging or modifying obsolete restrictive covenants by application to the Lands Tribunal.[11] This is regularly used, but experience shows that very many owners of properties

---

[3] The Conveyancing Standing Committee gave these examples: "It was common in the nineteenth century to impose restrictions upon carrying out dangerous, noisy and smelly trades. Those restrictions often still apply in areas where it would now be unthinkable for planning permission to be granted for such trades, and where it is unlikely that anyone would want to establish such a factory. Some restrictions, again usually old ones, prevent building on land which was intended to form the roads on estates being laid out. Those roads may long ago have been adopted as public highways, so that to build on that land is now out of the question": *What Should We Do About Old Restrictive Covenants?* (1986), pp.5–6. It is possible for covenants which are imposed in standard form as a matter of routine to be obsolete when originally imposed: *Re Quaffers Ltd.'s Application* (1988) 56 P. & C.R. 142 (L.T.).

[4] A former Chief Land Registrar, Mr Theodore Ruoff, observed: "Today these millions of words of restrictive covenants serve no truly useful social public or private purpose": *Second Report of the Conveyancing Committee* (1985), para. 7.22.

[5] That phrase is already used in section 84(1A) of the Law of Property Act 1925, having been inserted by the Law of Property Act 1969 as recommended in our *Report on Restrictive Covenants* (1967), Law Com. No. 11.

[6] *see para. 3.43 below.*

[7] Moeran, *Practical Conveyancing* (11th ed.) (1987), p.27.

[8] "No solicitor can ignore a multitude of irrelevant and apparently anachronistic provisions on titles nor indeed dare the Chief Land Registrar": Mr Theodore Ruoff, *Second Report of the Conveyancing Committee* (1985), para. 7.22.

[9] Coles, *How Often do People Move House?, Housing Finance,* October 1989. In the year 1989–90, the Land Registry registered 1,156,162 transfers of whole or part of the 12,084,658 titles they had then registered (*Report on the Work of H.M. Land Registry for England and Wales 1989–1990*), suggesting that, taking all types of land together, land comprised in a title is transferred in whole or part about once every 10·5 years.

[10] The Conveyancing Committee "strongly recommended" that "methods of overcoming the problems caused by obsolete restrictive covenants should be considered, in particular to ease the problems for HM Land Registry": *Second Report* (1985), para. 9.37. This recommendation was welcomed: Professor J. E. Adams, *So Farrand no Further on Conveyancing Reform: a Critique of the Second Conveyancing Report* (1985) Conv. 109.

[11] Law of Property Act 1925, s.84; para. 1.6 above.

burdened by obsolete covenants do not avail themselves of the facility. This may well be because they are reluctant to incur the cost of an application when there is little to be achieved: to have obsolete covenants cleared off their title will generally leave the value of their property unaltered. Some property owners who want to act in contravention of a covenant, which they believe to be spent, insure against the possibility of resulting claims.[12] This is often cheaper and quicker than applying to the Lands Tribunal,[13] but it leaves the covenants on the title. We previously recommended that the jurisdiction of the Lands Tribunal should be enlarged to cope with the problem of covenants which have outlasted their usefulness.[14] Although this recommendation was implemented,[15] more than 20 years' experience has shown that this was not enough to solve the problem.

Lost Covenants

2.12 Another unsatisfactory feature of the present practice concerning restrictive covenants is that there are cases where it is know that a valid covenant, or one which must be assumed to be valid, exists but the terms of it have been lost. In the nature of things, this problem tends to arise in relation to older covenants rather than more recent ones. Not only does it affect unregistered titles, where a deed may physically have been lost or destroyed, but it will persist even after registration of title because the Registry cannot ignore evidence that the covenant is subsisting. The title to the property will be registered subject to the covenants of unknown content.[16] The effect of that is thoroughly unsatisfactory: the owner of the land is subject to whatever obligations the covenants impose, even though he generally has no means of discovering their terms.

Outline of our Proposals

2.13 We consider that a practical way to tackle all these problems can be provided by a single set of proposals. The scheme consists of two main recommendations: first, all restrictive covenants should cease to have effect eighty years after their creation, with transitional provisions for covenants which are older when the new legislation comes into force; secondly, any covenant which is shown not to be obsolete should be replaced with an equivalent land obligation.

2.14 Experience has shown that even though restrictive covenants are patently obsolete, many are allowed to remain on titles to land. This may result from ignorance either of the existence of the restrictions or of what can be done about them, lack of economic incentive or just apathy. Whatever the cause, the inconvenience of their continuing to be recorded has become clear. It seems doubtful whether any change or simplification in the removal procedure would significantly increase the number of owners of burdened land applying to discharge obsolete covenants.

2.15 We therefore consider that, in effect, the burden of proof should be reversed. Once a restriction has been in existence for a substantial period, it should be for the person claiming its benefit to show that there is good reason for it to continue in force, albeit by replacement by a land obligation.

---

[12] "Indemnities in respect of breach of restrictive covenants . . . are readily available from virtually all major insurers. They are not intended to cover what might be termed 'live risks'; they are offered to purchasers after investigation by the insurers to determine so far as possible that the risk is dormant. So, for example, restrictive covenant insurance is generally provided to land developers or purchasers where it is known that the development or intended use of the property will be in breach of the terms of particular restrictive covenants imposed in earlier deeds but when it is believed that the covenant, for some reason, cannot or will not be enforced": *Second Report of the Conveyancing Committee* (1985), para. 6.50.

[13] Cawthorn, *Registered Estate Conveyancing* (1983), p.72; Stratton, *Building Land and Estates* (2nd ed.) (1983), p.18.

[14] *Report on Restrictive Covenants* (1967), Law Com. No. 11, para. 26 and Proposition 9.

[15] Law of Property Act 1969, s.28.

[16] *Ruoff & Roper on the Law and Practice of Registered Conveyancing* (5th ed.), (1986) pp.239–240. This was the situation in *Faruqi* v. *English Real Estates Ltd.* [1979] 1 W.L.R. 963. One reason why this may occur is that it is not necessary, when registering covenants affecting unregistered land under the Land Charges Act 1972, to give details of the terms of the covenants.

2.16 This scheme will have three effects. First, many restrictive covenants which no longer offer any benefit, or of which the benefit is so slight that the owner of the dominant tenement is not minded to take any action, will disappear. This will make a major contribution to clearing away the dead wood from conveyancing documents. Secondly, however, restrictive covenants which are still of value will be converted into land obligations. It is right that anyone who continues to gain benefit from a restriction, however long ago it was first imposed, should continue to do so. Our proposals are not intended to prejudice their rights, although in the general interest of reforming and simplifying the law, they will be required to replace the covenant by a land obligation. Thirdly, covenants of which the terms have been lost will either disappear from the title of the servient land, or they will be replaced by a land obligation of which the terms will be given in full.

2.17 The scheme will also achieve a further important objective: to make it immediately clear, to everyone dealing with property, which covenants have lapsed. It is unlikely that the entries relating to all lapsed covenants which have been registered will be promptly removed from the register. However, the application of a fixed time limit will avoid misunderstanding.

2.18 It is true that by setting a limit of eighty years on the validity period of existing restrictive covenants, it will take a long time to finish the conversion to land obligations. However, we see these advantages:

(a) After eighty years, as time has already shown, many restrictions are indeed obsolete.[17] Accordingly, a period of this length would eliminate many covenants which, had the period been shorter, might simply have been replaced;

(b) The proposals place the responsibility on those entitled to benefit from restrictions: they must decide whether to apply for replacement, and if they do, they will be involved in trouble and expense. If a lengthy period reduces the number of covenants which are still beneficial, it minimises this burden;

(c) There are obvious administrative advantages in an extended transitional period. Applications to the Lands Tribunal, and consequential work at the Land Registry, will be phased.

2.19 A scheme under which old covenants lapsed with the option of their being replaced, as we are now proposing, was the most favoured option among those who responded to the Conveyancing Standing Committee's consultation. The majority of those who expressed that preference, however, suggested that the period before covenants lapsed should be shorter than eighty years. We consider that a more cautious approach of a longer period is to be preferred. Although the transitional period for converting restrictive covenants into land obligations is then necessarily longer, a greater number of covenants are likely to be obsolete before the period ends. This means that the administrative machinery is more likely to be able to cope with the change without strain and that the risk that people will overlook the need to apply to replace covenants which are still of value should be kept to a minimum.

2.20 One point will be noted: once a covenant has been replaced by a land obligation, its effect will again become indefinite, because no automatic expiry provision affects land obligations. It may well be that, even though when proposing the land obligations scheme we did recommend that there should be machinery for their modification or discharge,[18] a similar obsolescence problem

[17] "That period can be supported on the grounds that, in general, the character of an area will change with the passage of time so that, for example, covenants which were imposed before 1900 will no longer be appropriate today": Mr John Pryer, then Chief Land Registrar, *Second Report of the Conveyancing Committee* (1985), para. 7.22.

[18] *The Law of Positive and Restrictive Covenants* (1984), Law Com. No. 127, Part XVIII.

will arise. For this reason, we are attracted by the suggestion that an automatic lapse rule, subject to renewal should also apply to land obligations.

2.21 However, we make no recommendations now on this subject which is outside the scope of our present study. Land obligations can be positive as well as restrictive,[19] and for this reason considerations which are different from those affecting restrictive covenants may arise.[20] We should therefore want to consult before formulating further proposals. However, even if it seemed that land obligations should be made to expire at the end of eighty years (or some other period), subject to provision for renewal, there is obviously plenty of time to formulate and enact rules before the first land obligation should be made to expire.

[19] *Ibid.*, para. 6.6.

[20] Other statutory provisions would also have to be considered: e.g., Local Government (Miscellaneous Provisions) Act 1982, s.33.

PART III

OUR RECOMMENDATIONS

3.1 As we have already stated, we have two principal recommendations: first, that all restrictive covenants should cease to have effect eighty years after their creation, and secondly, any covenants which are then shown not to be obsolete should be replaced by land obligations to the like effect. In this Part of the Report we set out the recommendations in detail, and we shall deal in turn with each of the two aspects of our proposals.

A. LAPSE OF COVENANTS

Covenants Affected

3.2 The covenants with which we are concerned, and which cause the problems we identified in Part II, are agreements which restrict the use of freehold land. We recommend that our proposals should apply to all such covenants, with the exceptions identified below.

Covenants in Leases

3.3 Covenants restricting the use of property are also commonly found in leases. Most contain covenants on the part of the tenant restricting his use of the property demised and in some the landord agrees to abide by restrictions on his use of other property which he owns. It is not, however, possible to apply our proposals satisfactorily to lease covenants because there is not to be any machinery for inserting replacement land obligations into leases. A land obligation could be created for a term of years,[1] but that is not the same as making it a lease covenant, with all the attendant consequences. Nevertheless, because lease covenants differ in a number of ways from freehold covenants, we do not regard this as detracting from the value of our proposals.

3.4 First, it is in the nature of a lease that it is granted for a fixed period,[2] so the covenants it imposes will be limited in duration to that term.[3] That contrasts with the indefinite restrictions imposed on freehold property. Experience suggests that only a small minority of leases are granted for longer than 99 years. There is, therefore, already an automatic lapse of leasehold covenants, which will generally apply within one hundred years of their creation and often much sooner.

3.5 Secondly, the contents of the leases of registered land are not reproduced on the land register; all that is entered on the register are brief particulars of the registered lease which do not include the covenants it contains.[4] Covenants in leases, whether or not obsolete, do not therefore contribute to the Land Registry problems to which we have referred.[5] Further, they do not even clog the land charges register, because a restrictive covenant which is an agreement between a lessor and a lessee is not registrable as a land charge.[6]

3.6 Thirdly, there will normally be no doubt about who can enforce the covenants. The identity of the current landlord and the current tenant will be

---

[1] *The Law of Positive and Restrictive Covenants* (1984), Law Com. No. 127, para. 5.2.

[2] Or it may be terminable on notice.

[3] It is possible, when a lease is ended prematurely, for restrictions which it contained to continue in force if they constituted part of a building scheme. For this reason, the Chief Land Registrar has power to make an appropriate entry on the register: Land Registration Rules 1925, r.205.

[4] Land Registration Rules 1925, r.5(1).

[5] Para. 2.10 above. It is, nevertheless, true that the conveyancing drawbacks, of a repetitive examination of obsolete titles (para. 2.9 above), remain.

[6] Land Charges Act 1972, s.2(5)(ii).

known and they will have the right to enforce the covenants.[7] Thus, one of the major difficulties with restrictive covenants,[8] which is likely to intensify as time passes and the covenants get older, does not apply.

3.7 For these reasons, we do not consider it essential to extend our recommendations to lease covenants. Where obsolescence causes particular problems, the present legislation is available to discharge and modify covenants in a lease, other than a mining lease, granted for a term exceeding 40 years of which 25 years have elapsed.[9] We recommend that these provisions should continue to apply.

3.8 Some care is necessary in deciding precisely how this exclusion of lease covenants should be framed. This is not merely an exclusion of covenants relating to leasehold land, because the landlord may agree in a lease to restrict the use of other land which he owns.[10] Equally, a tenant could agree to a restriction on other freehold land which he owned. Lease covenants affecting other land in that way would generally only last for the length of the lease term. That time limit would represent a guarantee, similar to the one we are proposing for covenants within our scheme, against the problems created by the covenants becoming obsolete. Those lease covenants can therefore be excluded from our proposals, even if they affect property other than the land demised. However, it is conceivable that a lease document would include covenants intended and expressed to be permanent. Indeed, if inserting covenants in leases was a way to prevent their lapsing, those who wanted to avoid the effect of our scheme might artificially contrive to include extraneous covenants in leases.

3.9 The distinction between those lease covenants which can satisfactorily be excluded from our proposals and those which cannot, turns on whether their period of effectiveness is limited to the lease term. We therefore recommend that restrictive covenants entered into between landlord and tenant be outside the scheme, unless they will continue to have effect after the end of the term granted by the lease.

Planning Agreements

3.10 A local planning authority has power to enter into an agreement with a landowner to restrict or regulate the development or use of his land and such an agreement is enforceable by the authority against the landowner's successors in title as if the authority possessed adjacent land and the agreement had been expressed to be for the benefit of that land.[11] For the purposes of enforcement, therefore, these agreements are of the same nature as restrictive covenants created on a disposal of the property. [12] The Lands Tribunal jurisdiction to modify or discharge restrictive covenants applies to these planning agreements[13] and cases in which they are judged to be obsolete are not infrequent.

3.11 Here again, it is not possible for our proposals to operate satisfactorily. It is an important part of the land obligations scheme "that the dominant land . . . should be adequately described (whether or not by reference to a plan) in the creating instrument, or in a document to which it refers (which would include

---

[7] This assumes that the doctrine of privity of estate will apply to the covenants with which we are here concerned, i.e. they will, in the case of tenants' covenants, touch and concern the land (*Spencer's Case* (1583) 5 Co. Rep. 16a) or, in the case of Landlords' covenants, refer to the subject-matter of the lease (Law of Property Act 1925, s.142(1)).

[8] Para. 1.9 above.

[9] Law of Property Act 1925, s.84(12).

[10] e.g., *Dartstone Ltd.* v. *Cleveland Petroleum Co. Ltd.* [1969] 1 W.L.R. 1807.

[11] Town and Country Planning Act 1990, s.106. This power was previously conferred by the Town and Country Planning Acts 1947, s.25, 1962, s.37 and 1971, s.52. There were similar powers in earlier Acts.

[12] The planning agreements are registrable in the register of local land charges: Local Land Charges Act 1975, s.1(1)(b).

[13] The first such case in which the jurisdiction was exercised was apparently *Re Beecham Group Ltd.'s Application* (1980) 41 P. & C.R. 369.

an Ordnance Survey map)".[14] Clearly, it would be impossible to satisfy this requirement for the creation of a land obligation in a case where the person entitled to the benefit of the restrictive covenant is merely deemed to possess adjoining land.

3.12 There would, no doubt, be considerations of public policy to be taken into account before applying a rule of automatic lapse after a period of time to restrictions of this nature, which constitute an important part of the planning control structure.[15] On the other hand, experience of section 84 of the Law of Property Act 1925 has demonstrated that there can be problems of obsolescence. We therefore conclude that our proposals should only be excluded in the cases in which they are not capable of operating.[16] Once again, the exclusion of these covenants will not in most cases cause or exacerbate Land Registry problems,[17] but any conveyancing inconvenience would remain.[18]

3.13 What distinguishes these statutory covenants is what gives the person entitled to the benefit the right to enforce them against the original covenantor's successors in title. Where that right does not depend on the person being interested in an identifiable piece of land, we recommend that our scheme should not apply.

Covenants in the Public Interest

3.14 There are many other statutes which authorise the imposition of restrictive covenants, and some indeed which require them to be imposed. In some of these cases the public interest may require that the covenants should not automatically lapse. If they are indeed obsolete when they lapse, clearly no harm would be done. On the other hand, it would be unsatisfactory if a covenant which still protected the public interest were allowed to lapse without being replaced.

3.15 Consideration of a number of these cases made certain points clear to us. First, there are a very large number of such Acts, including local and private Acts, and it is not possible to identify all of them. Secondly, some deal with what are private transactions which are not of public concern,[19] others require covenants for the protection of vital public interests. Thirdly, it is not possible to define categories of covenant which need to be protected from lapse with sufficient precision. If lapsed obsolete covenants are to be cleared from conveyancing documents without excessive recourse to a court or tribunal, it is essential to be able swiftly and accurately to identify whether automatic lapse applies. To cancel the registration of covenants which should not have lapsed would defeat the perceived public interest; to err on the side of caution, allowing covenants to remain although they have in fact lapsed would undermine the whole purpose of our recommendations.

3.16 For these reasons, we do not favour any attempt at a comprehensive classification of existing statutory provisions and we do not think it would be helpful. Rather, we approach the matter by considering the action that Parliament has already taken. In a limited number of cases, covenants have been excluded

[14] *The Law of Positive and Restrictive Covenants* (1984), Law Com. No. 127, para. 8.21.

[15] Other statutes have applied the technique of making a covenant enforceable as if the covenantee possessed other land (para. 3.10 above): e.g., Housing Act 1985, s. 609; Oxfordshire Act 1985, s.4; West Glamorgan Act 1987, s. 52.

[16] There will be other statutory provisions to which this will apply. E.g., Artesans' and Labourers' Dwellings Improvement Act 1875, s. 9; *Governors of Peabody Donation Fund* v. *London Residuary Body* (1987) 55 P. & C.R. 355.

[17] Because local land charges are not normally registered; Land Registration Act 1925, s. 70(1)(i).

[18] Notwithstanding the introduction of the land obligations scheme, it would continue to be possible to create such covenants to run with the land: *The Law of Positive and Restrictive Covenants* (1984), Law Com. No. 127, paras. 24.25, 24.26.

[19] e.g., Leasehold Reform Act 1967, s. 10(4).

from the present statutory jurisdiction to modify and discharge restrictive covenants.[20] In all other cases, covenants, even if imposed under statute, are liable to that jurisdiction on the ground (inter alia) that they are obsolete. The recognition, in the latter cases, that they can become obsolete and should be capable of discharge or modification seems to us to justify their inclusion within our general scheme.

3.17 We therefore recommend that our proposals should not apply to any covenants to which the jurisdiction of the Lands Tribunal under section 84 of the Law of Property Act 1925 to modify or discharge restrictions does not extend, but that, subject to the other exceptions already identified,[21] other restrictive covenants imposed as required or authorised by statute should be included.

Period before Lapse.

3.18 Our proposal is that after a fixed period of eighty years from the original creation of a restrictive covenant, it is to be considered obsolete unless there is proof that it is not. Subject to the possibility of replacement,[22] this involves a rule that all restrictive covenants should lapse at the end of that time. Necessarily, the choice of a single period to apply to all covenants for this purpose will be arbitrary. What we have sought to do is to select a period which is sufficiently long to ensure that the majority of the covenants are likely to be obsolete, so that the number of landowners who need to take action to replace covenants which are still of value is kept to a minimum. At the same time, the period must not be so long that the full benefit of the scheme is unreasonably delayed. We consider that an eighty-year period strikes an appropriate balance.[23]

3.19 Whilst there are no available statistics to prove or disprove our view that after eighty years the majority of restrictive covenants will be obsolete, we have made a review of the limited number of decisions reported in one specialised series of reports on applications under section 84 of the Law of Property Act 1925 to discharge or modify covenants. There are reports of 32 such cases in the last ten years;[24] in 14 of them the application to discharge or modify was refused. Only two of those cases concerned restrictions which were over eighty years old,[25] but 20 of them related to covenants entered into since 1960.[26] General experience suggests that the character or use, or both, of many if not most areas of land changes materially over an eighty-year period.

3.20 Adopting eighty years as the period after which restrictive covenants lapse will not immediately solve the problems which stem from the fact that before 1926 they did not have to be registered. However, allowing for the fact that there must be an initial transitional period to settle what is to be done under any new arrangements with the very oldest covenants, we consider that dealing with all pre-1926 covenants, by lapse or replacement, by the end of the year 2005 is an acceptable target.

---

[20] Section 84 of the Law of Property Act 1925, other than the power to make declarations under s–s. (2), does not apply to:
(a) Covenants imposed for public purposes on a disposition made gratuitously or for nominal consideration (Law of Property Act 1925, s. 84(7));
(b) Covenants for Naval, military, Air Force or civil aviation purposes (*ibid.*, s. 84(11), (11A));
(c) Covenants to protect Green Belt land (Green Belt (London and Home Counties) Act 1938, s. 22(2);
(d) Forestry dedication covenants (Forestry Act 1967, s. 5(2)(b));
(e) Covenants on leasehold enfranchisement protecting furture development rights or rights of pre-emption (Leasehold Reform Act 1967, Sched. 4, para. 1(5));
(f) Restrictions protecting areas of special scientific interest (Countryside Act 1968, s. 15(4));
(g) Restrictions protecting National Trust property (National Trust Act 1971, s. 27);
(h) Agreements protecting ancient monuments and land in their vicinity (Ancient Monuments and Archaeological Areas Act 1979, s. 17(7)).

[21] Para 3.13 above.

[22] Paras. 3.34 *et seq* below.

[23] On consultation, this was the expiry period favoured by H.M. Land Registry.

[24] *Planning and Compensation Reports,* (1981–90) vols. 41–60.

[25] An application was allowed in respect of a restriction imposed in 1861, but refused in respect of another imposed in 1899.

[26] In respect of these 20 relatively recent covenants, the application was refused in 9 cases, although in one of those a modification had been agreed by the parties.

3.21 Accordingly, we recommend that the period at the end of which restrictive covenants should lapse, whether or not replaced, should be eighty years.

Commencement of Period

3.22 In most cases there will be no difficulty in calculating the eighty-year period: it will run from the date of the document imposing the restrictive covenant. The question arises, however, whether an application to the Lands Tribunal under section 84 of the Law of Property Act 1925 should be treated as having caused the period to restart. There are two possible circumstances: first, where the Tribunal modified the covenant, and secondly, where it refused to make any order. Obviously, if a covenant was discharged it will be of no further concern.

3.23 At the date of a Lands Tribunal decision, as a result of which a restrictive covenant continues in force, the covenant was clearly not obsolete. However, we do not consider that this justifies restarting the eighty-year period. The gradual process of change in a neighbourhood, which often carries with it the gradual obsolescence of a restriction, is not arrested by a Lands Tribunal order. That decision merely assesses the status of a covenant at that time and does not purport to forecast for how long it will remain enforceable, The fact, e.g., that a covenant is not obsolete after fifty years does not influence the position after eighty years, and does not of itself justify extending the validity of the covenant to a total of 130 years. Occasionally, a modification of a covenant may amount to the modernisation of it, but more often its effect is merely to allow some act which would otherwise be forbidden, without rewriting the terms of the covenant.

3.24 There would also be a practical inconvenience in restarting the eighty-year period following a Lands Tribunal decision. Where the title to the servient land is not registered, there is no mechanism for publicly recording the Tribunal's decision, other than the Tribunal's records.[27] That would introduce an unacceptable element of uncertainty, because where the title was not registered it would not be possible to be sure whether or not the eighty-year period had elapsed.

3.25 On an application to modify a restrictive covenant, the Lands Tribunal has power to add further restrictions.[28] We do not consider that it would be appropriate to calculate the eighty-year period applying to any such new provision from the date of the order imposing it. The Tribunal creates such a restriction on taking an overall view of the term being modified, and the intention must be that the two should be read together. We therefore recommend that the old and the new restrictions should both be treated for this purpose as having been created on the same date, i.e. the date on which the old one was originally imposed.

3.26 The terms of some restrictive covenants may also be varied by consent of the parties. The considerations affecting modification by order of the Lands Tribunal apply equally to variations by consent, although there may be the added uncertainty of knowing whether those who agreed the variation were then entitled to do so.[29]

3.27 For these reasons, we recommend that the eighty-year period should in all cases run from the date on which the restrictive covenant was first imposed.

Extensions

3.28 As many covenants will be over eighty years old when new legislation enacting our proposals comes into force, and others will be nearing that age, some transitional flexibility must be provided to ensure that those covenants do not lapse without there being the possibility of an application to replace them. We

[27] Where the title is registered, any reference to the order is entered in the register: Land Registration Act 1925, s. 50(3); Law of Property Act 1969, s. 28(7); Land Registration Rules 1925, r. 212.
[28] Law of Property Act 1925, s. 84(1C).
[29] Para. 1.9 above.

consider that five years would provide ample time for those with the benefit of such covenants to consider whether to apply for replacement and to make the application. We therefore recommend that in any case in which the eighty-year period would otherwise have expired before the legislation had been in force for five years, the time limit should be extended until the end of those five years.

3.29 Finally, in defining the period before a restrictive covenant lapses, we must consider the case where an application to replace a covenant is pending when the eighty-year period[30] would have ended. If the right to make such an application is to be effective, sufficient time must obviously be allowed; but it is equally important that it is always clear whether or not a covenant has lapsed. We recommend below that it should be possible to register an application to replace a restrictive covenant;[31] that will provide a method of giving notice of any extension of the period and will prevent the certainty about whether a covenant has lapsed[32] being undermined. Accordingly, we recommend that in a case in which an application to replace a restrictive covenant is registered before the end of the period on which it would otherwise lapse,[33] the period should only expire when that application is finally disposed of.[34]

Effect of Lapse

3.30 It is fundamental to our proposals that a restrictive covenant should lapse automatically at the end of the eighty-year period.[35] A person enjoying the benefit of it may apply to replace it with a land obligation,[36] but that should not affect the position that the covenant lapses in any event. We recommend that the lapse should be effective as a matter of law and without the need for the parties concerned to take any action.

3.31 As we have explained a restrictive covenant is effective in two ways. It is a contract between the original parties to the agreement, who normally remain bound even though they part with the land which they owned. Also, in certain circumstances, the successors of the original parties are bound by the covenant and can enforce it.[37] Once a covenant has lapsed under our proposals, the intention is that it should cease to have any effect, no longer binding nor benefiting either the original parties or their successors. The effect of a covenant which is obsolete does not need to be preserved in any way; if it is not, it can be replaced with a land obligation.[38]

3.32 Even though it will be possible to state precisely the date on which each restrictive covenant lapses, it is not likely that the registration of all those which are registered will be promptly cancelled. Experience suggests that many people are content to tolerate obsolete restrictive covenants appearing on the title of their land, and until there is a disposition of the property that generally does no harm. Indeed, it would probably not be desirable that all the cancellations should be carried out promptly, because, at least when the first wave of lapsed covenants arrives, the registrars might be overwhelmed with work for no very good purpose. It is simply necessary to make two things clear: first, once a restrictive covenant

---

[30] As extended, if appropriate, under para. 3.28 above.

[31] Para. 3.61 below.

[32] Para. 2.17 above.

[33] The need to register an application before the time for making it expires need not prevent a last-minute application in the case of unregistered land, where the applicant can take advantage of the possibility of registering a priority notice: Land Charges Act 1972, s. 11(1).

[34] We envisage that the meaning of "finally disposed of" would, in implementing legislation, be amplified as in the Landlord and Tenant Act 1954, s. 64(2). The formulation in that Act was interpreted to mean, when the Court of Appeal refuses leave to appeal to the House of Lords, the expiry of the month allowed for registering a petition to the Appeals Committee for leave to appeal: *Austin Reed Ltd.* v. *Royal Insurance Co. Ltd. (No. 2)* [1956] 1 W.L.R. 1339.

[35] Extended, as appropriate, under paras. 3.28, 3.29 above.

[36] Paras. 3.34 *et seq* below.

[37] See Appendix A.

[38] To which the original parties will be those interested in the land at the date of the application, but they will not benefit or be bound after parting with their interests: *The Law of Positive and Restrictive Covenants* (1984), Law Com. No. 127, para. 11.33.

has lapsed the fact that it continues to be registered gives it no force, and secondly, the owner of land formerly burdened with a restrictive covenant should at any time have the right to apply to have any reference to it removed from the register.

3.33 Accordingly, we recommend that, once a restrictive covenant has lapsed, any register entry protecting it should be of no effect. Further, we recommend that on the application of anyone interested in the land, the relevant registrar[39] should be under a duty to cancel the entry and should have the right to do so of his own motion.

B. REPLACEMENT OF COVENANTS

3.34 We propose that even a restrictive covenant which is not obsolete at the end of the eighty-year period should lapse. It would, however, be open to the person enjoying the benefit of it to apply for it to be replaced by a land obligation to the like effect. The value of the benefit of the restriction would not therefore be lost, but the transition of the older but still effective covenants into land obligations is an important aspect of our proposals. This is the way in which all freehold restrictive covenants[40] will finally be phased out.

3.35 Our suggestions involve the need for anyone who seeks to preserve the effect of an old restrictive covenant to make an application to the Lands Tribunal for an order to establish that the covenant is not obsolete and to replace it with a land obligation. This requirement, positively to demonstrate that the covenant still has value, is necessary in order to achieve the objective of clearing obsolete restrictions from titles to land. Were it possible for someone claiming the benefit of a covenant to obtain its replacement merely by making an unopposed claim, it is likely that many already obsolete covenants would be replaced. The inaction of the owners of land subject to obsolete restrictions, who might not bother to challenge a replacement claim, could result in many unjustified replacements. Those landowners would scarcely be prejudiced, because a restriction which is truly obsolete can have no effect except as a minor irritation. However, it would not be possible to dispense with the expense and inconvenience in connection with the registration of title and the repeated need to consider restrictions when property changes hands unless the restrictions were completely disposed of.

3.36 Obviously, there should be a way to avoid unnecessary formalities. If the owner of the land affected by a restriction gave express consideration to the position, accepted that the covenant was not obsolete and agreed the terms of the land obligation which should replace it, it would be oppressive to insist that the parties should incur the trouble and expense of a Lands Tribunal application and it would be a waste of the Tribunal's time. However, no application would be needed in such a case. Parties who were in full agreement would always be at liberty to allow the covenant to lapse and voluntarily to enter into a land obligation. No special provisions are required to govern that situation: people will always be at liberty to agree to enter into new land obligations. Accordingly, it is not necessary for us to consider it further.

Obsolete Covenants

3.37 An order to replace a restrictive covenant would only be made if the covenant were not obsolete. The person claiming the benefit of the covenant would have to establish that fact to the satisfaction of the Lands Tribunal. For the reason we have already given,[41] that condition would have to be met even if the application were not contested.

---

[39] The Chief Land Registrar, in relation to the land register and the land charges register, and the registering authority in relation to a local land charges register.

[40] Except, necessarily, the minority to which our recommendations do not apply.

[41] Para. 3.35 above.

Discharge or Modification of Covenant

3.38 However, it is open to anyone interested in freehold land affected by a restrictive covenant to apply at any time for it to be modified or discharged.[42] One natural result of a replacement application would be to draw the attention of the respondent to this alternative, which might in turn stimulate resort to it. There is no reason why an application under section 84 of the Law of Property Act 1925 should be ruled out merely because a replacement application has been made, particularly as it is proposed that there should be a similar jurisdiction in relation to land obligations.[43] Indeed, the owner of land affected by a restriction who wishes to resist replacement may be well advised to use the existing jurisdiction, because it offers grounds on which a covenant may be discharged even though, on the test we shall propose for replacement applications,[44] it may not be considered obsolete.

3.39 If an application for modification or discharge is made in the course of a replacement application, it is clearly appropriate that the two applications should be consolidated; the same or similar questions will be in issue between the same parties. As a matter of logic, the section 84 application should be considered first. If it results in the discharge of the covenant, there will be nothing to replace. If the covenant is modified, then the land obligation which replaces it should reflect that modification.

3.40 The precise machinery to co-ordinate the two applications before the Tribunal in the most convenient way would be best left to procedural rules. We accordingly recommend that legislation should give the necessary power to make rules.

Grounds of Application

3.41 In detail, an applicant for a replacement order would have to establish four matters:

(a) That there is a valid, subsisting covenant;

(b) That an area of land which he identifies is burdened by the covenant;[45]

(c) That, by reason of his interest in a particular parcel of land, he is entitled to enforce the covenant; and

(d) That he enjoys practical benefits of substantial value or advantage from the covenant.

The two areas of land, the one benefited and the other burdened, need not be the whole of the areas originally benefited or affected by the covenant, so long as they were part of those original areas and the covenant remains effective when restricted to the identified land.

3.42 The last of these requirements is the one directed to the fundamental question, whether the covenant is obsolete. We are suggesting that that matter be approached in this specific way, rather than by considering, without further guidance, whether the covenant is obsolete. This test, whether the person claiming to replace the covenant is actually obtaining a benefit from it, appears to address precisely what is relevant; any more general considerations about whether the covenant is indeed obsolete are not necessarily pertinent when considering whether the owner of the land to be benefited should be entitled to a reimposed restriction.[46] We have adopted the test of "any practical benefits of substantial

[42] Law of Property Act 1925, s. 84(1).

[43] *The Law of Positive and Restrictive Covenants* (1984), Law Com. No. 127, Part XVIII.

[44] Para. 3.41(d) below.

[45] The court has power to make a declaration as to whether land is affected by a restriction, its nature and extent and by whom it is enforceable: Law of Property Act 1925, s.84(2).

[46] Were planning agreements to be included in the scheme (paras. 3.10 *et seq* above), this test might need reconsideration.

value or advantage" from the present legislation for determining whether a covenant should be modified or discharged.[47]

3.43 "Practical benefits" is a test which has already received a wide interpretation. It has been held to include: securing an open space near the property benefited;[48] preventing rowdy entertainment in the house next door;[49] securing a view;[50] or the open character of a neighbourhood;[51] preventing the nuisance of building works.[52] It seems to us appropriate that all general benefits of this type should be protected, provided they are also "of substantial value or advantage". Those benefits may not be of financial value, but they might never have been and that might not have been the intention when they were first imposed.

3.44 We accordingly recommend that an application to the Lands Tribunal to replace a restrictive covenant should be granted if the Tribunal is satisfied on the four points outlined above.[53]

Building Schemes

3.45 Special considerations apply to the replacement of restrictive covenants imposed under a building scheme.[54] This is because the restrictions which the scheme imposes have effect as if the owner of each property had entered into covenants in that form separately with each of the other landowners. Looked at as individual covenants, there will often be a very large number of them.

3.46 However, there are a number of reasons why it would not be convenient, and would not be consistent with principle, to replace a building scheme with land obligations which operate in a similar way covering a whole development:

(a) The proposed adaptation of the original land obligations proposals to omit "development covenants",[55] means that the land obligations scheme does not offer an appropriate vehicle for replacement;

(b) Even if all the restrictions imposed by a building scheme truly benefited all the other plots affected when they were first imposed, there would probably be many cases in which, at the end of eighty years, this was no longer so. Accordingly, a particular covenant would be obsolete, in its application between certain properties within the building scheme, but still of value between others. Our aim to simplify conveyancing would suggest that it should not be possible automatically to replace covenants which were obsolete in their application to a particular property, merely because they still had value in relation to another. Dealings with the first property would continue to be impeded by covenants which no longer had any value;

(c) It would often be impossible to apply a single eighty-year period to the whole area covered y a building scheme, because plots are frequently not all sold in the same year; occasionally, sales have extended over more than a decade. Even an arbitrary rule that, in the case of a building scheme, the eighty-year period should run from the date of the sale of the first plot, or from the sale of the last one, would be impractical. Because the owner of plot A would generally have no means of knowing when the covenants were imposed on plot B, or any of the other plots, it would not

---

[47] Law of Property Act 1925, s.84(1A)(a). Before amendment in 1969, subsec. (1)(a) referred to "securing practical benefits to other persons", so earlier authorities are also relevant in interpreting the phrase "practical benefits".

[48] *Re Henderson's Conveyance* [1940] Ch. 835, 849.

[49] *Re Munday's Application* (1954) 7 P. & C.R. 130.

[50] *Re Saddington* (1964) 16 P. & C.R. 87; *Re Collett* (1963) 15 P. & C.R. 106; *Gilbert* v. *Spoor* [1983] Ch. 27; *Re Bushell* (1987) 54 P. & C.R. 386; *Re Whiting* (1988) 58 P. & C.R. 321.

[51] *Re Gossip* (1972) 25 P. & C.R. 215; *Re Purnell* (1987) 55 P. & C.R. 133; *Re Jones & White & Co.* (1989) 58 P. & C.R. 512.

[52] *Re Williams* (1987) 53 P. & C.R. 400.

[53] Para. 3.41 above.

[54] See Appendix A, para. 3.29.

[55] Paras. 1.12, 1.13 above.

be possible to determine whether or not a covenant affecting plot A had lapsed. He could not know whether the eighty-year period had lapsed, nor could the Land Registry. The important certainty of our proposals[56] would be lost;

(d) If different rules governed building schemes, it would be necessary to be sure whether any particular covenant was affected by them or whether it was governed by thegeneral rules. It is not always simple to determine whether the conditions set out in *Elliston* v. *Reacher*[57] have been satisfied, above all because after a considerable lapse of time it may be difficult to ascertain the facts surrounding the original development. This could also add to the difficulty of knowing whether a covenant had lapsed.

3.47 In the light of these considerations and bearing in mind that we expect a high proportion of covenants to prove to be obsolete when they lapse, we propose that covenants comprising a building scheme should be treated as if they were individual covenants imposed on one plot of land in favour, respectively, of each of those intended to those intended to benefit. The result would be, in theory, that the owner of a house on an estate which constituted a building scheme could apply to replace the covenants benefiting his property which had been imposed on each of the other houses. In practice, we do not believe that, after eighty years, there would be many covenants which owners would wish to have replaced.

3.48 Nevertheless, there will be a few areas covered by building schemes where, even after eighty years, the owners generally would like the local controls, which the restrictions under the scheme impose, to continue. This form of regulation of the use of a defined area of land is one of the purposes for which the proposed commonhold scheme is suitable.[58] We do not consider that it is necessary or appropriate to suggest that there should be compulsion to create a commonhold to replace a building scheme; but where landowners in a particular area are in agreement, they will have, when the commonhold scheme is implemented, the means to perpetuate the restrictions, by creating a commonhold as the restrictive covenants lapse.

3.49 It will accordingly be possible to treat restrictive covenants imposed under building schemes in the same way as other covenants. We recommend that there should be no special provisions relating to them.

Replacement Applications

Applicant

3.50 A restrictive covenant is entered into by one freeholder, burdening his land with a restriction, in favour of the owner of another parcel of freehold land which is to benefit. Obviously, therefore, the freehold owner of the land intended to be benefited should be entitled to apply for a replacement when the covenant lapses but is not obsolete. However, others may in practice benefit. Practical or financial benefits from a covenant may, e.g., accrue to a mortgagee or a long leaseholder of the land. While it is not desirable that applications for replacement should proliferate, it is important that others with valuable interests in the benefit of a covenant should not lose them merely because the freeholder makes no application. There will be cases in which the interest of the freehold owner in the benefit of a covenant is minimal, even if there is no question of the covenant being obsolete: his interest may be subject to a 100 per cent mortgage or to a lease for 150 years at a small ground rent. In those cases, it may be unrealistic to assume that the freeholder will make any application for replacement of the covenant.

---

[56] Para. 2.17 above.
[57] [1908] 2 Ch. 374; see Appendix A, para 3.29.
[58] Para. 1.13 above.

3.51 We do not consider that it is practical to identify on the one hand cases in which only the freeholder of the land benefited should be able to apply and on the other cases in which others should have that right. Rather, we believe that the class of possible applicant can be widely drawn, because the position will be regulated by the nature of what the successful applicant has to establish. The relevant requirement is that he enjoys practical benefits *of substantial value or advantage*.[59] No-one to whom the benefit of the covenant was merely of marginal value or advantage could succeed. Certainly, there will be cases in which more than one applicant could qualify to succeed, but there is no reason why anyone who could establish that they would suffer loss if the covenant were not replaced should not have the right to achieve that objective.

3.52 We therefore recommend that anyone interested in the land intended to be benefited by a restrictive covenant should be entitled to apply to replace it.[60]

Respondent

3.53 Similarly, it is not only the freeholder of the land burdened with a restrictive covenant who may wish to challenge its replacement. Although a covenant is imposed on the freehold estate, it can affect others interested in the land. They, therefore, should have a right to be heard. However, a restrictive covenant, and any land obligation which replaces it, is intended to impose a long-term restriction; this makes it inappropriate that a replacement application should be opposed by a tenant under a short lease whose interest in the property is not of the same nature.

3.54 With that in mind, we recommend that the respondents to any replacement application should be the freeholder, and the owner of any lease or sub-lease with more than 21 years to run at the date of the application,[61] of any part of the land to be made subject to the proposed land obligation.

3.55 There will be occasions on which it is difficult for an applicant to identify the owner of the land affected by a covenant or to be sure that he can name all the leaseholders. The steps which it will be appropriate for an applicant to take will vary from case to case, and sometimes it will be necessary to abandon as fruitless any efforts to identify the proper respondents. We consider that this is a matter on which the Lands Tribunal could appropriately make directions when called upon to do so and that primarily legislation need do no more than confer the necessary power to make procedural rules.

Time

3.56 One important element in our proposals to deal with obsolete restrictive covenants is to create arrangements which give certainty to those dealing with property. For this reason, the only extensions to the eighty-year period, after which restrictive covenants lapse, are those which will be immediately apparent to those dealing with the property, either because the five-year transitional period from the date on which the new Act comes into force has not expired[62] or because a replacement application has been made and registered.[63] This policy would be undermined if, notwithstanding that the restrictive covenant had already lapsed, an application could still be made to replace it. Were that to be possible, no purchaser of a property which appeared to be free from restrictions would ever be able to be sure; the land might have not been subject to a lapsed restrictive covenant, the registration of which had been cancelled, but in respect of which a

[59] Para. 3.41(d) above.
[60] We also recommend below, para. 3.71, that all those who are entitled to apply should be notified of any application.
[61] This would be the same qualification as for compulsory first registration of title: Land Registration Acts 1925, s.123 and 1986, s.2.
[62] Para. 3.28 above.
[63] Para. 3.29 above.

replacement application could still be made. That seems to us wholly undesirable and, provided a reasonable period is allowed for a replacement application before the covenant lapses, unnecessary.

3.57 The policy underlying our proposals could equally be undermined by allowing a replacement application too soon before the restrictive covenant lapsed. In fixing the eighty-year period, we have assumed that the majority of covenants are likely to be obsolete by then, which would keep the number of replacement applications to a minimum. The test to be applied, therefore, is whether, when an application is made at the end of that period, the covenant is still of value to a person entitled to the benefit of it.

3.58 In our view, a period of five years before a restrictive covenant would automatically lapse should give the person with the benefit ample time in which to make the application. In general, therefore, this would mean that an application could be made once 75 years had passed from the date on which a restriction was first imposed. In transitional cases,[64] the application could be made during the five years following the introduction of the new provisions.

3.59 In summary, we recommend that a replacement application should be made during the five years ending with the date on which the restrictive covenant would lapse,[65] but neither earlier nor later.

Registration

3.60 The fact that a replacement application is pending will necessarily be of significance to anyone considering taking an interest in the land affected by a restriction. The existence of a restrictive covenant would normally be disclosed to them, but they might not consider it significant if the date on which it would lapse was close. Once a replacement application has been launched, however, they would face the prospects of an indefinite restriction, of an extension of the period before the covenant lapsed and of the need to contest the application if they considered it unjustified. Clearly, the information that an application has been made should be readily available.

3.61 For this reason, we recommend that a replacement application should be protected on the land register, or be registrable in the register of pending actions maintained at the Land Charges Department, as a pending land action.[66] This would alert those proposing to take an interest in the land affected by providing information in public registers which are normally searched as a matter of routine in the course of the conveyancing process.

3.62 The consequences of non-registration vary slightly, depending whether the title to the land is registered. When a disposition of registered freehold land is registered, it confers on the new proprietor a title free from matters which could have been protected on the register but were not.[67] In the case of unregistered land, only a purchaser[68] without express notice is not affected by an unregistered pending land action.[69]

Form of Land Obligation

3.63 A successful replacement application will entitle the applicant to a land obligation to the like effect as the lapsed restrictive covenant. This will involve settling the precise form of the land obligation which is then to bind the land affected. That obligation might need to be in different form from the restrictive

---

[64] Para. 3.28 above.
[65] Ignoring any extension of the period by reason of making the application.
[66] Land Registration Act 1925, s.59; Land Charges Act 1972, s.5.
[67] Land Registration Act 1925, s.20(1).
[68] "Any person (including a mortgagee or lessee) who, for valuable consideration, takes any interest in land or in a charge on land": Land Charges Act 1972, s.17(1).
[69] *Ibid.*, s.5(7).

covenant it replaced for two reasons: first, if the Tribunal had ordered a modification[70] and secondly, because we recommend limits on the restrictions that could be imposed by land obligations.[71]

3.64 These seem to us to be matters that can properly be left to be settled by the Lands Tribunal in each case. We therefore recommend that the Tribunal's authority be framed in general terms, to order replacement of a covenant[72] by a land obligation to the like effect. The legislation should confer power to make the appropriate procedural rules.

Unsuccessful Application

3.65 Where a replacement application is unsuccessful, the covenant will have been judged obsolete and there can be no justification for keeping it on foot even until the end of the eighty-year period. We recommend that any covenant which is the subject of an unsuccessful application should cease to have any effect when the application is finally disposed of.[73]

3.66 Because our proposals envisage that an applicant must in every case establish to the Lands Tribunal's satisfaction that the covenant is not obsolete, it might well be that an application in which the respondent took no part would nevertheless fail because the Tribunal was not satisfied. In such a case, the respondent – the owner of the land affected – might not get to hear of the result of the application and therefore might not learn that the restriction was no longer effective. He would normally be the person who applies for the cancellation of any registration of the restriction and it follows that he would not make that application, or at least would not do so promptly.

3.67 This does not seem to us to be a matter of concern. A replacement application would only be possible towards the end of the eighty-year period and even if an unsuccessful one was completely ignored, those involved would still be able safely to assume that the covenant had lapsed at the end of the period. There might, however, be cases in which the matter later came to be of concern to the owner of the land affected. Say, a replacement application were made 75 years after the covenant had been imposed and was rejected a year later. In the following year, three years or so before the end of the eighty-year period, the owner might wish to sell the affected land. It could well then be to his advantage to be able to demonstrate that the covenant was no longer effective, and if title to the land was subject to a first registration after the sale one of our objectives – to reduce unnecessary Land Registry work on first registration – would be undermined if the covenant were still thought to be on foot. However, as a respondent, the owner of the affected land would have been served with notice of the replacement application and that would give him the information necessary to inquire of the Tribunal what was the outcome. Because it will probably be in his interest to make that inquiry, it is likely that the unnecessary work on first registration of title would be avoided.

3.68 We do not consider that any separate procedure for registering the result of unsuccessful replacement applications would be justified.

3.69 One other matter arises from our recommendation concerning the result of unsuccessful replacement applications, which does merit consideration. Various people may be interested in the benefit of a restrictive covenant and the result of providing that it should be of no further effect would be to deprive all of them of their interests. However, to provide that a covenant could become

[70] Paras. 3.38 *et seq* above.
[71] *The Law of Positive and Restrictive Covenants* (1984), Law Com. No. 127, paras 6.4, 6.6.
[72] Which may have been modified.
[73] In a case where the eighty-year period had been extended, this would be when it comes to an end: para. 3.29 above.

ineffective in relation to one beneficiary of it but not in relation to others, would unduly complicate the scheme. That would also involve the inconvenience of proliferating replacement applications.

3.70 Nevertheless, it has to be recognised that different people with an interest in the benefit of the same covenant might stand different chances of success in a replacement application. This is because an applicant must establish that he enjoys practical benefits *of substantial value or advantage* from the covenant.[74] All might benefit, but a particular applicant's value or advantage might not be considered "substantial".

3.71 The just solution is to give all who claim the benefit of a covenant the right to argue for replacement on the basis of their respective interests. What is needed therefore is a way to ensure that all who are affected by a pending application are alerted to the need to apply for replacement. This is again something which we consider can be satisfactorily achieved by procedural rules, for which appropriate provision should be made. We recommend that every applicant should be obliged to give notice to everyone else whom he knows enjoys the benefit of the covenant in respect of the same dominant land; the Tribunal could make appropriate directions as to the steps to be taken to identify those in question in case of doubt.[75] Anyone receiving notice should have the right to be joined as a party to the application.

Costs

3.72 Bearing in mind that to achieve our objective of limiting the replacement of restrictive covenants to those cases where it is fully justified, those who wish to renew and cannot reach agreement with the owners of the burdened land are bound to apply to the Tribunal, special consideration needs to be given to the power to award costs. In most ordinary litigation, if one party takes proceedings and the other offers no defence, the court's power to award costs will normally be exercised in favour of the plaintiff on the principle that costs follow the event. This serves the useful purpose of encouraging defendants without an arguable case to settle promptly. In relation to replacement applications, however, the public interest is not the same. The simplification of conveyancing and clearing dead wood from the land register require that, even if a respondent is not minded to contest the matter, there should still be a requirement that the applicant prove his case. However, if in these circumstances he does, it hardly seems appropriate to penalise the respondent whether he has played a passive role or has deliberately put the applicant to proof.

3.73 The current practice of the Lands Tribunal when exercising its jurisdiction in relation to modifying or discharging restrictive covenants is somewhat more complex than a rule that costs follow the event. It has been summarised:

> "1. An applicant who loses must expect to pay the costs of the objectors, unless it is a very borderline case.
>
> 2. An applicant who wins and does not have to pay any compensation may well recover some or all of his costs from the objectors or there may be no order as to costs. The more closely the case is analogous to hostile litigation, the greater is the chance that costs will follow the event.
>
> 3. An applicant who wins and has to pay compensation will normally have to pay the costs of the objectors, but, if a substantial proportion of the proceeding concerns a head of compensation which fails, there may be no order for costs even though another head of compensation succeeds. If a

[74] Para. 3.41(d) above.
[75] As in the similar case of respondents who are not readily identifiable: para. 3.55 above.

sealed offer exceeds the sum awarded this may influence the decision on costs. . . . In a case analogous to hostile litigation, . . . where the quantum of compensation had been agreed, the applicant may get his costs".[76]

We do not propose that that practice should be disturbed; indeed, it would be appropriate that costs in relation to modification or discharge applications which are consolidated with replacement applications should be dealt with in that way.

3.74 In relation to replacement applications, however, we do not consider that in a routine case it would be appropriate to require the respondent to pay costs, even if the application is successful. On the other hand, we recognise that there will be some cases where an order should be made; deciding which is a question appropriately left to the Tribunal's discretion. Accordingly, we recommend that the Tribunal should have power to order a respondent to pay the applicant's costs of a replacement application where, having regard to the circumstances and the conduct of the parties, there are special reasons for making an order.

Procedure

3.75 The procedure governing applications to the Lands Tribunal for replacement of restrictive covenants can best be laid down by rules, and to the extent that sufficient powers to make them do not exist we recommend that legislation should so provide. Earlier in this Report we have identified a number of specific matters that might need to be covered by rules, and for convenience we summarise them here:

(a) Consolidation of a replacement application with an application to modify or discharge the same covenant (para. 3.40);
(b) Giving directions for identifying respondents (para. 3.55);
(c) Determining the form of the replacement land obligation (para. 3.64);
(d) Notifying others entitled to apply of a pending application (para. 3.71).

[76] Preston & Newsom's *Restrictive Covenants Affecting Freehold Land* (8th ed.) (1991), para. 16–11 (omitting footnotes).

PART IV

SUMMARY OF RECOMMENDATIONS

4.1 The principal recommendations which we make in this Report are:

(a) All restrictive covenants should lapse eighty years after their creation; and

(b) Any covenant which is not then obsolete should be capable of being replaced by a land obligation to the like effect (para. 3.1).

4.2 Our detailed recommendations concerning the lapse of restrictive covenants may be summarised:

(a) The scheme should apply to all covenants restricting the use of freehold land (para. 3.2), with the following exceptions:

(i) Covenants between landlord and tenant, unless they will continue to have effect after the end of the lease term (para. 3.9);

(ii) Covenants imposed pursuant to statute which do not depend for their enforceability against successors in title on the person with the benefit being interested in an identifiable parcel of land (para. 3.13);

(iii) Covenants to which the Lands Tribunal's jurisdiction to modify or discharge restrictions does not apply (para. 3.17);

(b) A restrictive covenant should lapse after eighty years (para. 3.21), and for the purpose of calculating that period:

(i) The eighty years should start when the covenant was first imposed (whether or not the covenant was subsequently varied), which in the case of a new restriction ordered by the Lands Tribunal should be taken to be the date of creation of the covenant being modified (paras. 3.25, 3.27);

(ii) To provide an extension in transitional cases, the period should in no case expire before five years from the commencement date of the legislation (para. 3.28);

(iii) If, when the period would otherwise have ended, a replacement application was pending and registered, the period should expire when the application was fully disposed of (para. 3.29).

(c) The lapse of a restrictive covenant should take effect as a matter of law and without the parties taking action (para. 3.30). Any register entry protecting the covenant should then be of no effect and should be cancelled on the application of anyone interested, or on the registrar's initiative (para. 3.33).

4.3 Our detailed recommendations in relation to the replacement of lapsed covenants are, in summary:

(a) Any application to modify or discharge a covenant which it is sought to replace should be consolidated with the replacement application (para. 3.40);

(b) An applicant for replacement should have to establish:

(i) That there was a valid, subsisting covenant;

(ii) That an identified area of land was burdened with it;

(iii) That by reason of his interest in particular land he was entitled to enforce the covenant; and

(iv) That he enjoyed practical benefits of substantial value or advantage from the covenant (paras. 3.41, 3.44);

(c) Covenants imposed under a building scheme should be treated as if individually imposed (para. 3.49);

(d) It should be possible for anyone interested in land intended to benefit from a restrictive covenant to apply to replace it (para. 3.52);

(e) The respondents to an application should be the freeholder, and the owner of any lease or under-lease with more than 21 years to run at the date of the application, of any part of the land (para. 3.54);

(f) A replacement application should only be made during the five years preceding the date on which the covenant would lapse (para. 3.59);

(g) An application should be registrable as a pending land action (para. 3.61);

(h) The Lands Tribunal should settle the form of the replacement land obligation (para. 3.64);

(i) If a replacement application fails, the covenant should cease to have effect as soon as the application is finally disposed of (para. 3.65);

(j) The applicant under a replacement application should be obliged to give notice of it to everyone else who enjoys the benefit of the covenant and they should have the right to be joined as parties (para. 3.71);

(k) The Lands Tribunal should only have power to order a respondent to a replacement action to pay the applicant's costs where there are special reasons (para. 3.74);

(l) The procedure of the Tribunal in dealing with replacement applications should be laid down by rules (para. 3.75).

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

MICHAEL COLLON, *Secretary*
11 June 1991

APPENDIX A

SUMMARY OF THE PRESENT LAW: EXTRACTS FROM THE REPORT ON THE LAW OF POSITIVE AND RESTRICTIVE COVENANTS (Law Com. No. 127)

(a) Covenants as matters of contract

3.3 Covenants in general fall within that branch of the law which has to do with contract. A covenant amounts simply to a contractual obligation undertaken in a deed by one person towards another; and the general principles of contract law apply to it. As a result it can of course be enforced between the original covenantor and the original covenantee.[1] On their deaths the burden and the benefit normally pass automatically to their respective personal representatives. And it is usually possible by assignment to transfer the benefit, though not the burden, to some third party. Thus there is said to be "privity of contract" between the original covenantor and covenantee (or their personal representatives) and, if the benefit has been assigned, between the assignee and the original covenantor (or their personal representatives). Privity of contract always connotes enforceability—and enforceability, moreover, through the full range of remedies which the law allows. But that, so far as the general law of contract is concerned, is where the matter ends: enforceability goes no further.

(b) The relevance of land law

3.4 However, the last word is not said on all covenants by the law of contract. Land law has something to add in relation to two particular kinds of covenant: those between landlord and tenant and those between one landowner and another. Land can change hands and so can tenancies and the reversionary interests of landlords, and it is therefore desirable that the benefit and burdens of such covenants should normally change hands at the same time—or, to use legal language, should "run with" the property in question. The law of contract does not make them run in this way: does land law? The answer is that the principles outlined in the preceding paragraph are not extended *merely* by virtue of the fact that the covenant is entered into between people who happen to be landlord and tenant or nearby landowners. If the covenant is purely personal to the parties, then it is still enforceable only through privity of contract. But if it has to do with the land as such—if, to use legal language again, it "touches and concerns" the land—the position may be different because land law may then treat the covenant as creating an enduring property interest and so allow its benefit to "run".

. . . . . .

Covenants imposed on land for the benefit of other land

3.13 In this section of this part of the report, we set out to answer a question which may be stated as follows: to what extent, leaving aside matters of privity of contract,[9] will a covenant which is entered into by the owner of one piece of land with the owner of another piece, and which touches and concerns the latter piece of land, run (as to both benefit and burden) with the two pieces of land?

. . . . . .

3.16 In what follows we must differentiate . . . between the benefit and the burden of a covenant because different rules apply, both at law and in equity, to each of them. There is thus a four-fold division: between benefit and burden and between law and equity.

---

[1] For this purpose "the original covenantee" has a meaning wider than might be supposed because Law of Property Act 1925, s. 56(1), provides that a person "may take . . . the benefit of any . . . covenant . . . over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument." The precise scope of this provision is not free from controversy, but a person who falls within it is to be treated as an original covenantee.

[9] i.e., the rules outlined in para. 3.3 above.

(a) **The position at law**

3.17 The position at law, though it falls a long way short of landowners' requirements, can at least be stated with relative clarity.

(i) *The running of the burden*

3.1 At law the burden of a covenant does not run with the land of the covenantor in any circumstances.

(ii) *The running of the benefit*

3.19 The common law looked more favourably on the running of the benefit. The benefit of all covenants will run with land at law provided that the following conditions are satisfied:

(a) *The covenant must have been entered into for the benefit of ("touching and concerning") land belonging to the covenantee.* The benefit of a covenant which is intended to be purely personal to the covenantee will not run with land.

(b) *The covenantee must have had a legal estate in that land.* The old rule was that not only must the covenantee have had a legal estate, but the successor who sought to enforce the covenant must have acquired that same legal estate; and this additional requirement seems still to apply in relation to covenants entered into before 1926. But the additional requirement has been removed, in relation to covenants made after 1925, by the Law of Property Act 1925, section 78.[10]

(b) **The position in equity**

3.20 The position in equity is much more complex, but we must first note a crucial limitation: the body of rules which equity has built up in connection with the running of covenants applies only if the covenant is restrictive rather than positive.

3.21 Positive covenants are those which require the taking of some positive action—for example, a covenant to maintain a boundary wall. Restrictive covenants, by contrast, can be complied with merely by refraining from action—for example, a covenant not to use land for some particular purpose. The law looks at the substance of a covenant and not at its form, so that (for example) a covenant not to allow a fence or wall to fall into disrepair, though worded in a negative way, will be treated as a positive covenant because it does in fact require the doing of repair work.

(i) *The running of the burden of restrictive covenants*

3.22 In the mid-nineteenth century the courts of equity departed from the common law rule that the burden of a covenant does not run with the land. This step was taken decisively in the case of *Tulk* v. *Moxhay,*[11] which concerned a covenant against building in the garden at Leicester Square. The case had some precursors and the rules which it established were refined and to some extent altered over the latter half of the century, but "the doctrine of *Tulk* v. *Moxhay*" is commonly used as a convenient shorthand term to describe the body of equitable rules which has grown up in connection with restrictive covenants, and we shall adopt the same usage in this report.

3.23 The doctrine of *Tulk* v. *Moxhay*, as it now exists, is that the burden of a covenant will run with land provided that the following conditions are satisfied:

(a) *The covenant must be restrictive in nature.* Although there were a few cases after *Tulk* v. *Moxhay* in which the courts were willing to enforce

[10] *Smith and Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board* [1949] 2 K.B. 500; *Williams* v. *Unit Construction Co. Ltd.* (1955) 19 Conv. NS 262; *Federated Homes Ltd.* v. *Mill Lodge Properties Ltd.* [1980] 1 W.L.R. 594; though there is controversy as to whether s.78 was intended to have this effect.

[11] (1848) 2 Ph. 774.

positive covenants, it was settled in 1881,[12] that restrictive covenants alone fell within the doctrine. This outcome is perhaps to be regretted, but the task of preparing this report and the draft Bill has shown us that it was understandable. The difference between a positive and a restrictive covenant is by no means a purely formal one, and the running of the burden of positive covenants involves many problems which do not arise in the case of restrictive ones. It may be that the courts of equity could have solved these problems without the help of the legislature, but the task would have been a formidable one and its success would not have been a foregone conclusion.[13]

(b) *The covenant must have been entered into as a continuing burden upon (intended to run with) land belonging to the covenantor.* If a covenant is so worded as to be binding only upon the covenantor personally, the doctrine of *Tulk* v. *Moxhay* will not apply. But this will not normally be so,and since 1925 covenants relating to land belonging to the covenantor, or capable of being bound by him, are deemed (unless a contrary intention is expressed) to be made on behalf of his successors and those deriving title under him.[14]

(c) *The covenant must have been entered into for the benefit of ("touching and concerning") land belonging to the covenantee.* Conversely, the doctrine of *Tulk* v. *Moxhay* will not apply if the covenant is merely for the personal benefit of the covenantee: it must be for the benefit of his land. The land, moreover, must be sufficiently near the burdened land to be capable of benefitting and must benefit in fact. A covenant cannot be enforced under the doctrine if, at the time of enforcement, it cannot reasonably be regarded as being of benefit to the land.[15]

(d) *The person against whom enforcement is sought must not be a bona fide purchaser of a legal estate without notice of the covenant.* Since the doctrine of *Tulk* v. *Moxhay* is an equitable one it will not operate against anyone who acquires a legal estate in the burdened land for value and in good faith unless he has notice of the covenant in question.[16] Nowadays the existence of notice depends largely on registration. If the burdened land is registered land, the covenant will always be void against a purchaser unless protected by an entry on the register kept under the Land Registration Act 1925. If the land is unregistered, registration under the Land Charges Act 1972 is equired for any restrictive covenant created after 1925, and such a covenant will again be void against a purchaser unless registered. However, the enforceability of covenants created before 1926 still depends on the old doctrine of notice.

3.24 In effect the doctrine of *Tulk* v. Moxhay turns a restrictive covenant into an equitable interest in land and, if the conditions summarised above are fulfilled, it can be enforced as such—but only by means of equitable remedies—against anyone with an interest in the burdened land which is or derives from that of the original covenantee, against those who acquire title by adverse possession, and indeed against those who are mere occupiers and have no title.

(ii) *The running of the benefit of restrictive covenants*

3.25 The doctrine of *Tulk* v. *Moxhay,* though primarily concerned with the running of the burden of a restrictive covenant, extends also to the running of the benefit. Unfortunately the law in this area is very far from settled and recent developments have left a number of uncertainties. A leading textbook[17]

[12] *Haywood* v. *Brunswick Permanent Benefit Building Society* (1881) 8 Q.B.D. 403.

[13] It is doubtful, for example, how far purely equitable remedies could have been adequate for the enforcement of positive covenants: see para. 4.17(b) below.

[14] Law of Property Act 1925, s.79.

[15] *Wrotham Park Estate Co. Ltd.* v. *Parkside Homes Ltd.* [1974] 1 W.L.R. 798.

[16] Anyone, purchaser or not, who claims through such a person will also take free from the covenant.

[17] Megarry and Wade, *The Law of Real Property,* 4th ed. (1975), p.761.

comments: "This part of the subject has therefore become difficult"; and the difficulties have increased since those words were written.

3.26 If the benefit of a restrictive covenant is to run with the benefited land in equity, there are two requirements. The first is a familiar one: that the covenant must touch and concern the land of the covenantee. The second requirement is that the current owner of the benefited land must be able to show one at least of three things:

(a) that the benefit of the covenant has been "annexed" to the benefited land and that he has acquired the whole of that land or a part of it to which the benefit is annexed;

(b) that the benefit of the covenant has been expressly assigned along with the benefited land, or with a part of it which he owns; or

(c) that the benefit of the covenant has passed to him under a "building scheme".

We shall consider these three things briefly in turn.

3.27 *Annexation.* – Annexation means that the covenant has been attached to or linked with the benefiting land in a way which equity recognises. If the document creating the covenant shows an intention to annex—for example, by framing the covenant as being with "the owners for the time being" of the land, or as being "for the benefit of the land" or "for the benefit of the covenantee and his heirs and assigns"—then annexation will take place provided that the benefited land is clearly or easily identifiable from the instrument (with extrinsic evidence if necessary). If the benefit is purportedly annexed to the whole of a piece of land, annexation will be effective only if substantially the whole is capable of benefiting: otherwise it will fail altogether. And even if the whole does benefit, the right to enforce the covenant will then pass only with the land as a whole: a subsequent owner of part of it will have no such right. But a purported annexation to a piece of land "and each and every part thereof" will be effective to annex the covenant to such parts as are in fact capable of benefiting from it; and someone seeking to enforce it need then show only that he has become the owner of such a part. The courts will tend to be ready to find an annexation of the latter, rather than the former, kind. These principles have been modified in important respects, however, by the recent and controversial[18] decision of the Court of Appeal in *Federated Homes Ltd.* v. *Mill Lodge Properties Ltd.*[19] Two aspects of this case should be noted here:

(a) It was held, in relation to covenants created since 1925, that the effect of section 78 of the Law of Property Act 1925 was normally to effect an automatic annexation of those which touched and concerned the land of the covenantee. The section provides that such covenants "shall be deemed to be made with the covenantee and his successors in title . . .". Before the *Federated Homes* case this provision was generally thought to be designed merely to shorten the length of legal documents, not to effect an annexation where otherwise there would be none.

(b) The annexation brought about by section 78 would appear to be an annexation of the benefit to the whole of the benefited land rather than to each and every part, though this may not be entirely clear. Even if it is so, however, this may not be as restricting a feature as it seems, because the court found it difficult to understand how a covenant could be annexed to "the whole of the land but not to a part of it".[20] If this approach were adopted a further general change in the principles stated above would follow.

[18] The full implications of this case and its controversial nature are fully discussed in Preston & Newsom's *Restrictive Covenants Affecting Freehold Land,* 7th ed. (1982).

[19] [1980] 1 W.L.R. 594.

[20] Ibid., at p.606.

3.28 *Assignment.* – In view of the decision in the *Federated Homes* case, someone who acquires the benefited land will normally be able to show that the benefit of a restrictive covenant has passed to him through annexation. But if he fails, he may still be able to show it has done so through assignment. If the person against whom enforcement is sought is the original covenantor, assignment under the normal rules of contract will suffice. Here, however, we are concerned with the case where the passing of the burden of the covenant to the defendant depends on the doctrine of *Tulk* v. *Moxhay* and where, accordingly, equity allows redress only if the benefit has been assigned in circumstances which satisfy its own requirements. These may be summarised as follows:

(a) *The person seeking enforcement must show that he owns land which the covenant was intended to benefit.* This connection must be clearly established, but evidence of the surrounding circumstances is admissible for the purpose. The land owned by the person seeking to enforce must also be capable in fact of benefiting from the covenant.

(b) *There must be a clear "assignment".* Normally there will be an express formal assignment. Failing this there must at least be a clear agreement that the benefit of the covenant shall pass to the assignee.

(c) *The assignment must be part of the same transaction as the transfer of the land itself.* The person seeking to enforce must show that the benefit of the covenant has been assigned contemporaneously with the land. This rule is said to arise from the proposition that equity recognises only those assignments which are made as a necessary element in selling the land. There may be limited exceptions to this rule, but their existence is doubtful. (The rule does not, however, affect an assignment which merely gives effect to an existing entitlement to the benefit of a covenant.) There is no objection to an assignment which accompanies a transfer of part only of the land benefiting from the covenant. Even if the benefit has been annexed to the whole of the benefiting land and not to each and every part, so that a purchaser of part could not claim the benefit by virtue of annexation,[21] equity will still allow the benefit to pass to such a purchaser by assignment. And if, in a case where the benefit has been annexed only to the whole, the benefit is expressly (though unnecessarily) assigned with that whole to a purchaser, the fact that this purchaser subsequently sells off a part does not prevent him enforcing the covenant in virtue of the part which he has retained. The textbook to which we have already referred comments:[22] "This shows how one anomaly may be tempered by another."

There is a possibility that the effect of assigning the benefit of a covenant with land is to annex it to the land, so that it runs thereafter by virtue of annexation and further assignment is unnecessary; but this is not clear from the cases. There is also a possibility that the benefit of a covenant may be something which falls within section 62 of the Law of Property Act 1925 (which implies in conveyances general words of transfer covering various rights and other matters), so that it passes to a purchaser automatically *and* becomes annexed to the land thereafter; but this again is by no means clear.

3.29 *"Building schemes".* – A special set of equitable rules has grown up about the benefit of restrictive covenants imposed on purchasers in the course of a property development. If the necessary conditions are present – and these are dealt with below – equity treats the area of the development as being subject to a kind of local law. When this situation exists there is said to be a "building scheme". The creation of a building scheme is entirely voluntary: the developer

[21] Note, however, the doubt thrown on this rule by the *Federated Homes* case: para. 3.27(b) above.
[22] Megarry and Wade, *The Law of Real Property*, 4th ed. (1975), p. 767.

need not allow one to arise if he does not wish it (though his decision may depend in part on the preferences likely to be felt by his purchasers). But if there is such a scheme, certain consequences follow:

(a) The first consequence is that any restrictive covenants imposed according to a pattern on purchasers of units in the development are mutually enforceable. Every unit owner and his successors can enforce them against every other unit owner and his successors.[23] If there is a building scheme then the mutuality follows automatically: it is of the essence of the scheme. This mutuality could normally be achieved, if desired, without relying on the special rules of equity about building schemes: such reliance serves in this respect only to avoid some of the careful and technical drafting which would otherwise have to be included in the document of transfer.[24]

(b) The second consequence is that, once a building scheme crystallises on the sale of the first unit, the vendor himself becomes bound in an important, but perhaps not entirely clear, sense by the pattern of restrictions which are the foundation of the scheme. He may not act inconsistently with them. He must impose them upon the subsequent purchasers of units in the development. And he is not at liberty to waive, or authorise any breaches of, the restrictive covenants thus imposed. This second consequence, however, unlike the first, is not an essential part of the scheme: the developer can have a building scheme and still negative or modify these particular obligations, and in fact he commonly does so to some degree.

We now turn to the conditions which must exist before a building scheme will arise. The classic statement of these conditions is that by Parker J. in *Elliston* v. *Reacher*:[25]

> "(1) that both the plaintiffs and the defendants (i.e., both the unit owner seeking to enforce the covenant and the unit owner against whom enforcement is sought] derive title under a common vendor; (2) that previously to selling the lands to which the plaintiffs and defendants are respectively entitled the vendor laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiffs and defendants respectively), for sale in lots subject to restrictions intended to be imposed on all the lots, and which, though varying in details as to particular lots, are consistent and consistent only with some general scheme of development; (3) that these restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold, whether or not they were also intended to be and were of the benefit of other land retained by the vendor; and (4) that both the plaintiffs and the defendants, or their predecessors in title, purchased their lots from the common vendor upon the footing that the restrictions subject to which the purchases were made were to enure for the benefit of the other lots included in the general scheme whether or not they were also for the benefit of other lands retained by the vendors."

Over the years, however, and particularly in comparatively recent times, decided cases have shown that several of these conditions are not in fact necessary. As matters stand at present it seems that only two requirements are essential[26] – namely, that the area of the scheme be defined; and that those who purchase from

---

[23] There is little doubt that enforceability against successors depends on the normal rules about registration (or, in the case of pre-1926 covenants affecting unregistered land, notice).

[24] Megarry and Wade, *The Law of Real Property*, 4th ed. (1975), p. 769. The enforceability of covenants within a building scheme may, however, survive the sub-division of one of the original units, or the coming of two such units into a single ownership, in a way which other covenants would not do: see Megarry and Wade, *op. cit.*, p. 771.

[25] [1908] 2 Ch. 374, at p. 384.

[26] Preston & Newsom's *Restrictive Covenants Affecting Freehold Land*, 7th ed. (1982), p. 62.

the creator of the scheme do so on the footing that all purchasers shall be mutually bound by, and mutually entitled to enforce, a defined set of restrictions (which may nonetheless vary to some extent between lots). It remains to add that building schemes are not confined to cases where the units are sold freehold. Such a scheme may equally apply where units in a development are let to tenants and it is intended that certain covenants shall be enforceable by the tenants against one another. Schemes of the latter kind are sometimes called "letting schemes"; and building and letting schemes are often spoken of together as "schemes of development".

APPENDIX B

SECTION 84 OF THE LAW OF PROPERTY ACT 1925, AS AMENDED

(1) The Lands Tribunal shall (without prejudice to any concurrent jurisdiction of the court) have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restrictions on being satisfied –

(a) That by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Lands Tribunal may deem material, the restriction ought to be deemed obsolete; or

(aa) That (in a case falling within subsection (1A) below) the continued existence thereof would impede some reasonable user of land for public or private purposes or, as the case may be, would unless modified so impede such user; or

(b) That the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed, have agreed, either expressly or by implication, by their acts or omissions, to the same being discharged or modified; or

(c) That the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction; and an order discharging or modifying a restriction under this subsection may direct the applicant to pay to any person entitled to the benefit of the restriction such sum by way of consideration as the Tribunal may think it just to award under one, but not both, of the following heads, that is to say, either –

(i) A sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge or modification; or

(ii) A sum to make up for any effect which the restriction had, at the time when it was imposed, in reducing the consideration then received for the land affected by it.

(1A) Subsection (1)(aa) above authorises the discharge or modification of a restriction by reference to its impeding some reasonable user of land in any case in which the Lands Tribunal is satisfied that the restriction, in impeding that user, either –

(a) Does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; or

(b) Is contrary to the public interest;

and that money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification.

(1B) In determining whether a case is one falling within (1A) above, and in determining whether (in any such case or otherwise) a restriction ought to be discharged or modified, the Lands Tribunal shall take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas, as well as the period at which and context in which the restriction was created or imposed and any other material circumstances.

(1C) It is hereby declared that the power conferred by this section to modify a restriction includes power to add such further provisions restricting the user of or the building on the land affected as appear to the Lands Tribunal to be reasonable

in view of the relaxation of the existing provisions, and as may be accepted by the applicant; and the Lands Tribunal may accordingly refuse to modify a restriction without some such addition.

(2) The court shall have power on the application of any person interested –

(a) To declare whether or not in any particular case any freehold land is, or would in any given event be, affected by a restriction imposed by any instrument; or

(b) To declare what, upon the true construction of any instrument purporting to impose a restriction, is the nature and extent of the restriction thereby imposed and whether the same is, or would in any given event be, enforceable and if so by whom.

Neither subsections (7) and (11) of this section nor, unless the contrary is expressed, any later enactment providing for this section not to apply to any restrictions shall affect the operation of this subsection or the operation for the purposes of this subsection of any other provisions of this section.

(3) The Lands Tribunal shall, before making any order under this section, direct such enquiries, if any, to be made of any government department or local authority, and such notices, if any, whether by way of advertisement or otherwise, to be given to such of the persons who appear to be entitled to the benefit of the restriction intended to be discharged, modified, or dealt with as, having regard to any enquiries, notices or other proceedings previously made, given or taken, the Lands Tribunal may think fit.

(3A) On an application to the Lands Tribunal under this section the Lands Tribunal shall give any necessary directions as to the persons who are or are to be admitted (as appearing to be entitled to the benefit of the restriction) to oppose the application, and no appeal shall lie against any such direction; but rules under the Lands Tribunal Act 1949 shall make provision whereby, in cases in which there arises on such an application (whether or not in connection with the admission of persons to oppose) any such question as is referred to in subsection (2)(a) or (b) of this section, the proceedings on the application can and, if the rules so provide, shall be suspended to enable the decision of the court to be obtained on that question by an application under that subsection, or by means of a case stated by the Lands Tribunal, or otherwise, as may be provided by those rules or by rules of court.

(4) [*Repealed*].

(5) Any order made under this section shall be binding on all persons, whether ascertained or of full age or capacity or not, then entitled or thereafter capable of becoming entitled to the benefit of any restriction, which is thereby discharged, modified or dealt with, and whether such persons are parties to the proceedings or have been served with notice or not.

(6) An order may be made under this section notwithstanding that any instrument which is alleged to impose the restriction intended to be discharged, modified, or dealt with, may not have been produced to the court or the Lands Tribunal, and the court or the Lands Tribunal may act on such evidence of that instrument as it may think sufficient.

(7) This section applies to restrictions whether subsisting at the commencement of this Act or imposed thereafter, but this section does not apply where the restriction is imposed on the occasion of a disposition made gratuitously or for a nominal consideration for public purposes.

(8) This section applies whether the land affected by the restrictions is registered or not, but, in the case of registered land, the Land Registrar shall give effect on the register to any order under this section in accordance with the Land Registration Act 1925.

(9) Where any proceedings by action or otherwise are taken to enforce a restrictive covenant, any person against whom the proceedings are taken, may in such proceedings apply to the court for an order giving leave to apply to the Lands Tribunal under this section, and staying the proceedings in the meantime.

(10) [*Repealed*].

(11) This section does not apply to restrictions imposed by the Commissioners of Works under any statutory power for the protection of any Royal Park or Garden or to restrictions of a like character imposed upon the occasion of any enfranchisement effected before the commencement of this Act in any manor vested in His Majesty in right of the Crown or the Duchy of Lancaster, nor (subject to subsection (11A) below) to restrictions created or imposed –

(a) For Naval, military or Air Force purposes,

(b) For civil aviation purposes under the powers of the Civil Navigation Act 1920, of section 19 or 23 of the Civil Aviation Act 1949 or of section 30 or 41 of the Civil Aviation Act 1982.

(11A) Subsection (11) of this section –

(a) Shall exclude the application of this section to a restriction falling within section (11)(a), and not created or imposed in connection with the use of any land as an aerodrome, only so long as the restriction is enforceable by or on behalf of the Crown; and

(b) Shall exclude the application of this section to a restriction falling within subsection (11)(b), or created or imposed in connection with the use of any land as an aerodrome, only so long as the restriction is enforceable by or on behalf of the Crown or any public or international authority.

(12) Where a term of more than 40 years is created in land (whether before or after the commencement of this Act) this section shall, after the expiration of 25 years of the term, apply to restrictions, affecting such leasehold land in like manner as it would have applied had the land been freehold:
Provided that this subsection shall not apply to mining leases.

(13) [*Repealed*].

APPENDIX C

Individuals and Organisations who Responded to Consultations

PART I

Individuals and Organisations who Commented on The Conveyancing Standing Committee Consultation Paper

Professor J E Adams, Queen Mary College, University of London
Mr J N Adams, University of Kent
Mr S Alkin
Mr P R Allen
Anglia Building Society
Anstey, Horne & Co., Surveyors
The Rt Hon Sir John Arnold
Ashington, Denton & Co., Solicitors
Association of District Councils
Association of District Secretaries
A V C Astley, Solicitors
Avon County Council
Mr R Bagallay, Solicitor
Alan Bailey Studios Ltd
H J Banks & Company Ltd
Bankes, Ashton & Co., Solicitors
Mr and Mrs Barton
Mrs E Barton
The Bath and Wells Diocesan Board of Finance
Beal & Co., Estate Agents
Mr G R D Beart
Berry Bros., Surveyors
Bexley London Borough Council
Blake Lapthorn, Solicitors
Mr J Booth
Mr J Bradshaw
Branksome Dene Residents Association
Mr V Brindley JP
British Property Federation
British Railways Board
British Telecom
Bromley Securities Ltd
Mr M Brown
Mr M P B Brown
The Rt Hon Sir Nicolas Browne-Wilkinson V–C
Mr J Bryce Mungall
Building Societies Association
Mr R P Burrage
The Hon Mr J M E Byng
Campaign for Real Ale
Mr K Campbell
Canford Cliffs Land Society Ltd
Mr R J Cary
Mr P Catterall
Chancery Bar Association
Miss M K Chant
Chartered Institute of Building
Mr G A Cherry
Mrs W D Childs
Sir Kenneth Christofas
Church Commissioners

City of London Law Society
Mr and Mrs J Clarke
Cleeve Park Association
R H and R W Clutton, Surveyors
Mr C F Colbran
Mr P H Coleman, Solicitor
Mr G Collard
College of Law
Construction Surveyors' Institute
Sir Hugh Cortazzi
Mr and Mrs G W Cottrell
Council of Her Majesty's Circuit Judges
Council on Tribunals
Country Landowners Association
Ms L Crabb, University College of Wales
Professor S M Cretney, University of Bristol
T Cryan & Co., Solicitors
Currey & Co., Solicitors
Cyngor Defnyddwyr Cymru
Mr A J Daniell
Mr M Davey, University of Manchester
Mr R Davies
The Rt Hon Lord Justice Dillon
The Rt Hon Sir John Donaldson, MR
Doncaster Metropolitan Borough Council
Mr D H Douglas
Mr P J Dry
Mr G C Duncan
Mr A C Egleton
Mr R Eldred
Elim Pentecostal Church
Mr A Errington
Mr F Evans
Dr A R Everton, Leicester University
H Field & Co., Accountants
Forestry Commission
The Rt Hon Lord Fraser of Tullybelton
Freshfields, Solicitors
J Frodsham & Sons, Solicitors
Dr R J Gay, Oxford University
General Accident Insurance Group
Mrs S George and others, Liverpool Polytechnic
Mr D S Goldie
His Hon Judge Goodman
Mr A Greaves
R Green Properties plc
Mr W K Greenfield
Mr C Gregson
Mr W Grindle
Halifax Building Society
Mr D Hardaker
Mr R A Harris
Mr J H Harrison, Solicitor
Professor B W Harvey, University of Birmingham
Haselmere Society
Dr D J Hayton, Jesus College, Cambridge
Holborn Law Society Law Reform Committee
Mr P Hopkins
Hornors, Estate Agents
Mr J Howell Jones, Solicitor

Mr S Hudson
Incorporated Society of Valuers and Auctioneers
Institute of Chartered Secretaries & Administrators
Institute of Legal Executives
Mr A F Ives, Surveyor
Mr B S Jeeps, Solicitor
Mr Michael Jepson, Solicitor
Mr B S Jones
Mr D Jones
Mr J Keightley
The Rt Hon Lord Justice Kerr
Mr and Mrs R Kimpton
Laces & Co., Solicitors
H M Land Registry
Landed Property Consultative Council
Lands Tribunal
Landwater (Troutstream) Estate Ltd
Mr R S Latham, Solicitor
Law Society Standing Committee on Land Law and Conveyancing
Law Society Young Solicitors Group
The Rt Hon Lord Justice Lawton
Dr P Leadlay
Mr D Lee
Mr R G Lee, University of Lancaster
Mr N Lewis
London Borough of Bromley
London Borough of Redbridge
London Borough of Richmond upon Thames
Lovell, White & King, Solicitors
Mr Lupton
Mr T M McAll
Mr D McKenzie
Mrs McNally
Mr J Majubian
Manning Clamp & Partners, Surveyors
Mr C H Maybury
Mr B W Meaby
Mid Sussex District Council
Mrs Miller
Mr H Morrison
Miss M Murry
The Rt Hon Lord Justice Mustill
Nabarro Nathanson, Solicitors
National Association of Estate Agents
National Childminding Association
National Consumer Council
National Westminster Bank plc
Neates, Estate Agents
New Ash Green Village Association
Mr G H Newsom, QC
The Rt Hon Lord Justice Nicholls
North Dorset District Council
North York Moors National Park
Norwich Union Fire Insurance Society Ltd
Open Spaces Society
Mr R Osman
Outwood Society
Mr D J Parker
The Rt Hon Lord Justice Parker
Mr K V Parsons, Surveyor

Mr A Prichard
Prudential Assurance Company plc
Racing Pigeon Magazine
Mr M Ridzudi
Mr N Roland
Rothesay Drive Residents' Association
Royal Institution of Chartered Surveyors
Royal Town Planning Institute
Mr A Samuels, University of Southampton
Mr Sayers
The Rt Hon Lord Scarman
David Schayek & Co., Solicitors
Mrs B I Scholfield
Selly Park Property Owners Association
Senate of the Inns of Court and the Bar
Mr G Shellard
Shirley Institute
The Rt Hon Lord Justice Slade
Mr D Smith
Staffordshire Building Society
Mr J Stephenson
Stewart Wrightson Holdings
The Rt Hon Lord Justice Stocker
Mr J Sweetman
Mr J Thompson
Mr R P Towns, Solicitor
Mr S Tromans, Department of Land Economy, University of Cambridge
Mr & Mrs Walker
Mr J Walker
The Hon Mr Justice Walton
The Hon Mr Justice Warner
Weightmans, Solicitors
Wentworth Estate Roads Committee
Mr J West
West Midlands Autistic Society
The Hon Mr Justice Whitford
Mr Wiese
Wooley, Bevis & Diplock, Solicitors
Mr R J Woolford, Surveyor

PART II

Individuals and Organisations who Responded to The Specialist Consultation

Building Soocieties Association
Chancery Bar Association
Church Commissioners
Council on Tribunals
Mr P. Freedman, Solicitor
Incorporated Society of Valuers and Auctioneers
HM Land Registry
Lands Tribunal
Lord Chancellor's Department
Royal Institution of Chartered Surveyors
Mr R Tweed, City Secretary and Solicitor, City of Portsmouth

Printed in the United Kingdom for HMSO
Dd 0505874 7/91 C12 13110 3382/4C Ord 155211

HMSO publications are available from:

HMSO Publications Centre
(Mail and telephone orders only)
PO Box 276, London SW8 5DT
Telephone orders 071-873 9090
General enquiries 071-873 0011
(queuing system in operation for both numbers)

HMSO Bookshops
49 High Holborn, London, WC1V 6HB 071-873 0011 (Counter service only)
258 Broad Street, Birmingham, B1 2HE 021-643 3740
Southey House, 33 Wine Street, Bristol, BS1 2BQ (0272) 264306
9–21 Princess Street, Manchester, M60 8AS 061-834 7201
80 Chichester Street, Belfast, BT1 4JY (0232) 238451
71 Lothian Road, Edinburgh EH3 9AZ 031-228 4181

HMSO's Accredited Agents
(see Yellow Pages)

And through good booksellers

ISBN 0-10-254691-6

9 780102 546910