

# The Law Commission

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## TRANSFER OF LAND THE LAW OF POSITIVE AND RESTRICTIVE COVENANTS

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

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# THE LAW OF POSITIVE AND RESTRICTIVE COVENANTS

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# THE LAW COMMISSION

## *Item IX of the First Programme*

### THE LAW OF POSITIVE AND RESTRICTIVE COVENANTS

*To the Right Honourable the Lord Hailsham of St. Marylebone, C.H.,  
Lord High Chancellor of Great Britain*

#### PART I

#### INTRODUCTION

1.1 In this report we consider the law relating to positive and restrictive obligations imposed upon land (other than those between landlord and tenant) and make recommendations for its reform. A draft Bill to implement these recommendations appears in Appendix A.

#### **Background**

1.2 The mainspring of this report is the need to deal with the unsatisfactory state of the present law about positive obligations imposed upon one piece of land for the benefit of another. Obligations which are restrictive in character can be imposed, as restrictive covenants, in such a way as to bind successive owners of the burdened land, but this is not true of obligations which are positive (for example, to maintain a boundary wall).

1.3 Pressure for this gap in the law to be filled is of long standing. In 1963 the Committee on Positive Covenants affecting Land (the Wilberforce Committee) was set up and its report, which would be substantially implemented by the draft Bill appended to this report, appeared in 1965.<sup>1</sup> Since then there has been strong pressure from practising lawyers, The Law Society and the Building Societies Association (all of whom are, of course, responding to the needs of members of the public); and legal text books have continued to draw attention to the present anomalous situation.<sup>2</sup>

1.4 It has been recognised for some time, however, that great problems would be encountered, and an unsatisfactory result produced, if reform of

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<sup>1</sup>Cmnd. 2719.

<sup>2</sup>For example, Megarry and Wade, *The Law of Real Property*, 4th ed. (1975), p. 755:

“Positive covenants. It has been recommended that the law should provide for the running of positive as well as negative covenants. Apart from limited statutory exceptions, there is at present no satisfactory way of imposing positive obligations (e.g., to repair walls and fences) so as to bind successors in title where the property is freehold. There is no such difficulty with leasehold property, but the declining popularity of leasehold tenure makes the leasehold system less useful. This handicap on freehold property is illogical. It is particularly troublesome in the case of divided buildings, blocks of flats and building estates, where there is a need for permanent obligations to maintain the property and to contribute to the maintenance of common facilities and services, and where in the absence of binding covenants owners may be unable to obtain mortgages. Schemes for allowing such obligations to run with land have therefore been proposed.”

the law relating to positive obligations were carried out in isolation and without any associated reform of the law of restrictive covenants.<sup>3</sup> As will appear from Part III of this report, the latter is itself in many ways imperfect and uncertain, both in its juridical basis and in its practical effects. In particular it is often a matter of great difficulty to know whether a given set of restrictive covenants can be enforced at all and, if so, by whom. To build a new law of positive obligations upon these unsatisfactory foundations would therefore serve only to exacerbate the difficulties. Nor would satisfactory law reform be achieved if the law about restrictive obligations were left alone and a new law of positive obligations constructed on a basis which, in order to be more satisfactory, had necessarily to be different.<sup>4</sup>

1.5 This difficulty could be solved only in one way: by extending the process of law reform to include both positive and restrictive obligations and welding the two into a system which was both unified and satisfactory. Soon after the appearance of the Wilberforce Report, therefore, the then Lord Chancellor asked us to give priority to an examination of the law of restrictive covenants in order that comprehensive reform could be carried out. We made our proposals for reform of this branch of the law in our *Report on Restrictive Covenants*.<sup>5</sup> We ended that report by saying:

“When submitting proposals for the reform of the law it is our usual practice to append to our Report a draft of the legislative provisions which would be appropriate to give effect to our proposals. We have not done so in this case because we are convinced that a new code should be prepared to deal, at the same time, with the implementation of this Report and of the substance of the Wilberforce Committee’s recommendations.”

Subsequently a draft Bill was produced, dealing with both branches of the law, but its approach caused legal controversy because of what was seen by Chancery practitioners as its failure to establish “land obligations” (which were to take the place of restrictive and positive covenants) as interests in land which interacted satisfactorily with the surrounding body of general law and, in particular, with the 1925 property legislation. The Bill was never introduced.

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<sup>3</sup>In our *Report on Restrictive Covenants*, (1967) Law Com. No. 11, mentioned in the next paragraph of the text, we said (in para. 2) that although the Wilberforce Committee had been concerned with the law relating to positive covenants, it had suggested

“that certain of its principal recommendations should be applied also to restrictive covenants: and the Report covered a number of other matters in respect of which it would be convenient that the law relating to positive and restrictive covenants should be assimilated. In considering the possibilities of assimilation we read with interest the Memorandum presented to the Wilberforce Committee by the Council of the Law Society which, after stating the problems relating to positive and restrictive covenants respectively, suggested that the solution for the future lay in abolishing the distinction between the two and making them subject to a common set of rules. We were also shown a Report to the Bar Council by the Chancery Bar Association, which suggested that the time was ripe for a searching inquiry into the whole position of the imposition, enforcement, modification and discharge of restrictive covenants and drew attention to the recommendations of the Wilberforce Committee as showing the way towards reform of the whole of the law relating to covenants.”

<sup>4</sup>These issues are considered in more detail in paras. 4.14–4.20 below.

<sup>5</sup>(1967) Law Com. No. 11. Some of the less central recommendations made in this report were implemented by the Law of Property Act 1969.

1.6 This position of stalemate was followed by further work on the part of the Commission. In 1971, we produced a Working Paper on *Rights Appurtenant to Land*<sup>6</sup> in which it was proposed that the comprehensive reform should embrace the law not only of positive and restrictive obligations but of easements and profits as well, and should extend also to various other matters. This Working Paper produced useful results and its main proposals were strongly supported in consultation, but its plan can be seen in retrospect to have been too ambitious. Although the possibility of eventual assimilation of all these areas should not be ruled out, it is clear that so wide and complex a set of objectives could not be achieved as a single project and by means of a single Bill. We therefore decided as a first step to produce recommendations dealing only with the subject matter of the Wilberforce Report and our own Report on Restrictive Covenants. The result is this report, and in producing it we have been much helped by the consultation of the Working Paper.

### Consultation

1.7 We are extremely grateful to all those who have written to us in order to comment on our Working Paper. Their names are set out in Part 1 of Appendix B.

1.8 When the draft Bill was in what we intended to be nearly its final form, we sent copies of it together with a full explanatory note to a number of government departments, professional bodies, and others with special experience and expertise in this area. In some cases we were primarily concerned to have views on specific problems, often of a relatively isolated and technical nature, which had arisen in the course of preparing the Bill; but we were also more generally concerned to satisfy ourselves that the content of the Bill and its approach to the difficult and highly technical problems involved would command general support. This seemed to us to be important, particularly in the light of the long and unhappy history of the project. Different views may of course reasonably be held about some of the problems which have to be confronted by the reformer; and we thought we should try to establish that there would be a consensus of informed opinion in favour of the solution which we proposed, and had fully worked out in the detail required in draft legislation. We are glad to record that our consultation, in addition to eliciting a number of valuable comments and suggestions (many of which we have adopted), did produce the general support for which we had hoped.<sup>7</sup> Reform of the law is long overdue and we are therefore pleased that the Bill annexed to this Report is seen by those primarily concerned as providing an acceptable solution.

1.9 Those who were kind enough to take part in this recent round of consultation, and to whom we are most grateful, are listed in Part 2 of Appendix B.

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<sup>6</sup>Working Paper No. 36.

<sup>7</sup>The reactions of H.M. Land Registry are dealt with in more detail in Part IX of this report.

## PART II

### THE DESIRABILITY OF RESTRICTIVE COVENANTS: A PRELIMINARY ISSUE

2.1 Although our general conclusions are already on record<sup>1</sup> (and are indeed implicit in the contents of the preceding part of this report), we must pause here in order to consider some fundamental questions which have been raised as to the desirability and form of restrictive covenants.

#### **Ideas canvassed by the Royal Commission on Legal Services**

2.2 In Annex 21.1, starting on page 283 of their report,<sup>2</sup> the Royal Commission on Legal Services canvass (without specifically endorsing) certain ideas for the improvement and simplification of conveyancing. The first paragraph of the Annex sets the scene:

“We consider that there is force in the submissions made to us that, so far as possible, land law and conveyancing should be simplified. The problem is not easy. The present law could be substantially simplified only by extinguishing a number of existing rights and preventing the creation of such rights in the future. This would involve substantially restricting the freedom of contract which exists at present. The social reforms of recent decades have considerably extended the property rights of occupiers other than proprietors especially spouses and tenants. At the same time, the complexity of modern society has led to an extension of the obligations imposed on property owners and has increasingly placed restrictions on the use of land. The growth of planning law has resulted in local authority planning departments exercising functions which previously were the prerogative of the large landowner in restricting the development and use of land.”

In paragraph 3 of the Annex the following comment is made about restrictive covenants:

“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.”

And in paragraph 12 a further comment is made on the same subject:

“We have already suggested that if restrictive covenants are to remain they ought to be in a standard form which will eliminate all or most of the problems of construction which arise when every vendor and every vendor’s

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<sup>1</sup>See paras. 2.3, 2.14 and 2.18 below.

<sup>2</sup>(1979) Cmnd. 7648.

solicitor is free to invent his own form of restriction. We believe, however, that the use of restrictive covenants should be curtailed by statute and reliance placed in the main on planning uses as controlled by planning legislation.”

Two distinct ideas are being put forward, therefore: first, that all (or nearly all) existing and future restrictive covenants should become totally unenforceable except as between the original parties; and second, that (failing that) future covenants should be ineffective unless created by standard forms of wording officially prescribed. We consider these ideas separately.

**(a) Should restrictive covenants cease to be enforceable?**

2.3 In our *Fifteenth Annual Report 1979–1980*,<sup>3</sup> commenting on the Royal Commission Report, we referred to the first of these two ideas and recorded that we had already considered it in our *Report on Restrictive Covenants*,<sup>4</sup> where we had expressed the view that, notwithstanding the broad control now exercised by planning authorities, privately imposed restrictive covenants would continue to have a useful part to play. Our annual report continued:

“We have reconsidered this conclusion in the light of the [Royal Commission] report but adhere to our original view. We therefore disagree with the first proposal relating to restrictive covenants . . . . We shall explain our reasons in full in our forthcoming Report on positive and negative covenants . . . .”

We have now to fulfil that promise.

*(i) Do restrictive covenants bedevil conveyancing?*

2.4 We think it may be an exaggeration to say that restrictive covenants “bedevil modern conveyancing”. Time must indeed be devoted to considering their sometimes lengthy provisions, and an indemnity covenant must usually be inserted in the instrument of transfer. (We hope, incidentally, that this latter requirement will disappear under the scheme put forward in this report.) Added inconvenience certainly arises if they are difficult to construe, but we doubt whether this problem exists in a very substantial proportion of cases or whether standard forms would provide a satisfactory solution to it: the question of standard forms is considered later. We do agree that doubts about enforceability and the power to release may well be an additional difficulty (and the scheme put forward in this report would remove important sources of uncertainty in this connection), but the problem can often be cured in practice by a relatively inexpensive insurance policy. Section 84 of the Law of Property Act 1925 makes provision for the modification or discharge of restrictive covenants.

*(ii) The limitations of planning law*

2.5 Planning law may overlap to some extent with restrictive covenants, but we do not believe that it has removed the need for them. Perhaps especially in residential property developments, restrictive covenants commonly regulate

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<sup>3</sup>(1981) Law Com. No. 107, Appendix 1, paras. 9 and 10 (on page 40).

<sup>4</sup>(1967) Law Com. No. 11, para. 19.

many things for which planning law would not cater—and do so for the mutual benefit of the residents and with the aim of preserving the character and standard of the development as a whole. Nor does it seem to us that these things are confined, as the Royal Commission suggested they might be, to matters affecting privacy. Powerful support for this view is to be found in this extract from the preface to the sixth edition of *Preston & Newsom's Restrictive Covenants Affecting Freehold Land*:

“One thing that is abundantly plain is that there is no prospect whatever that restrictive covenants will become unnecessary and that their place will be taken by the planning laws. For planning standards are still too often below the standards imposed by restrictive covenants. Thus in *Re Bass Ltd.'s Application*<sup>5</sup> the Lands Tribunal held that the suggested modification would inflict upon the persons entitled to the benefit of the restriction noise, fumes, vibrations, dirt and the risk of accidents: these proposals had received planning permission. Again, in the *Wrotham Park*<sup>6</sup> case it was the local authority itself which, having bought the land for a very small sum, put it up for sale and received £90,000 on the basis that it was to be built upon, thereby destroying an open space which the owners of surrounding houses valued and which had been deliberately created by the original covenantee.”

It is also true that certain changes of use and building operations to which an adjoining resident might reasonably and justifiably object do not require planning permission at all.

2.6 It might perhaps be argued that the answer lies not in preserving the power to impose private restrictions but in extending the ambit of planning law. We think it unrealistic, however, to expect planning authorities to concern themselves with all the detailed matters for which restrictive covenants now commonly make provision. Indeed a Past President of the Royal Town Planning Institute<sup>7</sup> has expressed the view that: “It puts planning authorities under unreasonable pressure if they are expected to safeguard the interests of adjoining owners.” It must also be remembered that restrictive covenants may be used to serve purposes which are private and individual and for which planning law would not cater however far it were extended.

2.7 It must also be remembered that planning restrictions, even if they are wholly adequate to the needs of adjoining owners, are enforceable only by the planning authorities. Most owners would wish to have the power of enforcement in their own hands.

### (iii) *The popularity of restrictive covenants*

2.8 It is clear from the very large number of cases in which new restrictive covenants continue to be created that such covenants are still felt by the

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<sup>5</sup>(1973) 26 P. & C.R. 156. There have been other cases in which the Lands Tribunal has refused to modify covenants so as to allow development for which planning permission has already been obtained—e.g., *Re M. Howard (Mitcham) Ltd.'s Application* (1956) 7 P. & C.R. 219; *Re Sloggetts (Properties) Ltd.'s Application* (1952) 7 P. & C.R. 78.

<sup>6</sup>[1974] 1 W.L.R. 798.

<sup>7</sup>Sir John Boynton, in an address in 1978 to a joint conference of The Law Society, the Bar Council and the Royal Institution of Chartered Surveyors.



public to meet a real need. In our *Report on Restrictive Covenants*<sup>8</sup> we recorded that in the period of 10 years to the end of 1965 more than 600,000 new sets of restrictive covenants were registered in respect of unregistered land alone. The last five years' Annual Reports of the Chief Land Registrar record the following figures:

|         |        |
|---------|--------|
| 1977/78 | 69,288 |
| 1978/79 | 73,656 |
| 1979/80 | 78,855 |
| 1980/81 | 80,336 |
| 1981/82 | 62,550 |

It should be emphasised that these figures cover only unregistered land and therefore represent only a part of the sum total of new restrictive covenants created over the country as a whole—and a part, moreover, which constantly diminishes as the registered system spreads.<sup>9</sup> Figures are not published in respect of restrictive covenants newly created in respect of registered land.

2.9 It is only right to add that no member of the consultative group who helped us with the preparation of our *Report on Restrictive Covenants*,<sup>10</sup> and none of the many persons and institutions whom we consulted through our Working Paper on *Rights Appurtenant to Land*,<sup>11</sup> took the view that restrictive covenants ought not to be permitted.

2.10 In view of this it is clear that any recommendation to that effect would serve to curtail a freedom which people do in fact exercise to a very considerable degree.

(iv) *Problems of prohibition*

2.11 Such a recommendation would also involve great practical problems. The idea canvassed by the Royal Commission had to do only with restrictive covenants affecting freehold land; but we do not see how these could be considered in isolation from covenants between landlord and tenant. It may be argued that covenants of the latter kind are imposed for a rather different purpose; but the result of doing away with freehold covenants while preserving leasehold ones might simply result in land being sold leasehold rather than freehold, and that would not be a desirable outcome on any view.

2.12 There is a special difficulty in the proposal that existing restrictive covenants should simply cease to have effect, because this would result in one group of people (those who were burdened by covenants and who might well have paid less for their land as a result) making financial gains—perhaps, in some cases, enormous gains—at the expense of another group (those who were entitled to enforce the covenants and whose own land values would fall if they were no longer able to do so). We cannot think that this would be right.

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<sup>8</sup>(1967) Law Com. No. 11, para. 16.

<sup>9</sup>Registration is now compulsory in areas comprising about 75% of the population of England and Wales.

<sup>10</sup>(1967) Law Com. No. 11.

<sup>11</sup>(1971) Working Paper No. 36.

(v) *Summing up*

2.13 We think that the points made under the last four sub-headings lead inevitably to the conclusion reached in our *Fifteenth Annual Report*.<sup>12</sup>

(b) **Standard forms**

2.14 In our *Fifteenth Annual Report* we referred also to the second of the two ideas canvassed by the Royal Commission. We said:<sup>13</sup>

“We accept that there would be advantages in the standardisation of restrictive covenants but we have considerable doubts whether they outweigh the disadvantages. Be that as it may, we shall give further consideration to [this] suggestion . . . in the Report on positive and negative covenants . . .”

This promise, too, we must now fulfil.

2.15 It will be remembered that the idea canvassed was that of compulsory standard forms—that is to say, of officially prescribed forms which would have to be used, and not departed from, if a restrictive covenant were to be valid as such. Forms of this kind must be sharply distinguished from official forms produced for purely voluntary adoption. The objections mentioned below do not apply to forms of the latter kind; and indeed we later recommend the production of such forms.<sup>14</sup>

2.16 The purpose behind the proposal for compulsory forms is “to eliminate all or most of the problems of construction which arise when every vendor and every vendor’s solicitor is free to invent his own form of restriction”.<sup>15</sup> We are not entirely convinced that problems of construction are so widespread that this remedy is needed, nor indeed that the remedy would be an effective one. Uncertainty often lies not so much in the wording of the covenants as in the application of that wording to the infinitely various situations which may exist, and would continue to exist, on the ground.

2.17 Be that as it may, we think that, once the general principle of freedom of contract is conceded in relation to restrictive covenants, it is very difficult to justify what would amount to an arbitrary set of limitations on that freedom. In saying this we are assuming that the compulsory forms would in practice cater for a relatively small range of situations and would do so in a relatively small number of ways. If the forms were numerous and varied enough to deal with everything an intending covenantee might conceivably want to cover, the sheer labour of producing them would be enormous and the object of the exercise would in any case be largely lost. The idea must therefore be considered as one which would set very strict limits on the parties’ freedom to make their own bargains, and we do not think that there is sufficient evidence to justify it.

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<sup>12</sup>Para. 2.3 above.

<sup>13</sup>(1981) Law Com. No. 107, Appendix 1, para. 11 (on page 40).

<sup>14</sup>Part XXII of this report.

<sup>15</sup>See the third of the quotations set out in para. 2.2 above.

## Re-registration

2.18 Another suggestion about restrictive covenants is sometimes put forward, though it was not canvassed by the Royal Commission. In our *Report on Restrictive Covenants*,<sup>16</sup> we dealt with it as follows:

“It has been suggested to us that the problem of restrictive covenants which have outlasted their usefulness could best be dealt with by an entirely different approach. If registration were effective initially for a limited period of, say, 25 years, so that the registration then lapsed unless it were renewed, there would be comparatively few cases in which it would be necessary for the covenantor’s successor in title to apply to the Lands Tribunal for modification or discharge. In theory we see considerable merit in this proposal, but we do not regard it as practicable. In the majority of cases the need to re-register would be overlooked by the person entitled to the benefit of the covenant and the result would be the lapse of many reasonable and useful covenants. Moreover, this approach would not affect the large number of restrictive covenants created before 1926 which are still not subject to any form of registration unless their existence is disclosed when the land comes on to the register of title at the Land Registry. In our opinion the proper course is to enlarge the powers of the Lands Tribunal, in relation both to existing restrictive covenants and to restrictions imposed in accordance with our Propositions for the future, so as to enable it to order modification or discharge where it is appropriate in the circumstances. In Proposition 9, below, we suggest the lines on which this should be done.”

The suggestions made in Proposition 9 were in fact implemented by the Law of Property Act 1969.

2.19 Having considered this matter afresh, we still take the same view. One problem which genuinely does exist under the present law is that the identity of those entitled to enforce the covenant may not be clear from the documents—partly because the benefited land need not be clearly identified and partly because of the complexity of the rules whereby the benefit of a covenant passes to successive owners of that land. The scheme put forward later in this report would eliminate both these factors in relation to future obligations. But the problem does amount to a further argument against the idea now being considered, because if people do not know that they have the benefit of a covenant they cannot take steps to preserve that benefit. It may be argued that if people do not know they have a benefit it is not unreasonable to deprive them of it; but that seems to us a harsh doctrine, especially if it is applied at an arbitrary point of time at which they are not in receipt of legal advice. It would be less harsh if re-registration were required only when the benefited land was sold, because legal advice would normally be given at that time; but that would defeat the object of the exercise, because it would require the burdened owner to prove that a sale had taken place of land which *ex hypothesi* he cannot clearly identify.

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<sup>16</sup>(1967) Law Com. No. 11, para. 26.

**PART III**  
**THE PRESENT LAW**

3.1 In this part of the report we outline the existing law in so far as it is relevant to our later recommendations. In this report we are concerned almost exclusively with the reform of the existing law about covenants imposed on one piece of land for the benefit of another. This part, therefore, is mainly devoted to that topic. But we begin with some introductory paragraphs and we end (for reasons which will appear) with a short note on the present law of easements.

**Introductory**

3.2 The next few paragraphs may be of help in putting the topic with which we are mainly concerned within its legal context.

**(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.<sup>1</sup> 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?

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<sup>1</sup>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.

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”.

(i) *Covenants between landlord and tenant*

3.5 The extended enforceability which land law gives is both clear and important in the case of covenants<sup>2</sup> between landlord and tenant which touch and concern the land let.<sup>3</sup>

3.6 Covenants of this kind are in practice entered into, expressly or impliedly,<sup>4</sup> on behalf of the covenantor’s successors as well as on his own behalf. If this fact is added to the general principles of contract law, it follows that the liability of the original covenantor (or his personal representatives) continues despite the fact that the landlord’s interest, or the tenant’s, or both, may have changed hands several times.<sup>5</sup> The original tenant remains liable (to the current landlord, to whom the benefit will have passed) for any breach by his successors, and the original landlord remains liable (to the current tenant) for any breach by his. These rules follow merely from the application of the principles of privity of contract to the nature of the covenant in question.

3.7 But land law then adds its own doctrine of privity of estate: it declares that such covenants are enforceable also, and directly, between the person who is currently the tenant and the person who is currently the landlord. This is what matters most, because the continuing liability of the original covenantor is worth less and less as time goes on: he may die,<sup>6</sup> become bankrupt or simply disappear; and in any case he is no longer in personal control of the land and cannot directly ensure compliance with the covenant. Privity of estate, by virtue of which the burden and the benefit of the covenant run with the interests of landlord and tenant, fills the gap which privity of contract leaves and supplies the direct enforceability which is required.

3.8 The doctrine of privity of estate is, moreover, one which originates in the common law or in statute<sup>7</sup> rather than in the courts of equity, so that the benefit and burden run “at law”. The result is that the full range

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<sup>2</sup>Although a covenant, strictly speaking, must be made by deed the word is often used to include obligations in a lease or tenancy which is not under seal, to which the same principles apply.

<sup>3</sup>Or, to use the more modern phraseology of ss.141 and 142 of the Law of Property Act 1925, which “have reference to the subject matter of the lease”.

<sup>4</sup>Law of Property Act 1925, s.79.

<sup>5</sup>This continuing liability is of course subject to contrary provision being made in the lease, but such provision is in practice extremely rare.

<sup>6</sup>Although his personal representatives remain liable, the liability becomes valueless once the estate is wound up.

<sup>7</sup>At common law the benefits and burdens of covenants did not generally run with the reversion, but this was altered by statute as long ago as 1540 and the current statutory provisions enabling them to run are to be found in Law of Property Act 1925, ss.141 and 142.

of legal and equitable remedies which is available as between the original parties continues to be available between successors. This is a point to which we shall return.

3.9 We take this opportunity of emphasising that nothing in this report amounts to a recommendation for change in any of the principles just stated in relation to covenants between landlord and tenant. They will remain as they are.

(ii) *Covenants between landowners*

3.10 Land law also has something to add to the rules of contract in relation to covenants touching and concerning land which are made between one landowner and another.

3.11 As in the case of landlord and tenant covenants, such covenants are always entered into, expressly or impliedly, on behalf of the covenantor's successors in title as well as on his own behalf; and in this situation the rules of privity of contract produce a result exactly analogous to that outlined in paragraph 3.6 above. The original covenantor remains liable despite changes of ownership,<sup>8</sup> but contract law does not make the covenant directly enforceable as between the current owners of the two pieces of land.

3.12 Does land law fill this gap in the same way as it does in the case of landlord and tenant covenants? The answer is that it fills only part of it and that it fills that part in a way which is partial and unsatisfactory. It is the need to remedy these shortcomings which gives rise to this report, and we turn now to examine them more closely.

**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,<sup>9</sup> 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?

3.14 The answer which the present law gives to this question is complex and in some respects uncertain. What follows amounts to little more than an outline of the existing law, and the citation of authorities (which would otherwise have to be copious) is for the most part deliberately eschewed.

3.15 The origins of land law lie partly in the common law, partly in the rules of equity, and partly in statute. Statute has comparatively little to contribute to the answer we are seeking, but common law and equity both have important contributions to make; and we shall have to differentiate between the two because the consequences of a covenant running in equity are different

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<sup>8</sup>This, again, is subject to contrary provision and this provision is sometimes found in practice in relation to restrictive covenants.

<sup>9</sup>I.e., the rules outlined in para. 3.3 above.

from the consequences of it running at law. The most important difference is that if someone's entitlement to enforce a covenant is recognised only by equity then equitable remedies alone will be available to him for its enforcement. The primary equitable remedy will be an injunction (that is to say, a court order requiring the person bound by the covenant to take, or to refrain from, some physical action). Damages may occasionally be awarded in lieu of an injunction, but common law damages for breach of the covenant will not be available.

3.16 In what follows we must differentiate also 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.

**(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*

3.18 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.<sup>10</sup>

**(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.

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<sup>10</sup>*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.

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*,<sup>11</sup> 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 positive covenants, it was settled in 1881,<sup>12</sup> 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.<sup>13</sup>
- (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.<sup>14</sup>
- (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

<sup>11</sup>(1848) 2 Ph. 774.

<sup>12</sup>*Haywood v. Brunswick Permanent Benefit Building Society* (1881) 8 Q.B.D. 403.

<sup>13</sup>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.

<sup>14</sup>Law of Property Act 1925, s.79.



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 benefiting 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.<sup>15</sup>

- (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.<sup>16</sup> 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 required 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 text-book<sup>17</sup> 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”.

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

<sup>16</sup>Anyone, purchaser or not, who claims through such a person will also take free from the covenant.

<sup>17</sup>Megarry and Wade, *The Law of Real Property*, 4th ed. (1975), p.761.

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<sup>18</sup> decision of the Court of Appeal in *Federated Homes Ltd. v. Mill Lodge Properties Ltd.*<sup>19</sup> 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”.<sup>20</sup> If this approach were adopted a further general change in the principles stated above would follow.

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 that 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,

<sup>18</sup>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).

<sup>19</sup>[1980] 1 W.L.R. 594.

<sup>20</sup>*Ibid.*, at p.606.

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,<sup>21</sup> 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:<sup>22</sup> "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

<sup>21</sup>Note, however, the doubt thrown on this rule by the *Federated Homes* case: para. 3.27(b) above.

<sup>22</sup>Megarry and Wade, *The Law of Real Property*, 4th ed. (1975), p.767.

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 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.<sup>23</sup> 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.<sup>24</sup>
- (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*.<sup>25</sup>

“(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;

<sup>23</sup>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).

<sup>24</sup>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.

<sup>25</sup>[1908] 2 Ch.374, at p.384.

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 to enure 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<sup>26</sup>—namely, that the area of the scheme be defined; and that those who purchase from 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 as 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”.

### **The rule that the burden of positive covenants does not run**

3.30 The greatest and clearest deficiency in the law summarised in the preceding section is that the burden of a positive covenant entered into between nearby landowners does not in any circumstances run with the land of the covenantor. The position of such covenants is thus in striking contrast to the position of covenants between landlord and tenant: in their case the doctrine of privity of estate ensures that the burden runs automatically with the property let. One consequence is that many properties which would otherwise be disposed of freehold are nowadays let by lease. We say more about this later on.

#### **(a) Attempts to circumvent the rule**

3.31 Having resort to the leasehold system merely for this purpose must always be undesirable, but it may also be impossible or impracticable for one reason or another—not least, of course, the clear and understandable consumer preference for freehold property. As a result, a number of devices have been used or considered for use in attempts to circumvent the rule itself.

##### *(i) Chains of indemnity covenants*

3.32 The most common device is that of the chain of indemnities—but this, in truth, is not so much an attempt to circumvent the rule as an attempt to live with it. Positive covenants can of course be framed so as to be enforceable only while the covenantor himself retains the land; but in the normal case this will be totally unsatisfactory to the covenantee. As we have seen, therefore, the covenantee will insist upon the covenantor making his covenant on behalf of the successive owners of his land.<sup>27</sup> This, however, will put the

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<sup>26</sup>Preston & Newsom's *Restrictive Covenants Affecting Freehold Land*, 7th ed. (1982), p.62.

<sup>27</sup>This is indeed implied (as we have noted earlier) under Law of Property Act 1925, s.79.

covenantor in a difficulty because when he parts with his land he will remain liable for breaches of the covenant but lose all power to prevent them. To protect himself, therefore, he will insist that any purchaser of the land covenants with him to perform the covenant and to keep him fully indemnified against any liability which he may incur through its non-performance. In this way an uneasy compromise is reached. The owner of the benefited land cannot go against the purchaser of the burdened land, but he can go against the original covenantor who can himself go against the purchaser. If all goes well, compliance with the covenant can be indirectly ensured.

3.33 It is obvious, however, that the situation becomes more and more unsatisfactory as time goes on and the burdened land changes hands again and again. Each successive owner will extract an indemnity covenant from his purchaser and the "chain" of indemnities thus lengthens indefinitely. But, like all chains, it is only as strong as its weakest link and in practice it remains strong only so long as all the ex-owners remain alive, traceable and financially solvent. The fact that this situation will be of relatively short duration is too obvious to need stress. And when one of the links does break, everyone is left dissatisfied (except the fortunate current owner of the burdened land who is free thereafter to ignore the covenant). The owner of the benefited land can still make a claim against the original covenantor if he is alive and can be found, and the covenantor's liability can be passed down the chain of indemnities until it gets to the broken link. At that point, however, someone is left, purely by accident, with a liability which he ought to be able to pass on but cannot. And the benefiting owner cannot obtain, even indirectly, what he really wants, which is actual compliance with the covenant.

3.34 This, nonetheless, is the situation which nowadays obtains in relation to most positive covenants.

(ii) *Estate rentcharges*

3.35 Rentcharges are sums payable periodically (other than interest or rent under a lease) which issue out of or are charged on land.<sup>28</sup>

3.36 Since land is security for the rentcharge, the person to whom it is payable has a legitimate interest (in theory at least) in ensuring that the value of the land is maintained, and the law therefore sanctions his taking positive repairing and other covenants from the rent payer which support the rentcharge by ensuring the maintenance of buildings on the land. Both the payment of the rentcharge and the performance of these covenants are enforceable, without limit of time, by rights of re-entry on the rent payer's land.

3.37 It will be seen, therefore, that rentcharges are relevant to positive covenants in two ways. First, the rentcharge itself is (or could take the place

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<sup>28</sup>Rentcharges Act 1977, s.1.

of) a positive obligation of one particular kind: to pay money. And second, rentcharges enable positive covenants of a rentcharge-supporting character to be imposed on the land burdened by the rentcharge and to be enforced (by means of a perpetual right of re-entry) very much as if they ran with that land. In our *Report on Rentcharges*,<sup>29</sup> we referred briefly to the difficulties occasioned by the fact that the burden of positive covenants does not run with land, and said that these two features of rentcharges were sometimes used as devices to overcome them, particularly in cases where a property development produced a distinct group of freehold houses or where a single building was divided into separate parts. In such cases the owner of each unit has an interest in the upkeep of the development as a whole. We added:

“Two schemes are in common use:

- (1) Under the first scheme, which is more often used in smaller developments, a rentcharge affecting each unit will be imposed for the benefit of the other units and this rentcharge will be supported by positive covenants to repair, insure, and so on. The purpose of this scheme is not to procure the actual payment of the rentcharge—its amount may be nominal and the rent owners are unlikely to trouble very much whether it is paid or not—but to create a set of positive covenants which are directly enforceable because they happen incidentally to support the rentcharge.
- (2) Under the second scheme, which is more often employed in the larger developments, the developers or the unit owners will set up a management company to look after such things as the maintenance and insurance of the development as a whole. There is no problem here about enforcing the company's obligations: the difficulty is to ensure that the company has funds with which to carry them out. A simple covenant by each unit owner to contribute towards the cost would necessarily be a positive covenant and so would involve the problems of enforceability to which we have referred. But a rentcharge would not, and so rentcharges are created. This scheme therefore differs from the first one, because here the actual payment of the rentcharge, so far from being unimportant, is the primary object to be achieved. Its amount will not be nominal, and it may well be variable (so that it can represent a due proportion of whatever expenditure is currently required).”

3.38 The object of rentcharges in general is to provide the rent owner with a source of income for his own use; but the object of rentcharges used in one of the ways just illustrated is clearly quite different. As regards rentcharges in general, the Rentcharges Act 1977, passed to implement the recommendations made in our report, prohibited their future creation and provided for the automatic extinguishment of existing ones in 60 years' time. But rentcharges of the two kinds just illustrated were amongst those expressly excepted from these provisions<sup>30</sup> and their extinguishment through redemption was

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<sup>29</sup>(1975) Law Com. No. 68. See paras. 48–51. The quotation set out below is from para. 49.

<sup>30</sup>Rentcharges Act 1977, s.2(3)(c), (4) and (5) and s.3(3)(b).

also prevented.<sup>31</sup> The Act called them "estate rentcharges".<sup>32</sup> Within their limitations, therefore, and subject to their artificialities, estate rentcharges are still available for use.

(iii) *Rights of re-entry*

3.39 We have noted that the enforcement of a rentcharge, or of a positive covenant which supports a rentcharge, depends ultimately upon a right entitling the rent owner to re-enter upon the rent payer's land. It seems to be possible to adopt a right of re-entry as a device to ensure the performance of a positive covenant even though no rentcharge is involved.<sup>33</sup> But a right of re-entry which is not coupled with a rentcharge can be made exercisable only during the limited period permitted by the rule against perpetuities, and this is a very serious drawback if the covenant is intended (as nearly all covenants are) to be perpetual.

(iv) *Halsall v. Brizell*

3.40 The doctrine in the case of *Halsall v. Brizell*<sup>34</sup> derives from an old legal rule about deeds: that someone who claims the benefit of a deed must also discharge its burdens. If, for example, a conveyance of one unit in a property development includes benefits (the right to use a road or drain, for example) and at the same time imposes burdens in the shape of positive covenants, subsequent owners of the unit cannot take advantage of the benefits unless they discharge the burdens. It is clear, however, that this rule falls a long way short of solving the general problem left by the fact that the burden of positive covenants does not run with land. For one thing, it operates only where a benefit of some kind can be given to the covenantor. And for another, it continues to produce the desired result only while the benefit remains valuable enough for the covenantor's successors to go on claiming it.

(v) *Enlargement of long leases*

3.41 There is, finally, an extremely technical device involving the inclusion of a positive covenant in a lease granted for at least 300 years which is then enlarged into a freehold estate under the power contained in section 153 of the Law of Property Act 1925. When this happens, subsection (8) provides that the "estate in fee simple so acquired by enlargement shall be subject to . . . all the same covenants and provisions relating to user and enjoyment,

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<sup>31</sup>Rentcharges Act 1977, s.8(4).

<sup>32</sup>Section 2(4) defines "estate rentcharge" as "a rentcharge created for the purpose—

- (a) of making covenants to be performed by the owner of the land affected by the rentcharge enforceable by the rent owner against the owner for the time being of the land; or
- (b) of meeting, or contributing towards, the cost of the performance by the rent owner of covenants for the provision of services, the carrying out of maintenance or repairs, the effecting of insurance or the making of any payment by him for the benefit of the land affected by the rentcharge or for the benefit of that and other land."

Subsection (5) provided in relation to rentcharges created in future that they would qualify only if they were "of nominal amount" or represented "a payment for the performance by the rent owner of any such covenant as is mentioned in subsection (4)(b) above which is reasonable in relation to that covenant."

<sup>33</sup>*Shiloh Spinners Ltd. v. Harding* [1973] A.C. 691.

<sup>34</sup>[1967] Ch. 169.



and to all the same obligations of every kind, as the term would have been subject to if it had not been so enlarged." The precise effect of these words is not entirely clear, however, and the efficacy of this device has never been tested.<sup>35</sup>

**(b) General comment on circumvention**

3.42 None of the devices mentioned above can be said to provide an effective general solution to the problem posed by the rule that the burden of positive covenants does not run with land, and none of them is treated as doing so in practice. The device which perhaps comes closest to doing so is the type of estate rentcharge which enables certain positive covenants to be imposed ostensibly in support of a nominal rentcharge and made enforceable by the reservation of a right of re-entry. But such covenants do not really run with the land in the full sense. The remedy of re-entry is clumsy and draconian; and the device is artificial and technical in the extreme. Moreover, since the rentcharge is of only nominal amount, the idea that positive covenants are needed to support it has little basis in reality.

**Statutory rules about the running of covenants in favour of particular bodies**

3.43 We have been concerned up to now, in this part of the report, with general rules about the running of covenants between one ordinary landowner and another. At this stage we should record that a number of statutory provisions operate in such a way as to vary these rules in favour of particular bodies. If these statutes apply to the particular facts of the case, the burden of positive covenants may be made to run with the burdened land; and the burden of both positive and restrictive covenants may be made to run in this way despite the fact that the body in whose favour they are entered into has no land capable of benefiting from them.

3.44 An example is contained in section 33 of the Local Government (Miscellaneous Provisions) Act 1982, which provides that positive covenants to carry out works on land or to do any other thing on or in relation to land, which are contained in an instrument under seal made in favour of a local authority, may be enforced by the authority against persons deriving title under the covenantor.<sup>36</sup>

3.45 We refer at this stage to these special provisions partly because we shall have to return to them at a later stage in this report and partly because their very existence may be said to point clearly to the shortcomings of the general law.

**The doctrine of *Tulk v. Moxhay* in the field of landlord and tenant**

3.46 The preceding sections of this part of the report may have given the impression that covenants between landlord and tenant and covenants

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<sup>35</sup>The Wilberforce Report (Cmnd. 2719, para. 8(vi)) called it "untried and artificial".

<sup>36</sup>Another example is provided by Leasehold Reform Act 1967, s.19, which allows a landlord (subject to a ministerial certificate and High Court approval) to enforce restrictive and positive obligations which are for the general benefit of the neighbourhood against the owners for the time being of houses despite their enfranchisement under the Act. The role of the landlord in this respect may be assumed by another body, including one representative of the tenants or former tenants.

between nearby landowners are wholly distinct categories of covenant governed by quite different sets of legal principles. There is, however, some overlapping in ways which we must now outline.

(a) In general

3.47 We have already noted that covenants which have reference to the subject matter of a lease are (whether restrictive or positive) directly enforceable at law between the current landlord and the current tenant: this is because of the doctrine of privity of estate, and has nothing to do with the doctrine of *Tulk v. Moxhay* discussed above. And the general rule under which restrictive covenants are registrable does not apply to "a covenant or agreement between lessor and lessee".<sup>37</sup> In practice all covenants should come to the attention of incoming tenants (and landlords) because they are in a document which will always form an essential part of the title.

3.48 The principle of privity of estate does not, however, tell the whole story as regards covenants contained in leases. The tenant is normally free not only to assign his lease but also to create lesser derivative interests out of it, for example by mortgaging or subletting. The question whether covenants in the head lease are directly enforceable between the head landlord and a derivative interest holder is not governed by the doctrine of privity of estate (because there is no such privity) but by the other principles discussed above and, in particular, by the doctrine of *Tulk v. Moxhay*. As a result, such covenants may normally be enforced against a derivative interest holder—but only in equity and only if they are restrictive in nature. And although this situation is not within the doctrine of privity of estate, such covenants are nonetheless "between lessor and lessee" and so are not registrable. This means that the old doctrine of notice applies to them, and if the derivative interest holder is a bona fide purchaser for value of a legal estate he will take free from them unless he knew or should have known of their existence.

3.49 In these particular circumstances, the doctrine of notice has been the subject of statutory modification. Under the old rule in *Patman v. Harland*<sup>38</sup> a derivative interest holder was bound by notice of everything which would have been revealed by a full investigation of his immediate landlord's title, even though he was not entitled (in the absence of some special contractual provision negating the normal rule<sup>39</sup>) to make such investigation. But this was altered by the Law of Property Act 1925, section 44(5), which now provides that (subject to any contrary intention being expressed) someone who is acquiring a derivative interest and is not (because the normal rule applies) entitled to call for the title to the reversion

"shall not, where the contract is made after [1925], be deemed to be affected by notice of any matter or thing of which, if he had contracted that such title should be furnished, he might have had notice."

This provision does not of course protect a derivative interest holder who has actual notice of the covenant.

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<sup>37</sup>Land Charges Act 1972, s.2(5). An analogous provision is made for registered land by Land Registration Act 1925, s.50(1).

<sup>38</sup>(1881) 17 Ch.D. 353.

<sup>39</sup>The normal rule on this point is now in Law of Property Act 1925, s.44(4).

3.50 The position just discussed must be distinguished from the case where the restrictive covenant which affects the superior title is one entered into between nearby landowners rather than by a tenant with his landlord. If F, the freeholder, has already entered into a restrictive covenant with N, his neighbour, at a time when F grants a lease to T and T subsequently sublets to ST, the question whether N can enforce his covenant against T and ST depends upon the principles discussed in the two preceding paragraphs—but with one important difference. Since the covenant was not “between lessor and lessee” it can be registered against F, and if it was so registered at the relevant time then T and ST will be bound by it even though they may have been debarred from investigating the superior title and so prevented (in some circumstances) from discovering the registration. To this extent and in this situation the rule in *Patman v. Harland* may in a sense be said still to apply unmodified by section 44(5) of the Law of Property Act 1925.

(b) **Two particular points**

3.51 We must finally deal briefly with two particular points both of which involve the rule that covenants are not registrable if made “between lessor and lessee”.

(i) *Letting schemes*

3.52 We mentioned earlier that, just as building schemes may operate to impose a sort of local law over an area of land which is sold off in freehold plots, so may a letting scheme operate in the same way in respect of property which is let in separate units to tenants.<sup>40</sup> In such cases restrictive covenants imposed on an individual tenant will be enforceable by the other tenants as well as by the landlord. Sometimes this position is brought about not (or not only) by means of a letting scheme but simply by requiring each tenant to covenant expressly with the other tenants as well as with the landlord.

3.53 In so far as the covenants are made with the landlord they are clearly made between lessor and lessee and so are not registrable. The present position as to registration is, perhaps, not entirely clear in so far as the covenants are made with the other tenants. In principle however (and this is the point we wish to emphasise) covenants between a landlord and a tenant (who are people with different interests in the same land) form a quite distinct category of covenant from those entered into as a burden upon one piece of land for the benefit of another. Covenants of the latter kind may be entered into between two neighbouring tenants just as well as between two neighbouring freeholders; and the fact that they have a common landlord, or even that the covenant they make with one another happens to be one which both have also made with that landlord, ought not in principle to alter this situation. The covenants are not “landlord and tenant covenants”. Having noted this point, we leave it for the moment and shall return to it later.

(ii) *Dartstone v. Cleveland*

3.54 In the case of *Dartstone Ltd. v. Cleveland Petroleum Co. Ltd.*<sup>41</sup> a landlord let land to a tenant and covenanted in the lease that he would not

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<sup>40</sup>Para. 3.29 above.

<sup>41</sup>[1969] 1 W.L.R. 1807.

allow a certain use to be made of an adjoining plot of land which belonged to the landlord. It was held that this covenant was made "between lessor and lessee", that in consequence it could not be registered, and that as a result the question whether successive owners of the adjoining plot were bound by it depended on the old doctrine of notice.

3.55 The result in this case is widely thought to be unfortunate, and certainly it seems to us, for reasons similar to those given above, to be out of accord with principle. The fact that the parties to a covenant happen to be landlord and tenant should not, in principle, be decisive if the covenant, though contained in a lease, is intended to impose a burden on some land other than the land let. In reality such a covenant falls clearly into the category of covenants made between two nearby landowners, and not into that of landlord and tenant covenants. This, too, is a point to which we shall return later in this report.

#### **Other aspects of the law about covenants**

3.56 In summarising the existing law about covenants we have confined ourselves to dealing with those aspects of it which answer the question: how far, and in what circumstances, do covenants run with land? Most of the present law on covenants is indeed concerned solely with this question, but there are other legal rules which deal with other aspects of them. Examples include the statutory rules (contained in section 84 of the Law of Property Act 1925) giving the Lands Tribunal power to discharge or modify restrictive covenants; and case law as to whether a covenant is extinguished if the benefited and burdened lands come into the same ownership.

3.57 We think it will be more helpful if we refrain from dealing with these special points, and others like them, at this stage. We shall be making our own recommendations on all these matters later in the report and we intend to reserve our treatment of the existing law until then.

#### **A note on easements**

3.58 We end this part of the report with a brief note about easements. Easements have a good deal in common with covenants of the kind with which this report is concerned. Their purpose, like that of covenants, is to create enforceable rights between the owners for the time being of two pieces of land—one, the dominant land, which has the benefit of the easement, and the other, the servient land, which is burdened by it.

3.59 Nor does the resemblance end there, because exactly the same kind of right can sometimes be created either by covenant or by easement. If, for example, a landowner sells off part of his garden and wants to ensure that no building can be erected on it in such a way as to interfere with the flow of light to his house, he can do this either by taking from the purchaser a covenant that no such building will be put up or by reserving an easement of light.

3.60 It would be wrong to exaggerate the similarities between easements and covenants. A number of rights can be created only by covenant and

a number of other rights only by easement. In particular, easements cannot be used to achieve the effect of positive covenants.<sup>42</sup> The law of easements does nevertheless provide a juridical model for the creation, nature and incidents of rights between nearby landowners and it is in many respects a more satisfactory model than that provided by the existing law of covenants.

3.61 Covenants, as we have seen, operate primarily to create personal contractual rights and liabilities between the original parties. And in the case of positive covenants, that is all they do: the burden does not run. Restrictive covenants are different in that the burden can run with the land; but this feature, though crucially important in practice, is still in legal theory a subsidiary one. The common law still recognises nothing but the contractual liability which exists between the original parties, and this contractual liability continues to exist despite changes in ownership of the land. It is only equity which engrafts on to this a continuing liability between landowners for the time being (and then only if certain complex and technical conditions are met), and this latter liability can be enforced only by equitable remedies.

3.62 The law of easements is different and more satisfactory on all these points. The grant of an easement operates to create an immediate interest in land which (though in certain circumstances it may be equitable) is nearly always a full legal interest. This interest is "appurtenant" to the dominant land and passes with it to subsequent owners; and it continues to burden the servient land into whosoever hands it comes. Both benefit and burden thus "run" automatically—and they do so at law, so that full legal remedies are available for enforcement. Moreover, no contractual rights or liabilities remain with the original parties: easements are enforceable by and against the current owners of the dominant and servient lands, and them alone. In all these respects we think that the law of easements provides a satisfactory model and our later recommendations will be framed with that in mind.

3.63 In some respects, however, the law of easements does not provide a good model for a new law of covenants. For one thing, legal easements are not registrable under the Land Charges Act 1972. This may be justified on the ground that the existence of an easement may usually be discovered or inferred from an inspection of the land itself; but that would not be true in relation to covenants. For another thing, easements may be acquired by long usage. If, for example, one landowner has been accustomed to walk over the land of another for a considerable period of years, the law will in certain circumstances treat him as having acquired a full easement or right of way over that land. But acquisition by long usage would not be appropriate for the rights with which we are concerned in this report.

3.64 There are other respects in which we shall not be able to follow the law of easements precisely, and there are also respects in which we shall wish to go beyond that law in order to recommend provisions for which the present law provides no real analogy. But the law of easements may be said to form the kernel of our subsequent recommendations.

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<sup>42</sup>There is one exception to this rule, though it has been stigmatised as a "spurious easement" and is certainly anomalous: it is clear that a right to require one's neighbour to maintain fences around his land can exist as an easement.

## PART IV

### DEFECTS IN THE PRESENT LAW AND AN OUTLINE OF OUR PROPOSALS

4.1 In this part of the report we aim to set the scene for the detailed recommendations made in the remaining parts.

#### **Defects in the present law**

4.2 The defects of the existing law emerge clearly enough from Part III of the report, and we need not spend a great deal of time on them. We would, however, make one general comment about the summary contained in Part III—namely, that it may have made the present law seem rather less complex and more certain than it really is. We have tried to make Part III relatively brief and comprehensible and, while we have not set out to ignore difficulties, we are aware that some of the problems which would figure in a more detailed treatment have been glossed over in the interests of achieving those objectives.

#### **(a) Positive covenants**

4.3 The main defect in the present law about positive covenants is of course both simple and devastating: they do not run in any circumstances with the burdened land. None of the devices sometimes used to mitigate the consequences of this rule is apt to do so satisfactorily, but all of them result in conveyancing and other complexities for which there should be no need. It must also be remembered that there are, as it were, two sides to this rule. Not only do later owners not take the burden: the original owner does not lose it. The outcome, therefore, may well be not merely that the covenant cannot be enforced against someone who should be liable, but that it can be enforced against someone who should not.

4.4 The ill consequences of the rule are obvious in the simple case of two neighbours whose lands are side by side, and it is that case with which we set out primarily to deal. There can be no justification for the fact that a simple positive obligation—to keep trees pruned to below a certain height, for example, or to maintain a boundary wall—cannot be imposed as a covenant running with the land. But the consequences are every bit as serious in cases where a property development has produced a number of units which are mutually inter-dependent.

4.5 The most striking example is that of a block of flats. The block need not be large: the point is well illustrated by the simple case of a house divided into two. It is obvious that the security, and indeed the continued existence, of the upper flat depends upon the lower flat being kept in good repair; and it is equally obvious that the lower flat will have no shelter unless the upper flat is kept in good repair. Each flat owner, moreover, has a strong and legitimate interest in ensuring that the other insures his flat fully, keeps its exterior decorated in an agreed colour, and so on. Yet if the flats are sold freehold the burden of positive covenants imposed for these purposes will not pass to subsequent owners. The problem can be overcome by selling

the flats leasehold instead of freehold. The most effective leasehold scheme in this example would be one under which the purchaser of each flat received a long lease of that flat, and the freehold reversion was vested in the purchaser of the other flat. In this way each would become the landlord of the other and the covenants would be perpetually enforceable as between their successors through privity of estate. But it is clearly wrong that a perfectly reasonable objective such as this should have to be attained by such wholly artificial means.

4.6 At one time a number of freehold flat schemes were created in different parts of the country; but a growing appreciation of the legal difficulties of ensuring the perpetual enforceability of essential positive obligations has caused this practice largely to die out and has cast a blight on existing freehold flat developments.<sup>1</sup>

**(b) Restrictive covenants**

4.7 The defects in the present law of restrictive covenants cannot be so simply encapsulated. The burden of such covenants, as well as the benefit, does run with the land. It does so only in equity, but it may be said that this limitation does not greatly matter because the nature of a restrictive covenant is such that equitable remedies are usually adequate to enforce it. Judged by these criteria, therefore, the law on restrictive covenants may seem acceptable.

4.8 It must, however, be condemned on two main grounds: complexity and uncertainty.

4.9 So far as complexity is concerned, we think that the summary in Part III, relatively brief as it is, fully sustains the charge. 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. These rules are, if anything, more complicated than the rules about the burden, and some of them are particularly technical and hard to grasp: as examples, one may cite the rules about "annexation" and those about "building schemes".<sup>2</sup>

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<sup>1</sup>Documents creating freehold flats are drafted on the basis that the freehold estate which they confer is capable of lasting beyond the life of the building itself—that is to say, that the estate does not terminate when the building is demolished at the end of its natural life, or is destroyed prematurely in some other way. This assumption rests on the view that an estate can exist in what has become mere airspace. Although differing opinions have been expressed on this point, the preponderant view is that it can. Certainly the blight which affects freehold flats is not related to this point because the point is, in truth, equally applicable to leasehold flats. Here again it is assumed that the leasehold estate granted to a tenant does not end automatically with the destruction of the flat: otherwise, for example, covenants requiring reinstatement would need to be supplemented by arrangements for the grant of a new lease of the property thus reinstated. And if only half a flat were demolished, the consequence would be that half the estate disappeared and half remained. A decision that an estate cannot exist in airspace would give rise to so many problems, therefore, that we would not regard it as a realistic possibility. (This question is of course to be distinguished from questions relating to the "frustration" of leases, which involve other issues: see *National Carriers Ltd. v. Panalpina (Northern) Ltd.* [1981] A.C.675.)

<sup>2</sup>Paras. 3.27 and 3.29 above respectively.

4.10 As to uncertainty, we think that Part III again sustains the charge. A traveller in this area of the law, old though it is, walks on ground which is still shifting. Particularly striking examples come from the same two topics: the *Federated Homes* case has made radical and controversial changes in what was thought to be the law about annexation,<sup>3</sup> and successive court decisions in recent years have altered the conditions thought to be essential for the establishment of a binding scheme.<sup>4</sup>

4.11 Shifts in the law as interpreted by the courts may be wholly beneficial so far as future covenants are concerned, but they must of course apply equally to existing covenants and here their effects are much more mixed. If a landowner sought legal advice periodically about the enforceability of a particular covenant, he would have to be told different things at different times; and his lot would not be a happy one if he had acted in good faith on advice given one year only to find it invalidated the next.

4.12 Before leaving the subject of uncertainty we would mention one particular instance in which the law, though not itself uncertain, is productive of uncertainty in practice. There is at present no requirement that the instrument creating the covenant shall describe the benefited land clearly enough to enable it to be identified without extrinsic evidence. Thus the leading text-book on restrictive covenants<sup>5</sup> puts forward the following different descriptions of the benefited land as examples of descriptions which might be used in the creating instrument:

- “(i) the land of the Vendor coloured pink on the plan drawn hereon and every part thereof;
- or (ii) each and every part of the land of the Vendor adjoining or near [or adjacent] to the premises hereby conveyed;
- or (iii) each and every part of the Vendor’s Dale Estate remaining unsold at the date hereof;
- or (iv) such part or parts of the Vendor’s Dale Estate as shall for the time being remain unsold by the Vendor or other owner or owners for the time being thereof claiming under the Vendor otherwise than by a conveyance or conveyances on sale or as shall from time to time have been sold by the Vendor or by any other person or persons claiming under him as aforesaid with the express benefit of this covenant;
- or (v) The Vendor’s Dale Estate in its broad and popular sense.”

Because wording like that in examples (ii), (iii), (iv) and (v) may be used, a vast number of covenants exist today in a kind of limbo. Since no one can be certain of the exact identity of the land for whose benefit they 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

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<sup>3</sup>Para. 3.27 above.

<sup>4</sup>Para. 3.29 above.

<sup>5</sup>Preston & Newsom’s *Restrictive Covenants Affecting Freehold Land*, 7th ed. (1982), pp.99 and 100.



whom to negotiate. We regard this as a major fault in the present law, and it is one which our later recommendations will seek to eliminate.

#### **Approaches to reform**

4.13 In the paragraphs which follow, we consider two approaches to reform, rejecting the first and adopting the second.

##### **(a) Reforming positive covenants alone: a rejected approach**

4.14 It might be theoretically possible for us to make recommendations designed solely to ensure that the burden of positive covenants in future ran with the burdened land, and to leave the law of restrictive covenants entirely alone. In fact, as we pointed out in our brief historical summary in Part I of the report, this approach was rejected soon after the publication of the Wilberforce Report in 1965,<sup>6</sup> and we would not be returning to it now but for the fact that one or two of our more recent consultees have urged us to consider it.

4.15 The approach has obvious attractions. Changes in the law are certainly not desirable for their own sake. On the contrary, the disturbance which they cause to existing legal practice must weight the scales against them. If it were possible to leave the law of restrictive covenants alone and to confine reform to the law of positive covenants, the area of change would at least be smaller. And if it were possible to go further and to make the burden of a positive covenant run with the land just as if it were a restrictive one (so that, in effect, the law of restrictive covenants governed the whole field), the need for change would be still further reduced. Unfortunately our study of the subject has convinced us that neither of these things can be done.

4.16 In asking whether the law of restrictive covenants could not be left alone, it is important to be clear about the issues involved. The point is not whether the law of restrictive covenants, considered in isolation, is in need of reform. We ourselves have no doubt, for the reasons given earlier, that it is; but opinions may possibly differ as to the gravity of its defects and the degree of priority which should be given to its improvement. These issues, however, are hardly relevant because there can be no doubt that the law of *positive* covenants is in urgent need of radical reform, and we are committed to a project designed to achieve this. The real question, therefore, is whether the law of restrictive covenants can stay as it is *in the context of* that project?

4.17 The answer to this question might be affirmative if the law of restrictive covenants could actually be used to accomplish the aims of the project—if, in other words, it were possible simply to say: henceforth the law of positive covenants shall be just the same as the law of restrictive covenants. But that seems to us quite impossible. It is not merely that the law of restrictive covenants does have substantial defects on any view and that those defects would apply still more widely if this law governed a wider range of covenants. The real objection is that the existing law of restrictive covenants is not suitable

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<sup>6</sup>Para. 1.5 above.

for positive covenants in any case. Two of the main reasons for this are as follows:

- (a) Subject to rules about registration and notice, the owner of any interest, however small, in the burdened land is bound to observe a restrictive covenant. This is as it should be, because a restrictive covenant requires people merely to refrain from doing something. But positive covenants require them actually to do something, and that something may be a burdensome and expensive thing. It would be quite wrong, for example, if a weekly tenant of the burdened land automatically became personally liable to perform a positive covenant to erect and maintain a costly sea wall. Liability to perform a positive covenant therefore cannot rest on all those interested in the burdened land—as the Wilberforce Report recognised in 1965.<sup>7</sup>
- (b) The burden of a restrictive covenant runs only in equity, so that equitable remedies alone are available for its enforcement. This may not greatly matter in the case of a restrictive covenant because, as we have already suggested, the remedy most often sought will be the equitable remedy of injunction, or damages in lieu. But legal remedies must be available for positive covenants. The idea of enforcing a simple covenant to pay money by means of equitable remedies is wholly artificial. And the normal remedy for breach of a covenant to carry out works must be legal damages (including, if appropriate, damages for consequential loss). This point goes to the heart of the conceptual nature of the covenant: legal remedies cannot be available unless the burden runs at law and it cannot do that unless it amounts to a legal—not an equitable—interest in land. The law of restrictive covenants is therefore fundamentally unsuitable—something which, again, the Wilberforce Report recognised.<sup>8</sup>

4.18 We hope that we have said enough to show that the law of restrictive covenants could not be retained and simply expanded so as to embrace positive covenants. Positive covenants demand a legal regime which is different in fundamental respects. Furthermore, since a new legal regime would have to be created for positive covenants, it would not be right to reproduce in that regime the serious incidental faults which, in our view, beset the law of restrictive covenants. For example, we should not wish the new regime to reproduce the rule that the covenant remained enforceable as between the original contracting parties after they had parted with their lands; and we should wish to recommend a new rule whereby clear descriptions of the benefited and burdened lands had to be given in the creating instrument. Our views on these matters fully correspond, again, with those of the Wilberforce Report.<sup>9</sup> We should wish also to eliminate the complexities and uncertainties to which we have referred earlier.

4.19 Therefore, in order to reform the law of positive covenants we should have to recommend a new legal regime which would be not only different from but, in a number of important ways, simpler and more logical than,

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<sup>7</sup> *Report of the Committee on Positive Covenants Affecting Land*, Cmnd. 2719, paras. 19–21.

<sup>8</sup> *Ibid.* para. 18.

<sup>9</sup> *Ibid.*, paras. 15 and 18.

the existing law of restrictive covenants. The question which we have then to ask is whether that existing law could be left to stand unamended beside a new regime such as this. We have no doubt that the answer must be, "No". It would be quite inconsistent with our statutory duties in relation to law reform if our recommendations were to leave in their wake two separate and different regimes, one markedly inferior to the other, to govern two legal entities (positive and restrictive covenants) which ought in any rational system of law to be conceptually the same.

4.20 There is in our view only one way to proceed: namely, by extending the process of law reform to include both positive and restrictive covenants and welding the two into a system which is both unified and more satisfactory. There is another compelling reason for taking this course, but it is best postponed until later in this part of the report<sup>10</sup> when its background and nature can be properly explained.

**(b) "Land obligations": comprehensive reform according to the easement analogy**

4.21 The comprehensive reform which we envisage thus involves the creation of a new interest in land, whereby in appropriate circumstances obligations (whether positive or negative) may be imposed on one piece of land for the benefit of other land, and be enforceable by or on behalf of the owners for the time being of the one piece of land against the owners for the time being of the other. From this point onwards (borrowing terminology from the law of easements) we shall use the expressions "dominant land" and "servient land" to indicate respectively the lands benefiting from, and burdened by, the obligation.

4.22 The reform will in consequence lean heavily, as did the Wilberforce Report, on analogies with the existing law of easements; and the many technical refinements of the law of restrictive covenants, most of which are explicable solely by historical reasons, will disappear. Thus, the new interest will, like an easement, normally subsist as a legal interest in land, and be enforceable by legal remedies, including an action for common law damages. The highly technical rules determining whether the benefit and the burden of restrictive covenants may pass to new owners of the land affected will also disappear; and any doubt which might otherwise arise as to whether an obligation was intended to run with the land or operate only between the parties will be removed by requiring parties who intend to create an obligation running with the land to label it by express words as a "land obligation". (We have chosen the name "land obligations" because the things in question are obligations, and because they are capable of subsisting only for the benefit of, and as a burden on, pieces of land.) Finally, since the interest is essentially an interest attaching to the ownership of particular parcels of land, it will only be enforceable by and against the current owners of those parcels of land. Unlike a restrictive covenant it will not remain enforceable between the original parties after they have parted with the land.

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<sup>10</sup>Para. 4.36 below.

4.23 Those, then, are the main foundations of the scheme which we are putting forward. They will of course be amplified in the succeeding parts of this report, and the detailed structure of the scheme will be explained. It may be helpful to anticipate that explanation by mentioning here some of its more important structural features.

4.24 First, as we mentioned in Part III, we think that land obligations, unlike most easements, should be registrable under the Land Charges Act 1972 and the Land Registration Act 1925, and that registration should be a necessary pre-requisite for purchasers of the servient land to be bound by them. The existence of land obligations will seldom be evident from an inspection of the land and this leads us to think that, in the matter of registration, we should take the existing law of restrictive covenants as our model.

4.25 Second, as we mentioned earlier in this part of the report, positive obligations differ from restrictive ones in requiring the expenditure of money. It is therefore inappropriate that all those with an interest, however small, in the servient land should be liable to perform a positive obligation. Special provisions about this will be recommended. We shall also make recommendations designed to limit the class of persons who are liable in common law damages for breach of a restrictive obligation.

4.26 Third, we shall make two recommendations designed to increase the range of remedies available for the enforcement of the more common types of positive land obligation. A special "self-help" remedy will be proposed for optional adoption, whereby a dominant owner can carry out the works required by the land obligation and require the servient owner to pay the cost. And provision will be made for the parties who create a land obligation involving the carrying out of works or the making of payments to impose the payments, or the cost of the works, as a charge secured on the servient land.

4.27 Fourth, we shall recommend that the provisions of section 84 of the Law of Property Act 1925, which allow the Lands Tribunal to discharge or modify restrictive covenants in certain circumstances, should be adopted and extended so as to cater for both restrictive and positive land obligations (and indeed for certain other things which we shall mention under the next sub-heading).

4.28 Finally—for in this list we are seeking only to mention some of the main matters which will feature in our scheme—we shall make recommendations designed to deal with a question which arises particularly in relation to positive obligations: what happens if the servient land is divided into parts which then pass into different hands? Some means must be provided whereby the parties to this division can agree (and agree, moreover, in such a way as to bind their successors) which of them is in future to bear the burden of the obligation (or, if the burden is apportioned, which of them is to bear what part of it).

### **The needs of developments**

4.29 Under the last sub-heading we explained the main features of our scheme in so far as it sets out to achieve comprehensive reform of the present law of positive and restrictive covenants. But our scheme has another aim which requires us to make recommendations on certain matters which we might otherwise be able to ignore: that of catering satisfactorily for the special needs of freehold property developments, including freehold flats.

4.30 We have already mentioned<sup>11</sup> the way in which the present law's failure to provide a satisfactory means whereby positive obligations may be made to run with freehold land has bedevilled freehold housing and other developments which create multiple units. In particular, a growing appreciation of the problems involved has made it very difficult, if not impossible, to create freehold flats or maisonettes which can be mortgaged and sold freely, and has cast a blight on such freehold flat and maisonette developments as have been carried out in the past. But the needs of freehold flats and other developments would not be met in their entirety merely by allowing positive obligations to run in favour of one piece of land and against another. This might be enough for a house owner who sells off part of his garden as a building plot, but it is probably not enough for most building estate developers and it is certainly not enough for those who wish to provide enduring schemes for the more complex types of development including blocks of freehold flats.

4.31 We emphasise that our primary purpose in preparing this report is not to facilitate the creation of freehold flats, or indeed of any kinds of complicated property development. But the scheme which we are putting forward provides, for the first time, a means whereby the burden of positive covenants may be made to run with the servient land under English law, and we have to face the fact that the scheme will be used in the complex cases as well as in the simple ones. Nor indeed is it unreasonable for "consumers" of the scheme to demand that it shall be suitable for such use. In formulating it, therefore, we have sought to provide for all the situations in which it may legitimately be used.

4.32 These considerations have led us to put forward the idea of the "development scheme"—a scheme embodied in a deed which a developer can execute before he sells off units in his development. The concept of the "development scheme" goes hand in hand with that of "development obligations", which are a special class of land obligations designed for use in property developments: development obligations cannot be imposed unless there is a development scheme; and, conversely, a development scheme must be made with a view to the imposition of development obligations. Granted only that this latter requirement is fulfilled (and that certain other formalities are complied with), the development scheme may be used to achieve any or all of a number of other purposes.

4.33 Thus, it may make provision for the establishment of a "manager" of the development, and may provide that development obligations imposed on the individual units are enforceable by the manager, or by the other unit

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<sup>11</sup>Paras. 4.4–4.6 above.

owners, or by both. Obligations enforceable by the manager may include obligations to contribute towards the cost of his own work in repairing and maintaining the development and providing services; and the scheme may impose complementary duties on the manager to carry out this work. The manager need own no land and the duties imposed on him need not be land obligations. The powers and duties which may be attached to a manager under our scheme are closely modelled on the powers and duties commonly created under the present law in the case of a leasehold development and attached either to the landlord or to some other person (including a company or association controlled by the tenants) who plays a managerial role.

4.34 The scheme may also place enforceable duties (again, not amounting to land obligations) on the developer, including a duty to impose on the unit owners the pattern of development obligations provided for in the scheme. Provision may also be made for the variation of the scheme itself or of development obligations imposed under it.

4.35 It will thus be seen that the development scheme is intended as an instrument of great flexibility. It can be used to achieve all the objects of a building scheme under the present law but it can be used for other purposes, either additionally or alternatively.

4.36 The clear need which we see for an instrument of this kind provides another reason why we cannot, in this report, confine ourselves to recommending reform of the law of positive covenants alone. The development scheme must, if it is to be a useful and workable concept, operate in relation to both positive and restrictive obligations. There would be great confusion and complexity if developers had to create two different kinds of scheme—development schemes for positive covenants under the new law, and building schemes for restrictive covenants under the old—and allow them to operate side by side.

## PART V

### INTRODUCTORY: THE "LAND OBLIGATION"

5.1 The rest of this report will be devoted to a more detailed explanation of the scheme which we are putting forward. If it proves difficult, in reading the remaining parts of the report, to see the wood for the trees, it may be helpful to refer back to the outline of our scheme which is provided in Part IV.<sup>1</sup>

5.2 We have already mentioned<sup>2</sup> in general terms that we propose to reform and replace the present law of positive and restrictive covenants by introducing a new interest in land to be known as a "land obligation". The draft Bill annexed to this report therefore begins by creating and naming this new interest. The Bill also amends existing statutes in such a way as to ensure that the new interest has full effect, as an interest in land, within the existing framework of the general law of real property. Prominent among these amendments is one which inserts "land obligations" in section 1(2)(a) of the Law of Property Act 1925, thus showing that a land obligation may be a legal interest provided that it is "equivalent to an estate in fee simple absolute in possession or a term of years absolute". Land obligations which are validly created according to our later recommendations but do not meet these criteria will be equitable interests.<sup>3</sup>

5.3 All land obligations, therefore, are legal or equitable interests in land, taking their place with other such interests in the general law of real property. This by itself serves to answer a number of the questions which will arise as to their nature and incidents. Unfortunately it does not provide clear and complete answers to all such questions, and the draft Bill must contain detailed provisions about many aspects of the new interest.

5.4 We have also made it clear<sup>4</sup> that our basic recommendations about land obligations will follow "the easement analogy", and the draft Bill does indeed refer explicitly to this analogy in two places<sup>5</sup> and draws upon it implicitly in many more. It is therefore right to describe a land obligation in general terms as an easement-like interest in land. But this analogy cannot be followed slavishly. Though a land obligation is most closely akin to an easement, it is in some ways unlike one. In some respects it is necessary to take the existing law of restrictive covenants as a pattern. In others, the novelty of the land obligation demands the creation of new law which is not strictly analogous to anything else.

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<sup>1</sup>Paras. 4.21–4.36 above.

<sup>2</sup>Para. 4.22 above.

<sup>3</sup>See Part VIII of this report.

<sup>4</sup>Para. 4.22 above.

<sup>5</sup>Clauses 5(1) and 6(1). The point is further illustrated by many of the provisions of Schedule 3.

## PART VI

### NEIGHBOUR OBLIGATIONS AND DEVELOPMENT OBLIGATIONS

6.1 Our scheme is in essence designed for the simple case of two neighbouring landowners, but we have already given our reasons for thinking that it must also be capable of accommodating the more complicated cases involving property development.<sup>1</sup>

6.2 After prolonged consideration it has seemed to us that a better and simpler result is obtained if these two types of case are to some extent kept separate—both conceptually and in the provisions of the draft Bill. This separation starts at an early stage, because in its first clause the Bill establishes and distinguishes between two classes of land obligation: “neighbour obligations” and “development obligations”.

#### Neighbour obligations

6.3 Neighbour obligations are land obligations intended for use in the simple case mentioned above—the case, that is to say, where the obligation simply imposes a burden on one piece of land (the servient land) for the benefit of another piece of land (the dominant land).

6.4 It would of course be wrong to allow a landowner to make use of the new law of land obligations in order to impose an obligation of any kind which might happen to take his fancy. If, for example, a garage owner sold part of the garden attached to his house, he should not be allowed to impose on the purchaser a land obligation—enforceable in perpetuity against the purchaser’s successors in title—to buy a certain quantity of petrol from his garage every month. The old rule that a covenant must “touch and concern” (or be for the benefit of) the dominant *land* was established for good reason and we wish to reproduce it in our scheme.

6.5 There is also a need (for reasons which will become clearer as this report proceeds) to distinguish one kind of land obligation from another.

6.6 Putting these two requirements together, we recommend that obligations of the following kinds, and those only, should be capable of existing as neighbour obligations:

- (a) An obligation imposing a restriction which benefits the whole or part of the dominant land on the doing of some act on the servient land.

This obligation we propose to call a *restrictive obligation*. Its purpose is the same as that of restrictive covenants under the existing law.

- (b) An obligation requiring the carrying out on the servient land or the dominant land of works which benefit the whole or any part of the dominant land.
- (c) An obligation requiring the provision of services for the benefit of the whole or any part of the dominant land.

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<sup>1</sup>Paras. 4.29–4.36 above.



These obligations—one requiring works to be carried out, the other requiring services to be provided—we propose to call *positive obligations*. They are of course akin to positive covenants under the present law. An example of the first type of obligation would be one to maintain a boundary wall (and the wall might be on the servient or on the dominant land or partly on both). An example of the second would be one to provide heating (which might be desirable if a house had been divided into two flats and a central heating boiler installed in one to supply them both). And we recommend that the provision of insurance should be specifically included amongst “services”.

- (d) An obligation requiring the making of payments in a specified manner (whether to a person of a specified description or otherwise) on account of expenditure which has been or is to be incurred by a person in complying with a positive obligation (that is, an obligation of type (b) or (c) above).

We propose to call obligations of this kind *reciprocal payment obligations*. The simplest illustration is, perhaps, to be found in a case where there are two neighbours and one of them accepts a positive obligation to maintain the boundary wall while the other accepts a reciprocal payment obligation to meet half the cost. Illustrations may be found also in the case of a house divided into two flats: the upper owner might agree to maintain the roof if the lower owner met half the cost, or the lower owner might agree to insure the whole house if the upper owner paid half the premiums.

### **Development obligations**

6.7 Development obligations, as we have indicated, are a species of land obligation designed primarily for use in cases where a substantial area of land (including a block of flats, because “land” extends upwards as well as sideways) is or is to be divided into a number of separately owned but interdependent units.

6.8 In such a case, development obligations may be imposed on the units, and any unit on which such an obligation is imposed will be the servient land in relation to that obligation. Looked at from the point of view of the servient owner, therefore, development obligations do not differ greatly from neighbour obligations; and the rules which we propose about their burden and its devolution are virtually identical. The differences appear mainly in two ways.

6.9 First, they differ in relation to the benefit. The enforceability of development obligations, unlike that of neighbour obligations, is not confined to the owner of the dominant land for the benefit of which they were imposed. In relation to development obligations, indeed, there is no dominant land as such. The concept of the dominant land is replaced by that of “the development land”, and development obligations may be made enforceable either by owners of other parts of the development land or by a “manager” acting on their behalf. A full discussion of these points must be postponed until the next part of this report.

6.10 Second, they differ in relation to their scope, which is wider in the case of development obligations. We set out below the obligations which,

we recommend, should be capable of imposition as development obligations. It may be compared with the list of neighbour obligations which we set out earlier.<sup>2</sup> The descriptions of these obligations appear in the form of sub-headings:

*Restrictive*

- (a) An obligation imposing a restriction which benefits the whole or part of the development land on the doing of some act on the servient land or any other part of the development land.

*Positive*

- (b) An obligation requiring the carrying out on the servient land or any other part of the development land of works which benefit the whole or any part of the development land.
- (c) An obligation requiring the provision of services for the benefit of the whole or any part of the development land.
- (d) An obligation requiring the servient land to be used in a particular way which benefits the whole or part of the development land.

*Reciprocal payment*

- (e) An obligation requiring the making of payments in a specified manner (whether to a person of a specified description or otherwise) on account of expenditure which has been or is to be incurred by a person in complying with an obligation of type (b) or (c) above.

*Reimbursement*

- (f) An obligation requiring the making of payments to the manager of a development scheme in respect of expenditure incurred or to be incurred in the provision of works or services provided by him in pursuance of the scheme.
- (g) An obligation requiring the making of payments to the manager of a development scheme by way of contribution towards fees, costs or expenses charged or incurred by him in discharging his functions under the scheme, which costs and expenses may include costs or expenses incurred in accordance with the scheme in connection with any application (whether made by the manager or another) to the court or the Lands Tribunal under any provision of this Act.

*Access*

- (h) An obligation requiring access to the servient land to be afforded, in such circumstances and for such purposes as may be specified, to the manager, to any servant or agent of his or to any other person authorised in writing by him.

Some brief comments on this list may be made at this stage.

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<sup>2</sup>Para 6.6 above.

6.11 Obligations of types (a), (b), (c) and (e) are broadly analogous to neighbour obligations of the same types, the most notable difference being that references to the development land appear in place of references to the dominant land.

6.12 Obligations of type (d) are obligations requiring some particular and positive use to be made of the servient land. They are therefore positive obligations and are to be distinguished from restrictive obligations of a kind which merely require the land *not* to be used in some specified manner.<sup>3</sup> One of our objects in framing this list of development obligations is to make provision for all the types of obligation which are reasonably imposed upon tenants as covenants in a leasehold development, and we think that positive user obligations of this kind have a legitimate place here—for example, to ensure that premises are actively used to provide proper shopping facilities of certain kinds. We think, however, that such obligations could be used oppressively if they were included in our list of neighbour obligations. We also recommend that the court should be specifically enjoined to look at their substance rather than their form, and that if their real object is not to require land to be used in some particular way, but merely to prevent it being used in some other way, they should be treated as restrictive obligations.<sup>4</sup>

6.13 Obligations of types (f) and (g) (reimbursement obligations) are designed for the case where there is a manager of the development land. A further explanation must be postponed until the next part of this report, where the idea of the “development scheme” is explained.

6.14 Obligations of type (h) (access obligations) are also designed only for the case where there is a manager. It may at first seem strange that such obligations are not available in any other case; but the reason is that a right of access can normally be given by means of an easement imposed on one piece of land in favour of another: it is only in favour of a manager, who may not own any land, that the right needs to be available as a land obligation.

#### **Supplementary provisions**

6.15 Our recommendations as to the types of primary obligation which should be capable of creation, as neighbour obligations and development obligations respectively, appear above. We are conscious, however, that obligations of these kinds are nowadays commonly reinforced (especially in the landlord and tenant setting) by what might be called supplementary provisions.

6.16 For this and other reasons we recommend that it should be possible for the instrument creating the land obligation to make certain supplementary provisions of this kind and that, if it does so, these provisions should take effect as part of the land obligation. The provisions in question are set out

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<sup>3</sup>For an example, see *London Chatham and Dover Railway Company v. Spiers and Pond Ltd.* (1916) 32 T.L.R. 493.

<sup>4</sup>See the draft Bill, Schedule 1, para. 20.

in full in Part III of Schedule 1 to the Bill and we confine ourselves here to giving a general indication of their nature:

- (a) *Information*. A provision giving a right to information (for example, as to the current ownership of the servient land) or to the production of documents (for example, those dealing with changes in its ownership).
- (b) *Inspection*. A provision enabling any person entitled to enforce a land obligation to inspect the servient land in order to see whether it has been complied with.
- (c) *Self-help*. A provision enabling anyone entitled to enforce a land obligation requiring the carrying out of works to enter the servient land and carry them out himself in the event of non-compliance. (More will be said about this provision in a later part of the report.<sup>5</sup>)
- (d) *Fund*. A provision relating to the keeping of a fund out of which expenditure on the carrying out of works, or the provision of services, is to be met. A provision of this kind can be made whenever a works or services obligation is coupled with a reciprocal payment obligation, and can be made to take effect as part of either obligation.
- (e) *Interest*. A provision requiring the payment of interest if default is made in complying with a reciprocal payment or reimbursement obligation.
- (f) *Charge*. A provision imposing a charge on the servient land for certain money which becomes due as a result of the non-performance of a reciprocal payment or reimbursement obligation or of an obligation requiring the carrying out of works. (This provision, too, will receive detailed treatment later in the report.<sup>6</sup>)

#### **The uses of neighbour and development obligations**

6.17 Neighbour obligations may be imposed as simply, broadly speaking, as easements may be imposed under the present law. The detailed formalities for their creation are considered later in this report, but a few lines in a document will normally be sufficient.

6.18 Development obligations, though they must be imposed in the same way, are valid only if they are imposed in pursuance of a pre-existing "development scheme". Development schemes are dealt with in the next part of the report and we do not want to anticipate that discussion, but we are concerned to emphasise here that development obligations, unlike neighbour obligations, must necessarily entail a fairly elaborate scheme (the development scheme) covering a defined area of land. Those who opt to create a development scheme will find that it affords them many other facilities and advantages as well as the ability to impose development land obligations, and we think that the development scheme concept will be of great benefit to those who want these things. But those who find that all their needs are met by neighbour obligations will not wish to venture into these waters.

6.19 In what cases will neighbour obligations be sufficient? Obviously enough they include the simple case of two pieces of land side by side: if, for example, a landowner sells off part of his garden to a purchaser who intends to build on it, all the obligations which the parties are likely to wish

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<sup>5</sup>Paras. 13.28-13.31.

<sup>6</sup>Part XIV of this report.

to impose on one another may be imposed as neighbour obligations. But the uses of neighbour obligations are not confined to cases of this kind. We think they will normally extend, for example, to the case of a house divided into two flats: we see no need, in such a case, for the creation of a development scheme and development obligations. It may well be possible also to complete the development of a small housing estate by means of neighbour obligations alone. Each case must be considered according to its particular circumstances.

## PART VII

### DEVELOPMENT SCHEMES

7.1 We have already given a summary of the rationale and purposes of our proposals about development schemes,<sup>1</sup> and we think that that summary can serve as an introduction to this part of the report. We shall therefore proceed without more ado to the details of our recommendations.

7.2 We mentioned earlier that the development scheme is intended as an instrument of great flexibility: provided that certain basic requirements are met, it can (but need not) be used to achieve any one or more of a number of different objects. We therefore plan to deal first with the essential requirements and then with the optional features. After that we shall add some paragraphs designed to put development schemes in perspective and to explain them further.

#### **Essential requirements**

7.3 Under the rules which we recommend, all development schemes, to be valid as such, must comply with certain basic requirements.

##### **(a) Deed and statement**

7.4 A development scheme must be contained in a deed executed by the scheme's makers. We deal below with the question of who may be a maker of a scheme. The deed must state that it is a development scheme.

##### **(b) Making provision for development obligations**

7.5 A development scheme must make provision for a system of land obligations (which will be development obligations) to be imposed upon land which is or is to be divided into two or more separate units.

7.6 It is important to emphasise that the development scheme does not of itself impose any development obligations. These will have to be imposed upon the individual unit owners in accordance with the rules recommended in the next part of this report. But the development scheme is an essential pre-requisite to their imposition and it sets the scene by making provision for them.

7.7 Although the development scheme must make provision for the imposition of development obligations, we think it would be wrong to require that provision to be a detailed one. In many cases it may be possible for the scheme to set out in full the actual words of all the development obligations to be imposed on all the units. The provision thus made would obviously be fully detailed. And this would be a very desirable course to take because

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<sup>1</sup>Paras. 4.29–4.36 above. The term "development scheme" suggests a scheme made in connection with a projected property development—and designedly so, because most schemes will be prepared in these circumstances and this part of the report is therefore written with that case in mind. But, as we explain later in this part, the development scheme provisions may also be used by the existing owners of a number of neighbouring properties who simply wish to "club together" in order to set up a scheme for themselves.

it would then be possible for development obligations to be imposed on the individual units by means of instruments (normally conveyances or transfers) which were much shorter and simpler: instead of setting out in full the development obligations which they imposed, they would need only to refer to the development scheme and impose the obligations already set out there.

7.8 But of course it may not always be possible to plan the development obligations down to the last detail at the time when the development scheme is made. As we shall explain later, the provisions of a development scheme, including the provision originally made for development obligations, may be varied if an appropriate power is reserved, so it may still be worth trying to set out these obligations in full in cases where their details are relatively settled. In other cases, however, it may be best for the scheme to make less detailed provision for them, confining itself to describing them and their distribution in more general terms. Any description is sufficient if it can fairly be said to amount to "making provision".

7.9 It would of course be wrong to require exactly the same obligations to be imposed on every unit. Accordingly, although the scheme must make provision for a *system* of land obligations, it may provide for different obligations to be imposed on different units and even for some units to be free from obligations altogether.<sup>2</sup>

#### **(c) Designating the development land**

7.10 It is of the essence of a development scheme that it enables development obligations to be imposed over a particular area of land (and of course we use the word "land" in its legal sense: a block of flats is an area of land for this purpose) and it is of the essence of development obligations that they relate to this particular area. The development scheme must therefore (by reference to a plan or otherwise) describe the area of land to which it applies in sufficient detail to identify it. The draft Bill (clause 23(1)) refers to the land thus designated as "the development land" and we shall adopt the same phrase in this report.

7.11 Since the scheme will provide for a system of "local law", the development land must lie in one locality; but there is no reason why a scheme should not be made in respect of two or more pieces of land which are divided from one another (by a road, for example), so every part of it need not necessarily be contiguous with another part.

#### **(d) Makers of the scheme**

7.12 We said earlier that a development scheme must be embodied in a deed executed by its makers. This requirement ensures that the scheme is recorded on paper with due formality. But we see no need to limit the class of people who should be entitled to make a scheme. The result (in theory at least) is that it can be made by anyone at all.

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<sup>2</sup>In some cases, however, this may have undesirable results: see paras. 7.48–7.50 and 10.10–10.14 below.

7.13 This may seem startling, but we think it fully justifiable. As we explain later,<sup>3</sup> the *making* of a scheme does not of itself give rise to any legal rights or duties: such rights and duties come into existence only when the scheme is *used*—by the imposition on a unit owner of the development obligations for which it provides. It is only at this latter stage, therefore, that safeguards are required, and these are provided by the fact that the obligations will not be imposed unless the parties accept the contents of the scheme.

7.14 In practice, of course, schemes will not be made except by someone who is closely connected with the land or who intends to develop it or to control its development. But the legal arrangements for development may be complicated, involving options, contracts, associated companies and so on, and it would add great complexity to the draft Bill if it sought to list all those who might, at any given moment, have a legitimate reason to make a development scheme.

7.15 However, an important point must be added. Although no one is prohibited from being a maker of a development scheme, there is one situation in which certain people are required to be makers. One of the optional features of a scheme, to be discussed later in this part of the report, is a means whereby special obligations (not amounting to land obligations) may be assumed towards the unit owners. An example would be an obligation assumed by a developer to make up the estate roads. Anyone who is assuming an obligation of this kind under the scheme must be a maker of it, executing in that capacity the deed in which it is embodied. Different persons may assume the same obligation, or may assume different obligations, but all must execute the deed as makers of the scheme. In practice, therefore, a scheme which embodies makers' obligations will be executed by those who assume those obligations—and only by them, for there is no need for it to be executed by anyone else.

#### **Optional features**

7.16 We now turn to those features of development schemes which, according to our recommendations, are for optional use.

##### **(a) Managers**

7.17 If the nature of the development is such that it will require the continued exercise of management functions, the development scheme may provide for a person who is to be the manager of the scheme.

##### **(i) Identity**

7.18 The word "person" has, of course, its full legal meaning: it includes not only an individual but a body of persons corporate (for example, a limited company) or unincorporate (for example, a residents' association).<sup>4</sup> Those involved in a development have therefore a wide choice in deciding what kind of manager they want, and their decision is likely to depend on particular

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<sup>3</sup>Paras. 7.56–7.58 below.

<sup>4</sup>Interpretation Act 1978, Schedule 1.



factors such as the size and nature of the development and the type of managerial functions to be exercised. It should be mentioned, however, that there would be nothing to prevent the manager from employing another person, firm or company to deal with the day-to-day details of management (provided that the terms of the scheme were such as to allow for this). Therefore the manager provided for by the scheme need not necessarily be an entity which is suitable to do this, but could be an entity suitable only to exercise a general controlling function.

(ii) *“Provide for”*

7.19 When we say (using the words of clause 3(1) of the draft Bill) that a development scheme may “provide for” a manager, we are using an expression with a deliberately wide meaning. The simplest case would be that where the intended manager is a person already in existence. The scheme could then say merely that that person was to be the manager—though of course the appointment would not take effect without his agreement. (For simplicity we shall refer to the manager as “he”, but this word should be read as including “she”, “they” or “it”.) But if the manager has not yet been chosen, the scheme could simply provide a means of selecting him. And if the manager is to be a company still to be set up, the scheme could contain provisions as to its establishment, its constitution and its shares (including, perhaps, provisions whereby a controlling interest is to be held by the developer until the development is complete). If the developer is the maker of the scheme, or joins in it as one of its makers, he may also assume obligations as to the selection or establishment of the manager.<sup>5</sup> “Providing for” a manager would also include providing for any subsequent changes which may have to be made in the managership. Many different types of provision could be made on all these matters, including a provision whereby the developer himself became the manager either temporarily (with provision for the transfer of his functions to a permanent manager later on) or indeed permanently (though this would probably be less likely).

(iii) *Right to enforce development obligations*

7.20 One of the ways in which development obligations differ from neighbour obligations is that the former class is wider—mainly because it contains obligations (reimbursement obligations<sup>6</sup> and access obligations<sup>7</sup>) which provide for the making of payments, to, or the exercise of rights by, a manager, and which cannot therefore subsist except in the context of a development scheme which has a manager.

7.21 But the manager’s role in relation to development obligations imposed under the scheme is not confined to these particular obligations, because he may have the right to enforce obligations in general. It is indeed one of the most important features of our recommendations that a manager should have this power to enforce development obligations despite the fact that he himself owns no land which benefits from them. He acts in this respect in

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<sup>5</sup>As to such obligations, see para. 7.39 below.

<sup>6</sup>See the draft Bill, Schedule 1, paras. 10 and 11.

<sup>7</sup>*Ibid.*, Schedule 1, para. 12.

the interests of the unit owners and in virtue of the fact that the land which they own is capable of benefiting.

7.22 We think that, in cases where provision is made for a manager, it will be desired more often than not that he shall have the right to enforce development obligations. The provisions of the draft Bill are therefore such that he has this right automatically in respect of all obligations, except to the extent that the scheme expressly negatives it.

(iv) *Other functions*

7.23 In addition to any right which he may have to enforce development obligations, the manager will have such other functions as the scheme provides. These functions will again depend upon the size and nature of the development and may embrace many different things. Examples which come to mind include the following:

- repairing, maintaining and decorating buildings comprised in the development;
- tending communal gardens, verges, etc.;
- maintaining (and perhaps cleansing and lighting) passageways, parking areas and any roads and paths which are not public;
- providing central heating for the units;
- maintaining full insurance of the development (including or excluding the units themselves);
- providing a caretaker;
- keeping records of the owners of the units;
- keeping and producing accounts and having them audited.

These examples are all of functions which impose burdens on the manager. Other functions might give him benefits—for example, the right to charge for his services<sup>8</sup> and the right to use accommodation and facilities within the development land.

(v) *Obligations*

7.24 Another important feature of our recommendations is that it will be possible for a development scheme to impose upon the manager obligations which (though they will not of course be land obligations) will be enforceable, through remedies specifically provided for in the draft Bill,<sup>9</sup> by owners for the time being of units comprised in the development land.<sup>10</sup>

7.25 These obligations of the manager are logically distinct from his functions described under the last two sub-headings. In practice, however, the obligations will take the form of obligations to perform these functions, and it is likely that the obligations will be extended to all the functions—or, at any rate, to all of them which are of benefit to the unit owners. This must

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<sup>8</sup>A right of this kind will, we envisage, be given only when the manager is a "professional" one. If the manager is a company controlled by the unit owners, the company itself will not be given the right to charge fees but will normally be given the right to employ people who do.

<sup>9</sup>See clause 10 and Part XIII of this report.

<sup>10</sup>For full details of those entitled to enforce, see para. 7.50 below.

be done expressly, however, and the manager will have no obligations—not even to enforce the development obligations which he has a right to enforce—unless the scheme imposes them on him.

(vi) *Changes of manager*

7.26 Unless the manager is an entity whose continued existence can be ensured in perpetuity, the scheme should make provision for changes in the managership.<sup>11</sup> Such provision need not (and in practice will not) amount to an actual designation of a replacement manager, but will probably take the form of presenting a means whereby one may be selected.

7.27 If the manager changes, certain things will or may need to be transferred from the old manager to the new. We consider these in the paragraphs which follow.

7.28 So far as the old manager's actual functions are concerned, we think that these should pass, always and automatically, to the new one. It may indeed be said that the new manager is not a manager at all unless he has the functions of managership.

7.29 We next consider rights arising under the scheme, or under a development obligation, which have accrued to the old manager; and liabilities arising under the scheme which have been incurred by him. From the point of view of the unit owners it may well (on the assumption that a satisfactory choice of new manager has been made) be desirable that these things should pass to the new manager. The unit owners will then be able to deal for all managerial purposes with a single person. But an important distinction must be drawn between cases in which such a transfer would result in what we may call a "net liability" being imposed on the new manager and cases in which it would not. Normally, the liabilities of a manager (the debits) will be fully balanced by moneys which he is entitled to collect or has already collected from the unit owners (the credits). In such cases there is no net liability, and if it is clear that this situation exists<sup>12</sup> there is no reason why all relevant rights and liabilities should not be transferred. But there may sometimes be a net liability. Suppose, for example, that the old manager has failed to comply with an obligation to repair the roof of a block of flats and that water has in consequence got into an upper flat and damaged the furniture. The old manager is therefore liable both to repair the roof and to make good the damage to the furniture. In a properly constructed scheme, the liability to repair the roof will not be a net liability because the unit owners will be bound to pay for it, and that liability can therefore pass to the new manager<sup>13</sup> together with the counterbalancing credits mentioned above. But the liability in respect of the furniture is likely to be a net liability which the new manager

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<sup>11</sup>The court may sometimes be able to bring about changes in the managership (see Part XIX of this report) and the Lands Tribunal may have power so to vary a scheme that it makes satisfactory provision for such changes (see Part XVIII); but it would be wrong merely to rely on these powers.

<sup>12</sup>An incoming manager would normally wish to satisfy himself about this and perhaps to safeguard his position by seeking an indemnity from the existing manager.

<sup>13</sup>Liability for continuing contraventions of this kind would pass in any case, under the recommendation made in the preceding paragraph, because repair of the roof would in practice be a function of the manager.

will be unwilling to accept and which should remain with the old manager.<sup>14</sup> We therefore consider that the draft Bill should not provide for the automatic transfer of accrued rights and liabilities of the kinds considered in this paragraph, but should instead provide a facility which, if the development scheme makes use of it, will operate at the time when the manager is actually changed and will allow such accrued rights and liabilities to be transferred to him as may be appropriate in the circumstances which then exist. It should therefore be possible for the scheme to designate an instrument,<sup>15</sup> to be made in connection with a change of managership, which is to specify the rights and liabilities to be transferred—and their inclusion in such an instrument, when the time comes, should of itself suffice to transfer them.

7.30 We next consider assets held by the old manager, in the shape of bank accounts, investments and the like. We propose no special facility for transfer, still less an automatic transfer, in relation to those. We think it best that the transfer of such assets should be arranged between the two managers. For one thing, an automatic transfer would seldom be enough to give the new manager effective control over the assets: investments or a bank or building society account, for example, would not normally pass into the new manager's name without specific authorisation. For another thing, an automatic transfer might possibly operate to transfer something which should not be transferred: for example, if the old manager had committed some tortious act for which he was liable to one of the unit owners but in respect of which he was covered by an insurance policy, it would be wrong for the entitlement to the insurance money to pass to the new manager.

7.31 Finally, we consider rights and liabilities which do not fall within paragraph 7.27 above because they exist as between the old manager and third parties with whom the old manager has entered into contractual relationships—for example, builders who have undertaken repair or maintenance work, or solicitors or accountants who have done work or provided advice. Here again, we make no proposals in regard to transfer. We think it would be wrong if the third party, having contracted with one person, found him suddenly replaced by another. Transfers of rights and liabilities in these cases should be effected, if at all, by the parties and under the general principles of the relevant law.

(vii) *Problems of the managership*

7.32 A brief word may finally be added about problems which may beset the managership, and about the ways in which they can be avoided or solved.

7.33 It is essential, obviously enough, to ensure that the manager, whether an individual, a company or an association, is a satisfactory entity to begin with. Individuals should be carefully chosen, and companies or associations

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<sup>14</sup>The liability may, of course, be covered by an insurance policy taken out by the old manager. (It might well be wise for the scheme to provide for such insurance—particularly, perhaps, in cases where the manager is a management company which would otherwise have no assets save those it could collect from the unit owners.)

<sup>15</sup>If the method of changing the manager which the scheme lays down involves an instrument, it might be convenient to designate that instrument as the one which transfers the rights and liabilities; but any relevant instrument, or one made specially for the purpose, could be designated.

should be appropriately constituted. Individuals inevitably retire or die, and there must be a satisfactory means of replacing them. Failing this, replacement may be sought through the court.<sup>16</sup> Individuals may also become incompetent or default,<sup>17</sup> and in those cases the same need exists. The risk of default may be reduced by requiring the manager to keep management funds in a separate account and to have a periodical audit.

7.34 These requirements, indeed, should normally be laid down in all cases, and for more reasons than one. If, for example, the manager goes bankrupt, or goes into liquidation, it is vital that management moneys should not be intermixed with his own money but should be in a separate fund. We doubt whether a separate fund of management moneys could be claimed by the manager's general creditors, but it would be wise to avoid any such possibility by providing expressly in the scheme that the manager is to hold such moneys as a trustee. The same need for proper provisions about replacement exists in relation to insolvent managers.

**(b) Scheme makers' obligations**

7.35 As we said earlier it will also be possible for the scheme to impose obligations on its maker or makers—or, to put it another way, for anyone (such as the developer) who wishes to assume obligations under the scheme to do so by executing as maker the deed in which it is embodied.

7.36 Legally, makers' obligations will be very much like managers' obligations: they will not be land obligations but they will be enforceable, through remedies expressly provided by the draft Bill,<sup>18</sup> by owners for the time being of units comprised in the development land.<sup>19</sup> Makers' obligations will also be enforceable by the manager (if any).

7.37 There is no limit set upon the kinds of obligation which a scheme maker can assume. In practice, no doubt, the matter will be determined largely by market forces: makers will assume such obligations as are thought necessary to ensure that the scheme is viable and sufficiently attractive to make the units readily saleable. Various examples come to mind of the things which their obligations could cover.

7.38 First, there might well be an obligation to ensure that the scheme is implemented by the actual imposition on the units of the development land obligations for which it provides.<sup>20</sup> It is important to note that the mere making of the scheme connotes no obligation to do this:<sup>21</sup> the obligation

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<sup>16</sup>See footnote 11 above.

<sup>17</sup>So, of course, may the employees or agents of non-individual managers, but here different considerations apply.

<sup>18</sup>See clause 10 and Part XIII of this report.

<sup>19</sup>Further details are in para. 7.50 below.

<sup>20</sup>Since the enforceability of development obligations against successive owners of the units will depend upon registration (see Part IX of this report), an obligation to implement the scheme might well be coupled with an obligation to register the land obligations—at least in the case of unregistered land, where registration will not happen automatically.

<sup>21</sup>It would not be possible to depart from the scheme by imposing development obligations not within the system of obligations for which it provided; but it would be possible to refrain from imposing such obligations.

must be express and it may of course be absolute or qualified in some way. We say more about this later on.<sup>22</sup>

7.39 Second, a maker might well assume obligations in relation to the manager, if the scheme provides for one—particularly in a case where the manager is to be a company not yet in existence, in which case a maker of the scheme might well assume obligations in relation to the incorporation of the company, the holding and transfer of its shares, and so on.

7.40 Third, the scheme might well impose obligations on a maker in regard to matters of a more material nature relating to the development, such as the making up of estate roads, the surfacing of parking areas and the laying out of communal gardens.

7.41 And fourth, a maker might assume obligations in relation to units which for the time being remain unsold—for example, to make contributions in respect of them to any expenses incurred or to be incurred by the manager.

7.42 We are also conscious that a developer may run into difficulties before the development is completed and may have to hand it on to someone else with some units still unsold. The draft Bill (in clause 3(3)(d)) therefore allows the development scheme to cater for this possibility by making provision for obligations, corresponding with the original makers' obligations, to be assumed by other people—so that the original makers remain bound by their original obligations but the newcomer can assume similar obligations (with the same effect) in order to ensure that the development scheme remains sound and that the unsold units will attract purchasers.

#### (c) Unit owners' enforcement rights

7.43 Under this heading we consider the rights of unit owners to enforce development land obligations imposed in pursuance of the scheme and managers' and makers' obligations imposed by it.

##### (i) *Development obligations*

7.44 Our intention is to give those responsible for drawing up development schemes a wide range of choice in determining who is entitled to enforce development obligations. Speaking broadly, the choice is between:

- (a) enforceability by the manager (if any);
- (b) enforceability "for the benefit of the development land as a whole"; and
- (c) enforceability "for the benefit of only a specified part of the development land".

Still speaking broadly, enforceability as in (a) can be combined with enforceability as in (b) or (c). An explanation of the precise meaning of the words in inverted commas in (b) and (c) above must be postponed to a later part of this report where it properly belongs.<sup>23</sup> Broadly, however, the words in

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<sup>22</sup>Para. 7.62 below.

<sup>23</sup>Paras. 10.10–10.14 below.

(b) connote enforceability by all the unit owners<sup>24</sup> and those in (c) connote enforceability by only some one or more of them.

7.45 How, then, are these choices to be exercised in framing a development scheme? We think that schemes should not be required to contain unnecessary verbiage, and we therefore intend to proceed by means of "presumptions" which can be displaced if necessary.

7.46 If there is a manager, all development obligations imposed under the scheme will (as we have already said<sup>25</sup>) be enforceable by him *unless* the scheme provides to the contrary.<sup>26</sup> And a development obligation which is enforceable by a manager will not be enforceable by anyone else *unless* express provision is made; but such express provision may be made in relation to positive and restrictive obligations,<sup>27</sup> which may thus be made enforceable either for the benefit of the development land as a whole or for the benefit of only a specified part of the development land.

7.47 A development obligation which is not enforceable by a manager will be enforceable for the benefit of the development land as a whole *unless* express provision is made that it shall be enforceable for the benefit of only a specified part of that land.<sup>28</sup>

(ii) *Managers' and makers' obligations*

7.48 In describing managers' and makers' obligations, we have already noted in general terms that they are enforceable by the unit owners for the time being. (Makers' obligations are enforceable also by the manager, if there is one.)

7.49 "Unit owners", however, is a vague expression. We have to remember that the units need not necessarily be sold freehold,<sup>29</sup> nor indeed need they all be sold for the same (freehold or leasehold) estate; nor indeed need they be sold at all.<sup>30</sup> There is therefore no simple way of designating the estates in the units whose owners are to have enforcement rights. The picture is further complicated by the fact that managers' and makers' obligations,

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<sup>24</sup>"Unit owners" in this context includes other persons who have derivative estates or interests in the units: see the paragraphs mentioned in the preceding footnote and Part X of this report generally.

<sup>25</sup>Para. 7.22 above.

<sup>26</sup>If reciprocal payment obligations (as distinct from reimbursement obligations) are to be imposed under the scheme, contrary provision should always be made in regard to them because enforcement should be in the hands of the person who is to receive the payment.

<sup>27</sup>Contrary provision cannot be made in relation to reimbursement or access obligations because their nature makes it inappropriate that they should be enforceable by anyone but the manager. Nor can it be made in relation to reciprocal payment obligations because these will not be enforceable by the manager anyway: see the preceding footnote. These matters are dealt with in clause 3(2)(a) of the draft Bill.

<sup>28</sup>Such provision ought to be made in relation to any obligations which are for the benefit of only one, or a limited number, of other units (including, of course, reciprocal payment obligations).

<sup>29</sup>See paras. 7.72-7.76 below.

<sup>30</sup>See paras. 7.69-7.71 below.

although they are not land obligations, are similar to them in many ways and should in our view be enforceable, as they are,<sup>31</sup> by the holders of derivative interests as well as by the unit "owners".

7.50 Bearing these points in mind, we recommend that those entitled to enforce managers' and makers' obligations should comprise all those (other than mere occupiers with no actual interest in the land) who are currently bound by any development land obligation imposed under the scheme. This solution to the problem is analogous to one put forward in relation to a similar problem later in the report,<sup>32</sup> and it seems to us to give a simple and satisfactory answer.

7.51 Since there is in any case no compulsion to include managers' or makers' obligations in the scheme, we think it should be possible for the scheme to contain provisions limiting the manager's or maker's liability for such obligations as are included. It will therefore be possible for the scheme

- (a) to restrict the circumstances in which an obligation is to be enforceable, and
- (b) to restrict the manager's or maker's liability for a contravention.<sup>33</sup>

**(d) Arbitration provisions**

7.52 Leases of units in a development nowadays often contain a provision requiring disputes between the landlord and the tenant to be referred to arbitration. These provisions have effect, of course, within the context of the general law of arbitration which, among other things, sets limits to the kinds of dispute on which they can validly operate.

7.53 We think it should be possible for a development scheme to contain such provisions for arbitration in relation to differences arising between any of the following: the maker or makers; the manager; and anyone who is or becomes entitled to enforce, or bound by, any development obligation imposed under the scheme. This does not mean that the scheme, if it is to provide for arbitration at all, must provide for it in relation to all disputes between all such persons: within the scope of this general enabling power, it may make as wide or as narrow a provision as may be desired.

7.54 The draft Bill therefore contains an enabling power on these lines.<sup>34</sup> It does so not because any special statutory power is needed to enable people to make a valid arbitration agreement—they are, of course, always free to do so—but because it might be difficult to the point of impossibility, in this particular case, to obtain the signatures of all the people who would be necessary parties to it. A provision in the scheme is therefore intended to take the place of such an agreement; and indeed the provision will take effect as an arbitration agreement as between all those who are within it at the

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<sup>31</sup>See Part X of this report.

<sup>32</sup>Paras. 10.10–10.14 below.

<sup>33</sup>The remedies available on a contravention are dealt with in Part XIII of this report.

<sup>34</sup>Clause 3(3)(b) and (6).



time when the difference arises, so that the general law of arbitration will apply on that basis.<sup>35</sup>

(e) **Variation, etc.**

7.55 Although a formal development scheme is a practical and logical necessity, it is obvious that circumstances may change before, during and after a development and that the scheme itself must be capable of adaptation in the light of such changes. Under this heading, therefore, we deal with the subject of variation, but before doing so we want to put this subject in its context by discussing briefly the legal effect of a development scheme.

(i) *The effect of a development scheme*

7.56 From the moment it is made, a development scheme has important, if only potential, legal effects. It always provides a framework of development obligations which hang, as it were, over the development land waiting only to be imposed upon it. It may also lay down an analogous framework of managers' functions and obligations and of makers' obligations.

7.57 Despite this, however, a development scheme does not by itself create any legal rights or obligations enforceable by or against anyone. No such rights or obligations arise unless and until the first development land obligation is imposed in pursuance of the scheme.<sup>36</sup> It is obvious that no land obligation comes into existence until this time; but it is equally true that no managers' or makers' obligations are enforceable until this time because they are enforceable only by those who are bound by development obligations.<sup>37</sup>

7.58 We may sum the matter up by saying that the development scheme creates no legal rights or obligations until such time as it is *used* (in the way just described). It follows that the makers of a development scheme who, before this time, became dissatisfied with the scheme they had made could, if they chose, simply ignore it and make themselves another one, proceeding to use the second scheme instead of the first. This would be an untidy way to behave because the first scheme would remain hanging over the land, and it would be better formally to revoke it. But the point we wish to emphasise is that it is only prior to the use of a development scheme that its makers, merely by virtue of being makers, have any control over it. Once it is used it cannot be revoked, still less ignored.<sup>38</sup>

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<sup>35</sup>In particular, the award will be binding on all those claiming under any party to the dispute: Arbitration Act 1950, s. 16.

<sup>36</sup>There might in theory be an exception to this rule. A maker's obligation is enforceable by a manager (para. 7.36 above) and if the manager came into existence before any development obligations had been imposed under the scheme he could enforce the obligation before this time—but this is extremely unlikely, and indeed there would be little basis for or purpose in a manager's attempted enforcement in these circumstances.

<sup>37</sup>Para. 7.50 above (subject to the point made in the preceding footnote).

<sup>38</sup>It would be possible for a development scheme (though not, strictly speaking, revoked or extinguished) to be rendered inoperative even though it had been "used" in the way described in the text. This would occur if any development obligations which had been imposed under it were released—through a power contained in the scheme or by agreement amongst all those bound by or entitled to enforce them. Subject only to the point mentioned in footnote 36 above, there would then be no one entitled to enforce any of the scheme's provisions.

(ii) *Variations of schemes and development obligations*

7.59. The scheme can, however, make provision for its own variation or extinguishment,<sup>39</sup> or for the variation, release<sup>40</sup> or apportionment<sup>41</sup> of any development land obligations imposed in pursuance of it. In what follows, we use the term “variation” to include all these things.<sup>42</sup>

7.60 No limits are set upon the variations which can be made or upon the ways in which they can be made: these matters are left to the provisions of the scheme itself. And those provisions will no doubt be framed in the light of the developer’s wish (on the one hand) to safeguard his own interests and (on the other) to offer potential buyers a scheme which will function satisfactorily in the long term despite changes of circumstance.

7.61 Variations for which provision is likely to be made may perhaps be divided into two main classes.

7.62 The first class comprises variations primarily for the benefit of the developer, which, he himself will probably be given power to make (or procure to be made), albeit with some suitable degree of formality (probably by means of a deed). Variations falling into this category might include variations, made during the course of the development, in the system of development obligations for which the scheme provides, and might extend to associated variations in other provisions of the scheme. It would of course be undesirable for such a power as this to be untrammelled, particularly if the developer has assumed an obligation to impose the system of development obligations for which the scheme provides (so that the power amounts to a power to vary his own obligation); but developers who make use of building schemes under the existing law commonly reserve a power to depart from the scheme, though such a power may well be limited by a proviso such as the following:<sup>43</sup>

“Provided nevertheless that the power hereby reserved shall not be exercisable so as to create a radical alteration in the scheme comprised in the stipulations herein contained and that any purported exercise of the same contrary to this proviso shall be void.”

7.63 The second class comprises variations primarily for the benefit of the unit owners, which are likely to be made during the years after the development is complete. Power to make these variations is likely to be given, directly or indirectly, to the unit owners themselves. The manager may be given a voice in them but the manager alone is not likely to be given a power to make them—unless the manager is (in one form or another) the unit owners themselves. If, for example, the manager is a management company controlled by the unit owners, the scheme might contain a provision for variations to be made by (for instance) a resolution passed by a three-quarters majority.

<sup>39</sup>To extinguish a scheme is, of course, only to render it inoperative for the future: once used, a scheme can never be nullified retrospectively.

<sup>40</sup>To release a land obligation is to render it inoperative for the future.

<sup>41</sup>To apportion a land obligation is to divide the liability to perform it between two or more people.

<sup>42</sup>Variation under a provision of the scheme itself is not the only way in which variation can occur. Other such ways are dealt with in later parts of this report: see particularly Parts XV–XIX.

<sup>43</sup>Preston & Newsom’s *Restrictive Covenants Affecting Freehold Land*, 7th ed. (1982), p. 111.

Again, the power need not be a simple and untrammelled one: appropriate limitations and safeguards could be built into it. The nature of the things capable of being varied under such a power might be very wide (embracing all the provisions of a scheme, including managers' obligations—but not, in practice, makers' obligations—and any development obligations imposed in pursuance of it), or it might be narrower.

7.64 It should be made clear that amongst the variations for which the scheme may make provision are variations having the effect of adding land to, or subtracting land from, the original development land.<sup>44</sup> In all but the simplest cases, the addition or subtraction is likely to involve variations being made in the system of development obligations for which the scheme provides, or in other provisions of the scheme.

7.65 Additions or subtractions (and the associated changes) may be made in whatever way the scheme provides. It goes almost without saying, however, that these changes are of particular importance and should be required to be made by a formal document which clearly identifies the land affected.<sup>45</sup>

#### **Development schemes and building schemes compared**

7.66 We have now described development schemes, and their contents, in some detail; and it may be appropriate to compare them with building schemes under the existing law. There is a danger of misunderstanding the relationship between the two. Development schemes, despite the similarity of the names, are not simply "our version" of building schemes. They are certainly intended to provide a very wide and flexible framework within which it is possible to do all the things which can be done by means of a building scheme. But development schemes *need* not be used to do these things; and they *can* be used to do other things as well or instead.

7.67 A reading of our earlier summary of the law about building schemes<sup>46</sup> will show that everything that can be done under that law can indeed be done through a development scheme. In particular, land obligations can be made enforceable by the unit owners amongst themselves; a developer can undertake an obligation to impose the system of obligations which is inherent in the scheme; and a power to vary the scheme (or obligations imposed under it) can be reserved.

7.68 But development schemes also provide a means of doing things which cannot be done at all (or cannot be done satisfactorily) under the present law. In particular, the provisions enabling managers' and makers' obligations to be imposed in such a way as to be enforceable in perpetuity by successive unit owners amount to an innovation, as do the provisions whereby land

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<sup>44</sup>The wording of clause 2(3) of the draft Bill removes any doubt which might otherwise exist on this point.

<sup>45</sup>Clause 2(4)(a) of the draft Bill requires a development scheme to "describe in sufficient detail to identify it the land to which the scheme is applicable (whether by reference to a plan or otherwise)". This provision is intended to have an ambulatory quality, so that "the scheme" includes the scheme as varied, and "the land to which [it] is applicable" includes any land to which it becomes applicable by variation.

<sup>46</sup>Para. 3.29 above.

obligations may be enforced in perpetuity against successive unit owners by a manager who need own no dominant land. In these and other respects we think that our proposals should improve the machinery which is needed to ensure the satisfactory long-term survival of property developments.

**“Clubbing together” by existing unit owners**

7.69 Hitherto we have illustrated our recommendations about development schemes mainly by reference to the case of a developer who wants to sell off to purchasers the units comprised in his development; but it is important to emphasise that the use of development schemes is not confined to that case.

7.70 If there are several pieces of separately owned land in the same locality (each of which may or may not already be or include a house, flat or other building), the individual owners may want to keep the properties they already have but may want to club together in order to set up a development scheme covering those properties as a whole. There is no question here of anything being sold: the unit owners merely wish to impose a system of development land obligations on their units and perhaps to make use of other facilities inherent in the development scheme provisions.<sup>47</sup> There is no reason why they should not do so: we have sought to ensure that the provisions of the draft Bill are apt to cover this case as well as the more common case of property development.<sup>48</sup>

7.71 This point may be of particular importance in relation to existing blocks of freehold flats, whose owners may if they wish club together in this way in order to set up a development scheme which may well increase the value of their flats and make them more readily saleable. We say more about this in Part XX of this report.

**Leasehold schemes**

7.72 A final word should be said about developments which do involve the disposal of the units, but in which the disposals are on a leasehold rather than a freehold basis.

7.73 It emerged from Part III of this report that the law about positive and restrictive covenants as between landlord and tenant is in a relatively satisfactory state. Such covenants are enforceable as between the current owners of the lease and of the reversion. This is the main reason why certain types of property development (including blocks of flats) are now carried out by the grant of leases of the units. We propose no changes in the relevant law about covenants between landlord and tenant, so developers will be able to go on using this method if they wish.

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<sup>47</sup>If all their needs can be met merely by imposing neighbour obligations, they would no doubt adopt that course instead.

<sup>48</sup>At least in theory, therefore, whole streets of properties could be brought within a development scheme. We see no objection to this if their owners are sufficiently determined to take all the necessary steps.

7.74 However, it does not follow that our provisions about development schemes have no useful part to play in this setting. Even if a developer plans to dispose of his units by the grant of leases, he may still wish to set up a development scheme for two reasons at least.

7.75 First, it provides a more satisfactory framework for the establishment of a manager. As we have said, there is no problem about the enforcement of covenants as between the tenant and the landlord; but the landlord may not want to perform management functions. If it is desired to appoint as manager a person who does not hold the reversion and who is therefore not the landlord, the enforcement of obligations as between him and the tenants is less satisfactory. The problem could be solved by the establishment of a development scheme under which obligations towards the manager would be imposed as development land obligations and the obligations of the manager towards the tenants would be imposed as managers' obligations under the scheme. Any obligations owed by the tenant to the landlord could of course still be imposed as ordinary landlord and tenant covenants.

7.76 Second, it provides a framework for the enforcement of obligations by one tenant against another. If it is desired that any obligations (in addition to or instead of being enforceable by the landlord or the manager (if any)) shall be directly enforceable as between the individual tenants,<sup>49</sup> the way to achieve this objective in future would be to impose them as land obligations under a development scheme and to ensure that the scheme makes them enforceable in this way.

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<sup>49</sup>In para. 3.52 and 3.53 above, we discussed this situation under the existing law, making it clear that whatever the exact status of covenants entered into between tenants may now be, we thought they should not fall into the category of landlord and tenant covenants but into the category of obligations owed by one landowner to another. Accordingly, they cannot be effectively imposed except as land obligations (see also paras. 24.22-24.24 below).

## PART VIII

### CREATION OF LAND OBLIGATIONS

8.1 In this part of the report we deal with the formal and other requirements necessary for the creation of a land obligation.

#### Preliminary

8.2 We said earlier<sup>1</sup> that land obligations could subsist either as legal or as equitable interests in land. It will be helpful to preface this part of the report by stating three principles.

8.3 First, a land obligation will not come into being at all—either as a legal or as an equitable interest—unless the requirements mentioned in this part are complied with. The two remaining principles arise only when there is compliance.

8.4 Second, a land obligation will come into being as a legal interest provided that:

- (a) It is “equivalent to an estate in fee simple in possession or a term of years absolute”. This condition, as we explained earlier,<sup>2</sup> is a condition which, under the Law of Property Act 1925, all comparable interests in land must fulfil if they are to be legal. It will be fulfilled by any land obligation which is to take effect on its creation and is to continue either perpetually or for a fixed term. The overwhelming majority of land obligations will of course fall into this category.
- (b) The creating instrument complies with the particular formal requirements (usually involving a deed) which are necessary to the creation of a legal interest. We say more about this point later<sup>3</sup>.

8.5 Third, a land obligation will be equitable if it fails to meet either of the conditions stated in the preceding paragraph. It may fail to meet condition (a) if, for example, it is created so as to take effect only at some future time (as an interest in reversion or in remainder) or if it is to subsist only during someone’s lifetime. It may fail to meet condition (b) if, for example, although a deed is required for its creation as a legal interest, it is in fact created only by a written document not under seal.

8.6 With that preamble, we now turn to the requirements themselves.

#### **The creator must have a legal estate in the servient land**

8.7 Any interest which could be created by someone whose proprietary interest in the land is an equitable one, rather than a legal estate, would itself have to take effect as an equitable interest; but it is not altogether clear how far such a person can create an easement-like interest in any form. At all events we recommend that no one but a legal estate owner<sup>4</sup> should be

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<sup>1</sup>Para. 5.2 above.

<sup>2</sup>Para. 5.2 above.

<sup>3</sup>Paras. 8.8 and 8.9 below.

<sup>4</sup>Or someone entitled to be registered as such under s.37 of the Land Registration Act 1925.

entitled validly to create a land obligation. We think it unnecessary to allow anyone else to create an interest of this kind (a conclusion which is perhaps supported by the dearth of authority about the creation of such interests under the present law), and we think it would add considerably to the complexities of the proposed new law if this situation were to be catered for.

#### **Nature and execution of creating instrument**

8.8 Under the existing law, a legal interest in land can be created only in compliance with the requirements of section 52 of the Law of Property Act 1925 which, subject to certain exceptions, requires such creation to be by deed. The creation of equitable interests is governed by section 53 of the same Act which, again subject to exceptions, requires an instrument in writing.

8.9 We recommend that these existing rules should govern the creation of land obligations, subject only to one qualification—namely, that a written instrument should always be necessary. Some of the exceptions mentioned in the preceding paragraph might otherwise (in theory at least) allow a land obligation to be created without any writing at all, and this would be unacceptable because of the recommendations about the contents of creating instruments which we are about to make. The result is, therefore that

- (a) if it is to subsist as a legal interest, a land obligation must be created by deed—unless it falls within section 52(2) of the Law of Property Act 1925, in which case it may be created by written instrument.
- (b) if it is to subsist as an equitable interest, it must always be created by written instrument.

These rules are subject only to the very limited exceptions mentioned later in this part of the report.<sup>5</sup>

8.10 The deed or other written instrument must of course be executed or signed by the person creating the land obligation<sup>6</sup> (or by his agent deriving authority in accordance with the requirements of the general law).

#### **Contents of the creating instrument**

8.11 Our recommendations about the contents of creating instruments fall into several groups. One group (with which we deal first) applies to all land obligations and others apply to neighbour and development obligations respectively.

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<sup>5</sup>Paras. 8.27–8.30 below.

<sup>6</sup>Subject to one possible exception, this person will be the person who becomes bound by the land obligation. The exception arises because section 65 of the Law of Property Act 1925 allows a legal estate to be conveyed with a reservation—that is to say, with a legal interest being kept back, or reserved, out of it—and in this case the purchaser of the estate need not execute the conveyance. A land owner could thus sell part of his land and reserve out of it an easement for the benefit of the land retained. We see no reason to disapply this general rule in the case of land obligations, so it will be theoretically possible to create them in this way. In practice, however, we have little doubt that they will be created by express grant made in a conveyance executed by the purchaser.

(a) Requirements for all land obligations

8.12 We make three recommendations which are common to both neighbour and development obligations.

(i) *Obligation to be called a land obligation*

8.13 Our first recommendation is that the creating instrument should state that the obligation is to be a land obligation. We emphasise the importance of this requirement: no obligation which is not "labelled" in this way can have effect as a land obligation. The requirement may at first sight seem unduly formalistic. An easement may be created without calling it an easement: why then (it may be said) should not a land obligation be created without calling it a land obligation? But the main answer lies precisely in the need to distinguish land obligations from such things as easements—the distinction being of great importance because different rules (for example, as to registration) and incidents apply in relation to them.

8.14 We have already mentioned that some of the objects which can be achieved by means of land obligations can be achieved under the existing law by means of covenants or, in some cases, easements. This will continue to be true after our draft Bill is implemented because the law of easements will remain unchanged and, although restrictive covenants will cease to run with land,<sup>7</sup> personal covenants may still be created. Nor, if there were no labelling requirement such as that just recommended, would there be anything to prevent a land obligation being created in such a way that it "looked like" an easement or a covenant. We therefore consider that such a requirement is essential for the purpose of identification.

8.15 The point mentioned in the preceding paragraph leads us to make another recommendation: that if a land obligation is validly created but the manner of its creation is such that it could *also* have effect as an easement or some other interest in land, or as a covenant, it shall nonetheless have effect only as a land obligation.<sup>8</sup> This seems to us a necessary recommendation, but of course it can be made only in the context of a requirement of labelling which serves to distinguish a land obligation *from* these other things.

(ii) *Description of servient land*

8.16 We recommend that the servient 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. The need for this requirement is obvious enough, and such a description would no doubt be provided even if there were no specific requirement to that effect. But we consider it important that adequate descriptions should be given of both servient and dominant (or development) land. It is in relation to the dominant land that description tends to be inadequate nowadays (when restrictive covenants are imposed) and we say more about this point in that connection.<sup>9</sup>

<sup>7</sup>For fuller details, see paras. 24.2–24.38 below.

<sup>8</sup>It seems to us undesirable that a single provision should have a dual effect of this kind. But see further paras. 11.33 and 11.34 below.

<sup>9</sup>Paras. 8.21 and 8.22 below.



(iii) *Designation of the burdened estate*

8.17 Although the vast majority of land obligations will be created out of a legal fee simple (freehold) estate, some may be created out of a legal leasehold estate. The point is important because various questions will depend upon it—in particular, the question of who is to be bound by the land obligation, because an obligation created by a tenant cannot bind the freeholder or any superior tenant. The concept of the “burdened estate” is therefore an important one in this report and in the draft Bill,<sup>10</sup> and the identity of this estate must emerge from the creating instrument.

8.18 We say “emerge from” because our actual recommendation is that the burdened estate (that is to say, the legal estate in the servient land by virtue of which the creator of the obligation creates it) should be identified *expressly or impliedly*. It is safe to say that such identification will almost invariably be automatic. It would be a most unusual creating instrument which did not show, apart from this requirement, whether the creator was a freeholder or a leaseholder (and, if the latter, what his leasehold estate was). But the requirement means that, in the unlikely event that these things would otherwise be omitted, care must be taken to include them.

8.19 We must, however, make one special recommendation about a particular case. It arises where a legal estate owner (whom we will assume to be the freeholder) has mortgaged his land to a lender, so that there are now two estates in the land: that of the borrower (which is subject to the mortgage) and that of the lender. Suppose then that the borrower wishes to burden his land with a land obligation. Normally he cannot do this in such a way that the lender’s estate is subject to the obligation, because the lender has priority: the borrower’s estate, and that alone, will be the burdened estate. But suppose that the lender is willing to join in the creation of the land obligation, or the mortgage gives the borrower power to create it in such a way as to bind the lender. In those cases the lender’s estate will be bound. In a real sense, therefore, there will be two burdened estates. Is the instrument creating the land obligation then required to identify them both? Our main recommendation, as it stands, might indeed require this; but we think it would be an unnecessary and unreasonable requirement and we therefore propose that it should not exist. Provided that the creating instrument (or some subsequent variation of it) says that the lender has authorised or confirms the creation of the land obligation it need do no more than identify the borrower’s estate as the burdened one.

**(b) Additional requirements for neighbour obligations**

8.20 We now turn to those additional requirements which apply only to neighbour obligations.

(i) *Description of dominant land*

8.21 In the case of neighbour obligations, we recommend a requirement that the dominant land, like the servient, 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 an Ordnance Survey map).

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<sup>10</sup>See, in particular, paras. 11.12 and 11.16 below.

8.22 We set some store by this requirement. One of the problems about the existing law of restrictive covenants, as we have said,<sup>11</sup> is that it allows the benefited land to be described so loosely that it may be or become almost impossible to identify—with the result that no one knows who (if anyone) can enforce the covenant or who (if anyone) has power to release it.

(ii) *Designation of the benefiting estate*

8.23 Just as the creating instrument should identify (expressly or impliedly) the burdened estate in the servient land so, we recommend, should it identify (in the same way) the benefiting estate in the dominant land. The reasons for this requirement are analogous to those given for our earlier recommendation. As we explain more fully later on,<sup>12</sup> an appurtenant right is strictly speaking appurtenant, not to land, but to a particular estate in land; and although that estate is normally the freehold (so that nothing really turns on the distinction) it may be a leasehold estate. In that case the distinction does matter because the benefit of the right will attach itself to, and devolve with, the leasehold estate and that alone.

8.24 It is necessary, therefore, that the nature of the benefiting estate should emerge from the creating instrument. Again, however, it would be a most unusual creating instrument which did not, by its very nature, make this clear.

(c) **Additional requirement for development obligations**

8.25 The last two requirements do not apply to development obligations. Their place should, we recommend, be taken by a requirement that the instrument which creates a development obligation should identify the development scheme in pursuance of which it is imposed. Those who act for the purchaser will of course wish to examine the development scheme itself (and any variations of it) and to ensure that an authenticated copy is available for future reference.<sup>13</sup>

**Exceptions, etc.**

8.26 We recommend several exceptions, or special provisions, in relation to the foregoing requirements.

(a) **Agreements to create a land obligation**

8.27 A contract for the sale of a proprietary estate in land gives the purchaser (provided that the courts would if necessary grant him an order of specific performance for its enforcement) an immediate equitable interest in the land. The same is true if parties enter into a specifically enforceable contract for the creation of an easement: the contract gives rise at once to an equitable interest.<sup>14</sup>

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<sup>11</sup>See, in particular, para. 4.12 above.

<sup>12</sup>Paras. 10.3 and 10.6 below.

<sup>13</sup>See further para. 9.23 below.

<sup>14</sup>It is not quite clear whether this interest actually amounts to an equitable easement. It would seem, on principle, that it should, and Paul Jackson, *The Law of Easements and Profits* (1978), p. 39, suggests that it does; but *Gale on Easements*, 14th ed. (1972), p. 72, suggests otherwise.

8.28 The fact that contracts give rise, before completion, to equitable interests is not usually of much importance in this context because completion itself is seldom long delayed and after that the contract ceases to matter. The requirements recommended in this part of the report are meant, however, to relate to the completion document, not to the preliminary contract. We therefore recommend that those requirements should not prevent an agreement to create a land obligation from giving rise to an equitable interest in land.

**(b) Land obligations created under statutory powers**

8.29 Statutory provisions, existing and future, may confer power on a court, or on a person, to create land obligations (either by making specific reference to them or because land obligations fall within a class of interests in land to which the power extends). Provisions in the draft Bill itself enable the Lands Tribunal<sup>15</sup> (or the court exercising the Tribunal's powers<sup>16</sup>) to do this.

8.30 The requirements mentioned in this part of the report should clearly give way to any such statutory provisions in so far as they are inconsistent with them, and we recommend accordingly.

**(c) The rule against perpetuities**

8.31 The rule against perpetuities has been developed by the courts over many years and has been much affected by the Perpetuities and Accumulations Act 1964. Its main purpose is to prevent the indefinite "tying up" of property; and its effect, very broadly, is that an interest in property is void unless it vests (if it vests at all) within a limited period of time.

8.32 We do not intend to go into the details of the rule. We are concerned only with one particular aspect of it, which was considered in the case of *Dunn v. Blackdown Properties Ltd.*<sup>17</sup> In that case an easement had been granted which took the form of a right to use sewers and drains "now passing or hereafter to pass" under certain land. At the date of the grant there were no sewers or drains. The court decided that the easement was void under the rule because there was no knowing when the sewers and drains would be constructed. The case was decided before the 1964 Act and that Act would probably save a similar grant made today if the sewers and drains were in fact constructed within a relevant perpetuity period—but not otherwise. The fact remains, therefore, that an easement granted in these or similar terms could be ineffective.

8.33 It seems likely that the same fate could befall a land obligation in certain circumstances. A land obligation to repair (or to contribute towards the cost of repairing) any building for the time being erected on land (being the servient or the dominant or the development land) would perhaps be vulnerable. So, for example, would an obligation that, if and when a wall were removed, it should be replaced by a fence or a hedge.

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<sup>15</sup>Clause 17(5)(b) and Schedule 2, para. 2(2).

<sup>16</sup>Clause 13(6).

<sup>17</sup>[1961] Ch. 433.

8.34 It seems to us undesirable that a land obligation should be invalidated in cases of this kind, and we think there is no reason in principle why it should be: the mischief at which the rule against perpetuities is aimed does not seem to us to exist in relation to land obligations. It can be strongly argued that it does not exist in relation to easements either, and *Dunn v. Blackdown Properties Ltd.* has not gone uncriticised. Certainly this aspect of the law of easements is ripe for review; but we cannot embark on such a review in this report. So far as land obligations are concerned, our view is strengthened by the fact that (at least according to one leading textbook<sup>18</sup>) the rule against perpetuities does not apply under the existing law to restrictive covenants.<sup>19</sup>

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<sup>18</sup>Megarry and Wade, *The Law of Real Property*, 4th ed. (1975), p. 265. Other views have been expressed, however.

<sup>19</sup>It must be remembered that restrictive covenants can be terminated by the Lands Tribunal and that we are recommending a similar facility in relation to land obligations: see Part XVIII of this report.

## PART IX

### REGISTRATION

9.1 We have already expressed in general terms our view that land obligations should be registrable under the Land Registration Act 1925 (in the case of registered land) or the Land Charges Act 1972 (in the case of unregistered land), so that such registration would be necessary if purchasers of the servient land were to be bound by them.

9.2 We do not think that we need spend much time in justifying this general recommendation. It would not be fair for a purchaser to be bound by a land obligation unless he had a clear means of ascertaining its existence. Inspection of the land does not provide such a means, since land obligations would seldom, if ever, be apparent from an inspection. The only acceptable means must therefore lie through the registration system, which has now come to replace the old doctrine of notice in relevant respects.

9.3 From this point onwards, however, we must differentiate between the system of registration as it applies to registered and unregistered land respectively. We take unregistered land first.

#### **Unregistered land**

9.4 The system of registration in regard to unregistered land is relatively simple because its only real purpose is to achieve the object just stated: that of replacing the old doctrine of notice. Entries are made on the appropriate register kept under the Land Charges Act 1972, against the name of the person whose land is affected by them, of certain adverse interests and other matters.

9.5 We recommend that land obligations, whether legal or equitable, should be added to the list of things which are registrable under the Land Charges Act 1972, taking their place amongst those now registrable as land charges of Class C.<sup>1</sup> Restrictive covenants are registrable as land charges of Class D,<sup>2</sup> but we think that land obligations should fall within Class C because of the slightly wider range of persons who take free of Class C land charges if they are not registered.<sup>3</sup> These comprise all purchasers<sup>4</sup> of the servient land or of any interest in it,<sup>5</sup> whereas non-registration of a Class D charge frees only purchasers for money or money's worth of a legal estate in the land.<sup>6</sup>

9.6 We do not intend to attempt any exposition of the detailed working of the 1972 Act: we simply recommend that that Act, and the rules made

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<sup>1</sup>Section 2(4).

<sup>2</sup>Section 2(5).

<sup>3</sup>It is worth noting that puisne mortgages which, like nearly all land obligations, amount to legal interests, fall within Class C.

<sup>4</sup>"Purchaser" in this provision means any person (including a mortgagee or lessee) who, for valuable consideration, takes any interest in land or a charge on land: s. 17(1).

<sup>5</sup>Section 4(5).

<sup>6</sup>Section 4(6).

under it (with any amendments which may be considered appropriate<sup>7</sup>), should operate according to their existing pattern in respect of this new type of interest.

### **Registered land**

9.7 More needs to be said, however, about land obligations affecting land registered under the Land Registration Act 1925. This Act makes provision for the registration of title to land itself, and the registration of adverse interests forms only a small part of its overall purpose. Once land is registered, moreover, it falls within the comprehensive regime provided by the Act, which thenceforth governs the way in which it can be dealt with, including the creation out of it of subsidiary interests. Our task, therefore, is to decide the position which land obligations should occupy within this regime as a whole.

#### **(a) What pattern to follow: our discussions with the Registry**

9.8 In considering this matter we have been greatly helped by representatives of H.M. Land Registry, and we record our gratitude to them.

9.9 The most fundamental matter at issue is the extent to which the creation of a new interest in land—the land obligation—need affect the existing rules and practices of the Registry. The Registry itself is naturally concerned, for several good reasons, that these things should be affected as little as possible. It is anxious fully to maintain its service in those areas of the country where registration is already compulsory and at the same time must keep in mind that it has been government policy for many years to extend those areas to the whole of England and Wales as soon as possible; and it is concerned lest these objectives be jeopardised by innovations which may divert some of its limited manpower in other directions.

9.10 We have already committed ourselves to recommending comprehensive reform of the law of positive and restrictive covenants according to the easement analogy.<sup>8</sup> But how far should this analogy be pursued in the particular context of the registered land regime? The question is important because pursuing it fully and to its logical conclusion would tend to add significantly to the Registry's burden of work. To explain this we must pause to indicate the way in which the existing regime applies to restrictive covenants on the one hand and to easements on the other.

9.11 *Restrictive covenants.*—In the normal way, restrictive covenants (which run, under the existing law, only in equity) appear solely upon the title of the land which is burdened by them: save in exceptional cases, no mention is made of them on the title to the benefited land.<sup>9</sup> Moreover, the

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<sup>7</sup>Section 16 of the Act gives the Lord Chancellor power to make rules, and an amendment made in Schedule 3 to the draft Bill will ensure that this power extends to rules needed in relation to land obligations.

<sup>8</sup>Paras. 4.14–4.20 above.

<sup>9</sup>*Ruoff & Roper on the Law and Practice of Registered Conveyancing*, 4th ed. (1979), pp. 16–17 and 347–348. As to entry of the burden of restrictive covenants, see Land Registration Act 1925, s. 50(1); and see s. 52.

Registry does not, before making an entry in respect of them, investigate their validity or purport to guarantee that they do in fact affect the land comprised in the title. The entry has the effect merely of recording that they are said to do so; and the question of whether and to what extent they really do so falls to be determined, in the last resort, from evidence outside the register.

9.12 *Easements*.—A different situation exists in regard to legal easements created by instrument<sup>10</sup> out of registered land. Such creation amounts to a registered disposition which must, if the easement is to amount to a legal interest, be completed by registration. Registration involves the entry of notice on the title of the servient land and the entry of the benefit of the easement on the title to the dominant land as appurtenant to that land.<sup>11</sup> Two entries are necessary, therefore, instead of one. Nor is this the end of the matter, because the register itself is the source both of the right to enforce and of the duty to comply with an easement: these things are not determined, as they are in the case of restrictive covenants, from outside the register. It follows that the Registry must, before giving effect to the registered disposition, ensure that the easement is valid, and that it does indeed benefit the land which it purports to benefit and burden the land which it purports to burden. Not only, therefore, must two entries be made: they must, in order to ensure that it is possible to guarantee the appurtenant right, be preceded by additional investigative work.

9.13 It thus becomes apparent that following the easement pattern in this respect would cause the Registry more work than following the restrictive covenant pattern. But neither the Registry nor we feel any real doubt that, if land obligations are to have all the characteristics of easements, the easement pattern should be followed for registration purposes, and this view is strongly supported by our consultees. The restrictive covenant pattern is an inherently inadequate one. It is not satisfactory, in the context of a system of land registration, that the registered title of a piece of land should omit all mention of substantial rights which devolve with it; nor that the true existence and validity of such rights, though they may be noted on the title of the burdened land, should depend upon extrinsic evidence. That this situation exists in relation to restrictive covenants may perhaps be justifiable on the grounds that they amount only to equitable interests and that the extent of the benefited land is often very difficult to ascertain from the relevant documents; but we have sought to ensure that neither of these things will be true of land obligations. The entry of both benefit and burden on the easement pattern, therefore, is the only course which could be conscientiously recommended as satisfactory in relation to land obligations, and the more detailed recommendations which follow are framed on this basis.

#### (b) Our recommendations

9.14 Just as we did not, in dealing earlier with the place of land obligations in the system of registration under the Land Charges Act 1972, attempt any

<sup>10</sup>Easements, unlike land obligations, may also arise in other ways (e.g., by prescription).

<sup>11</sup>See ss. 18 and 19 (especially proviso (c) to subsection (2)) and ss. 21 and 22 (especially proviso (c) to subsection (2)).

detailed analysis of that system, so here we shall not attempt a detailed description of the far more comprehensive regime which exists under the Land Registration Act 1925.

9.15 Under this heading, therefore, we shall confine ourselves to making recommendations on matters which are basic and fundamental to the place which land obligations are to occupy within that regime. Our intention is that, those questions having been settled, the 1925 Act shall be left to operate according to its established pattern: minor consequential amendments which need to be made as a result of our main recommendations are dealt with fully in the draft Bill<sup>12</sup> and we do not think it necessary to include a discussion of them in this report.

9.16 We think that we can do no better at this point than to reproduce the provision of the draft Bill which embodies our general intentions:

“Land obligations shall not be capable of being overriding interests for the purposes of the Land Registration Act 1925, but subject to that (and to the other provisions of this Act) and to rules made under that Act,<sup>13</sup> that Act shall have effect in relation to land obligations as it has effect in relation to easements created by an instrument”.<sup>14</sup>

(i) *Not overriding interests*

9.17 One element of this provision needs to be explained before we go any further: the reference to “overriding interests”. Overriding interests are certain interests<sup>15</sup> affecting registered land which may be binding upon purchasers of the land even if they are not recorded in any way on the register. Easements of some kinds are overriding interests, and this may be justifiable on the ground that inspection of the servient land is likely to reveal their existence or to point to its likelihood. But this is not true of land obligations, and we do not think they should be binding on a purchaser<sup>16</sup> unless they appear from the register.

(ii) *Neighbour obligations*

9.18 Our recommendations as to the creation of neighbour obligations in respect of which the servient and dominant titles (or, more accurately, the burdened and the benefited estates) are registered land<sup>17</sup> are inherent in what has already been said. They should be noted on the servient title and included as appurtenant rights on the dominant title.<sup>18</sup>

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<sup>12</sup>Schedule 3, para. 4.

<sup>13</sup>The rule-making power is in s. 144(1) of the Act and it is amended by the draft Bill so as to apply to land obligations.

<sup>14</sup>See footnote 10 to para. 9.12 above and clause 5(1) of the draft Bill.

<sup>15</sup>Set out in s. 70 of the 1925 Act.

<sup>16</sup>In the registered land context, purchaser means anyone who takes a disposition of registered land or of any legal estate or interest therein (including a lease) for valuable consideration: ss. 20 and 23.

<sup>17</sup>Registered land is defined in s. 3, para. (xxiv) of the 1925 Act in terms of particular estates in the land which are registered. If only one of the two estates is registered land, the registered land regime will of course apply so far as it can do so. As to burdened and benefited estates, see paras. 8.17–8.19 and 8.23 and 8.24 above.

<sup>18</sup>In accordance with the provisions (appropriately amended) of ss. 19 and 22.



9.19 These recommendations, however, are appropriate only for the normal case where a land obligation is created as a legal interest. In the case of easements, those which are merely equitable, though they may be noted on the title of the servient land, are not recorded on that of the dominant;<sup>19</sup> and we think the same should apply to equitable land obligations.<sup>20</sup>

(iii) *Development obligations*

9.20 As regards the burden of development obligations, our recommendations are exactly the same: both legal and (if any should exist) equitable development obligations should be noted on the registered title of the servient land.

9.21 Our recommendation about registration of the benefit of a development obligation, however, must necessarily be different. In cases where a development obligation is enforceable only by a manager, there can of course be no question of its benefit being registered, for there is no land to which it is appurtenant. Even if the manager happens to have land vested in him (and he need have none), the benefit of the development obligation is not appurtenant to that land: it could, in a sense, more accurately be said to be appurtenant to his managership. But most development obligations may be enforceable by all or some of those interested in other units comprised in the development land. At first sight it would seem obvious that the benefit of obligations which are enforceable in this way should be recorded on the titles of those other units. Unfortunately, however, the possible magnitude of this task precludes a requirement to that effect.

9.22 An example will demonstrate the point. Suppose there is a development with 200 units and that development obligations imposed on all these units are to be enforceable by all the other unit owners. The first unit is sold, but at that time there are no obligations on any of the other units so no entries of the benefit could be made. As the other units are sold off, however, the owner of the first gradually becomes entitled to enforce more and more sets of development obligations (which need not necessarily be exactly the same) imposed on more and more units. If these benefits had to be included on his title the Registry would have to make 199 separate entries, spread perhaps over a period of years. And it would have to do the same in respect of the 199 other plots in the development.

9.23 The Registry's task would clearly be an impossible one and we must therefore recommend that there should be no duty to register the benefit of a development obligation. This recommendation, though we regret having to make it, will not lead in practice to serious ill consequences. There is no real risk of any owner, or subsequent owner, of a unit in a development not knowing that he has the right to enforce development obligations. The

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<sup>19</sup>Land Registration Rules 1925, r. 257.

<sup>20</sup>These will fall to be noted on the servient title by virtue of s. 59 of the 1925 Act which deals, in subs. (2), with things which amount to land charges under the unregistered land system. Since both legal and equitable land obligations will amount to land charges, legal ones (which fall under ss. 19 and 22) need to be excluded from s. 59, and this the draft Bill does: see Schedule 3, para. 4(9).

right will not exist unless it is contained in the development scheme, and his advisers will always seek to ensure (for more reasons than one) that he has, or has access to, an authenticated copy of the scheme. There is slightly more risk of his not knowing the exact details of the obligations in respect of which his enforcement power exists: although the scheme must "make provision" for the system of development obligations it need not (though it is desirable that it should) contain their exact wording. This, however, is analogous to a problem which exists under the present law in regard to restrictive covenants imposed upon units in a development: even if there is a building scheme, an individual unit owner may not know precisely what covenants he can enforce against whom. The only solution lies in making arrangements whereby all the relevant details of the scheme itself, of the development obligations imposed in pursuance of it, and of any variations of the scheme or of those obligations are made available to current unit owners. If there is a manager, he would seem the most obvious person to charge with the task of keeping and producing the necessary records.

9.24 One further point should be made under this heading. Although the Registry's only duty in regard to development obligations will be to note them on the servient titles, so that in this respect it will necessarily be following the restrictive covenant pattern rather than the easement one,<sup>21</sup> there is no suggestion that the validity of the development obligations should (like that of restrictive covenants under the present law) be left to be determined from outside the register. It follows that the Registry will need to investigate and verify the obligations before it notes their existence on the Register and, inasmuch as their validity depends upon the development scheme, it will need to inspect and consider the scheme and any relevant variations.<sup>22</sup>

**(c) An alternative**

9.25 The foregoing recommendations are designed to give effect to the general decision that, in relation to the registration of land obligations, it is plainly right to follow the easement pattern rather than the restrictive covenant one. But we have already mentioned that the Registry have misgivings about the impact which, unless the recruitment of some additional staff were authorised, this decision might have upon their work. We fully understand the Registry's concern and we acknowledge its importance. If the restrictive covenant pattern were to be followed instead, very little extra work on the part of the Registry would be entailed. Land obligations would then appear only on the servient title and on a "non-guaranteed" basis, and investigation would not be required.<sup>23</sup>

9.26 Despite the fact that most land obligations would exist as legal interests, we see no reason in principle why the restrictive covenant pattern should

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<sup>21</sup>Paras. 9.11 and 9.12 above.

<sup>22</sup>Variations will of course be relevant only if they relate to the land obligations imposed or to be imposed in pursuance of the scheme. The Registry will have no concern with variations (or indeed with the schemes themselves) in so far as they relate to other matters.

<sup>23</sup>Some reduction in the Registry's work should indeed follow from the omission of indemnity covenants; see paras. 11.32-11.34 below.

not be followed;<sup>24</sup> and we think that this course would be acceptable if it were the only alternative to further postponement of the general reforms which this report advocates. For the reasons which we have already given, however, we should feel considerable regret if this expedient had to be adopted and, if it were, we should like to think that consideration could be given to our preferred recommendations on this matter being adopted at some future time.

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<sup>24</sup>Leases for a term not exceeding 21 years are not registrable under the Land Registration Act 1925 although they, too, give rise to legal interests. Some of them can be noted on the landlord's title and all "take effect as if" they were registered: s. 19(2).

## PART X

### THE RUNNING OF THE BENEFIT

10.1 One of the main objects of the scheme put forward in this report is to replace the present complex and unsatisfactory rules according to which the benefit and burden of a covenant run (or fail to run) with a logical and unified set of rules for land obligations. We turn first to the running of the benefit of a land obligation.

#### Neighbour obligations

10.2 Our recommendation in relation to neighbour obligations is that the benefit should, like that of an easement, be appurtenant to the dominant land and run with it on that basis.

10.3 Before going any further, we must refine a phrase used in the foregoing paragraph. Although easements are spoken of as being appurtenant to the dominant land, it is really more accurate to speak of them as being appurtenant to a particular estate in that land.<sup>1</sup> If this estate is the fee simple, as is normally the case, the distinction is in a sense academic, but in other cases it may be important. If, for example, an easement is granted solely to a lessee of the dominant land, it is appurtenant only to his leasehold estate: it is not appurtenant to any superior estate and no superior estate owner can benefit from it.<sup>2</sup> Land obligations must follow the same pattern, and this is why it is necessary that the instrument which creates a land obligation should identify (expressly or impliedly) the estate in the dominant land the owner of which is primarily entitled to enforce it. We have already recommended<sup>3</sup> a requirement to this effect and labelled the estate thus identified "the benefiting estate". The benefiting estate must of course be the estate to which the land obligation is appurtenant.

#### (a) The existing rules as to easements

10.4 The main rules about the passing of the benefit of an easement are summarised below. They are conveniently considered in conjunction with the provisions of section 62 of the Law of Property Act 1925 which provides that a conveyance of land (a phrase which has a very wide meaning,<sup>4</sup> and includes leases and many other types of disposition) shall be deemed to include (among other things) all easements appertaining or reputed to appertain to it.

(1) An easement which is already in full existence passes automatically on a disposition of the estate to which it is appurtenant. It is in the nature of an appurtenant interest that it should do this, and no help is needed from section 62 (save that it may serve to put the matter beyond doubt and avoid dispute as to whether passing was intended).

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<sup>1</sup>Cf. Paul Jackson, *The Law of Easements and Profits* (1978), p. 205.

<sup>2</sup>Except perhaps in some circumstances involving the premature ending of the lease, when the immediate landlord may sometimes benefit during the remainder of its term.

<sup>3</sup>Paras. 8.23 and 8.24 above.

<sup>4</sup>See Law of Property Act 1925, s. 205(1), paras. (ii) and (ix).

(2) The same seems to be true if the disposition is of some lesser estate granted out of the one to which the easement is appurtenant. Thus if the easement is appurtenant to the fee simple and the fee simple owner grants a lease out of his estate, it seems that the benefit of the easement passes to the tenant in the same way.<sup>5</sup> Here again, however, section 62 normally serves to put the matter beyond doubt.

(3) The rules stated above are in a sense academic in the overwhelming majority of cases because the benefit of the easement is nearly always included expressly in the disposition.

(4) It is doubtless true, however, that an easement may, on any such disposition, be expressly "held back" and so excluded from the disposition. If the disposition is a disposition of the whole of the dominant land for the estate to which the easement is appurtenant, this would amount to extinction of the easement because an appurtenant interest cannot exist on its own.

(5) In the case of easements, section 62 has an important function in that it may in certain circumstances serve to bring into existence as a full easement something which did not exist as such before the disposition. If, for example, a landowner leases part of his land to a tenant, then makes an informal arrangement with the tenant allowing him to use a path over the retained land, and subsequently sells the leased part of the land to the tenant outright, section 62 will imply words in the conveyance which may well serve to elevate the informal arrangement to a full easement appurtenant to the land of which the tenant is now the owner.

#### **(b) Application of those rules to land obligations**

10.5 The rules stated in sub-paragraphs (1)–(4) in the preceding paragraph should apply to land obligations in exactly the same way as they apply to easements. The rule stated in sub-paragraph (5), however, is not appropriate: in our view the nature of land obligations is not such that they could or should come into existence through the operation of general words such as those implied by section 62. Although paragraph 3(3) of Schedule 3 to the draft Bill amends section 62 so as to make it refer to land obligations in the same way as to easements, the effect of this reference will be much more limited because our earlier recommendations about the creation of land obligations will ensure that they cannot come into existence without express mention.

10.6 Our recommendations about the running of the benefit of a neighbour obligation may therefore be summed up, in the words of the draft Bill,<sup>6</sup> as follows:

"A neighbour obligation is appurtenant to the benefiting estate in the dominant land (in like manner as an easement) and accordingly the benefit of the obligation is capable of passing (expressly or by operation of law) to any person who, in relation to the whole or part of the dominant land, claims under or through, or is a successor in title of, the person primarily entitled to enforce the obligation or claims under or through such a successor."

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<sup>5</sup> *Skull v. Glenister* (1864) C.B. (N.S.) 81.

<sup>6</sup> Clause 6(1).

### **Development obligations**

10.7 We have already recommended<sup>7</sup> that it should be possible for a development scheme to create any one of several different situations with regard to the enforceability of development obligations imposed in pursuance of it. Subject to certain exceptions applying to particular kinds of obligation, an obligation may be:

- (a) enforceable by a manager,
- (b) enforceable "for the benefit of the development land as a whole", or
- (c) enforceable "for the benefit of only a specified part of the development land".

Normally, enforceability as in (a) may be combined with enforceability as in (b) or (c).

10.8 We must now spell out the consequences of a development obligation being enforceable in these several ways.

10.9 In so far as such an obligation is enforceable by a manager, we recommend that it should simply be enforceable by the manager for the time being. If there is a change of manager, the old manager's functions will pass automatically to the new one<sup>8</sup> and the latter will thus become entitled to enforce development obligations in future.<sup>9</sup>

10.10 The other two categories of enforceability—"for the benefit of the development land as a whole" or "for the benefit of only a specified part of the development land"—will be chosen if and in so far as it is desired to make obligations mutually enforceable (like restrictive covenants imposed through a building scheme under the present law) amongst the owners of the parcels of land (plots, flats, or whatever they may be) comprised in the development scheme. The first of the two categories connotes enforceability amongst all such owners, the second connotes enforceability amongst a particular section of them.

10.11 We therefore recommend that development obligations which fall into these categories should be enforceable just as if they were neighbour obligations appurtenant to every other parcel of land comprised in the development land, or comprised in the specified part, as the case may be.

10.12 For the reason given earlier in relation to neighbour obligations,<sup>10</sup> we must refine the phrase "appurtenant to every other parcel of land" which we used in the preceding paragraph. Strictly, obligations must be appurtenant, not to land, but to estates in land. To what estates should these obligations be treated as appurtenant? The answer is not as easy as one might suppose. Most development schemes will be made in preparation for the parcels of land comprised in them to be sold off freehold, but this will not necessarily be so. Development schemes may cover a variety of situations, as we have

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<sup>7</sup>Paras. 7.44 to 7.47 above.

<sup>8</sup>Para. 7.28 above.

<sup>9</sup>The right to take action in respect of past contraventions may remain with the old manager: see para. 7.29 above. See also paras. 19.5 and 19.6 below.

<sup>10</sup>Para. 10.3 above.

already noted, and they are not confined to cases where the parcels are to be sold off, let alone to cases where the parcels will all be held for the same estate. A satisfactory solution to this problem may nonetheless be found if we remember that every parcel of land comprised in a development scheme will almost invariably, in practice, have the *burden* of at least one development obligation imposed in pursuance of the scheme, and that the instrument which imposes it will have to identify (expressly or impliedly) the estate in that parcel which is the burdened estate.<sup>11</sup> It is in fact the same estate which we are seeking now to designate as the estate to which the benefit of a development obligation should be treated as appurtenant.

10.13 The recommendation made in the last paragraph but one should therefore be recast in the following form: development obligations which fall into those (mutually enforceable) categories should be enforceable as if they were neighbour obligations appurtenant to any *estate* in the other parcels of land comprised in the development land (or in the specified part) *which is the burdened estate in relation to any development obligation imposed on that parcel in pursuance of the development scheme.*

10.14 There is in theory the possibility that some parcels comprised in the development land will not be burdened by any development obligations and in that case the owners of those parcels would have no right to enforce obligations imposed on other parcels. This result is arguably right, but would in any case be extremely rare and could easily be avoided by ensuring that all the relevant parcels were burdened with a development obligation of some kind.

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<sup>11</sup>Paras. 8.17–8.19 above.

## PART XI

### THE RUNNING OF THE BURDEN

11.1 Having dealt, in the last part of this report, with the running of the benefit of a land obligation, we deal in this part with the running of its burden. Our general approach, again, is to take the law of easements as our analogy, but since we shall have to depart from that law at several points we think it best to make our recommendations self-contained.

11.2 We emphasise that we are dealing in this part of the report only with matters relating strictly to the running of the burden. We are not dealing with the question of who is liable for a particular contravention of a land obligation: that question is considered in the next part of this report. Still less are we dealing here with the remedies available for enforcement—a matter which is considered in Part XIII.

11.3 Since neighbour obligations and development obligations are conceptually the same so far as the burden is concerned, we shall not need to distinguish between the two in the explanation which follows.

#### The principles

11.4 We do, however, have to draw a distinction between two other classes of land obligation: restrictive and access obligations on the one hand, and other obligations on the other. What we are concerned with in this part of the report is the question of who, among the many different kinds of people who may become concerned with the servient land (whether as freeholders, lessees, mortgagees, occupiers or otherwise) after the creation of the land obligation, should be bound by it. And the two classes of obligation differ from one another in two ways which are very relevant in answering this question.

11.5 In the first place, the former of the two classes of obligation does not require the taking of positive action or the expenditure of money, so that compliance (unlike compliance with the second class) is not in itself onerous. It is therefore reasonable that a very wide class of person should be bound. In the second place, obligations in the latter class are complied with even if only one person complies with them: provided that *someone* takes the action, or pays the money, compliance is complete. But obligations in the former class are not complied with unless everyone complies. It is therefore necessary, as well as reasonable, that the widest possible class of person should be bound.

#### (a) Restrictive and access obligations

11.6 With these considerations in mind, the principle which we recommend in regard to restrictive and access obligations is that they should be binding:

- (a) upon everyone who is the owner of any estate or interest in the servient land or any part of it, and also
- (b) upon everyone else who is in occupation of the servient land or any part of it.



11.7 We refer to this as a “principle” because it is subject to the important considerations dealt with later in this part of the report under the heading, “Exceptions”.

(b) **Other land obligations**

11.8 For the reasons already given, the class of those bound by other land obligations must be much smaller. It must comprise a sufficient range of substantial “targets” to make the obligations real and valuable from the point of dominant owners; but it must not include anyone whom it would be unfair to burden with their performance.

(i) *Freeholders*

11.9 Those who have an interest in the servient land, or part of it, as freeholders must obviously be primary members of the class. Even they, however, should not be bound unless their interest is such as to give them a right to possession of the land.

11.10 A right to possession is not to be confused with a right to occupy. Thus “possession” includes receipt of rents and profits,<sup>1</sup> so a freeholder does not cease to have a right to possession merely because he has leased the property to a tenant. But the limitation we propose does have the effect of excluding cases where the interest is one in remainder or in reversion. If, for example, the servient land is settled on A for life and then to B absolutely, B has technically a freehold interest, but during A’s lifetime it does not entitle him to possession and we do not think he should be bound by a land obligation because he has it.

(ii) *Long leaseholders*

11.11 With the same limitation (that their interests should be such as to give them a right to possession), we recommend that those who have long leases of the servient land, or any part of it, should also be bound. And we recommend that, for this purpose, a lease should be considered “long” if, and only if, it is for a term of more than 21 years. Our recommendation on this point is in a sense arbitrary; but this is inevitable and the dividing line of 21 years is well recognised for legal purposes.<sup>2</sup>

(iii) *Owners of the burdened estate*

11.12 We recommend that owners of the burdened estate in the servient land, or in any part of it, should also, and always, be within the class. The need for this recommendation is best explained by an example. Suppose that a land obligation to carry out works is entered into by a tenant who has a 20 year lease of the servient land. The land obligation will not bind the owners of any interests superior to his (for reasons given under the heading, “Exceptions”, below<sup>3</sup>), so unless it bound his interest it would bind nobody at all and would be nullified as soon as it was created. The recommendation

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<sup>1</sup>Law of Property Act 1925, s. 205(1).

<sup>2</sup>In, for example, the Landlord and Tenant Act 1954, Part I, and the Leasehold Reform Act 1967.

<sup>3</sup>Para. 11.16 below.

just made is therefore logically necessary, but in practice the burdened estate will almost invariably be a freehold or a long leasehold and its owners will therefore be bound by virtue of one or other of the recommendations already made.

(iv) *Mortgagees*

11.13 The final category who should fall within the class of those bound consists of mortgagees of the servient land or any part of it. According to our later recommendations, mortgagees will be liable for a contravention of a land obligation only in exceptional circumstances, but the principles of land law within which we are operating require that their interests should always be bound.

**Exceptions**

11.14 In the foregoing paragraphs of this part of the report, we have described the classes of person who should be bound by a land obligation. But there are circumstances in which a person, though falling within those classes, should not be bound. We deal with these circumstances under this heading.

(a) **Priority**

11.15 The first exception is a major and important one. We recommend that no one should be bound, as the owner of an interest in the servient land, if (under the rules of land law which govern the priority of one interest over another) his interest has priority over the land obligation. The concept of priority is well known to lawyers and it has several ramifications. These are illustrated in the following paragraphs.

11.16 The most obvious example is one which was mentioned briefly a few paragraphs ago.<sup>4</sup> We recommended in an earlier part of this report<sup>5</sup> that the instrument creating a land obligation should identify (expressly or impliedly) the burdened estate in the servient land—that is to say, the legal estate in the servient land which enables the creator of the land obligation to create it. In at least nine cases out of ten, this will simply be the legal fee simple, but it could be a leasehold estate. If, for example, a sub-tenant of the servient land creates a land obligation, his leasehold estate will be the burdened estate, and neither superior leasehold estates nor the superior freehold estate will be burdened estates. It must follow that no owner of those superior estates should be bound by the land obligation. The interests belonging to such owners have priority to the obligation. This, therefore, is one result secured by our present recommendation.

11.17 Another result has to do with the time sequence in which interests are created. Even if an interest is not superior to the burdened estate, its owner should not be bound by a land obligation if, at the time when he acquired his interest, the land obligation was not binding on the person from whom he acquired it. Suppose that a freeholder grants a derivative interest

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<sup>4</sup>Para. 11.12 above.

<sup>5</sup>Paras. 8.17–8.19 above.

(perhaps a lease or a mortgage) and subsequently creates a land obligation as a burden on his land. The freehold will be the burdened estate, but the obligation will not bind the derivative interest holders because their interests have priority to it.<sup>6</sup>

11.18 Our main recommendation does not in terms cover an analogous case which ought to be covered. If a person is bound by a restrictive or access obligation merely because he is an occupier of the servient land, he has no interest in the land and so no question of its "priority" can arise. We nonetheless recommend specifically that he should not be bound if his right to occupy derives from a person who was not himself bound by the obligation at the time when the right was granted.

11.19 A further example of our main recommendation is provided by a case in which an interest has been accorded special priority by agreement. Suppose that the owner of an estate already burdened by a land obligation wishes to raise money by a mortgage. The land obligation is an onerous one and its existence reduces the value of the security so that the mortgagee is willing to make only a reduced loan. There would be nothing to prevent the dominant owner (if he were willing, for some special reason, to do so) from agreeing expressly that the mortgage should have priority to the land obligation. The land obligation would then no longer reduce the value of the mortgagee's security, because he could sell free of it if the need arose.<sup>7</sup> but it would otherwise remain fully effective.

11.20 It is appropriate also to note that the rules about priority incorporate such things as fraud and estoppel, which may operate in some circumstances to disturb the priorities which would otherwise exist.

#### **(b) Registration**

11.21 We have already made our recommendations for the registration of land obligations, under either the Land Registration Act 1925 (in the case of registered land) or the Land Charges Act 1972 (in the case of unregistered land).<sup>8</sup> The recommendations made earlier in this part of the report, about those who should be bound by a land obligation, must of course be subject also to the provisions of these Acts. Their provisions could perhaps be regarded as dealing with "priorities" and thus as falling under the preceding sub-heading, but they are sufficiently distinct and important to deserve separate mention. Their consequences, when applied to land obligations, may be briefly summarised in the following way.

11.22 First of all, registration or non-registration cannot of course affect the position of the person who actually created the land obligation. As creator, he will always be bound so long as he retains the burdened estate. Registration

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<sup>6</sup>Moreover, if the derivative interest holder is a mortgagee he could (in exercise of his power of sale) sell even the burdened estate free of the land obligation: Law of Property Act 1925, s. 104(1). Note, however, that if the derivative interest is one which should be registered priority may be lost through non-registration.

<sup>7</sup>Law of Property Act 1925, s. 104(1).

<sup>8</sup>Part IX of this report.

is relevant only to the position of people who subsequently acquire that estate or an interest deriving from it. Broadly, the effect of non-registration upon such people depends on whether they acquire their interests for value or as a gift. If they give value for their interests, they will take them free from an unregistered land obligation. (They will also take free from a land obligation which is registered if they have obtained an official search certificate which fails to reveal it.) If they do not give value, non-registration has no effect: they will be bound by a land obligation whether it is registered or not.

11.23 All these results follow from the application to land obligations of the general principles of law governing registration. Another such result may be worth mentioning. Once non-registration of a land obligation has enabled someone to acquire an interest in the servient land free from the obligation, no subsequent owner of that interest (and no owner of an interest subsequently derived from it) can be bound by the obligation even if the failure to register is made good in the meantime. This must be so both in fairness and in logic, because an interest cannot be said, in any meaningful sense, to be held free of something unless it can be disposed of free of that something.

**(c) Contrary provision**

11.24 Finally, we recommend that the principles set out earlier in this part of the report (as to who is bound by a land obligation) should give way to any contrary provision made in the instrument which creates the land obligation, or in any subsequent variation of the terms of that instrument which may have been validly made, which operates to restrict the class of persons who are to be bound by it.

11.25 We think it right to preserve the parties' freedom of contract in this way, but we do not anticipate that the facility will often be used. An example might be a case where a freeholder agreed to impose on his land a reciprocal payment obligation provided that it should be framed so as not to bind any leasehold estates in the servient land, thus leaving it open to him to grant long leases of that land free of the obligation.<sup>9</sup>

**A special provision for managers**

11.26 The foregoing recommendations are not entirely adequate, as they stand, to determine exactly who is bound by a development obligation which is enforceable by a manager.

11.27 The problem may be illustrated in this way. Suppose that half a dozen existing owners of separate unregistered freehold properties (plots, houses, flats or whatever they may be) club together and set up a development scheme which provides for a manager who is to have the power of enforcing development obligations; and that they then impose these obligations on their

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<sup>9</sup>Even if the obligation did bind long leaseholders, he could of course covenant to indemnify them against it, but that would be rather less satisfactory to them.

properties in the proper manner. One of them, however, has already created an equitable charge on his property and his charge is registrable<sup>10</sup> but has not in fact been registered: does the chargee hold his interest, as against the manager, free of the land obligations or not? If the obligations had been imposed in favour of a dominant landowner, the answer would be clear. Assuming the dominant owner to have given value for them, the charge would void against him as the purchaser of an interest in the land<sup>11</sup> and the chargee would therefore be bound by the obligations. The position of the manager ought in our view to be exactly the same, but something is needed to make it so because he is not, strictly speaking, a purchaser. We therefore recommend that for this purpose a manager should be deemed to have acquired the benefit of development obligations enforceable by him at the time of their creation and for valuable consideration.

### Possessory titles

11.28 It is appropriate to consider briefly the case where someone takes adverse possession of the servient land, or part of it. Under the Limitation Act 1980, the title of the person dispossessed is extinguished if the adverse possession continues for a prescribed period which is normally twelve years. If the person dispossessed is the freeholder, the adverse possessor thus acquires an unchallengeable freehold title at the end of the twelve year period. If the person dispossessed is a leaseholder, the twelve years' adverse possession serves only to give him the leasehold title; but if he continues in possession for twelve years after the expiry of the leasehold term he will acquire an indefeasible title to the freehold as well.

11.29 How far, then, is the adverse possessor bound by a land obligation?

11.30 We deal first with the case where possession has continued long enough to extinguish the title of a freeholder or leaseholder, and thus to give an indefeasible freehold or leasehold title to the adverse possessor. In that event the recommendations already made will ensure that, since he is the owner of an estate in the land, he will be bound by any land obligations affecting it. Under the present law, a person who has acquired title through adverse possession is bound by easements and restrictive covenants;<sup>12</sup> and it is clearly right that the same result should follow in the present context.

11.31 We now turn to the position of the adverse possessor while the relevant period is running but before it is complete. During this time he does in fact have a title: this title is defeasible by the true owner, but it does nonetheless exist and is good against the rest of the world. However, when one asks, what is this title, and what is it a title *to*?, the general law does not give a very clear answer.<sup>13</sup> It might seem probable that the defeasible estate which the adverse possessor has is an estate equivalent to that of the

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<sup>10</sup>Under Land Charges Act 1972, s. 2(4), as a Class C land charge.

<sup>11</sup>By virtue of Land Charges Act 1972, s. 4(5).

<sup>12</sup>There is no certainty as to whether someone who acquires title to the *dominant* land in this way can *enforce* an easement or covenant; and this uncertainty will therefore be perpetuated in relation to land obligations: see Part X of this report. Since the difficulty is one of general principle we have not sought to resolve it in this particular context.

<sup>13</sup>See, e.g., the discussion by Bernard Rudden, "The Terminology of Title", (1964) 80 L.Q.R. 63.

person dispossessed, so that if the latter is a leaseholder the adverse possessor's defeasible estate is only a leasehold one. But the better view seems to be that the defeasible estate which the adverse possessor acquires is always a freehold estate from the beginning.<sup>14</sup> If the land is leasehold he will not acquire an indefeasible freehold title until after he has acquired an indefeasible leasehold one (if indeed he does so at all), but he has from the beginning a freehold title good against everyone except those who have a better title. It follows that until the original freehold title is extinguished, there will be two freehold titles to the land. As a leading textbook<sup>15</sup> puts it:

"[The adverse possessor] has, in fact, a legal estate, a fee simple absolute in possession. But so also has [the owner], until such time as his estate is extinguished by limitation."

On this basis the adverse possessor has from the start an estate which is substantial enough for him to be bound, according to our earlier recommendations, by any kind of land obligation. This will be so even if the person whom he has actually dispossessed is a tenant for only a short term. Those who were previously bound by the land obligation will also remain bound until such time as their titles are extinguished. This result seems to us right.

### The position of the original creator

11.32 We should finally make clear a point which is implicit in what we have already said: namely, that we are making a deliberate departure from the existing law about covenants, under which the original covenantor normally remains bound by the covenant, and liable for any breaches of it, even after he has parted with all interest in the burdened land. The original creator of a land obligation will not remain bound by it in these circumstances. This is a result which follows logically from the nature of a land obligation as an easement-like interest in land and, in view of the strength of the remedies available for its enforcement,<sup>16</sup> we think that it would be unnecessary as well as harsh if the original creator were to continue bound.

11.33 It would of course remain open to the parties, when creating a land obligation, to enter into a separate and distinct personal covenant to the same effect as the obligation.<sup>17</sup> This covenant, even if restrictive, would in no sense run with the land;<sup>18</sup> but it could serve, like any other personal covenant, to impose a perpetual liability on the covenantor towards the covenantee. Such liability would then be a liability on the covenant, not on the land obligation. It would no doubt be possible for us to recommend express legislative provisions to make such personal covenants void, but at the moment we think that there is no sufficient case for interfering with freedom of contract in this way.

<sup>14</sup>R. E. Megarry and H. W. R. Wade, *The Law of Real Property*, 4th ed. (1975), pp. 1006-1007 and 1028-1029.

<sup>15</sup>R. E. Megarry and H. W. R. Wade, *op. cit.*, p. 1007.

<sup>16</sup>See Parts XIII and XIV of this report.

<sup>17</sup>The covenant would have to be separate and distinct because of the recommendation made in para. 8.15 above.

<sup>18</sup>Paras. 24.2-24.38 below.

11.34 If personal covenants of this kind were utilised, however, they would inevitably generate indemnity covenants imposed in ever-extending chains on every disposal of the property in the way which we have earlier described,<sup>19</sup> with consequent lengthening of conveyancing documents and unsatisfactory results when the chains began to break. We count it as an important advantage of our scheme that such chains of indemnities are unnecessary for land obligations, and it would be most regrettable if they were to re-appear in aid of a device which is itself unnecessary.

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<sup>19</sup>Paras. 3.32–3.34 above.

## PART XII

### LIABILITY FOR PARTICULAR CONTRAVENTIONS

12.1 In the preceding part of this report we dealt with the running of the burden of a land obligation. The recommendations made there will determine the question of who, at any given time, is bound by such an obligation. Those recommendations lay the groundwork for, but do not by themselves provide, the answer to another question: who is liable for a particular contravention of the obligation? In dealing with that question we have once again to distinguish between different classes of land obligation.

#### **Positive, reciprocal payment and reimbursement obligations**

12.2 Positive, reciprocal payment and reimbursement obligations<sup>1</sup> all require some positive action to be taken if they are to be complied with. Mere inaction therefore amounts to a contravention, and if a number of people are bound by the obligation they must all be inactive for a contravention to occur. There would be no way of imposing liability for any particular contravention on any particular one of them (even if it were desirable to do so).

12.3 Accordingly we recommend that an obligation of any of these kinds should be enforceable in respect of any contravention of the obligation against every person bound by the obligation at the time when the contravention occurs.

#### **Restrictive and access obligations**

12.4 Restrictive obligations are different, however, because in their case inaction amounts to compliance and a contravention can come about only through the taking of positive action. Much the same is true of access obligations.<sup>2</sup> In the case of restrictive and access obligations,<sup>3</sup> therefore, the person who is guilty of a contravention will always identify himself by this act and we recommend that it is he, and only he, who (being bound by the land obligation) should be liable for the contravention which he commits. The primary remedy for such a contravention will be an injunction, and it is obvious that this remedy need not, and cannot be, sought against anyone but the person whose act was a contravention.

12.5 We must say a little more, however, about the conduct which amounts to a contravention. In this connection we have two recommendations to make.

12.6 The first serves to widen to some degree the kind of conduct which gives rise to liability. Restrictive covenants today are commonly framed in such a way as to forbid not only the doing of the forbidden thing itself but also the "permitting or suffering" of that thing. This enables a person who has the benefit of the covenant to take action against anyone who (being

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<sup>1</sup>For a description, see paras. 6.6 and 6.10 above, and Schedule 1 to the draft Bill.

<sup>2</sup>Contravention of an access obligation should be taken as occurring through any conduct restricting or denying the access which ought to be afforded.

<sup>3</sup>For a description, see paras. 6.6 and 6.10 above, and Schedule 1 to the draft Bill.



bound by it) permits or suffers someone else to do the forbidden thing—even if that someone else is not himself bound. It seems to us understandable and justifiable that liability should be widened in this way, and we see no reason why it should not be similarly widened in relation to land obligations of the kind with which we are now concerned. We therefore recommend that a restrictive or access obligation should be enforceable against any person bound by it in respect of any conduct by that person which amounts to doing the prohibited act, or to permitting or suffering it to be done by another person (whether or not that other person is bound by the obligation). The result, in effect, is that all such land obligations will automatically be of the wide “permit or suffer” type—unless the parties creating them stipulate otherwise under the power mentioned below.<sup>4</sup>

12.7 The second recommendation is two-fold. We think it should be made clear that “conduct” for this purpose includes omissions as well as acts (because omissions may constitute “permitting or suffering”), and that the acts or omissions of a person’s employees or agents, acting as such, should be treated as his own. This, too, is an echo of the existing law of restrictive covenants.

#### **An exception for mortgagees**

12.8 We think it right to recommend one general exception to the rules proposed above. If the servient land is mortgaged, the mortgagee will not normally be in a position to monitor the observance and performance of land obligations, nor will he be able directly to take the action which may be necessary to comply with them. We therefore recommend that he should not be liable unless, at the relevant time, he has actually taken possession of the land or has appointed a receiver. If either of these two events has occurred the mortgagee may be taken to have assumed control of the land and we think that in these circumstances (but not otherwise) he should, if bound by a land obligation, be liable for its contravention.

#### **“Continuing” contraventions**

12.9 Some breaches of covenant under the existing law (whether the covenants are made between freeholders or between landlord and tenant) are known as continuing breaches. This is because the covenants are so framed that any breach of them recurs continually for so long as the wrongful state of affairs goes on. For example, a covenant forbidding premises to be used in a particular way is not only broken when the forbidden use begins but broken anew at every moment for which it continues. It will similarly be possible for land obligations to be so framed that contraventions may be continuing ones.<sup>5</sup>

12.10 This may be relevant in important ways to questions of liability. In accordance with the recommendations already made, a person will be liable for a contravention of a land obligation only if, at the time of the contravention, he was bound by it; and he will be bound by it only if he was, at

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<sup>4</sup>Para. 12.14 below.

<sup>5</sup>Any possible doubt about this is dispelled by the words in brackets in clause 8(4) of the draft Bill.

that time, the owner of a relevant interest in the servient land. To put the matter at its simplest, if a freehold house changes hands the new owner will not be liable for contraventions occurring under the old ownership. But, of course, if the contravention is a continuing one, and it continues from the old ownership into the new, the new owner will be liable because (on a true analysis) contraventions will have occurred during his ownership. This result must follow from the general law about continuing breaches.

12.11 Continuing contraventions of a kind discussed in the two preceding paragraphs may appropriately be called "true continuing contraventions". In our view, however, certain other contraventions, though they would not be classed as continuing ones under the general law, should in justice be treated as continuing for the purposes of determining the liability of new owners. Certain artificialities would thus be removed. For example, the breach of a covenant to keep a house properly painted would be a continuing one under the existing law but the breach of a covenant to paint a house in 1990 would probably not be a continuing one once 1990 had passed. Similarly, although the breach of a covenant not to use premises as a public house would be a continuing one, the breach of a covenant not to change their use to that of a public house would probably not. We therefore recommend that the contravention of a land obligation should be treated as a continuing one so long as either:

- (a) the obligation remains capable of being complied with apart from any requirement as to time, or
- (b) the contravention continues adversely to affect the enjoyment of the dominant land (or, in the case of a development obligation, the development land) or part of it.

In this way there will be added to the class of true continuing contraventions a further class which may be called "deemed continuing contraventions".

12.12 There will of course be many contraventions which fall outside these two classes. If, for example, a servient flat owner has failed, for some period during the winter months, to comply with a land obligation requiring him to supply heat through central heating to a dominant flat owner, and the servient flat is sold to a new owner during the summer, the new owner should clearly not be liable for the contravention because its effect is by then wholly spent.

12.13 We emphasise that our recommendations about deemed continuing contraventions are made only for the purpose already stated: there is no suggestion that they should be assimilated to true continuing contraventions in any other respect. In particular, there is no intention to extend the period for which a deemed continuing contravention may be actionable. Rules about the limitation of actions, and analogous rules affecting the grant of equitable remedies, should apply in just the same way as they would otherwise do.<sup>6</sup> In this respect there will be a distinction between true continuing contraventions and deemed ones.

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<sup>6</sup>Clause 8(5) of the draft Bill.

### **Contrary provision**

12.14 We have already recommended<sup>7</sup> that the rules as to who is bound by a land obligation should give way to any restrictive provision made by the terms of the instrument creating the obligation or by any subsequent variation of those terms. For similar reasons we now recommend that any such provision should be capable of restricting the circumstances in which an obligation is to be enforceable, in accordance with the rules proposed in this part of the report, against a person.<sup>8</sup>

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<sup>7</sup>Paras. 11.24 and 11.25 above.

<sup>8</sup>For an example, see para. 12.6 above. It would also be possible, for instance, to provide that an obligation requiring repairs to be carried out should not be enforceable against a person unless he had had notice of the need for repair.

## PART XIII

### REMEDIES FOR CONTRAVENTION (INCLUDING CONTRAVENTION OF MAKERS' AND MANAGERS' OBLIGATIONS)

13.1 Having dealt, in the two preceding parts of this report, with the questions of who is bound by a land obligation and who is liable for particular contraventions of it, we now consider remedies.

#### Scope and arrangement of this part

13.2 This part of the report differs from the preceding two parts in that it deals not only with land obligations but with makers' and managers' obligations under a development scheme. The nature of these latter obligations is explained in Part VII of this report. In the event, the remedies we recommend in respect of them are the same as those recommended in respect of land obligations and we deal with them all together.

13.3 This part does not deal, however, with the particular remedies available in cases where those who created a land obligation have exercised the option available to them and made it a charge on the servient land. This matter is best considered separately and will therefore be dealt with in the next part of this report.

13.4 This part begins by referring to the rules already recommended to determine who is liable; it then states our general recommendations about the remedies available against those liable; it then deals with certain exceptions and special provisions; and it ends by putting forward a scheme to assist in discovering the identity of persons potentially liable.

#### Who is liable: rules already recommended

13.5 The remedies recommended in the paragraphs which follow are available only against those who are liable for the particular contravention in question.

13.6 So far as land obligations are concerned, our recommendations on this subject are in Part XII of the report.

13.7 As regards managers' obligations, liability normally rests with the current manager; but if a contravention took place before a change of management it is possible that liability in respect of it may remain with the old manager.<sup>1</sup>

13.8 It is inherent in the nature of makers' obligations that they are enforceable only against the person who assumed them<sup>2</sup> (or, if he is an individual, his personal representatives on his death).

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<sup>1</sup>Para. 7.29 above, and see paras. 19.5 and 19.6 below.

<sup>2</sup>This includes anyone who has assumed existing obligations under the facility recommended in para. 7.42 above.

### Remedies against those liable: in general

13.9 We recommend that the following remedies should be available in the event of a contravention (or, in the case of an injunction, a threatened contravention) of a land obligation, manager's obligation or maker's obligation:

- (a) proceedings for an injunction (including a mandatory injunction) or other equitable relief;
- (b) an action for sums due under the obligation; and
- (c) an action for damages (whether in respect of pecuniary or non-pecuniary kinds of damage).

13.10 The preceding paragraph lists the remedies which are in principle to be "available" in the event of a contravention. The equitable remedies referred to in (a) above are by their nature discretionary. As regards the others, it will of course be necessary to decide, on the facts of each case (and having regard to the nature both of the obligation and the contravention), which remedies should be sought; and, if the matter comes to court, it will be necessary for the court to decide which remedies should be granted.

13.11 We think it would be both impossible and undesirable to lay down in advance any immutable rules about entitlement to particular remedies in particular circumstances. Certain obvious points may be made. Contravention of an obligation involving payment will normally evoke an action for the sums due. A restrictive land obligation will normally be enforced by an injunction, though an action for common law damages might sometimes be appropriate as well, or instead. A positive land obligation will normally be enforced by means of an action for damages,<sup>3</sup> though a mandatory injunction might sometimes be sought. But the appropriateness of particular remedies in particular cases, the application of the rules about remoteness of damage, and the heads under which damages should be awarded—these are questions to be decided, in the last resort, by the courts through the application of existing and developing legal principles.

13.12 So far as heads of damage are concerned (and by "heads" we mean the different types of damage resulting from a contravention in respect of which damages may be claimed) we emphasise our express recommendation, made above, that damages should be capable of being awarded not only for pecuniary damage but also for non-pecuniary damage such as personal injury.<sup>4</sup> This reference to personal injury may seem unexpected in the context of land law, but we think it only right that the courts should be free to award damages for such injury if it is caused by the contravention.<sup>5</sup>

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<sup>3</sup>Or by self-help, followed by an action for the cost: see paras. 13.28–13.31 below.

<sup>4</sup>The remedy of damages for "mental distress" (disappointment, anxiety, vexation, worry, etc.) is currently being developed by the courts. Our recommendations would not preclude the award of such damages by the courts if the circumstances were such as to justify it.

<sup>5</sup>Suppose, for example, that the servient owner is bound by an obligation to maintain a structure which is or involves the dominant owner's business. He fails to do so and the structure collapses, causing personal injury to the dominant owner, as well as doing damage to his business equipment and resulting in loss of business profits. Damages for all these things would be within the scope of our recommendation.

13.13 We recommend, however, that one particular remedy should not be available: that of re-entry upon the servient land. We explained earlier<sup>6</sup> that it is apparently possible to reserve a right of re-entry exercisable on breach of a covenant. But in view of the wide range of remedies proposed above we think it would be unnecessary, and potentially oppressive, to allow it in the case of a land obligation.

**Exceptions and special provisions**

13.14 We now make various recommendations designed to modify or augment the general principles just stated.

**(a) Contrary provision**

13.15 In considering the subject of contrary provision, we shall deal separately with land obligations on the one hand and managers' and makers' obligations on the other. We shall then add some further general comment.

*(i) Land obligations*

13.16 As we have done elsewhere in this report, we recommend that the principles just stated should give way to any restrictive provision made by the terms of the instrument creating the land obligation or any subsequent variation of it. It should be possible in this way to restrict a person's liability for a contravention. Examples would include an exclusion of one particular kind of liability: for common law damages;<sup>7</sup> or of damages under a particular head;<sup>8</sup> or perhaps of damages beyond a specified amount.

*(ii) Managers' and makers' obligations*

13.17 An analogous recommendation about liability for managers' and makers' obligations has in fact been made already. In an earlier part of this report we recommended that it should be possible for a development scheme (or any variation thereof) to contain a provision to the same effect as that described in the preceding paragraph.<sup>9</sup>

*(iii) Further comment*

13.18 Inasmuch as the foregoing recommendations would permit the exclusion of liability for specified kinds of damage, or for damages beyond a certain amount, it would permit (among other things) the exclusion or restriction of liability for personal injuries even if this resulted from a contravention involving negligence.

13.19 We are conscious that different views might be held about the desirability of allowing this. In particular, the Unfair Contract Terms Act 1977 is designed, among other things, to prevent the exclusion or restriction, by contract term, of liability for death or personal injury. But the relevant provisions of that Act<sup>10</sup> are confined to things done by a person in the course

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<sup>6</sup>Para. 3.39 above.

<sup>7</sup>Since breach of a restrictive covenant does not give rise to liability for such damages under the existing law (except as between the original parties) such liability might occasionally be excluded in relation to restrictive land obligations.

<sup>8</sup>An example is given in para. 13.18 below.

<sup>9</sup>See para. 7.51 above. The recommendation in question is the one contained in sub-para. (b) of that paragraph. The one contained in sub-para. (a) is analogous to one made in relation to land obligations in para. 12.14 above.

<sup>10</sup>Sections 2-4.

of a business or involving the use of premises used for business purposes,<sup>11</sup> and in any case they do not apply to "any contract so far as it relates to the creation or transfer of an interest in land . . .".<sup>12</sup> It is clear, therefore, that the 1977 Act was not aimed at liabilities of the kind with which we are now concerned. We think it important, in a matter such as this, that the parties should be left free to make their own bargain: compulsory liability for negligently caused personal injury might result (to the detriment of both parties) in people being unwilling to enter into obligations, or being prepared to do so only for a consideration so large as to be incommensurate with the nature of the obligation itself.

13.20 One most important point should be added. If personal injury or death were to result from the contravention of an obligation, it is probable that the appropriate actions for damages could be framed in either of two ways: as actions for the contravention of a land (or manager's or maker's) obligation, or as quite independent actions for the tort of negligence. Nothing in our recommendations would preclude or affect an action which could be founded independently on the tort of negligence<sup>13</sup> (or on a cause of action analogous to it<sup>14</sup>), or enable the damages recoverable in such an action to be limited in any way.

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<sup>11</sup>Section 1(3).

<sup>12</sup>Section 1(2) and Schedule 1, para. 1(b).

<sup>13</sup>The ability to frame an action as one for negligence would depend upon whether there was, independently of the land obligation, a duty of care. The point may be illustrated by reference to a land obligation to repair a wall which is at the boundary between the dominant and servient lands and which in fact collapses on to the dominant land through lack of repair, causing personal injury or damage to property. If the wall stood on the servient land and so belonged to the servient owner, an action in negligence would *prima facie* be possible, because owners of property have a duty to take reasonable care to ensure that their property does not cause damage to their neighbours. But if the wall stood on the dominant land, there would be no such independent duty and any claim would have to take the form of an action for contravention of the land obligation. It would then succeed only to the extent that (a) liability for the damage in question had not been excluded under our recommendations and (b) the damage was suffered by someone who was personally entitled to enforce the obligation.

<sup>14</sup>We have particularly in mind an action under the Occupiers' Liability Act 1957, which determines the liability of an occupier of property to his visitors in respect of dangers due to the state of the property or things done or omitted to be done on it.

The existence of a land obligation may connote a right to enter property—either because the obligation is an access obligation (para. 6.10(h) above), or because it incorporates a supplementary provision for entry for inspection or for self-help (para. 6.16(b) and (c) above), or because its nature is such (e.g., an obligation to repair something not on the servient land) that it can be complied with only through such an entry. In all such cases we consider that the person entering should be a visitor to whom the "common duty of care" is owed under the 1957 Act, and that any possible doubt about this should be removed: see further footnote 36 to para. 24.50 below.

As regards a person so entering, a situation analogous to that described in the preceding footnote will then arise. In so far as he can found any action upon the provisions of the 1957 Act, nothing in our recommendations would allow him to be stopped or prejudiced in any way. Thus if the obligation is one to repair a boundary wall and the dominant owner enters the servient land, under a supplementary provision for inspection, and suffers injury there because the wall collapses from want of repair as he inspects it, the position may depend, as in the preceding footnote, on whether the wall is on the dominant or the servient land. If it is on the servient, he can *prima facie* found an action on the 1957 Act (as indeed he could if his injury arose from any other danger on the servient land); but if it is on the dominant land, his only action will be for contravention of the land obligation and it will succeed only to the extent stated at the end of the preceding footnote.

**(b) No remedy without material prejudice**

13.21 We recommend that (save in a case where the contravention causes personal injury or actual damage to property) no one should be entitled to any remedy for a contravention unless he has been materially prejudiced by it. In considering this question, the court should have particular regard to the nature of the interest (if any) which entitles the would-be enforcer to enforce the obligation, and to the situation of the land in which his interest subsists. But if the would-be enforcer is a manager this recommendation should not apply unless the court is satisfied that *no one* is materially prejudiced by the contravention.

13.22 This recommendation seems to us self-evidently right. Under the present law of restrictive covenants, several rules<sup>15</sup> combine to ensure that the benefit of a covenant normally does not pass to someone who acquires a part of the "dominant" land which is not in fact capable of benefiting from it. Inevitably therefore, such a person is debarred from enforcing the covenant. But our scheme works rather differently. The dominant land, in relation to a neighbour obligation, may be land the whole *or part* of which benefits from the obligation,<sup>16</sup> and the benefit of the obligation then devolves automatically with all parts of the dominant land.<sup>17</sup> On the face of it, therefore, someone may enforce an obligation even though he owns no land which actually benefits from it.

13.23 This result would clearly be wrong, and one of the purposes of the present recommendation is to negative it. It is no doubt true that the courts would not in practice give a substantive remedy to someone who had lost nothing through the contravention, but this recommendation puts the matter beyond doubt (even in relation to the award of nominal damages which might otherwise be available). The recommendation also applies the same principle to those people whose interests, though they may subsist in land which benefits, are so insubstantial that their owners are still not materially prejudiced; and adapts it to the case of enforcement by a manager of a development scheme.

**(c) No common law damages against those with insubstantial interests**

13.24 Under the present law, restrictive covenants can be enforced (except as between the original parties) only by injunction or damages<sup>18</sup> in lieu of injunction. Common law damages, extending to such things as consequential pecuniary loss and personal injury, are not available.

13.25 Our general recommendations would have the effect of making damages at common law available for contraventions of restrictive and access obligations, as well as other obligations, and this seems to us right.<sup>19</sup> But our earlier recommendations also have the effect of making a wider range

<sup>15</sup>Paras. 3.23(c), 3.27 and 3.28(a) above. Effect is given to the recommendations in paras. 13.21-13.23 of the text by clause 10(3)-(5) of the draft Bill.

<sup>16</sup>See Part I of Schedule 1 to the draft Bill.

<sup>17</sup>Clause 6 of the draft Bill.

<sup>18</sup>Under Chancery Amendment Act 1858, s.2; now Supreme Court Act 1981, s.50.

<sup>19</sup>See para. 4.22 above.



of people potentially liable for the contravention of a restrictive or access obligation than are liable for the contravention of other obligations,<sup>20</sup> and we think that the joint effect of these principles might be an oppressive one.

13.26 We therefore recommend that damages at common law (as distinct from injunctions and damages in lieu) should not be available against this wider class. They should be available only against those who are bound by other types of obligations—that is to say owners of an estate or interest in the servient land which

- (a) is the burdened estate or the interest of a mortgagee, or
- (b) confers a right to possession and is either freehold or leasehold for a term of more than 21 years.

13.27 It does of course follow that if the only person liable in respect of the contravention of a restrictive obligation<sup>21</sup> is a person falling outside this class, common law damages will not be available at all. But this result leaves the plaintiff no worse off than he is under the existing law, and it seems to us necessary in order to avoid the risk of hardship.

**(d) Practising self-help and recovering the cost**

13.28 If the contravention in question consists in a failure to perform a land obligation requiring the carrying out of works then—whether the obligation is a land obligation<sup>22</sup> or an obligation of a manager or a maker under a development scheme—the quickest and most economical means of enforcement by the person entitled to enforce the obligation may well be to do the work himself and charge the person liable with the cost. It seems to us that he should be entitled to do this.

13.29 Two possible obstacles may, however, lie in his way. The first is that if the works can be carried out only on, or from, the servient land, the would-be enforcer may have no right to enter that land and carry them out. This obstacle we seek to overcome by the recommendation we have already made<sup>23</sup> that parties creating a land obligation should be able to attach to it a right to enter the servient land and carry out works in these circumstances. The right may of course embody conditions (as to notice, for example).

13.30 The second obstacle is that the right of a person who exercises a self-help remedy in this way to recover in full the reasonable cost of the necessary works may not always be entirely clear. We therefore recommend expressly that the damages recoverable for a contravention of this kind shall be (or include, for it may give rise to other damages as well) this cost. This recommendation must of course be appropriately qualified in cases where the obligation to do the work is associated with a reciprocal payment obligation or for some other reason the person exercising the self-help remedy would have had to meet the cost, or part of the cost, anyway.

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<sup>20</sup>Part XII of this report.

<sup>21</sup>Liability will, however, extend to those who permit or suffer the contravention: para. 12.6 above.

<sup>22</sup>Within para. 2 or para. 6 of Schedule 1 to the draft Bill.

<sup>23</sup>Para. 6.16(c) above.

13.31 Our intention is, however, that a would-be enforcer should be left quite free to choose whether or not to pursue the self-help remedy. If he chooses instead to make an ordinary claim for damages, he should run no risk of having his damages reduced on the ground that he might have mitigated them through self-help.

**(e) Contributory negligence**

13.32 The Law Reform (Contributory Negligence) Act 1945 provides for a reduction in the damages recoverable where a person suffers damage partly as a result of his own fault and partly as a result of the fault of others. The Fatal Accidents Act 1976 applies this principle in the case of fault causing death.<sup>24</sup> It is clearly right that the same principle should apply if, although there has been a contravention of a land obligation (or of a manager's or maker's obligation), the loss or damage suffered by a person results partly from his own fault and partly from the contravention. We recommend accordingly.

**(f) Limitation**

13.33 The law of limitation of actions deals with the period for which a wrong remains actionable. Two aspects may be distinguished: the time limit itself, and the moment from which time begins to run.

**(i) *The time limit***

13.34 The Limitation Act 1980 prescribes an ordinary time limit of six years for actions in tort, actions in contract and actions for sums recoverable by statute.<sup>25</sup> We can therefore see no justification for recommending any period other than six years in respect of contraventions of a land obligation. It is true that the 1980 Act lays down a period of twelve years in respect of an action upon a specialty—that is, broadly, a contract under seal—and nearly all land obligations will be created by instruments under seal; but this is in a sense fortuitous in the present context.<sup>26</sup> It should also be noted that interference with an easement is actionable as a tort and so attracts the six year period whether or not the easement was created under seal. The 1980 Act does, however, lay down special rules<sup>27</sup> for actions in respect of personal injuries or death, and we think that these should apply if a contravention gives rise to such consequences. We also recommend that the special rules in Part II of the Act (relating, for example, to actions by persons under disability and to the concealment of causes of action by fraud) should apply.<sup>28</sup>

13.35 The preceding paragraph is not directly relevant to equitable remedies such as injunction. The 1980 Act provides that the relevant time limits

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<sup>24</sup>See especially s.5.

<sup>25</sup>Sections 2, 5 and 9 respectively.

<sup>26</sup>Nor do we consider that the six year period should be altered in cases where sums due in respect of contraventions of a land obligation are secured by a charge of the kind discussed in Part XIV of this report, notwithstanding that s.20 of the 1980 Act prescribes a twelve year period for the recovery of "principal" secured by a charge.

<sup>27</sup>Sections 11-14.

<sup>28</sup>These recommendations are implemented in the draft Bill (Schedule 3) by the insertion of a new section 9A in the 1980 Act. The placing of this new section makes it automatically subject to ss. 11-14 and to Part II.

which it prescribes do not apply to claims for equitable relief "except in so far as any such time limit may be applied by the court by analogy . . .". The same situation should exist, in our view, in relation to equitable remedies for contravention of a land obligation.<sup>29</sup>

(ii) *When time starts to run*

13.36 Limitation periods run from the time at which the cause of action accrues. In the case of a contravention of a land obligation (or of a manager's or maker's obligation) the cause of action must necessarily accrue at the time of the contravention because those who are entitled to enforce it must be entitled to take action as soon as the contravention occurs. It follows that—apart, of course, from the special rules in Part II of the 1980 Act—the period of six years must start to run at that time.<sup>30</sup>

13.37 We emphasise these points in order to show that the question with which we are concerned here is a relatively simple one. In a series of cases involving negligence, culminating in *Pirelli General Cable Works Ltd. v. Oscar Faber & Partners*,<sup>31</sup> the courts have recently been much exercised by the question whether a cause of action accrues, for limitation purposes, when damage occurs or when damage is discovered (or could with reasonable diligence be discovered). But this question only arises in the case of negligence because that tort is not actionable at all unless and until there is damage. It does not arise in the case of contract, because a cause of action for breach of contract arises at the moment of the breach and does not depend upon damage. In this respect a contravention of the kind with which we are concerned must clearly follow the contract analogy. Any other conclusion would mean that those who were entitled to enforce an obligation would have to sit back and wait because, although there had been a contravention, it had not yet given rise to actual damage.

13.38 It may sometimes be, however, that a particular claim could be founded either as one of damages for negligence or as one of damages for contravention of an obligation. The plaintiff would then be free to frame it in whichever way was most beneficial to him—whether for the purposes of limitation or otherwise.

**Discovering who is liable: a notice procedure**

13.39 Before action can be taken to enforce any obligation, it is necessary to discover who is liable for the contravention which has occurred. This should present few difficulties in the case of managers' and makers' obligations, but it may present considerable difficulties in the case of land obligations—involving as it does the discovery not only of the identities of those interested in the servient land but of the nature of their interests.

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<sup>29</sup>It follows that delay on the part of the claimant might be sufficient to make an injunction unavailable to him, but not sufficient to bar his right to common law damages. But the possibility of this result is inherent in the general law.

<sup>30</sup>If the contravention is a "continuing" one (that is, one which constantly recurs for so long as the wrongful state of affairs continues), the limitation period constantly begins afresh and therefore runs, in effect, from the date on which the contravention was last continuing.

<sup>31</sup>[1983] 2 W.L.R. 6 (H.L.).

13.40 It should be remembered that, under an earlier recommendation,<sup>32</sup> it will be possible to attach to a land obligation a supplementary provision requiring the giving of information (or the production of documents) about changes in those interested in the servient land. In the nature of things, however, such provisions (like similar provisions under the existing law) may be difficult to enforce, because contraventions may not be apparent. For this and other reasons it has been strongly represented to us that those who are entitled to enforce land obligations should have some means of obtaining the necessary information about the servient land.

13.41 It seems to us that such a means can best be provided by a statutory provision enabling notices to be served on those who are in occupation of, or appear to have interests in, the servient land, requiring them to give relevant information. Various precedents exist for such provisions. The scheme which we recommend is as follows.

13.42 Anyone entitled to enforce a land obligation should be entitled to serve a notice on anyone who is, or whom he believes to be:

- (a) in occupation of the servient land or part of it, or
- (b) the owner of an estate or interest in that land or part of it, or
- (c) the recipient (whether direct or not<sup>33</sup>) of rent payable in respect of that land or part of it, or of analogous payments made in respect of its occupation,<sup>34</sup>

and the notice could require the person served to state in writing:

- (i) the nature of any estate or interest which he has in the servient land or part of it,
- (ii) the name and address of any other person whom he knows or believes to have an estate or interest in that land or part of it,
- (iii) the name and address of any person whom he knows or believes to be the recipient (whether direct or not) of rent or other periodical payments of the kind described in (c) above,<sup>35</sup> and
- (iv) if he is served as occupier and not addressed by name,<sup>36</sup> his name.

The person served should have a duty to give this information within one month. We think that an intending enforcer will be able by this means to build up a full picture of the ownership of the servient land, and to discover who is liable for a particular contravention.

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<sup>32</sup>Para. 6.16 (a) above. It also seems possible that information about the servient land, in so far as it appears from the register kept under the Land Registration Act 1925, might be obtainable under the provisions of s.112 of that Act (as substituted by Administration of Justice Act 1982, s.67 and Schedule 5).

<sup>33</sup>A notice could be served not only on the person who originally collects the rent or other payment, but on any person who receives it from him.

<sup>34</sup>These words apply our recommendation not only to recipients of rent strictly so called but also to those who receive payments made under a licence to occupy the land.

<sup>35</sup>See footnotes 33 and 34 above.

<sup>36</sup>See the next paragraph of the text.

13.43 We do not intend to deal here with the detailed rules about what constitutes "service" of the notice. These are set out in the draft Bill<sup>37</sup> and do not differ substantially from other statutory rules made in analogous cases. They include a rule that a notice served on a person as occupier may be addressed to him simply as "the occupier" (with a description of the land).

13.44 We have considered whether some express sanction or penalty should be prescribed for failure to respond to the notice within the one month's time limit. It would perhaps be possible to provide that, in the absence of such a response, the person served should be deemed liable for the contravention in question; but this approach, besides being less simple than it seems, could result in hardship. All in all, it seems to us unnecessary to do more than to impose a statutory duty to comply with the notice. In reaching this conclusion we are mindful of the precedent set by section 40 of the Landlord and Tenant Act 1954, which imposes a very similar statutory duty to provide information and incorporates no express sanction. It is thought that damages or injunction could be obtained on a failure to respond to a notice under section 40;<sup>38</sup> notices prescribed for the purposes of the section state that "failure to give the information asked for or the giving of incorrect information could involve the landlord in loss for which you might in certain circumstances be held liable;"<sup>39</sup> and so far as we know section 40 works well in practice. In these circumstances it seems to us that an express sanction would be unnecessary and perhaps undesirable (since it might cast doubt on the sanctions thought to exist in relation to section 40).

#### **A note on arbitration provisions**

13.45 In an earlier part of the report we made an express recommendation about the insertion of arbitration provisions in development schemes.<sup>40</sup> Such provisions would be capable of applying (within the limits of the general law about arbitration) in relation to the provisions of development schemes (including managers' and makers' obligations) and development obligations imposed under them. The recommendations made in this part of the report are therefore subject to any provisions of this kind which may have been made.

13.46 In making that recommendation we also pointed out that anyone is free to make an arbitration agreement, and that the recommendation was needed only because of the difficulties which would otherwise arise, in the development scheme case, in obtaining the execution by all the relevant parties of such an agreement. These difficulties do not apply in the case of neighbour obligations. The parties would be free, in creating such an obligation, to couple it with a provision amounting to an arbitration agreement binding upon their successors.<sup>41</sup>

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<sup>37</sup>Clause 12.

<sup>38</sup>See, e.g. *Halsbury's Laws of England*, 4th ed., vol. 27 (1981), para. 479, footnote 1; *Hill and Redman's Law of Landlord and Tenant*, 17th ed. (1982), p. 789.

<sup>39</sup>Landlord and Tenant (Notices) Regulations 1957, S.I. 1957 No. 1157, Forms 13-15.

<sup>40</sup>Paras. 7.52-7.54 above.

<sup>41</sup>Arbitration Act 1950, s.4(1). Awards are also binding upon successors: s.16.

## PART XIV

### THE CHARGE FACILITY

14.1 We recommended earlier that, amongst the supplementary provisions which parties could attach to a land obligation should be:

“A provision imposing a charge on the servient land for certain money which becomes due as a result of the non-performance of a reciprocal payment or reimbursement obligation or of an obligation requiring the carrying out of works.”<sup>1</sup>

In this part of the report we discuss the reasons for having a charge facility and make detailed recommendations about it.

#### **Background and main recommendation**

14.2 If money is secured by a charge on land, the person who has the benefit of the charge can exercise certain remedies against the land. The most important of these normally consists in selling the land (free of any interests to which the charge has priority) and, out of the proceeds of the sale, taking the money due to him.

14.3 It may be said that no such charge ought to be needed in order to support a land obligation. We have put forward recommendations to make positive as well as restrictive land obligations run with land, and we have proposed an adequate range of remedies against those who contravene them, and that should be enough. But this view is open to argument. For one thing, land obligations must be an adequate substitute for estate rentcharges<sup>2</sup> because we are recommending the abolition of the latter<sup>3</sup> and they do (as their name suggests) connote a charge.<sup>4</sup> More important, we are seeking to provide, through land obligations, a means whereby property now developed on a leasehold basis can be developed freehold, and it is therefore incumbent on us (it may be said) to make available a means of enforcement which is as effective as the means now available to landlords for the enforcement of tenants' covenants; and these means are not confined to personal remedies against the tenants, but include the forfeiture of their leases.

14.4 The real question is this: is it enough for land obligations to be enforceable only by personal remedies—so that a land obligation is really worth, at any given time, only so much as the persons then bound by it are worth—or should there be some means of enforcing it against the servient land itself?

14.5 It seems to us that there is no universal answer to this question. In many cases, no one would think it necessary for a moment to support a land obligation by a charge. In others, however, and perhaps particularly

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<sup>1</sup>Para. 6.16(f) above.

<sup>2</sup>Paras. 3.35–3.38 above.

<sup>3</sup>Paras. 24.39–24.45 below.

<sup>4</sup>Statutory remedies are in Law of Property Act 1925, s.121. They do not include outright sale, but they do include the grant of leases. It is common also to reserve an express right of re-entry.

in the case of obligations relating to the repair and preservation of freehold flats, a charge may be thought desirable in view of the importance of the obligations and of the possibly high cost of complying with them.

14.6 We therefore conclude that there is no need or justification for a charge which attaches automatically to all land obligations, but that there is need for a charge facility—that is to say, a power for the parties themselves to create a charge if they so desire. In reaching this conclusion we are fortified by the fact that optional charges of this kind are available in analogous circumstances under the Law of Property Act 1925, section 77(7), and the Leasehold Reform Act 1967, section 19(8).

#### **The characteristics of the charge facility**

14.7 We now turn to more detailed recommendations about the scope of the facility and the effect of the charge.

##### **(a) Subject matter and priority**

14.8 The rules of priority, already discussed in another context,<sup>5</sup> do of course apply to charges. In the ordinary way a charge has priority to all interests which the person bound by it may subsequently create out of the land; and since a chargee who exercises his power of sale can sell free of all interests to which his charge has priority<sup>6</sup> it follows that these derivative interest holders are liable to lose their interests. In our own recommendations which follow, we set out to mitigate, so far as possible, the loss to these people. But there is no way of protecting them altogether: if all subsequent derivative interest holders were automatically protected, their interests could drain the value out of the charge and make it worthless. It would then fail to serve any useful function. Not only would there then be no point in trying to enforce it, but it would also fail to serve what is really its most important purpose—which is not to be enforced, but to act as a real and credible deterrent to the servient owner against committing contraventions or allowing them to remain unremedied.

14.9 At this stage we must make explicit a point which is implicit in what we have already said. Any useful and credible charge must have the same priority as the land obligation itself. It must, in other words, date from the creation of the obligation.<sup>7</sup>

14.10 However, the position of derivative interest holders—for example, mortgagees and tenants—who acquire their interests after this time is a major consideration. It is not merely that these people may be prejudiced in the unlikely event of a sale by the chargee. Equally important from the servient owner's point of view is that, because of this risk, there may be no such people—in other words, that he may find it difficult to find mortgagees and tenants prepared to accept the situation.

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<sup>5</sup>Paras. 11.15–11.20 above.

<sup>6</sup>Law of Property Act 1925, s.104(1).

<sup>7</sup>It follows that a charge would normally have priority to a building society or other mortgage granted to facilitate a purchase of the servient land. The Building Societies Association have, in view of the purposes served by the charge, expressed themselves as satisfied with this position. A small consequential amendment of the Building Societies Act 1962 is made in Schedule 3 to the draft Bill (cf. *Re Abbots Park Estate (No. 2)* [1972] 3 All E.R. 148).

14.11 All these considerations drive us to the conclusion that the charge facility should be as narrow as possible. We think it should exist only for the purpose of securing what may be called the "actual performance" of "essential" land obligations. We explain these two expressions below.

14.12 As to "actual performance", what we mean is that the charge should secure only sums which have to do with the performance of the obligation and not, for example, damages for any loss consequential upon a contravention. Damages for consequential loss could be high, and we think it would be wrong for these to be secured on the land. It would also pose great conceptual difficulties if sums such as unascertained potential damages were to be the subject of a charge. By "essential" land obligations we mean obligations the performance of which may be vital to the continued existence or viability of property in general and flat and other developments in particular. Repairing obligations clearly fall into the "essential" class, and so do the complementary reciprocal payment obligations. In the case of developments, however, the place of both these obligations is likely to be taken by reimbursement obligations which provide the money necessary for the manager to do repairs and to provide for such things as insurance which may be equally essential.

14.13 It therefore seems to us that the charge facility should be available to support land obligations involving payment and those requiring the carrying out of works; but that (in view of the considerations already mentioned) it should not extend further. So far as works obligations are concerned, one question remains. How is the amount required to secure "actual performance" to be quantified? We think the answer should be provided by means of our previous recommendations whereby someone who is entitled to enforce a works obligation may (subject to his reserving a right to enter and do the works, if he needs one) exercise a self-help remedy and recover the reasonable cost.<sup>8</sup> It is this cost which in our view should be the subject of the charge.

14.14 We therefore recommend that the charge facility should take the form of a power for the parties, in creating a reciprocal payment obligation, a reimbursement obligation or an obligation requiring the doing of works, to make a supplemental provision imposing a charge (having the same priority as the obligation itself), binding upon every estate or interest in the servient land which is for the time being bound by the obligation, in respect of

- (a) in the case of the first two obligations, any amount from time to time outstanding under the obligation, and
- (b) in the case of a works obligation, any amount from time to time recoverable as expenses after the exercise of the self-help remedy.<sup>9</sup>

**(b) Charge not to be separately registrable**

14.15 Our recommendation that the charge facility should be exercisable by means of a provision supplemental to the land obligation in question will ensure that the two are linked together in the same creating instrument. Since

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<sup>8</sup>Paras. 13.28 to 13.31 above.

<sup>9</sup>Para. 18 of Schedule 1 to the draft Bill.



the land obligation itself will be registrable under the Land Registration Act 1925 or the Land Charges Act 1972,<sup>10</sup> we see no reason why the charge should be separately registrable under either of these Acts. We recommend accordingly.

14.16 We also consider that a charge of this kind is not a matter which should need to be registered under Part III of the Companies Act 1948 if the servient owner for the time being is a company; and having sought and obtained confirmation of this view from the Departments of Industry and Trade, we make a recommendation to that effect.

**(c) Who can enforce the charge?**

14.17 In the case of a charge supporting a works obligation, the person entitled to enforce the charge must clearly be the person who has incurred the expenses in question.

14.18 In the case of one which supports an obligation involving payment, the position is less simple. Reimbursement obligations are enforceable by the manager for the time being. Reciprocal payment obligations may be *enforceable* by the owners of various interests in the dominant land, though the obligation itself must be so worded as to require *payment to* a designated person who might conceivably not be one of those entitled to enforce. We therefore recommend that in these cases the charge should be enforceable by anyone entitled to enforce the obligation, but only for the benefit of the person to whom the payment should be made.

**(d) Enforcement of the charge: the court's powers**

14.19 We have alluded several times to the remedies of a chargee and we have pointed out that the existence of the remedies is essential if a charge is to serve its purpose. We therefore recommend that a person who is entitled to enforce a charge supporting a land obligation should have the same powers and remedies for that purpose as if he were a legal mortgagee by deed—but we also recommend that those powers and remedies should not be exercisable except with the court's leave and upon terms and conditions specified by the court.<sup>11</sup> This latter recommendation is made for the benefit not only of the servient owner who is guilty of a contravention but of the derivative interest holders to whom we have already referred.

14.20 So far as derivative interest holders are concerned,<sup>12</sup> we recommend expressly that the court should (without prejudice to the general nature of its discretion) have power to do two things in particular:

- (a) To order that, despite the general rule mentioned above, the sale should be subject to specified derivative interests even though the charge had priority to them. We envisage that the court would exercise this power if a sale which was subject to derivative interests would still realise

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<sup>10</sup>Part IX of this report.

<sup>11</sup>Clause 11(6) of the draft Bill.

<sup>12</sup>We envisage that rules of court would ensure that derivative interest holders had notice of the application for an order for sale.

sufficient money to pay the sum secured by the charge. The court might also exercise the power even though this was not so, if it considered that the balance of justice required it.

- (b) To order that a specified amount of the proceeds of sale should be paid to derivative interest holders by way of compensation. Under the general law any derivative interest holders who were chargees would of course have first claim on the proceeds of sale once the sum secured had been paid off.<sup>13</sup> But this recommendation would enable the court to compensate derivative interest holders in general and, if it thought fit, to do so out of the money which would otherwise go to pay off the sum secured by the charge.

14.21 An example may help to illustrate these recommendations. Suppose that S, the servient owner, has mortgaged his land to M. D has the benefit of a reciprocal payment obligation binding on S, which is supported by a charge having priority to M's mortgage. D allows the payment arrears to mount up with no complaint for a long period. In the end, D seeks a sale of the land. The land is worth £20,000 net; the amount due to M is £15,000; and the amount due to D is £6,000. If the court ordered a sale without exercising either of the powers just recommended, the sale would take place free from M's interest, D would receive his full £6,000 and M would receive only £14,000. But the court might consider on the facts that this would not be fair to M. If it considered that M should not be prejudiced at all, it could order that the sale take place subject to his interest. Alternatively it could take a middle course and order, for example, that M should receive £14,500 from the proceeds, thus in effect penalising D's conduct to the extent of £500.

14.22 As regards the purchaser to whom the land is sold in pursuance of a court order, we recommend that he should not be required to investigate the chargee's right to sell beyond ensuring that the court has ordered the sale and that any terms and conditions (other than those which fall to be complied with after the conveyance) have been complied with.

14.23 It goes almost without saying that the land sold will still be subject, in the hands of the purchaser, to the land obligation itself and to the supporting charge (though the latter will, of course, no longer secure the debt in respect of which the land was sold).

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<sup>13</sup>Law of Property Act 1925, s.105.

## PART XV

### EXTINGUISHMENT, VARIATION, ETC., IN GENERAL

15.1 It may be desired, at any time after its creation and for any one of a variety of reasons, to extinguish or vary a land obligation.

15.2 We are concerned here to point out that the general status conferred on land obligations—that of interests in land—will of itself ensure that they can be extinguished or varied in the same way and in the same circumstances as any other comparable interest in land. If all those who are currently entitled to enforce<sup>1</sup> a land obligation are prepared to join with those currently bound by it they can, by appropriate documents and with appropriate formalities,<sup>2</sup> achieve any result they may desire in this respect. No express recommendations (or provisions in the draft Bill) are necessary for this purpose.

15.3 In addition, special powers to extinguish or vary a development obligation may be reserved in a development scheme: these have already been mentioned,<sup>3</sup> and will be exercisable in whatever way the scheme provides.

15.4 The parts of this report which immediately follow are concerned with particular cases of extinguishment or variation for which (for reasons explained in those parts) special provision does have to be made. They do not diminish or replace the general powers mentioned in the preceding paragraphs.

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<sup>1</sup>If a development obligation were enforceable by a manager, the manager would have to participate in the extinguishment or variation—as he could do, subject to any provisions made in the scheme itself. In practice, however, development obligations may more often be extinguished or varied under express powers contained in the scheme: see the next paragraph of the text.

<sup>2</sup>If the land obligation is a legal interest (as normally it will be), a deed will be required: Law of Property Act 1925, s.52.

<sup>3</sup>Paras. 7.59–7.63 above.

## PART XVI

### EXTINGUISHMENT BY "MERGER"

16.1 In this part of the report we consider whether and in what circumstances land obligations and development schemes should be extinguished because—to put the matter broadly—lands or interests in land with which they are involved come into the ownership of the same person.

#### **Extinguishment of neighbour obligations through common ownership of the dominant and servient lands**

16.2 It has long been established, in relation to easements, that extinguishment occurs if the dominant and servient lands come into the ownership of the same person in the same right, at least if no other person has a proprietary interest (for example, as tenant) in either. But it is less clear that this latter requirement is essential to the extinguishment of easements other than easements of light.<sup>1</sup>

16.3 The position as to restrictive covenants was not decided until 1978, in the case of *Re Tiltwood, Sussex*,<sup>2</sup> which established that a restrictive covenant is similarly extinguished when the benefited and burdened lands come into common ownership. The case also shows that, for this result to occur, it is not necessary that the common ownership should extend to the whole of the burdened land: if it extends only to part, extinguishment occurs in relation to that part. The issue which remains in some doubt in relation to easements—how far the existence of other proprietary interests prevents extinguishment—did not arise in *Re Tiltwood*.

16.4 The fact of extinguishment does not of course matter to the common owner (that, indeed, is in a sense why it occurs): as owner of both lands, he is free to decide upon, and regulate, his own conduct in relation to them. Its real significance is that if one of the lands is later sold off once more to a separate owner, the easement or covenant does not revive automatically so as to be a burden or a benefit to him. If it is to come into existence again, it must be expressly re-created.<sup>3</sup>

16.5 Partly because of the areas of uncertainty which still exist under the present law in relation to easements and restrictive covenants and partly because land obligations are not in any case precisely analogous to either of these things, we have thought it right to consider this area of the law afresh for the purposes of this exercise and to make our own recommendations.

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<sup>1</sup>*Richardson v. Graham* [1908] 1 K.B. 39; *Buckby v. Coles* (1814) 5 Taunt. 311.

<sup>2</sup>[1978] Ch. 269.

<sup>3</sup>If the common owner has in fact continued to make an easement-like use of one of the lands for the benefit of the other, a full easement may come into existence again, on a sale, by virtue of that fact—but this is a doctrine which does not apply to restrictive covenants and will not apply to land obligations.

**(a) Unity of ownership of the whole of the dominant and servient lands**

16.6 So far as neighbour obligations are concerned,<sup>4</sup> we have no doubt that extinguishment through common ownership is in conformity not only with principle but with practical needs. It seems to us that once the dominant and servient lands have come into the same ownership it is unsafe to assume that the automatic revival of such obligations, on a subsequent division, would be desired or desirable. It is much more likely that the parties to that later transaction would wish to formulate their own obligations, and we have little doubt that they would in practice do so. Moreover, obvious difficulties would arise, on an automatic revival, if the subsequent division produced pieces of land whose boundaries differed from those of the original dominant and servient lands. Extinguishment therefore seems to us the "fail safe" position.

16.7 But we do not think it should occur so long as the continued existence of the land obligation is of any advantage to anyone. The question which may exist at present, as to whether easements or covenants are extinguished despite the existence of some lesser proprietary interest in the servient or dominant land, should, so far as land obligations are concerned, be answered in the negative. If someone enjoys the benefit of a land obligation by virtue of an interest in the dominant land, (whatever that interest may be) he ought not to lose it in this way, either by being deprived of it altogether or by being deprived of his right to enforce it against some particular person. We therefore recommend that the extinguishment of a neighbour obligation should occur if

- (a) the burdened estate in the whole of the servient land and the benefiting estate in the whole of the dominant land come into the ownership of the same person in the same right,<sup>5</sup> and
- (b) no one else has the benefit of the obligation or is bound by it.

**(b) Unity of ownership of part only of the dominant and servient lands**

16.8 How far should the rule just recommended apply if the unity of ownership does not extend to the whole of the dominant and servient lands—if, in other words, some part of the dominant land, or the servient land, or both, is left out? It will be recalled<sup>6</sup> that in *Re Tiltwood* part of the servient, or burdened, land was left out of the unity and a restrictive covenant was nonetheless extinguished in relation to the part within it. It seems to us that the *Re Tiltwood* circumstances are in fact the only ones in which partial unity should give rise to the extinguishment of a land obligation.

16.9 We think it is self-evident, first of all, that no extinguishment can occur when the land left out of the unity is a part of the dominant land. The owner of that part has rights in respect of the whole of the servient land and there is no reason why he should lose them. It would perhaps be possible to recommend that the part of the dominant land which was within

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<sup>4</sup>As to development obligations, see paras. 16.12 and 16.13 below.

<sup>5</sup>The words "in the same right" show that extinguishment is not to occur if, for example, although both estates vest in the same person, he holds one for his own benefit and one as trustee for someone else.

<sup>6</sup>Para. 16.3 above.

the unity (and that alone) should lose the benefit of the obligation, but this would not amount to extinguishment since the obligation would remain enforceable by someone, and we think it could give rise to complexities.

16.10 This leaves open the possibility of extinguishment where it is a part of the servient land which is left out of the unity. Even in that case, however, we do not think that extinguishment should occur in relation to any land obligation which is not a purely restrictive one. Other types of obligation all involve the expenditure of money in one way or another, and they may be onerous. The whole of the servient land is "security" for these obligations, in the sense that (unless there is a legal apportionment<sup>7</sup>) the owner of any part of it can be called upon to discharge the obligation in full. In the normal way, the owner of a part who is so called upon will be able to claim a contribution from other owners who are bound by the obligation<sup>8</sup>—but if (in the case we have in mind) the obligation were extinguished in relation to part of the servient land the owner of the remainder could be called upon for full discharge and would have no recourse against anyone. This would be plainly wrong. The situation is otherwise, however, in the case of a restrictive obligation, and there is no reason why this should not be extinguished in relation to that part of the servient land which is within the unity.

16.11 Our only recommendation in this context, therefore, is that where unity of ownership (in the sense already explained) embraces the whole of the dominant land and a part of the servient land, restrictive land obligations (and those only) should be extinguished in so far as they relate to that part of the servient land.

#### **Extinguishment of development schemes and development obligations through common ownership of the development land**

16.12 The recommendations made up to now in this part of the report are confined to neighbour obligations. Development obligations ought not, in our view, to be extinguished to any degree merely because two or more of the units come into the same hands. Extinguishment would be plainly wrong if the obligations were enforceable by a manager, but it would in our view be equally wrong even if rights of enforcement were confined to the unit owners themselves. There should be no such pockets of immunity within a development; and it is significant that extinguishment of a restrictive covenant forming part of a building scheme does not occur in these circumstances under the existing law.<sup>9</sup>

16.13 It is, however, a different matter if the whole of the development land should come into one ownership. In that event, we think that not only the development obligations but also the development scheme itself should

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<sup>7</sup>See para. 17.1 below.

<sup>8</sup>Either because there has been an equitable apportionment (paras. 17.1–17.20 below) or because of the Civil Liability (Contribution) Act 1978 (paras. 17.22 and 17.23 below).

<sup>9</sup>*Brunner v. Greenslade* [1971] Ch. 993; *Texaco Antilles Ltd. v. Kernochan* [1973] A.C. 609.

be extinguished. We therefore recommend that such extinguishment should occur if

- (a) a legal estate, or legal estates,<sup>10</sup> in every part of the development land is, or are, in the ownership of one person in the same right, and
- (b) no one else (except the manager, if any) has the benefit of, or is bound by, any development obligation imposed under the scheme.

**Extinguishment should not affect accrued rights and liabilities**

16.14 It is clear that no extinguishment, whether of a land obligation or of a development scheme, should affect any rights or liabilities which may already have accrued, under the obligation or the scheme, at the time of the extinguishment.

**Land obligations which binds a tenant but not the landlord: preservation on surrender or merger of the lease**

16.15 Cases may exist in which a land obligation is binding upon a tenant but not his landlord—usually because the tenant alone has entered into it. When the term of the lease expires, of course, the land obligation will expire with it; but we need to consider certain events which may occur in the meantime.

**(a) Surrender and merger**

16.16 If a lease is surrendered by a tenant to his immediate landlord, the lease merges in the landlord's reversion and so is extinguished. Similarly, if the tenant acquires the reversion (or if a third party acquires both lease and reversion), a merger normally occurs and the lease is absorbed into the reversion. Although merger takes place in both cases, the term "merger" is often reserved for the second and that of "surrender" applied to the first.

16.17 It is clear under the existing law that neither surrender nor merger operates to destroy an incumbrance which is binding only upon the leasehold: the incumbrance continues to bind the person who now owns both lease and reversion (or the estate which results from their merger) for so long as it would have bound the tenant.

16.18 This is clearly the right result so far as land obligations are concerned and, in order to avoid any doubt which might otherwise exist,<sup>11</sup> we make an express recommendation to that effect.<sup>12</sup>

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<sup>10</sup>It is impossible in this context to speak of burdened and benefited estates because there may conceivably be units within the development which are not affected by development obligations.

<sup>11</sup>There would be no such doubt if the existence of a land obligation served of itself to prevent merger, because in that event the leasehold estate would remain in existence and its owner would be bound, under the principles recommended in Part XI of the report, by virtue of such ownership. But it seems likely that merger would take place despite the land obligation, and so the recommendations made in Part XI (and implemented in clause 7 of the draft Bill) need to be supplemented by this further recommendation.

<sup>12</sup>There is of course the converse case. The *benefit* of a land obligation may be appurtenant only to a leasehold estate, and that estate and the reversion may come into the same hands. Having regard to the recommendations already made in Part X of this report (and implemented in clause 6 of the Bill), an analogous result will follow and the obligation will remain enforceable for so long as the leasehold term would have lasted—at least, provided there is no express declaration of merger. Equity will lean against merger in such circumstances because it would be against the landowner's interests (*Ingle v. Vaughan Jenkins* [1900] 2 Ch. 368), but it seems that enforceability would not survive an express declaration (*Golden Lion Hotel (Hunstanton) Ltd. v. Carter* [1965] 1 W.L.R. 1189).

**(b) Forfeiture**

16.19 The position must be otherwise if the lease is forfeited by the landlord because of conduct connoting fault on the part of the tenant. The principle of forfeiture is that the landlord must be able, if the tenant is sufficiently at fault, to recover his property unincumbered—that is to say, free from the lease and from any interests which the tenant may have created out of it. Subject to relief,<sup>13</sup> therefore, forfeiture must cause the termination of any land obligation which is binding only upon the leasehold estate.

16.20 No express recommendation (or provision in the draft Bill) is needed to achieve this result because it will follow from the application of existing principles to land obligations as easement-like interests in land.

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<sup>13</sup>Under Law of Property Act 1925, s.146.



## PART XVII

### “EQUITABLE” VARIATIONS

17.1 We explained earlier<sup>1</sup> that a land obligation could always be varied if everyone who had the benefit were prepared to join with everyone who had the burden in order to execute an appropriate document. A variation of this kind may (by borrowing a phrase from analogous areas of the existing law) be called a “legal” variation.

#### **The nature of equitable variations**

17.2 Sometimes, however, it will be difficult or impossible to obtain the concurrence of all interested parties to a variation which some of those parties may nonetheless desire to make.

17.3 The most obvious example of this situation will occur when land which is the servient land in relation to a land obligation is divided into two or more parts and the parts pass into different ownerships. It must be remembered that the whole of the servient land is security for the land obligation, in the sense that, broadly speaking,<sup>2</sup> anyone whose interest in any part of that land is such that he is bound by the obligation is liable (unless the obligation is a restrictive or access one<sup>3</sup>) for any contravention of it.

On a division of the servient land, the parties to the division may wish to alter this state of affairs so far as it lies in their power to do so. A few examples may clarify the point:

- (a) Servient land with the burden of a land obligation to maintain the whole of a wall is divided into two parts, each containing one section of the wall. It is desired that the owner of each part shall be not liable for any non-maintenance of the section of wall which is not on his land.
- (b) Servient land similarly burdened is divided into two parts, one of which does not contain any of the wall. It is desired that the owner of that part shall not be liable for non-maintenance at all.
- (c) Servient land burdened with a reciprocal payment obligation is divided into two parts, one of which derives no benefit from the works for which the payment is made. It is desired that the owner of that part should not be liable for any of the payment.

Many other examples could be given. Of these particular ones, example (a) is an example of apportionment and examples (b) and (c) could be described as examples of release (since part of the land is to be released altogether from the obligation). In this part of the report we use the word “variation” to cover apportionments, releases and any other kinds of variation.

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<sup>1</sup>Part XV of this report.

<sup>2</sup>For full details, see Parts XI and XII of this report.

<sup>3</sup>As to these obligations, see paras. 12.4–12.7 above. The rules there recommended are such that variations of the kind envisaged in this part of the report are not necessary merely because the servient land is divided, but they may still occur in circumstances of the kind mentioned in para. 17.5 below.

17.4 We reiterate that variations of the sort mentioned in the preceding paragraph can be legal variations if all those with the benefit of the land obligation are prepared to join in making them. But in the circumstances there envisaged it is probable that those with the benefit will not be asked or, if asked, will refuse. Any arrangement which is made only amongst the servient owners themselves will fall short of a legal variation and will therefore not operate actually to vary the land obligation *itself*. As between them and the persons entitled to enforce it, the obligation will remain just the same and will remain enforceable in just the same way. As between themselves, however, they can make an enforceable agreement to act *as if it were* varied. Such an agreement may be described (again taking a term from the existing law) as an "equitable" variation.<sup>4</sup> Its purpose is to ensure that if the land obligation is enforced against the "wrong" person (or against a person to a "wrong" extent), that person can call on the other parties to the deed to reimburse him.

17.5 Equitable variations are by no means confined to the case where servient owners wish to make a variation in which the dominant owners will not join.<sup>5</sup> They may be made in any case where the variation is prevented from being legal by the non-participation of some interested party. The non-participant may be one of several servient owners.<sup>6</sup> Equally, it may be that the only non-participant is one of several dominant owners.<sup>7</sup>

17.6 Parties are of course quite free, under the general law of contract, to make an agreement that a land obligation shall, as between themselves, be treated as varied. No specific legislative provisions are required. The difficulty is that under the general law of contract the agreement would bind only the original parties to the agreement and would not be enforceable by and against their successors in title. Legislative provisions are required in order to achieve that result, and it is the details of these provisions which we are concerned to formulate in this part of the report.

17.7 The need for such legislative provisions has already been recognised in relation to equitable apportionments of rent payable under a lease, or by virtue of a rentcharge, on a division of the property let or charged.<sup>8</sup> The provisions we are about to recommend, though necessarily different and more comprehensive, are based upon the same principle.

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<sup>4</sup>The word "equitable" is used to distinguish this type of variation from a legal one which operates to alter the obligation itself: it does not imply that equitable interests are created or that the rules of equity are invoked.

<sup>5</sup>We use the term "dominant owners" to mean or include the manager of a development scheme where such a manager has power to enforce a land obligation.

<sup>6</sup>For example, the servient land is divided into three parts and sold to A, B and C respectively. A and B want to vary a land obligation, but C refuses to join. A and B can proceed on their own, with or without the participation of the dominant owner or owners.

<sup>7</sup>For example, the servient land is owned by X and no one else is interested in it; but the dominant land is owned by Y and let to Z, both of whom have the right to enforce the land obligation. If X and Y want to vary it but the participation of Z is not forthcoming (or is not worthwhile because he will soon be leaving on the termination of his lease), X and Y can proceed to make an equitable variation on their own.

<sup>8</sup>See Law of Property Act 1925, s.77(1)(B) and (D) and (2)-(8), and Schedule 2, Parts VIII and X; and s.190.

## **Our recommendations**

17.8 In formulating our recommendations, we deal first with the general principle and subsequently with more detailed points.

### **(a) The principle**

17.9 We recommend that if a deed provides for a land obligation to be treated as varied (in a specified manner or to a specified extent), but the deed does not bring about a legal variation because of the non-participation of some interested party, the deed should, subject to certain conditions, nonetheless be binding upon the successors in title of the original parties to it as well as on the original parties themselves (unless a contrary intention appears).

### **(b) Details**

17.10 This leaves several questions to be answered: what are the conditions just mentioned; who, for this purpose, is a successor in title; and what exactly is the effect of the equitable variation upon those bound by it?

#### *(i) The conditions*

17.11 The conditions are designed to ensure that the original parties are qualified to make the equitable variation, as being involved with the land obligation in a relevant way. The successors of an original party should be bound only if:

- (a) the original party has (or is to have) an estate or interest in a piece of land to which the deed relates and, by virtue of owning that estate or interest, is (or will be) bound by, or entitled to enforce, the land obligation; or
- (b) the land obligation being a development obligation, the original party executes the deed as manager of the development scheme by virtue of which it was imposed.<sup>9</sup>

#### *(ii) The successors*

17.12 The definition of successors must of course vary according as the original party falls within sub-paragraph (a) or (b) of the preceding paragraph.

17.13 In the sub-paragraph (a) (non-manager) case, the following persons should (if they are for the time being bound by or entitled to enforce the land obligation) rank as successors so as to be bound by the equitable variation:

- (i) Anyone who has acquired the original party's estate or interest in the whole or part of the original party's piece of land.

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<sup>9</sup>A development scheme may provide a special means of varying a development obligation (perhaps at the behest of the manager): see paras. 7.59-7.63 above. Such variations will be legal ones. The case contemplated in the text is that where there is no such provision, or for some reason it is not used, so that the manager (as a person entitled to enforce the obligation) is joining in an equitable variation. He would be able to do this, subject to any relevant provisions of the scheme.

- (ii) Anyone who has acquired an estate or interest, in the whole or part of that piece of land, which was created since the deed, and who claims it under or through the original party or a successor described in (i) above.
- (iii) Anyone who has, since the deed, gone into occupation of the whole or part of that piece of land, otherwise than by virtue of a right derived from a person who was not bound by the equitable apportionment when the right was granted.

17.14 In the sub-paragraph (b) (manager) case, the persons bound as successors should simply be the persons in whom the functions of manager are currently vested.

17.15 Successors should not, of course, be bound by the variation except in the capacity which makes them successors: if, for example, the original parties were confined to servient owners, the fact that one of their successors happens also to have an estate or interest in the dominant land should not mean that he is bound by the deed in his capacity as dominant owner.

(iii) *The effect*

17.16 The equitable variation should give rise, as between those currently bound by it, to directly enforceable mutual duties to ensure that its terms are implemented. In so far as it binds dominant owners, they should have a duty, enforceable at the suit of others currently bound by it, not to enforce the land obligation against persons, or in ways, inconsistent with the variation. In so far as it binds servient owners, they should have a duty, similarly enforceable, to indemnify to any necessary extent any one of their fellows who is made liable for a contravention for which, or to an extent to which, he ought not to be liable under the terms of the variation.

17.17 Once the equitable variation is made, therefore, nothing more is necessary. The enforceable cross-duties described in the preceding paragraph attach automatically to those who are currently bound as successors, and fall away automatically from those who are no longer so bound. No indemnity covenants or other express provisions are needed on any subsequent change of ownership.

(iv) *Registration*

17.18 So far as unregistered land is concerned, variations (whether equitable or legal) will not be registrable under the Land Charges Act 1972. This is consonant with principle since registration under the 1972 Act gives notice of the existence of the thing registered but not of its details, and variations are therefore not normally registrable. It is for a purchaser of servient land to ascertain the details of a registered land obligation, including any variations in those details which may have taken place; and of course a vendor who failed to disclose a variation would normally be liable to a purchaser who suffered loss as a result.<sup>10</sup>

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<sup>10</sup>See also Law of Property Act 1925, s.183(1).

17.19 As regards registered land, variations are registrable under section 46(b) of the Land Registration Act 1925.<sup>11</sup> A variation will nearly always be made on the sale of part of the land comprised in a title and will be contained in the transfer, and in such cases it will in practice be noted both on the title of the land retained and on the new title of the land sold. A variation made in some other way may not be noted unless a specific application is made and there is therefore a very slight possibility that a successor will be affected by a variation which does not appear on the register; but this again is consonant with existing principle<sup>12</sup> and the considerations mentioned at the end of the preceding paragraph would again apply.

**(c) Successive equitable variations**

17.20 There is, however, no reason to prevent an equitable variation of an equitable variation. The provisions recommended above should apply equally to a deed which operates to vary a previous deed.

**Two concluding matters**

17.21 Before leaving this subject, note should be taken of two matters which are relevant to it.

**(a) Contribution between servient owners in the absence of variation**

17.22 When the servient land is divided, it is obviously important that the servient owners should have a satisfactory means of apportioning amongst themselves, in accordance with their own wishes and on a permanent basis, future liability arising under land obligations; and the foregoing recommendations are designed (among other things) to provide such a means.

17.23 But if for any reason advantage is not taken of it, a long-stop measure exists under the present law in the shape of the Civil Liability (Contribution) Act 1978. This enables any person who is liable in respect of damage suffered by another person to recover a contribution from anyone else who is liable in respect of the same damage.<sup>13</sup> The contribution obtainable is such as the court finds to be just and equitable having regard to where the responsibility for the damage lies, and it may amount to a complete indemnity.<sup>14</sup> If, therefore, a dominant owner seeks to make an owner of part of the servient land liable in damages<sup>15</sup> for the contravention of a land obligation in circumstances which are (or to an extent which is) "unjust", the servient owner may be able to claim contribution from other servient owners under the Act. In so far as the matter is governed by an equitable variation, however, the terms of that variation will prevail.<sup>16</sup>

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<sup>11</sup>As amended by the draft Bill, Schedule 3, para. 4(6).

<sup>12</sup>Compare, for example, Law of Property Act 1925, s.190.

<sup>13</sup>Section 1. Section 6(1) ensures that the Act applies to actions for damages "whatever the legal basis of [the] liability, whether tort, breach of contract, breach of trust or otherwise".

<sup>14</sup>Section 2.

<sup>15</sup>The relevant provisions of the Act are confined to damages: it would not apply, therefore, in relation to sums due under a reciprocal payment or reimbursement obligation.

<sup>16</sup>Section 7(3).

(b) "Variation" as between landlord and tenant

17.24 Up to now we have been concerned with what may be called "side-ways" division of the servient land—that is, division of the actual land itself into separate parts. It can also be the subject of "downwards" division—that is, division of the ownership into leasehold as well as freehold estates. Similar problems of variation may exist in this case because landlord and tenant will usually wish to settle, as between themselves, the liability for performing a land obligation. If the situation is such that the dominant owner has the right to enforce the obligation against both landlord and tenant, he will of course retain that right despite any arrangement which the two of them may make; the arrangement will operate only between themselves and it therefore has the characteristics of an equitable variation.

17.25 However, although the provisions recommended in this part of the report could be invoked for this purpose, the problem will in practice be solved in the way in which similar problems are already solved today: by means of a simple covenant by landlord with tenant, or tenant with landlord, to perform the land obligation. The liability to perform a land obligation is only one of a number of liabilities (of which the liability to pay rates is an obvious example) which have to be assigned to one or other of them, and the assigning will be done in the familiar way.

17.26 It remains to add that if the lease makes no express provision, and if both landlord and tenant are liable for damages in respect of a contravention as against the dominant owner, the Civil Liability (Contribution) Act 1978 could again be invoked.

## PART XVIII

### EXTINGUISHMENT AND VARIATION BY THE LANDS TRIBUNAL

18.1 The law has long recognised that someone who is bound by a restrictive covenant should have the right, in certain circumstances, to apply to a judicial tribunal to have it discharged or modified. This right is conferred by section 84 of the Law of Property Act 1925, and the tribunal to which application must be made is now the Lands Tribunal. It is clear that an analogous jurisdiction is needed in relation to land obligations.

18.2 Section 84 has, in general, worked satisfactorily and amendments widening its scope were made as recently as 1969.<sup>1</sup> Accordingly, we see no reason or justification for reconsidering its basic approach for the purposes of this project. On the other hand, as will appear in more detail below, the features of our scheme are such as to require substantial additions or modifications to the present section 84 regime.<sup>2</sup>

18.3 In what follows we shall deal first with the powers which we think the Lands Tribunal should have, and then with the grounds on which they should be exercisable.

#### **Powers of the Lands Tribunal in relation to land obligations, etc.**

18.4 The powers of the Tribunal under section 84 are confined to covenants which are restrictive (or, more accurately, to "any restriction arising under covenant or otherwise as to the user [of land] or the building thereon").<sup>3</sup> This limitation must be reconsidered in the context of our scheme.

##### **(a) Scope of powers**

18.5 Inasmuch as it is one of the main purposes of this report to put positive obligations on the same juridical footing as restrictive ones, it is clear that the Lands Tribunal's powers under what we may for convenience call the new regime should not be limited to restrictions but should extend to land obligations of all kinds. But they need to extend still further, because in the case of a development scheme there may be a close relationship between development obligations on the one hand and makers' obligations, managers' obligations and the other provisions of the scheme on the other. It would make no sense if development obligations were subject to variation and the latter were not. Nor indeed would it be desirable, even if it were possible, to exclude the latter from review under the new regime. If development schemes are to be useful, they must be flexible and open to modification in the light of changing circumstances.

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<sup>1</sup>By Law of Property Act 1969, s.28, passed as a result of our Report on Restrictive Covenants (1967), Law Com. No. 11.

<sup>2</sup>The general approval of our proposals elicited by our recent round of consultation (see para. 1.8 above) did, of course, extend to the recommendations made in this part of the report.

<sup>3</sup>Section 84(1).

18.6 We therefore recommend that the Tribunal's powers under the new regime (which are dealt with in clauses 17 and 18 of, and Schedule 3 to, the draft Bill) should be powers by order:

- (a) to extinguish or modify any land obligation, or
- (b) to modify a development scheme by modifying or deleting any of its provisions (including provisions imposing an obligation on a manager or maker).

The power recommended in (b) above stops short of a power to extinguish a development scheme altogether, but we recommend that the Lands Tribunal should have power to do this if, having extinguished all the development obligations imposed under the scheme, the Tribunal considers it appropriate to go on and extinguish the scheme itself.

**(b) Who can apply?**

18.7 Section 84 says that an application may be made by "anyone interested" in the burdened land. Our own recommendations on this point must be rather more elaborate.

*(i) Neighbour obligations*

18.8 We recommend that anyone interested in the servient land or part of it should be entitled to apply to the Tribunal in relation to a neighbour obligation. "Anyone interested" covers a wider range of people than those who are currently bound by the land obligation, because it includes, for example, those who have made a contract to purchase servient land and those who have an option to purchase it. We think it right to follow the section 84 precedent in this respect, because such people should in our view be within the class of potential applicants.

18.9 A further recommendation should be made in relation to reciprocal payment obligations. These, it may be recalled, are land obligations to meet or contribute towards the cost of performing a primary land obligation to carry out works or provide services. Under the recommendation just made, a person bound by the works or services obligation could apply for modification or discharge of that obligation (and if he were successful the reciprocal payment obligation would itself be reduced or discharged). But what of a person bound by a reciprocal payment obligation who wants to have his payments reduced or discharged? The foregoing recommendation would entitle him simply to apply for a reduction or discharge of that obligation, but such an application would seldom meet with much success while the primary works or services obligation continued in full force. His only real hope of success would lie in obtaining a discharge or modification of the works or services obligation itself; and the foregoing recommendation would give him no right to ask for that. We therefore make an additional recommendation that someone who is interested in the whole or part of land which is servient land in relation to a reciprocal payment obligation should be entitled to apply in respect of the works or services obligation on which it depends.

*(ii) Development obligations and development schemes*

18.10 In considering who should be entitled to apply in respect of a development obligation or a provision of a development scheme, we must bear



in mind not only that all these things are inter-related but also that each of them is of potential concern to all those people who are interested in the development and in the individual units which it comprises. It follows, in our view, that any one of those people should be entitled to apply in relation to any one of the things in question.

18.11 To put the matter more formally, we recommend that the class of potential applicants should consist of:

- (a) the manager (if any) of the development scheme, and
- (b) any person interested in the whole or part of any land which is servient land in relation to any land obligation imposed in pursuance of the scheme.

**(c) Modification or extinguishment on terms**

18.12 Section 84(1C) gives the Lands Tribunal power on modifying a restriction by relaxing its existing provisions, to add to it such other restrictive provisions as may be reasonable in view of the relaxation. The applicant must consent, but if he refuses consent the Tribunal may refuse the modification.

18.13 This power is necessary in relation to the new regime, and perhaps even more so for positive land obligations than for restrictive ones. We therefore recommend that the Lands Tribunal's powers of extinguishment or modification should always include a power to extinguish or modify the thing in question upon such terms as the Tribunal may think fit.

18.14 We also recommend that the Tribunal should, in furtherance of that general power, have power to do certain specific things—namely:

- (a) To add provisions to any existing obligation or to any development scheme. Thus the deletion of a manager's obligation to keep an area of communal garden stocked with flowers might be accompanied by a new provision requiring him to keep it grassed and properly mown.
- (b) To impose new land obligations (whether or not in substitution for obligations extinguished by the order). Thus the relaxation of a land obligation restricting the use to be made of the servient land might be accompanied by the imposition of a new obligation to maintain a substantial boundary wall.
- (c) In the case of an order made with respect to a development obligation or a development scheme, to give such directions as the Tribunal may think fit to persons affected by it. Suppose, for example, that development obligations require each unit owner to maintain a front garden wall, but after some years the walls begin to disintegrate and the expense of maintaining them becomes burdensome. If an order discharging the obligations were made, it might be accompanied by a direction (made in order to preserve the appearance of the development) to clear away the existing, and crumbling, walls.
- (d) In the case of an application, made by someone bound by a reciprocal payment obligation, to discharge or modify a primary works or services obligation, to give directions to a person bound by the latter obligation.

Thus if an application to discharge a primary obligation to maintain a boundary wall were successfully made in this way, it might be appropriate to order the demolition of the existing wall lest it become a source of danger.

**(d) Compensation**

18.15 Section 84(1) enables the Lands Tribunal, in an order discharging or modifying a restriction, to

“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.”

*(i) Comment on section 84(1)(ii)*

18.16 Head (ii) demands some comment. It seems clearly intended to cover the kind of case in which X sells off part of his garden to Y, at the same time imposing a restrictive covenant which limits the use which Y can make of the land. As a result, the land sold is less valuable than it would otherwise be and Y therefore pays X a reduced price for it. What head (ii) provides in effect is that if Y, or a successor in title of his, later succeeds in having the covenant discharged or modified (probably with a consequent increase in the value of his land), the Tribunal can order a payment to be made to a person who was entitled to the benefit of the covenant, so as to make up for the reduction in the price which Y paid to X.

18.17 It can be argued that this provision falls some way short of perfection even in its present context.<sup>4</sup> Be that as it may, however, we think it would on balance be undesirable to reproduce it in the context of our new regime. It must be remembered that the new regime caters for land obligations of all kinds and, in addition, for all the provisions of development schemes. Our recommendations about compensation must therefore have the same wide scope. The provisions of head (ii) could not, however, be sensibly reproduced except in relation to neighbour obligations; and it seems to us that it would be anomalous and unnecessary to cater specially for these in this way. The recommendations for compensation which we make below will in our view enable the Tribunal to do substantial justice in all cases.

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<sup>4</sup>It can appropriately be used only if (to use the example given in the preceding paragraph of the text) the benefited land is still owned by X. Even then the effects of inflation are likely to militate against its effectiveness. There is also the problem that the situation in which it applies (where a vendor imposes a covenant on a purchaser and takes a lower price) seems logically no different from other situations in which it does not apply—for example, where there is no sale of land but one landowner simply pays another to enter into a covenant; or where there is a sale but it is the vendor who accepts the burden of a covenant, obtaining in consequence a higher price for the land sold.

(ii) *Our main recommendation*

18.18 For the reasons just given we feel justified in making one of our very few departures from the existing pattern of section 84 and recommending that the new regime should contain no provision corresponding with head (ii). We therefore recommend simply that the Lands Tribunal should have power to order anyone who benefits from its order to compensate anyone bound by it for any loss or disadvantage which he will suffer because of it.

(iii) *Managers*

18.19 The recommendation just made requires two modifications for cases where one of the persons bound by the order is the manager of a development scheme.

18.20 First, we recommend that no compensation should be payable to the manager as such. If the Tribunal's order affects the manager, the Tribunal will of course be concerned to ensure (by making consequential changes in the development scheme or in the development obligations imposed under it) that the manager's position remains a viable and satisfactory one; but we do not consider that the manager should be treated as a person entitled to "compensation".

18.21 Second, however, we make a recommendation designed to deal with the case where a development obligation is enforceable by a manager. In that case we recommend that, for the purposes of the main recommendation, the persons "bound" by the order should include all those whom enforcement by the manager is intended to benefit, so that they qualify for compensation. If and in so far as a development obligation is enforceable by unit owners as well as by the manager, those unit owners will of course be bound by the Tribunal's order and will qualify for compensation on that basis. But the recommendation just made will permit compensation to be paid to unit owners who have no direct right to enforce but who are intended to benefit from the manager's enforcement.

(e) **New or additional burdens resulting from the order**

18.22 We mentioned earlier<sup>5</sup> that section 84(1C) provides that, although the Lands Tribunal may, on relaxing a restriction, add further restrictive provisions, this may not be done without the consent of the applicant.

18.23 Building on this principle, we recommend that an order made under the new regime should not impose any new or additional burden (including the burden of a direction to pay compensation) on any person unless he consents.

18.24 We do, however, propose one limited exception to this rule. It arises in connection with development schemes. Applications for changes to be made in these schemes, or in development obligations imposed under them, are

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<sup>5</sup>Para. 18.12 above.

likely to involve the interests of all or many of the unit owners and, if the changes are necessary or beneficial, they should succeed. It is important that they should not fail merely because one unit owner withholds consent quite unreasonably. In such cases, therefore, we recommend that the Lands Tribunal should, in imposing a burden on a person, have power to dispense with that person's consent if, but only if, it is satisfied that the prejudice which it causes him does not substantially outweigh the benefits which will accrue to him from the other provisions of the order.

18.25 If the Tribunal considers that an order ought not to be made without the imposition of some new or additional burden, and the necessary consent is not forthcoming and the exception does not apply, the Tribunal should refuse to make the order.

**(f) Procedural matters**

18.26 Section 84 contains several provisions of a procedural nature. Subsection (3) deals with the making of enquiries and the giving of notice to persons affected by the application. Subsection (3A) deals with the persons who are, or are not, to be admitted to oppose the application. The same subsection requires rules to make provision for the proceedings before the Tribunal to be suspended so that certain legal questions can be determined by the court.<sup>6</sup> Subsection (6) deals with the instrument alleged to impose the restriction, and says that the actual instrument need not be produced to the Tribunal provided that there is sufficient evidence of its terms. And subsection (7) requires the Land Registry to give effect to an order relating to registered land.

18.27 We recommend that all these provisions should have a place in the new regime—unchanged save for the adaptations necessary to fit them for use in the wider context of that regime.

18.28 Subsection (5) of section 84 contains provisions as to who shall be bound by the Tribunal's order. These provisions, too, should have a place in our scheme but they must necessarily become more elaborate if they are to cover development schemes and development obligations and take account of certain of our other recommendations:

- (a) In the case of an order affecting a development scheme, we think that the order should bind everyone who is or becomes (broadly speaking) involved in the scheme.
- (b) In the case of an order affecting a land obligation, we think that the order should bind everyone who is or becomes bound by or entitled to enforce it (and, in the case of a development obligation, the makers and any manager of the development scheme).

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<sup>6</sup>The questions concerned are those the court has power to determine under s.84(2). The analogous powers of the court in relation to land obligations are dealt with in Part XIX of this report. Also dealt with there is the court's power, analogous to that in s.84(9), to suspend legal proceedings to enforce a land obligation pending an application in respect of it being made to the Lands Tribunal.

- (c) But in so far as the order imposes a new land obligation, or adds provisions to an existing one,<sup>7</sup> we think that the order itself should specify those who are to be bound by it. No simple rule can be propounded in this case: if, for instance, the new obligation was "linked" in some way to an existing one which (by reason, for example, of lack of registration) was not binding on all those interested in the servient land, it might be right to restrict the class of those bound by the new one.

(g) **Exceptions**

18.29 Section 84 also provides for certain exceptional cases in which the Lands Tribunal's powers do not apply.

18.30 Subsection (7) provides that they do not apply "where the restriction was imposed on the occasion of a disposition made gratuitously or for a nominal consideration for public purposes". We have decided not to recommend that this exception be reproduced in relation to land obligations. It dates from 1925, and has not (so far as we know) been reconsidered since then. Its rationale presumably is that if someone has been public-spirited enough to donate land for public purposes he should at least be sure that any restrictions which he imposes on that land will remain inviolate. We are doubtful whether this reasoning, even if it is valid, ought to preclude variations of any kind, on any ground and against any successor in title of the original donor. We also find it strange that the provision seems on the face of it to preclude variations not only of restrictions imposed on the land given away but of any restrictions which the donor may have imposed on his own land (an event which is unlikely but not impossible). However this may be, we consider that to make a similar exception for land obligations, which may be positive rather than restrictive and may involve reciprocal obligations, would give rise to complications and to potential hardship. We think that the matter should be left to the discretion of the Lands Tribunal, which will in any case take into account the circumstances in which the obligation was created.

18.31 Subsection (11) operates to exclude from the variation provisions of section 84:

- (a) certain restrictions imposed for the protection "of any Royal Park or Garden" (and similar restrictions imposed before the 1925 Act);
- (b) restrictions "for Naval, Military or Air Force purposes"; and
- (c) restrictions "for civil aviation purposes under the powers of the Air Navigation Act 1920 or of section 19 or 23 of the Civil Aviation Act 1949".

Subsection (11A) then operates to limit the duration of these exclusions. Having carried out consultations on these provisions, our conclusions are as follows. *Case (a)* above need not be reproduced in relation to land obligations because the restrictions which it covers are confined to those imposed by

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<sup>7</sup>Under the powers recommended in paras. 18.14(a) and (b) above and 18.44 below.

virtue of section 137 of the Law of Property Act 1922, and the powers conferred by that section are amongst those which we propose to preserve unaffected by our Bill.<sup>8</sup> Restrictions of this kind will therefore not need to be created as land obligations (so that they will not fall within our new regime), and will continue to be excluded from the existing section 84 regime. *Case (b)* should be reproduced in our new regime because land obligations may be imposed for naval, military or air force purposes. It is arguable that the exclusion does not need to apply to all types of land obligation, but it has been requested that it should and we see no harm in this. *Case (c)* ought also to be reproduced, but we are advised that, instead of incorporating a reference to specific enactments, it can suitably be framed simply as an exclusion of land obligations imposed "for civil aviation purposes". To sum up, therefore, we think that subsection (ii) should be reproduced in the new regime as an exclusion of land obligations imposed for naval, military, air force or civil aviation purposes. The limitation in subsection (11A) should also be reproduced.

#### **Grounds for the exercise of the Lands Tribunal's powers**

18.32 The grounds on which, in our view, the Lands Tribunal should exercise its powers of extinguishment or modification are set out in Schedule 2 to the draft Bill. Part I deals with the grounds themselves and Part II with matters to be taken into account in considering them. We shall deal separately with these two aspects of the matter.

##### **(a) The grounds themselves**

18.33 Section 84 of the Law of Property Act 1925 lays down several different grounds for the discharge or modification of restrictive covenants. Our new regime, however, will apply not only to restrictive obligations but to other things as well.<sup>9</sup> This means that the existing grounds must be modified so as to fit them for a wider application and that they must also be supplemented by new grounds designed specifically to cater for these other things.

18.34 In the paragraphs which follow we shall not consider every detail of the grounds which we propose for the new regime, but we shall deal with their substance. We shall also indicate to what types of thing, amongst the several different things to which the Tribunal's powers extend, each ground should apply. The reasons for our recommendations on this latter point are usually evident from the nature of the ground concerned.

##### **(i) *Obsolescence***

18.35 The first ground corresponds with one of the existing section 84 grounds,<sup>10</sup> and we think it should apply to all land obligations and to managers' obligations under a development scheme.

18.36 It is that the obligation has become obsolete, through changes in the character of the servient land or development land (as the case may be) or of the general locality, or for other reasons.

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<sup>8</sup>Paras. 24.25-24.30 below.

<sup>9</sup>Para. 18.6 above.

<sup>10</sup>Section 84(1)(a).

(ii) *Harmlessness*

18.37 The second ground again corresponds with one of the existing grounds<sup>11</sup> and should have the same application as the first.

18.38 It is that the change proposed will not injure the persons having the benefit of the obligation.

(iii) *Agreement*

18.39 The third ground also corresponds with an existing ground<sup>12</sup> and should have the same application.

18.40 It is that the persons of full age and capacity who have the benefit of the obligation have expressly or impliedly agreed to the change proposed.

(iv) *Removal of a prejudicial factor*

18.41 The next ground is a new one which seems to us necessary in relation to development obligations, managers' obligations and other provisions of development schemes (but not makers' obligations).

18.42 It is that the change proposed would remove some factor which is currently prejudicing the fulfilment of the general purposes of the development scheme, and

- (a) is for the benefit of the whole or part of the development land, and
- (b) is such that any prejudice which it would cause to any person bound by a development obligation does not substantially outweigh the benefits it would give him.

18.43 As we have already said in another context, we think it important to the long term usefulness of development schemes that they (and their associated land obligations) should be capable of alteration in the light of changing circumstances. This is the main ground through which such alterations will be brought about.

18.44 We think that "removal of a prejudicial factor" should include the repair of an omission, and that (exceptionally) it should be possible on this ground to apply for the imposition of new obligations or new provisions as well as (or instead of) the extinguishment or modification of existing ones.

(v) *Impeding reasonable user*

18.45 The fifth ground again corresponds with one of the existing grounds under section 84.<sup>13</sup> It should apply to restrictive, access and positive land obligations (that is to say, to any land obligation other than one to pay money).

18.46 It is that the obligation impedes some reasonable user of the land for public or private purposes, or would do so unless modified, and that

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<sup>11</sup>Section 84(1)(c).

<sup>12</sup>Section 84(1)(b).

<sup>13</sup>Section 84(1)(aa) and (1A).

- (a) in impeding that user, the obligation either secures no practical benefits of substantial value to anyone who has the benefit of it or is contrary to the public interest, and
- (b) if any such person would suffer loss or disadvantage from the change proposed, money will be an adequate compensation.

(vi) *Change of circumstances affecting positive obligations, etc.*

18.47 The next ground is another new one, which is made necessary by the fact that the new regime must apply to positive obligations and managers' obligations, and it should therefore be restricted to obligations of those kinds.

18.48 It is that as a result of changes in circumstances, performance of the obligation

- (a) has ceased to be reasonably practicable, or
- (b) has become unreasonably expensive when compared with the benefits it gives.

18.49 It seems to us essential that a ground of this kind should exist. Otherwise the perpetually enforceable nature of a positive obligation could, as circumstances change, make it onerous to an extent which was quite unforeseen.

(vii) *Change of circumstances affecting development schemes*

18.50 This ground is essentially a version of the preceding ground, re-formulated so as to apply to the provisions of development schemes (other than managers' obligations, which are covered by the preceding ground, and makers' obligations, to which no such ground is appropriate).

18.51 It is that changes of circumstances have caused the provision in question

- (a) to become obsolete,<sup>14</sup>
- (b) to cease to be reasonably practicable to give effect to, or
- (c) to give rise to expense which is unreasonable when compared with the advantages of the provision.

(viii) *Consequential changes*

18.52 The final ground is designed to ensure that, where one thing is changed by the Tribunal on one of the other grounds, an appropriate consequential change can be made in a thing with which it is inter-related. It should therefore apply to any development obligation, to any provision of a development scheme (including managers' and makers' obligations) and to neighbour obligations which are reciprocal payment obligations.

18.53 The ground is that a change in any of the things to which it applies is made necessary by any order of the Tribunal made on any of the other grounds.

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<sup>14</sup>This serves also, in effect, to apply the substance of the first of the grounds listed above ("obsolescence") to the provisions in question.



**(b) Matters to be taken into account**

18.54 We recommend that the Lands Tribunal should be specifically required to take two things into account, in circumstances where they are relevant, before making its order.

*(i) Planning, etc.*

18.55 The first thing is one which the Tribunal is required to take into account by section 84<sup>15</sup>—namely

“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 the context in which the restriction was created or imposed and any other material circumstances.”

Under the existing provisions of section 84, the Tribunal must consider this in deciding whether a case is one which falls within the “impeding reasonable user” ground, and also in deciding whether a restriction should in fact be discharged or modified on that or any other existing ground.

18.56 We therefore recommend that, under the new regime, the Tribunal should give consideration to the same factors in deciding

- (a) whether the case falls within our version of the “impeding reasonable user” ground,<sup>16</sup> and
- (b) whether a particular restrictive obligation, access obligation or positive obligation ought to be extinguished or modified on any ground.

Land obligations involving the payment of money are excluded from para. (b) above for obvious reasons.

*(ii) Developments as a whole*

18.57 Having regard to the inter-dependence of the units comprised in a development, we recommend that the Tribunal should, in deciding whether to modify a provision of a development scheme (including a manager’s or maker’s obligation), or a development obligation imposed in pursuance of it, have particular regard to

- (a) the effect of the change proposed on the development land as a whole, and
- (b) the question whether the change is consistent with the general purposes of the scheme.

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<sup>15</sup>Section 84(1B).

<sup>16</sup>Para. 18.45 above.

## PART XIX

### POWERS OF THE COURT TO MAKE DECLARATIONS AND CHANGES

19.1 In this part of the report we shall propose that the court should have powers of certain specific kinds.

#### **Power to make declarations**

19.2 Section 84 of the Law of Property Act 1925, as well as conferring jurisdiction on the Lands Tribunal to discharge or modify restrictions, gives two declaratory powers to the court.<sup>1</sup>

19.3 The first power is one to declare whether or not in any particular case land is, or would in any given event be, affected by a restriction. We recommend that a similar power should exist in relation to land obligations, and that it should extend also to declaring whether land is, or would be, affected by a development scheme.

19.4 The second power is one to declare what, upon the true construction of any instrument purporting to impose a restriction, is the nature and extent of the restriction, and whether it is, or would in any given event be, enforceable and if so by whom. We recommend that this power, too, should be reproduced in relation to land obligations, and that it should be extended so as to cover

- (a) variations of a land obligation, and
- (b) development schemes and variations of such schemes.

#### **Powers in relation to changes of manager**

19.5 The functions of the manager in relation to a development scheme may be vital, and we think it important for the long-term usefulness of such schemes that the court should have power, if necessary, to replace an unsatisfactory manager or to fill a vacancy in the managership. We therefore recommend that the court should have power to do either of these things if satisfied that it is expedient and that it is inexpedient, difficult or impracticable for it to be done without the court's assistance. The court should also have power to give directions for the transfer to the new manager of managerial functions, property, rights and liabilities.

19.6 If a change of manager has taken place under the scheme and without the court's assistance, difficulties may still arise as to the transfer to the new manager of the property, rights and liabilities of the old.<sup>2</sup> No transfer at all may have taken place; or a transfer which has taken place may be unsatisfactory either because it is inadequate or because it is too extensive. We recommend that in any such case the court should have power to set matters right.

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<sup>1</sup>Section 84(2). A case can be made out for the court's declaratory powers to be shared with the Lands Tribunal, and we have given consideration to this possibility. It does, however, raise issues which are complicated, and it seems to us to have implications wide enough to put it outside the scope of this report.

<sup>2</sup>As to these, see paras. 7.27-7.31 above.

### **Powers in relation to the Lands Tribunal's jurisdiction**

19.7 In the preceding part of this report we made recommendations under which the Lands Tribunal would have extensive powers to extinguish or modify land obligations and development schemes.

19.8 It may well happen, in the course of court proceedings involving a land obligation or a development scheme, that a question as to the possible exercise of this jurisdiction presents itself. It may then seem desirable that the question of extinguishment or modification should be explored before the proceedings go any further. In such cases we think that the court should be empowered to act in either of two ways.

#### **(a) Power to facilitate determination by Lands Tribunal**

19.9 The first power is analogous to one which section 84 confers.<sup>3</sup> We recommend that the court should be able to give such direction as it thinks fit with respect to the making of an application to the Lands Tribunal, and to stay the court proceedings in the meantime.

#### **(b) Power to exercise the Lands Tribunal's jurisdiction**

19.10 If the court exercises the power recommended in the preceding paragraph, the normal procedure for an application to the Lands Tribunal will be followed, and in many cases this will be the most appropriate course.

19.11 In some cases, however, and particularly in those where all the relevant parties are already before the court, it may be much more economical, in terms of both time and money, if the court itself can exercise the Lands Tribunal's jurisdiction and dispose of the matter then and there. Although there is no analogous power in relation to the existing jurisdiction under section 84, we recommend that the court should be entitled, where it appears appropriate, to deal with the matter in this way.

### **Ancillary provisions**

19.12 We recommend, in connection with the jurisdiction proposed in this part of the report, ancillary provisions dealing with the question of who is to be bound by a court order which affects, or makes a declaration in relation to, a land obligation or a development scheme; with the giving effect by the Land Registry to an order affecting registered land; and with the evidence, of land obligations or development schemes, on which the court may act. These are all broadly analogous to similar provisions recommended earlier in relation to the powers of the Lands Tribunal.

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<sup>3</sup>Section 84(9).

## PART XX

### THE "RESCUE" OF EXISTING FREEHOLD FLAT SCHEMES

20.1 We have already mentioned the special importance of positive covenants in relation to blocks of flats and maisonettes. Whether the block is large or small, the units are physically dependent upon one another and it is essential that each unit owner should be able to ensure the compliance of the other owners with the obligations which are necessary to secure proper repair, maintenance, decoration, insurance, etc. But these obligations are all of a positive nature, and the burden of positive covenants does not run with freehold land under the present law. Growing realisation of the problems to which this gives rise has served to ensure, in recent years, that flat developments are invariably, or almost invariably, carried out on a leasehold basis.

#### **Introductory**

20.2 In the past, however, a substantial number of freehold flats has been created. The owners of such flats now find themselves in difficulties. Most building societies take the view that freehold flats are, for the reasons already mentioned, an unsatisfactory security, and decline to finance their purchase. This remains largely true even if one of the "devices" designed to overcome the problem<sup>1</sup> has been adopted, because none of these devices seems to have gained general acceptance among lending institutions. As a result, many flat owners are finding it difficult to sell their flats, and almost impossible to do so at their real value.

20.3 We have been conscious of this problem for a number of years and have been aware of the possibility of offering some solution to it in the course of this present exercise. Representatives of The Law Society have strongly urged us to do so. Before making a final decision, however, we felt that we should take further steps to ascertain the nature and extent of the problem, and we are very grateful to the Law Reform Committee of The Law Society's Council for arranging for the publication in The Law Society's Gazette of a general request for information on these matters.<sup>2</sup> This request evoked a considerable and most useful response from practitioners in various parts of the country. It is clear from this that the problem is large enough, and serious enough, to merit a legislative solution and that there are some areas, particularly certain coastal resorts, where freehold flats are common. It is the nature and details of this legislative solution with which we are concerned in this part of the report.

20.4 We emphasise that our present concern is only with freehold flats which are already in existence. Our earlier recommendations, and particularly those concerned with development schemes and development obligations, will enable developers to create freehold flats in future if they wish to do so;

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<sup>1</sup>Paras. 3.31-3.42 above.

<sup>2</sup>The Law Society's Gazette, 9 September 1981, p.958.

and the Building Societies Association has confirmed that freehold flats comprised in a development which makes full and proper use of the provisions of the draft Bill will be acceptable as satisfactory security for building society loans.

20.5 Nor indeed is the usefulness of the recommendations which we have already made confined entirely to freehold flats created in the future. In the case of very small blocks (and certainly in the simple case of the house divided into two flats) it may well be possible for existing flat owners to rescue themselves from their predicament merely by entering into mutual neighbour obligations. In other cases, they can do so by setting up a development scheme and then entering into development obligations in pursuance of that scheme.<sup>3</sup> But in all these cases it is necessary, if the rescue operation is to be fully effective, for all the owners of all the units, and anyone else who has an interest, to be willing and able to club together and execute the necessary legal documents. And the larger the block, or the more complicated the situation, the less likely is this to be so.

20.6 Failure to obtain the necessary complete co-operation may be due to several causes. It may, of course, be due to unreasonable recalcitrance on the part of one of the unit owners. Equally, however, it may be due less to recalcitrance than to lack of interest: a tenant or a mortgagee (if there is one, and provided that his security is not inadequate) may see no reason why he should trouble himself with a thing like this. And again, and perhaps most likely, it may be due to sheer weight of numbers. To explain the matter to (say) a hundred unit owners (and their tenants and mortgagees if there are any), to obtain their (or their various solicitors') approval to the details of a new scheme, to ensure that they are all ready and willing at the right time to execute the necessary documents . . . these and many other tasks would have to be successfully accomplished by someone at considerable expense of time and money, and they might well add up to a wholly insuperable obstacle.

20.7 Our task in this part of the report, therefore, is to produce a means by which the desired result may be achieved without obtaining the full co-operation of all the many people who may be interested, but without the risk of prejudice or unfairness to any of them. We regard the latter point as a most important one: both the reasons and the safeguards must be very strong if an alteration in people's existing legal position is to be justified.

20.8 Before we come to the details of our scheme we would add that we have, before deciding upon it, considered several alternatives, and we are most grateful to those who suggested them to us. One, involving a sort of retrospective transformation of existing positive covenants into land obligations, had to be rejected for both practical reasons and reasons of principle. (The reasons of principle had to do with the point made at the end of the preceding paragraph.) Another, involving in effect the imposition of basic and mutually enforceable repairing obligations on all the units comprised

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<sup>3</sup>We have already explained that the use of development schemes is not confined to developers: paras. 7.69-7.71 above.

in existing blocks of freehold flats, was rejected because (whether or not its retrospective element would have been acceptable in principle) it would not have gone far enough to solve all the problems which exist in practice and would not necessarily have provided a universally satisfactory solution even to problems involving repair.

#### **General effect of the rescue provisions**

20.9 Our conclusion is that a satisfactory means of rescue can be provided only through the medium of a development scheme tailored to the needs of the particular block of flats to be rescued. There is of course no way in which the details of such a scheme can be made to spring into being automatically: they must be worked out by someone.

20.10 Our general recommendation is, therefore, that if a unit owner or group of unit owners prepares a development scheme for the block in question, and puts it forward, the court should have power to approve it and to ensure that legal effect is given to it.<sup>4</sup>

20.11 Our more detailed recommendations are dealt with in the remainder of this part of the report. Their object will be simply to enable one or more of the interested parties to bring about, with the court's help, a result which all the interested parties could (if they were all co-operating fully with one another) bring about without it. It is relevant to consider what steps, in a case of the latter kind, the interested parties would have to take—because it is these steps which, in a proper case, the court must have power to replicate. They are noted briefly in the following paragraphs.

20.12 First, the development scheme itself would have to be made and executed. In all probability this scheme would have not only to designate the property and make provision for the intended system of land obligations, but also to contain other provisions. In most cases, for example, the makers of the scheme would undertake obligations to ensure its implementation by the imposition of the requisite land obligations on their respective units. If a manager were required, the scheme would include provisions as to the setting up of the manager, and obligations to ensure that these provisions were carried into effect, and provisions as to the manager's functions. If the manager were to be a limited company, the makers of the scheme might assume obligations to take up shares. All these and similar matters might feature in the scheme itself.

20.13 Second, the steps contemplated by the scheme would have to be carried out. The manager (if any) would have to be set up and the shares (if any) taken up; and, most important of all in the present context, the scheme

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<sup>4</sup>We recommend that this power should be exercisable by the court, and in para. 23.9 below we recommend that the court should, for this purpose, normally be the High Court. We are conscious that a case could be made for assigning this jurisdiction to the Lands Tribunal; but it may involve the determination of difficult legal issues as well as the imposition of new obligations upon people against their wishes, and we think a jurisdiction of this kind is best exercised by the High Court.

would have to be implemented by the actual imposition on the units of the land obligations for which it made provision. These obligations would then have to be registered to ensure that they bound subsequent purchasers.

20.14 Third, the arrangements replaced by the scheme would have to be nullified. Any covenants superseded by land obligations should be released, and provision should be made in regard to anyone carrying out any managerial functions which were to be assumed by the new manager. Obligations to take these steps also might be amongst the obligations contained in the scheme.

#### **The rescue provisions in detail**

20.15 With these points in mind, we now turn to our detailed recommendations.

##### **(a) In what cases?**

20.16 Since the provisions which we propose involve an element of compulsion, we have no doubt that they should be strictly confined to the situation at which they are aimed: that of blocks of residential freehold flats or maisonettes existing before the date on which they come into force. On the other hand they should not be excluded merely because some one or more of the units in the block is or are let to tenants or used for non-residential purposes (as, for example, in the case of a block with one or two units at ground floor level used as shops).

##### **(b) Who can apply?**

20.17 In consonance with our general policy, described above, we recommend that anyone who has a legal estate in any part of the land to which the proposed development scheme is to apply should be entitled to put that scheme forward, or to join in putting it forward, to the court.

20.18 It may be helpful to point out at this stage that three different classes of people may be involved in a case of this kind:

First, the applicants themselves. These are the people who, falling within the description just given, put forward the scheme and seek the court's help in getting it made and implemented.

Second, the participants. This description may be given to all those who, though they are not applicants, are nonetheless willing, for their own part, actively to take any steps necessary for the making and implementation of the scheme.

Third, the respondents. This description may be given to all those people whose participation is required (or would be required, but for the court's proposed powers) but who do not fall within either of the other two classes. It should be emphasised that respondents are by no means necessarily opponents of the scheme. They may merely have chosen, for one reason or another, to remain inactive.

20.19 It may of course be, in a particular case, that there are no participants: everyone may be either an applicant or a respondent. But if there

is a class of participants, and their co-operation can be relied upon, there will of course be no need for the applicants to seek any orders from the court in respect of them.

**(c) Respondents: notification, etc.**

20.20 The procedure to be adopted in relation to applications to the court under these provisions will of course be governed by rules of court, and the details of those rules should be left to the Rules Committee. We would only make the general observation that whilst some form of notification of the application must clearly be given to all respondents, allowance will have to be made for the fact that their names and addresses (and indeed, in some cases, their existence) may not be readily ascertainable. It should be remembered that the respondents may comprise not only the freehold flat owners themselves but mortgagees and tenants of theirs and other people with interests in the building and its curtilage. It may be, therefore, that notice by means of advertisement or an announcement displayed at the building itself (or both), or some similar means of notice, would be appropriate, at least in some cases.

20.21 We would, however, make one other point in this connection. When we described respondents as those (other than applicants and participants) "whose participation is required", we were choosing our words with care. It is not everyone with any kind of interest in any part of the land whose participation is required if the scheme is to serve its purpose. If, for example, the existing restrictive covenants are not being replaced by land obligations (and there may be no reason why they should be), and the scheme is confined to the imposition of positive, reciprocal payment or reimbursement obligations, the court's order need not be sought against anyone whose interest is not substantial enough to be bound by such obligations. Indeed it may not always be essential to seek it even in respect of all those whose interests are substantial enough to be bound. Of course no one's interest will be bound by the new obligations unless such an order is sought in respect of him; but the fact that the interest of (for example) a tenant for 22 years is not bound may not really matter if the interest of the freeholder (and perhaps that of a superior tenant) is bound. These are all matters to be decided in the light of the particular circumstances.

**(d) Of what must the court be satisfied?**

20.22 If the court is to make orders designed to ensure that the scheme is carried into effect, it should be satisfied that certain stringent conditions are fulfilled.

20.23 We recommend that it should, first, be satisfied that the building in respect of which the application is sought is still basically a block of residential freehold flats or maisonettes in the sense already mentioned.

20.24 Second, the court should be satisfied that the main object of the scheme is to remove some factor which tends to prejudice the maintenance in good repair, or the amenities, of the whole or part of the building, or the disposability of the freehold estate in at least one unit comprised in the



building. The primary example of a prejudicial factor of this kind is of course the non-running of the existing positive covenants—a factor which can be removed by the substitution of land obligations. But we are deliberately proposing not to confine the present provisions expressly to that case. We understand that some freehold flat developments have run into difficulties not (or not only) because the positive covenants do not run but because adequate positive covenants were not imposed at all. A case of this kind should also be covered. And indeed if it is possible, by means of a development scheme, to remove any other prejudicial factor having the severe effect just described, we see no reason why this should not be done.

20.25 Third—and this condition is of course inherent in the present provisions—the court should be satisfied that the object just mentioned cannot be achieved without the participation of the respondents in respect of whom the order is sought.

20.26 But fourth—and this condition is of crucial importance—we recommend that the court should be satisfied that any prejudice caused to a respondent by the making of the order does not substantially outweigh the benefits which he will derive through the scheme.

20.27 And fifth, the court should be satisfied that the provisions of the scheme, and of the development obligations to be imposed in pursuance of it, are in all the circumstances reasonable. This and the preceding condition are intended to provide a fully adequate safeguard for respondents.

**(e) The court's order**

20.28 The court's order will take the form of an order dispensing with the need for the respondents to participate in the making and implementation of a development scheme.

*(i) What scheme?*

20.29 The scheme to which the court order relates will normally be the scheme as put forward by the applicants. We are conscious, however, that that scheme may sometimes be such that it does not, in the court's view, fulfil the relevant conditions. If modifications would enable it to do so, we see no reason why the court's order should not relate to the scheme as so modified. This must, however, be subject to one point. If the case is one involving those whom we have called participants, the consent which they have given to the original scheme will not have embraced the modifications. The court's order should not be made in respect of the modified scheme, therefore, unless they do consent to its being modified.

*(ii) Details of the order*

20.30 Broadly speaking, the purpose of the court's order is to enable the steps summarised in paragraphs 20.12—20.14 above to be taken despite the non-participation of the respondents.

20.31 In addition, therefore, to simply dispensing with that participation, the court should have power to include in its order such incidental and supplemental provisions as it thinks fit. In particular it should in our view be possible for the order to do any of the following things:

- (a) To contain any necessary directions for the making and implementation of the scheme. These could include directions for the imposition of development obligations on respondents and for their registration.
- (b) To contain directions as to the application to respondents of any obligations imposed upon makers of the scheme as such.
- (c) To provide for the extinguishment or modification of rights, powers and duties superseded by the new scheme and by the development obligations imposed in pursuance of it.

20.32 It should be emphasised that these powers of the court relate only to the roles which would otherwise be played by the respondents. The applicants and the participants must still play their own roles and must actively take any steps which are necessary on their part. It is of course inherent in the existence of participants that one of them might, when the time came, refuse to take these steps. The possibility could be guarded against if the applicants entered beforehand into a binding agreement with the participants. Short of that, there is always the possibility that another court application could be made in which the erstwhile participant became a respondent (and that possibility might serve of itself to keep him on his original course).

## PART XXI

### COMPULSORY PURCHASE

21.1 Although the subject is peripheral to the main purposes of this report, it is necessary to consider the place which land obligations should occupy in what we may call (though the description is not an exact one, as will later appear) the law of compulsory purchase. In doing so we have been much helped by the Department of the Environment, to whom we are most grateful.

21.2 No provisions on this subject appear in the draft Bill, however, because consultation has not yet taken place with other Government Departments or with local authorities and others possessing the relevant powers. It seemed to us that there was no purpose in initiating the consultation process until our main proposals had reached their final form, and it is for this reason that the process is incomplete. What follows, therefore, is merely an outline of the ideas which we have developed in conjunction with the Department of the Environment.

#### **Authority acquiring land which has the benefit of a land obligation**

21.3 The first point to mention is also the simplest. It relates to the acquisition of land by an authority possessing powers of compulsory purchase (whether the acquisition itself is compulsory or not). It is clear under the present law that the benefit of any easement which is appurtenant to the land acquired will pass to the authority; and we think that the same result should follow if the land acquired is dominant land in relation to a land obligation. It is equally clear that this result follows from the general recommendations made earlier in this report.<sup>1</sup>

#### **Authority owning land which is burdened with a land obligation**

21.4 The next question arises where the authority has acquired land which is servient land in relation to a land obligation: does it have to observe the obligation, and what happens if the land is to be put to a use which is inconsistent with it?

21.5 To answer these questions it is appropriate to look again at the existing position of easements and other adverse interests. What matters, it seems, is not whether the land was acquired compulsorily, or even whether the authority has powers of compulsory acquisition, but whether the authority in question has statutory powers (or duties) to use the land in a particular way. In principle the authority is bound by the adverse interest just like anyone else, but if it does possess statutory powers of this kind, and exercises them,

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<sup>1</sup>Part X; and see clause 6(1) (as to neighbour obligations) and clause 6(5) and (6) (as to development obligations) of the draft Bill. It also follows (and, we think, rightly so) that an authority acquiring land within a development scheme would, if burdened with any development obligations under the scheme, acquire a right to enforce managers' and makers' obligations: para. 7.50 above, and clause 3(5) of the draft Bill.

and if and in so far as observing the rights of the adverse interest holder is inconsistent with such exercise, then those rights are suspended, while the use continues, and cannot be enforced;<sup>2</sup> but their owner can claim compensation for injurious affection.<sup>3</sup>

(a) *Neighbour obligations*

21.6 So far as neighbour obligations are concerned, we think that the same rules should apply.

21.7 Having regard to the diverse character of land obligations, we have considered whether some attempt should be made to define the circumstances in which compliance with different kinds of obligation should be treated as "inconsistent" with the exercise of statutory powers; but we think that any such definition would be extremely difficult to frame and that it might have undesirable repercussions on the meaning of the word in relation to adverse interests of other kinds. If this problem arises in practice, we think its solution is best left to the courts. Certainly it seems to us that land obligations involving merely the making of payments would never be "inconsistent" in the relevant sense.

(b) *Development obligations and development schemes*

21.8 We think the same rules should apply also (if the land owned by the authority forms part of the land comprised in a development scheme) to development obligations; but these pose two particular problems on which more needs to be said.

21.9 The first is: who should be treated as having the benefit of a development obligation so as to be entitled to claim compensation for injurious affection? It will be recalled that most development obligations may be enforceable by a manager and that most of them may be enforceable (as well, or instead) by some or all of the owners of units in the development. We consider that:

- (a) if the obligation suspended is one which is enforceable by some or all of those interested in the other units, they should be entitled to claim compensation; and
- (b) if the obligation (whether or not it falls within (a) above) is enforceable by a manager, the manager himself should not be entitled to claim compensation, but such entitlement should extend to all those who are intended to benefit from enforcement by him.<sup>4</sup>

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<sup>2</sup>There is apparently no permanent extinguishment, so that the rights could seemingly revive again if the inconsistent use ceased: *Manchester Sheffield and Lincolnshire Railway Co. v. Anderson* [1898] 2 Ch. 394 (C.A.), per Lindley M.R. at p.400. See also *Re Simeon and Isle of Wight Rural District Council* [1937] 1 Ch. 525 at p.535.

<sup>3</sup>Under Compulsory Purchase Act 1965, s.10 (see also Lands Clauses Consolidation Act 1845, s.68). This provision is not confined to cases in which the land was acquired compulsorily: *Kirby v. Harrogate School Board* [1896] 1 Ch. 437 (C.A.). Special provisions may apply in cases where an adverse right is suspended through the exercise of statutory powers belonging to a person who is not an authority covered by the 1965 Act.

<sup>4</sup>This suggestion is analogous to a recommendation about compensation made earlier in another context: paras. 18.19–18.21 above.

21.10 The second problem arises because the suspension of a development obligation may have disruptive consequences for the development scheme as a whole. Individual development obligations are liable to be closely linked to, and dependent on, other development obligations on the one hand and, on the other, the obligations of a manager and the other provisions of the scheme. It therefore seems to us that the variation powers of the Lands Tribunal<sup>5</sup> (exercisable by the court in certain circumstances<sup>6</sup>) should apply in such a case so as to enable any appropriate changes to be made in these things. It may be that one of the grounds for variation which we have already recommended (“Removal of a prejudicial factor”<sup>7</sup>) is adequate to serve this purpose, but a concluded view on this point must await the further consultation already mentioned.

**Power for authority to impose new land obligations on its own land**

21.11 We see no reason to doubt that authorities of the kind we have in mind should have general power to enter into transactions which involve the imposition of land obligations upon their own land. It must of course be remembered that, in the case of reciprocal payment obligations, and the works and services obligations with which they are allied, the imposition of one obligation upon one’s own land is a necessary concomitant of the other being imposed upon the land of another person.

**No power for authority to impose new land obligations on other people’s land**

21.12 We do not suggest, however, that authorities’ powers of compulsory purchase should enable them compulsorily to impose land obligations upon the land of other persons. Bearing in mind the onerous character which some land obligations may have, it can be argued that such a power would be perceived as an oppressive one.

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<sup>5</sup>Part XVIII of this report.

<sup>6</sup>Para. 19.11 above.

<sup>7</sup>Paras. 18.41–18.44 above.

## PART XXII

### MODEL FORMS

22.1 The implementation of the proposals made in this report will of course create new powers and facilities in relation to property, and the legal profession will be called upon to produce legally satisfactory forms of words through which they may be exercised. Three classes of thing may be distinguished for this purpose: neighbour obligations, development obligations and development schemes. Another distinction, cutting across the one just mentioned, should also be drawn: between the formal legal words common to all the things in each of these classes (the legal skeleton), and the actual content of the obligation or scheme, which will differ from one case to another (the substantive content).

22.2 So far as neighbour obligations are concerned, we think that neither the legal skeleton nor the substantive content are likely to cause much difficulty. The former can be readily derived from the provisions of the draft Bill, which amount almost to drafting instructions;<sup>1</sup> and the latter will be very much the same as the substantive content of restrictive and positive covenants under the existing law.

22.3 As regards development obligations, the same is largely true of the legal skeleton;<sup>2</sup> but the substantive content may give draftsmen greater pause because it will be less familiar to them.

22.4 As to development schemes, we think that both the legal skeleton and the substantive content may make more calls upon the resourcefulness of draftsmen, because they involve ideas still more unfamiliar. So far as the legal skeleton is concerned, we think that the requirements are clear, but that making provision for all the matters required in a particular development may result in a skeleton which is relatively complex.<sup>3</sup> As to the substantive content, the most one can say is that there is some relevant experience to be drawn upon: that of freehold housing developments and (more particularly, perhaps, in manager cases) that of leasehold developments, especially those involving blocks of flats.

#### The usefulness of model forms

22.5 How far would model forms, officially promulgated, have a part to play in assisting legal practitioners to meet the needs of their clients?

22.6 For reasons already given in another context,<sup>4</sup> we do not think it would be right to recommend the promulgation of such forms for *compulsory* use, and this view was very strongly confirmed in our recent consultation. That consultation did however disclose a substantial body of opinion that

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<sup>1</sup>Clause 4(2) and (3).

<sup>2</sup>See clause 4(2) and (4).

<sup>3</sup>See clauses 2 and 3.

<sup>4</sup>Paras. 2.14-2.17 above.

it would be helpful to have some model forms officially produced for purely voluntary adoption; and we agree with this. We feel that it would indeed be useful, perhaps especially in the early days of the new system, for practitioners to have available to them some authoritative precedents on which they could confidently base their documents.

22.7 We think that the power to promulgate such precedents should take the form of a power for the Lord Chancellor to prepare and publish them. It would of course be for the Lord Chancellor himself to decide upon the best means of producing forms of this kind; but they would no doubt be produced with the help of representatives of the professions engaged in the legal and other aspects of property transactions, including those who lend on the security of property. We therefore recommend that such a power should exist, and that it should extend both to the legal skeleton and to the substantive content of the forms.

22.8 Quite apart from the helpfulness of such forms, we think they would have another very desirable function: that of encouraging or promoting a degree of uniformity. The one certain means of achieving uniformity would lie in jettisoning all freedom of contract and making the use of official forms compulsory, but that would be too high a price to pay. So far as uniformity can be achieved, however, it is clearly most desirable. The Building Societies Association have told us of the difficulties which their members encounter, in relation to property developments, of seeking to evaluate the legal efficacy of the complex but differing documents with which they are confronted in each case. The Land Registry have explained how much easier its task would be if covenants under the existing law were imposed in relatively standard form; and the same will apply even more strongly in relation to the land obligations which its staff will be required to incorporate in registered titles and the development schemes which they will be called upon to scrutinise. Individual legal practitioners, acting for the intending purchasers of units comprised in developments, must also harbour the same wish for more uniformity.

22.9 In reaching the decision to recommend the promulgation of forms, we are strengthened by the fact that the Wilberforce Report<sup>5</sup> recommended that "model schemes" should be made available for voluntary adoption in the case of blocks of flats and other multiple developments. The Report suggested the provision of two model schemes: one a comprehensive one for use in large developments and the other a "less elaborate" statutory model scheme. For ourselves we recognise that no single form of development scheme could be suitable for all cases, and we would envisage the production of alternative versions—either of the whole scheme or of particular provisions of it.

#### **A note on condominium**

22.10 Some countries have legislation designed to provide a full and detailed network of rights and obligations for the owners of units in blocks

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<sup>5</sup>Cmnd. 2719, para. 53(xi) and (xii).

of flats and similar property developments. These are comprehensive and elaborate. They deal not only with the obligations of the unit owners and the obligations of the manager, but with many other things as well, such as the establishment of title to the individual units; shared ownership of common parts of the development; easements; byelaws; the constitution of the corporate manager; the voting rights of the unit owners; and the resolution of disputes. In relation to all these matters, and to others, the relevant legislation contains detailed and immutable provisions. Legislation of this kind is often called "condominium legislation".

22.11 A few of our consultees have expressed the wish that we should, in this report, make detailed recommendations for condominium legislation.<sup>6</sup> The advantages of such legislation are obvious enough. It serves substantially to reduce the work which has to be done, by developers and purchasers (and their advisers) and by Land Registries and lending institutions, in the course of a development; it reduces the length of legal documents; and it gives individual unit owners the security of knowing that all the many legal aspects of their ownership are governed by statute. There are, however, some disadvantages. The main one, no doubt, is that freedom of choice is reduced: for example, if a different kind of manager would be more suitable for a particular development (and we are told that management companies are not considered satisfactory in this country for all types of development), there would be no way of varying the statute's provisions. Another disadvantage is that, if experience shows that changes in the details of the scheme are desirable, those who plan future developments cannot take advantage of that experience but must instead press for amendments to be made in the statute.

22.12 Our own view is that condominium legislation has very great advantages, and we would certainly not rule out the desirability of such legislation in this country at some future time. We are inclined to think, however, that it is better to allow detailed legal provisions of this kind to be tailored to the needs of particular developments, provided—and this is a most important proviso—that this does not result in the setting up of schemes which are unacceptably and needlessly diverse on the one hand, or legally or practically inadequate on the other. We think that the provision of model forms,<sup>7</sup> as recommended above, has an important part to play in avoiding both these results.

22.13 We may perhaps sum the matter up in this way. In this report we set out to provide, not condominium legislation, but a legal framework (which has not existed up to now) within which people can in effect create condominium regimes of their own. The publication of model forms making use

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<sup>6</sup>Indeed, the first of the two recommendations of the Wilberforce Report, mentioned in the last paragraph but one above, amounts to a recommendation for condominium legislation on the lines of the New South Wales Strata Titles Act 1961.

<sup>7</sup>Model forms of development scheme might not deal with everything for which condominium legislation would provide. It is worth noting, however, that there is no reason why a development scheme deed should not cover matters other than those for which the draft Bill provides. It could, for example, set out details of easements as well as land obligations, and conveyances of individual units could then grant or reserve easements by reference to the wording in the deed.



of this framework would then amount, in effect, to the provision of condominium regimes for voluntary adoption (or adaptation). We think that some time should be allowed to pass in order to judge whether these facilities are adequate to our needs: if they are not, then serious consideration should be given to the enactment of detailed condominium legislation.

## PART XXIII

### COURT JURISDICTION

23.1 Several of the recommendations made in this report involve resort being had to the courts. It will therefore be necessary to decide what courts should have jurisdiction in relation to them and in what circumstances. Because these are questions to which the final answers should be given through consultation with the appropriate authorities, the draft Bill at present contains no provisions dealing with them;<sup>1</sup> but we have given some thought to them and our provisional conclusions are set out below.

#### Existing county court jurisdiction

23.2 It seems to us that three of the existing determinants of the county courts' jurisdiction are relevant for our purposes. They are as follows (the short description in inverted commas being the one by which we shall call them in this part of the report):

*"Amount of claim"*. In the case of claims in tort and contract, jurisdiction exists for claims not exceeding £5000,<sup>2</sup> and claims for money recoverable by statute have the same limit.<sup>3</sup>

*"NAV of property"*. Jurisdiction in respect of easements exists if the net annual value (NAV) of "the hereditament in respect of which the easement is claimed, or on, through, over or under which the easement . . . is claimed, is not above the county court limit".<sup>4</sup> An analogous rule exists in relation to injunctions and declarations.<sup>5</sup> It should be noted, however, that this statutory requirement has been held to mean that the net annual values of both the dominant and the servient lands must be within the county court limit.<sup>6</sup>

*"Amount secured by charge"*. Jurisdiction in "proceedings for foreclosure or redemption of any mortgage or for enforcing any charge or lien" exists where the amount owing does not exceed £30,000.<sup>7</sup>

#### Our provisional views

23.3 Our provisional views, formed in the light of this existing jurisdiction, are as follows. We set them out in relation to the relevant clauses of the draft Bill, appending a brief description of the provisions in question.

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<sup>1</sup>Clause 23(1) says that "the court" means the High Court or a county court, but this does not pre-empt the questions discussed in this part of the report.

<sup>2</sup>County Courts Act 1959, s.39, and County Courts Jurisdiction Order 1981 (S.I. 1981 No. 1123).

<sup>3</sup>Section 40, and 1981 Order.

<sup>4</sup>Section 51. The county court limit is currently £1000: Administration of Justice Act 1973, s.6, Sch.2.

<sup>5</sup>Section 51A.

<sup>6</sup>*R. v. Judge Drucquer* [1939] 2 K.B. 588.

<sup>7</sup>Section 52(1)(c), and County Courts Jurisdiction Order 1981 (S.I. 1981 No. 1123).

23.4 *Clause 10*. This clause provides for the remedies for enforcing land obligations and obligations imposed by a development scheme on a manager or maker.

- (a) As to land obligations, we think that if the claim is for damages or sums due under the obligation the jurisdiction of the county court should be on the *amount of claim* basis. Claims for injunctions should, we think, be on the *NAV of property* basis, but we are inclined to think that
  - (i) the net annual value of the servient land, and that alone, should be relevant; and
  - (ii) if the servient land has been divided, the relevant net annual value should be that of the part in which the particular defendant is interested.<sup>8</sup>
- (b) As to managers' and makers' obligations, the *amount of claim* jurisdiction should again apply if the claim is for damages or sums due. If the claim is for an injunction, there is no relevant net annual value to form a basis for jurisdiction. We understand that the position as to injunctions in the county court in respect of a claim in contract or tort depends on whether an injunction may be obtained as ancillary relief,<sup>9</sup> and we think that the same rule must apply in this case.

23.5 *Clause 11(6)*. This provision requires the leave of the court to be obtained before powers and remedies are exercised to enforce a charge imposed to secure performance of a land obligation. Here we think that the *amount secured by charge* jurisdiction should apply.

23.6 *Clause 13(1)*. This gives the court certain declaratory powers. It is intended to reproduce in relation to land obligations existing jurisdiction given by section 84(2) of the Law of Property Act 1925 in respect of restrictive covenants, and to widen that jurisdiction to cover development schemes (including managers' and makers' obligations).

- (a) In so far as the subsection relates to land obligations, we think the county court should have jurisdiction on the *NAV of property* basis, the only relevant property being the servient land (or, if it has been divided, the part in respect of which the declaration is sought).<sup>10</sup>
- (b) In so far as the subsection relates to other things, it seems to us that the High Court must have exclusive jurisdiction. There is no relevant criterion according to which jurisdiction could be apportioned, and it

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<sup>8</sup>If an action is brought against two or more defendants, each interested in a different part, we think that county court jurisdiction should exist provided that the net annual value of none of the parts exceeds the *NAV of property* limit; but this is very much a matter for decision by the appropriate authorities.

<sup>9</sup>Under s.74 of the County Courts Act 1959.

<sup>10</sup>This suggestion seems to us a logical one, but it might need reconsideration if it would produce a different jurisdictional situation from the one which now exists under s.84(2). It seems clear that, prior to the Administration of Justice Act 1977, the High Court had exclusive jurisdiction under s.84(2). But ss.14 and 32(6) of that Act inserted the new s.51A into the County Courts Act 1959. This deals with injunctions and declarations generally and adopts the NAV basis of jurisdiction. In terms the section seems wide enough to include jurisdiction under s.84(2), although practitioners' textbooks published since the 1977 Act which we have consulted do not suggest that it does so.

may be argued that the matters in question are likely to be complex enough to make the High Court the more suitable tribunal in any case.<sup>11</sup>

23.7 *Clause 13(2)*. It seems to us clear for similar reasons that this provision, which enables the court to make changes in the managership of a development scheme, should attract the exclusive jurisdiction of the High Court.<sup>12</sup>

23.8 *Clause 13(4)-(6)*. These provisions give the court power either to exercise the Lands Tribunal's jurisdiction in respect of variation, etc., or to stay proceedings so that an application to the Lands Tribunal can be made. They do not require separate consideration, however, because the powers are secondary: they arise if, and only if, the matter is properly before the court already.

23.9 *Clause 20*. This clause deals with the "rescue" of existing freehold flat schemes. We think it is clear that the High Court should have exclusive jurisdiction.<sup>13</sup>

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<sup>11</sup>In this and other cases (see paras. 23.7 and 23.9 below) in which we propose that the High Court should have exclusive jurisdiction, we think that the High Court should nonetheless have power to remit cases to the county court. We think it should also be possible, if experience shows that a satisfactory basis can be found for allowing some cases to go direct to the county court, for provision to this effect to be made by rules.

<sup>12</sup>See the preceding footnote.

<sup>13</sup>See footnote 11 above.

## PART XXIV

### CONSEQUENTIAL CHANGES IN THE EXISTING LAW

24.1 The implementation of our recommendations will require certain changes to be made in the present law.

#### **The law about covenants**

24.2 Since our proposals about land obligations are intended to supersede, and so replace, the existing law of positive and restrictive covenants, it is necessary to ensure that covenants cannot be used in future to achieve the same ends. But before we come to our recommendations about covenants for the future, we want to consider a possibility which arises in relation to covenants already in existence.

24.3 If we confine ourselves to preventing the future use of covenants for the purpose of creating obligations running with land, existing covenants will still have effect under the old law and, inasmuch as the covenants themselves are perpetual, the old law will remain relevant for the indefinite future. It would obviously be very much better if existing covenants could be automatically transformed into land obligations enforced by the new law. But we have come regretfully to the conclusion that this would be impossible.

24.4 The first main problem is one of definition. What covenants would be transformed in this way? It would be clearly wrong to transform all covenants. Those intended to be purely personal should not be transformed. Nor, it seems clear, should positive covenants: if positive covenants which do not run under the present law, and are unregistrable, were given effect as land obligations, this could only mean that obligations which had seemingly died were revived and imposed upon people who might not know of their existence.<sup>1</sup> So the transformation would have to be confined to restrictive covenants—and confined, moreover, to those restrictive covenants which complied with the conditions imposed by the present law for such covenants to run with the land. This conclusion of itself goes far towards destroying the advantages of transformation, because if transformation applied only to covenants which ran under the old law, the old law would still have to be studied in order to determine whether a particular covenant had been transformed or not.

24.5 Even if that were thought acceptable, there would still be difficulties about the retrospective alteration of existing rights and duties. The incidents of land obligations are designedly not the same as those of restrictive covenants. Land obligations are legal interests; they are enforceable by an action for damages at common law; and no liability for their contravention remains with the original creator after he has parted with the burdened land. In all these ways, and in others, they differ from restrictive covenants. We

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<sup>1</sup>We have already rejected this approach even in the limited context of existing freehold flat schemes: para. 20.8 above.

doubt whether it would be fair to bring about the changes which transformation would involve. One solution to this problem might be to transform restrictive covenants into land obligations, but into land obligations to which a special set of modified rules would apply. But that again would go far towards destroying the purposes of transformation because two regimes would then have to co-exist.

24.6 Even if two regimes did not arise for the reason just mentioned, we think that they would inevitably arise for another reason. The differences between land obligations and restrictive covenants are not confined to their incidents or consequences: they extend also to anterior matters. To take one example, restrictive covenants are registered in a different way and, in particular, the benefit of a covenant attached to registered land is not normally mentioned on the title of that land; and this may be, in part, because the present law does not require the benefiting land to be defined with the clarity with which we think the dominant land should be defined on the creation of a land obligation. So there would in practice be no way in which transformed restrictive covenants could be equated with land obligations in this respect (even if the Land Registry could provide the resources which such a task would involve). For this and other reasons we think that differences would have to remain between "real" land obligations on the one hand and transformed restrictive covenants on the other, and that transformation would therefore be largely cosmetic in its effects, resulting only in the same name being given to two things which would nonetheless remain distinct in law and in practice.

24.7 Our conclusion is that transformation would make things worse rather than better. It would be complicated. It would give rise to possible unfairness. And not only would it fail to make the old law irrelevant: it would also require the creation of a modified version of the new law. Our recommendations must therefore be confined to future covenants, and to these we now turn.

**(a) Covenants no longer to run with land**

24.8 Subject to the exceptions and transitional provisions mentioned below, we recommend that the existing rules of law and equity whereby the burden or the benefit of a covenant which touches and concerns land may pass to persons other than the original parties should not apply to covenants entered into after the commencement of the Act which implements our recommendations. (In what follows we shall, for brevity, refer to this date simply as the commencement date.)

24.9 So far as the benefit of such covenants is concerned, this recommendation will not have any great impact: the benefit will no longer pass automatically but in theory it could still be expressly assigned in accordance with the normal rules of contract law. As regards the burden—which cannot, of course, be assigned at all under contract law—the recommendation will have no impact upon positive covenants because their burden does not run in any case. The recommendation's main impact will be upon the burden of restrictive covenants: although this normally does run under the present law by virtue

of the doctrine of *Tulk v. Moxhay*, it will not do so, and there will be no way of making it do so, in the case of covenants created after the commencement date.

(b) **Main exceptions**

24.10 Three important exceptions to the foregoing general recommendation must now be proposed.

(i) *Landlord and tenant covenants*

24.11 We have made it clear more than once that we have no intention of altering the general law about landlord and tenant covenants.

*The exception*

24.12 We therefore recommend an exception to the general recommendation in that it should not affect the application of any such rules of law or equity to covenants between landlord and tenant. The precise scope of this exception is clarified a little later.

24.13 We said earlier<sup>2</sup> that the benefit and burden of such covenants already run, at law, in such a way that they can be enforced by and against the current landlord and the current tenant: this is the doctrine of privity of estate, and the main result of the exception just recommended is to preserve its effect. But we also said earlier<sup>3</sup> that this doctrine does not govern the question of whether covenants between landlord and tenant bind those (such as sub-tenants) whose interests derive from that of the tenant (so that the head landlord can enforce them directly against the derivative interest holder). This question is governed by the same principles as those which determine the running of freehold covenants,<sup>4</sup> and in particular by the doctrine of *Tulk v. Moxhay*. The effect of the exception which we recommend is also to preserve these principles—but only, of course, in their application to covenants between landlord and tenant.

24.14 The overall result is that those who are concerned only with “landlord and tenant covenants” need pay no regard to our recommendations. In particular such covenants need not be, and cannot be, framed as land obligations.<sup>5</sup>

*The scope of the exception*

24.15 We do nonetheless propose to clarify exactly what amounts to a landlord and tenant covenant for the purposes of the exception.

24.16 We recommend that such covenants should *not* include any covenant which (though the parties to it may be, or happen to be, landlord and tenant)

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<sup>2</sup>Paras. 3.7 and 3.8 above.

<sup>3</sup>Paras. 3.48 and 3.49 above.

<sup>4</sup>Except that the covenants are not registrable: see paras. 3.48 and 3.49 above.

<sup>5</sup>A land obligation must be an obligation imposing a burden on one piece of land for the benefit of *another* (clause 1(1) of the draft Bill) or (in the case of a development obligation) for the benefit of the whole or part of the development land (Schedule 1, Part II).

imposes an obligation on land which is not included in the property demised by the lease. As a result, such obligations will have to be imposed, in future, as land obligations and will (if they are to bind purchasers) have to be registered as such.

24.17 The object of the recommendation just made (for convenience we may call it the *Dartstone* recommendation) is to ensure that the result of the case of *Dartstone Ltd. v. Cleveland Petroleum Co. Ltd.*, to which we have already referred<sup>6</sup> and which is widely felt to be unsatisfactory, will not apply for the future. Obligations of the kind with which that case was concerned are not truly "landlord and tenant covenants", and it is wrong that the law should treat them as such. It is particularly wrong that they should in consequence be unregistrable. If we were seeking to do nothing more than to reverse the effect of this case, we should recommend merely that such covenants should be treated as ordinary registrable restrictive covenants between adjoining landowners. Since the reversal is taking place in the context of a general reform of the law of restrictive covenants, our recommendation must perforce be that they should be created as land obligations.

24.18 Several points may be added, however, about the scope of the *Dartstone* recommendations.

24.19 First, it applies only to covenants which *impose an obligation on* land not included in the lease. Thus if L, being the owner of both Blackacre and Whiteacre, leases Blackacre to T, he could not effectively impose an obligation *on* Whiteacre (such that subsequent owners and tenants of it would be directly bound by it) for the benefit of T by means of a covenant. In accordance with our general recommendation, the burden of the covenant would not run with Whiteacre and subsequent purchasers of that property would not be bound by it. For such purchasers to be bound, the obligation would have to be imposed as a land obligation and registered as such.

24.20 The *Dartstone* recommendation does not say, however, that covenants are outside the landlord and tenant exception merely because they *relate to* land not included in the demise. Suppose that, in the example given above, the intention was merely that L should assume towards T an obligation as to the use of Whiteacre, for breach of which L and his successors as landlord would be liable to T and his successors as tenant, but which would not bind subsequent purchasers or tenants of Whiteacre itself—then, of course, the desired effect could be achieved by means of an ordinary landlord and tenant covenant between L and T. It is only if the obligation is to *bind* the land not demised that it must be imposed by land obligation.

24.21 Second, the *Dartstone* recommendation applies only when it is the burdened land which is not included in the lease. An obligation between landlord and tenant can still be effectively imposed by means of a covenant even though it is intended to *benefit* land not in the lease. To return again to our previous example of Blackacre and Whiteacre, there would be no objection

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<sup>6</sup>Paras. 3.54 and 3.55 above.



to L, on leasing Blackacre to T, imposing on him by way of ordinary covenant an obligation not to use Blackacre in a certain way—even though the restriction thus imposed is for the benefit of Whiteacre rather than for the benefit of L's reversion in Blackacre. Such a covenant would, as now, be enforceable by L and his successors as landlord<sup>7</sup> directly against T and his successors as tenant.

24.22 A final point should now be mentioned. We have dealt earlier<sup>8</sup> with cases in which a landlord lets a number of units to different tenants and it is intended that some or all of the covenants imposed upon individual tenants are to be enforceable against them directly by the other tenants.<sup>9</sup> This object may be achieved in either of two ways (which may in practice be found in combination): first, by requiring each tenant to covenant expressly and directly with all the others or, second, by creating a "letting scheme" which connotes such mutual enforceability.<sup>10</sup>

24.23 In so far as these covenants are covenants with, and enforceable by, the landlord, they are of course true landlord and tenant covenants and will remain fully effective if imposed as such. But in so far as they are to be enforceable directly by and against the tenants for the time being, our intention is that they should in future have to be imposed as land obligations and registered accordingly. This intention extends not only to cases where there is an express covenant by each tenant with the others,<sup>11</sup> but also to cases where the effect is produced by means of a letting scheme.<sup>12</sup> We have sought to ensure that development schemes and development obligations (which afford advantages, since they can be used to impose obligations which run at law and may be positive as well as restrictive) can be used in such cases,<sup>13</sup> and we think it would be both confusing and wrong in principle if the letting scheme facility were allowed to co-exist with them.

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<sup>7</sup>And in so far as it would be enforceable, under the present law, by a purchaser of Whiteacre, our recommendations do nothing to alter that situation. In practice the benefit would (if it were intended to pass) be expressly assigned, and such assignment could still take place.

<sup>8</sup>Paras. 3.52 and 3.53 above.

<sup>9</sup>This situation must be distinguished from one in which the landlord merely covenants with each tenant that *he* will enforce covenants imposed on the others. Arrangements of the latter kind are unaffected by our recommendations.

<sup>10</sup>Paras. 3.52 and 3.53 above; and para. 3.29 above.

<sup>11</sup>In these cases the covenants are plainly not between lessor and lessee and so fall squarely within the main recommendation made in para. 24.8 above and implemented in clause 19(1) of the draft Bill.

<sup>12</sup>The precise way in which letting schemes achieve their effect in legal theory is obscure and difficult; but these cases also fall within our main recommendation and clause 19(1) of the draft Bill, and are not excepted by the provisions of clause 19(2), because:

- (a) Although it is true that the only express covenant is one "between lessor and lessee", we think that the rationale of letting schemes depends upon the implication of a covenant with the other tenants and this covenant is clearly not within clause 19(2).
- (b) Letting schemes operate only if covenants are imposed according to a pattern on all tenants. It is therefore the covenants imposed upon the individual tenant which (taken in conjunction with the letting scheme) give him the right to enforce the obligations imposed upon other tenants. So even if the only relevant covenants were ones between lessor and lessee (and so *prima facie* within clause 19(2)) it may be said that these covenants operate to impose obligations on land not included in the demise (so that they are to that extent not within clause 19(2)).

<sup>13</sup>Para. 7.76 above.

24.24 It follows, of course, that if the same obligation is to be enforceable both by the landlord and by the other tenants it must henceforth be imposed both as a covenant with the landlord and as a land obligation for the benefit of the other tenants.<sup>14</sup>

(ii) *Covenants entered into under statutory powers*

24.25 The second exception from our general recommendation—that covenants should no longer run with land—relates to covenants created by virtue of specific statutory powers, given usually to particular bodies and institutions.

24.26 There is a large number of these and they take various forms. The simplest type of power is one which merely authorises the entity concerned to participate in the creation of a restrictive or other covenant,<sup>15</sup> questions as to the efficacy and effect of the covenant thus imposed being left entirely to the general law about covenants affecting land. But, as we have already noted,<sup>16</sup> the powers are not all of this kind. Many are designed to give the covenant an efficacy which it would not otherwise have, or to give it some special effect. Some powers of this kind operate by attracting the general law on the basis of an artificial hypothesis—for example, that the entity which has the statutory power possesses land capable of benefiting from the covenant and that the covenant is taken for the benefit of that land<sup>17</sup> (though such is not in fact the case). If, as sometimes happens, the intention is, in effect, to make positive covenants, as well as restrictive ones, run with land, the hypothesis must be different—for example, that people who are in fact the successors in title of the original contracting parties are themselves the original contracting parties.<sup>18</sup> Other enactments operate to make positive covenants run, but without the use of any hypothesis.<sup>19</sup>

24.27 Ideally we should like to recommend a “blanket” provision that all such powers should henceforth take effect as powers to enter into land obligations, but no such simple approach is possible. Each statutory provision is tailor-made for its particular purpose, and most of them need to “adapt” the general law in different ways in order to achieve it. A statutory power to create a land obligation where there was in fact no dominant land, for example, would have to be carefully constructed; and, in the case of a power to create restrictive covenants, consideration would have to be given to the question of whether or not it would be right to substitute a power to create land obligations of all types. Every provision would have to be separately considered and there would have to be consultation on each one.

<sup>14</sup>Probably by means of a development scheme: see para. 7.76 above.

<sup>15</sup>E.g., Requisitioned Land and War Works Act 1945, s.33(1); Land Powers (Defence) Act 1958, s.13, para. (c).

<sup>16</sup>Paras. 3.43–3.45 above.

<sup>17</sup>E.g., Countryside Act 1968, s.15; Town and Country Planning Act 1971, s.52.

<sup>18</sup>Local Government (Miscellaneous Provisions) Act 1982, s.33, especially subs. (2). Subs. (3) operates also to give special remedies for the enforcement of positive covenants.

<sup>19</sup>E.g., Church Property (Miscellaneous Provisions) Measure 1960, s.8, under which positive obligations are enforceable against the incumbent of a benefice for the time being.

24.28 There is a further problem here, because some of these special statutory powers incorporate a provision that the covenant shall be exempt from the Lands Tribunal's powers of modification under section 84 of the Law of Property Act 1925. It would be necessary to consider whether, if such powers were turned into powers to create land obligations, the land obligations thus created should be exempt from our own version of the section 84 regime<sup>20</sup>—and the answer might not be obvious because (unless the new power were confined to restrictive land obligations) it might be right to exempt some types of land obligation but not others.

24.29 All in all, we see only one course as being open to us: that of recommending that, despite the introduction of land obligations into the law, all these statutory powers should be preserved as powers to create covenants, with the same effect in all respects as they have under the existing law.<sup>21</sup> Any relevant exemption from section 84 will of course be preserved as well, and our own section 84 regime will not affect them since it applies only to land obligations.

24.30 As we shall explain in more detail later,<sup>22</sup> however, we recommend that the Lord Chancellor should have a wide power to amend existing enactments, and this power could be exercised so as to convert powers to create covenants into appropriate powers to create land obligations. The Lord Chancellor's power is designedly such that it could also confer an exemption from our version of the section 84 regime.<sup>23</sup>

(iii) *Halsall v. Brizell*

24.31 We have already noticed briefly<sup>24</sup> the doctrine in the case of *Halsall v. Brizell*, which we described as deriving from the rule that someone who claims the benefit of a deed must also discharge its burdens. We take this opportunity to make it clear that our general recommendation about the future running of covenants does not affect this doctrine in any way.

24.32 Use has been made of the doctrine as a means of circumventing the existing rule that positive covenants do not run with land. If, for instance, a conveyance of land includes continuing benefits (perhaps in the shape of easements) and at the same time imposes positive obligations in the shape of covenants, the current owner of the land cannot claim the benefits unless he honours the obligations. It will be seen, therefore, that the doctrine is not really a rule under which the burden of the positive obligation may "pass",<sup>25</sup> but rather one which determines the consequences incurred by a particular person at a particular time if he fails to comply with it.

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<sup>20</sup>Part XVIII of this report.

<sup>21</sup>The draft Bill gives effect to this recommendation, even in relation to statutory powers which depend upon the general law of covenants, because although clause 19(1) prevents rules of law and equity from applying to covenants made after the commencement date, it does not abolish those rules for all purposes. They will therefore remain in being to be attracted or referred to so as to complete the effect of a statutory provision which attracts or refers to them.

<sup>22</sup>Paras. 24.51–24.54 below.

<sup>23</sup>See the wording of clause 21(2)(b) of the draft Bill.

<sup>24</sup>Para. 3.40 above.

<sup>25</sup>Within clause 19(1)(b) of the draft Bill.

24.33 But although the doctrine in *Halsall v. Brizell* thus remains available for use, we have little doubt that much less use will in fact be made of it in future. The system of land obligations which we recommend will provide a more effective and satisfactory means of imposing positive obligations.

(c) **Transitional exceptions**

24.34 In relation to our general recommendation that covenants created after the commencement date should not run with land, it is necessary also to recommend two transitional exceptions of a strictly temporary nature.

(i) *Pre-existing obligations*

24.35 The first such exception should be made when, prior to the commencement date, someone has assumed an obligation to enter into (or to cause another person to enter into) a restrictive covenant.<sup>26</sup> There are only two recommendations which we could make for a situation of this kind. One would be that the obligation thus undertaken should be automatically transformed into an obligation to enter into a land obligation. It seems to us that this would be wrong, because the incidents of land obligations are not exactly the same as those of restrictive covenants<sup>27</sup> and we do not think that people's bargains ought to be altered in this way if it can be helped.<sup>28</sup> The other is the recommendation which in fact we make: that a restrictive covenant entered into after the commencement date, in discharge of such an obligation, should be treated for all purposes (including that of registration) as if it were entered into before that date.

24.36 The most obvious example would be that of a contract, entered into before the commencement date, under which a restrictive covenant is to be created (with or without a sale of land) and which falls to be completed after that date. But the obligations need not necessarily arise by contract: for example, a gratuitous obligation by deed would equally be covered. And we recommend expressly that a restrictive covenant created in pursuance of an option or right of pre-emption granted before the commencement date should be within the exception even if the option or right is not actually exercised (so that strictly the relevant obligation does not arise) until after the commencement date.

(ii) *Building and letting schemes already in operation*

24.37 The other exception relates to building and letting schemes. These schemes involve the mutual enforceability of covenants as between the owners or lessees of units in a freehold or leasehold development.<sup>29</sup> They depend for their efficacy upon the general law about the running of covenants, and

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<sup>26</sup>No special provisions are needed in relation to positive covenants because a positive covenant entered into after the commencement date will not be significantly less effective than one entered into before it. Those interested could of course agree that a land obligation should be created instead.

<sup>27</sup>Para. 24.5 above.

<sup>28</sup>There would of course be nothing to stop those involved from agreeing voluntarily to use a land obligation instead of a covenant, and this might well be a desirable course to take.

<sup>29</sup>See para. 3.29 above.

if that law were to be altered at a time when some, but not all, of the units had been disposed of, it is obvious that serious problems could arise.

24.38 We therefore recommend that if a building or letting scheme is already in operation on the commencement date, any restrictive covenants entered into afterwards in pursuance of the scheme should take effect as if made before that date and thus be exempt from our general recommendation.

#### **Estate rentcharges**

24.39 Earlier in this report<sup>30</sup> we outlined the nature of estate rentcharges and said that, as recommended in our *Report on Rentcharges*,<sup>31</sup> the Rentcharges Act 1977 had allowed their continued creation and had indeed improved their efficacy.

24.40 Our report<sup>32</sup> did however make the following comment:

“[W]e are in the process of examining the position of positive covenants generally, as part of our work on rights appurtenant to land. The need to preserve this exception [in favour of estate rentcharges] will obviously fall to be reconsidered if and when any change occurs in the state of the underlying law.”

#### **(a) Estate rentcharges prohibited for the future**

24.41 We referred, in our earlier explanation, to the limitations and artificialities of estate rentcharges. Our wish to preserve them, expressed in our rentcharges report, stemmed only from the fact that the existing law offered no better alternative. We are satisfied, however, that the recommendations made in this report do offer such an alternative.<sup>33</sup>

24.42 We therefore recommend that it should be made impossible to create any estate rentcharges after the commencement date.

#### **(b) Exceptions**

24.43 No permanent exceptions to this recommendation seem to us to be necessary, but two transitional exceptions should be made. These are analogous to those put forward above in relation to covenants.<sup>34</sup>

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<sup>30</sup>Paras. 3.35–3.38.

<sup>31</sup>(1975) Law Com. No. 68.

<sup>32</sup>Para. 51.

<sup>33</sup>In saying this we do not overlook the question of remedies. In the case of rentcharges, a right of re-entry is commonly reserved for exercise on failure either to pay the rentcharge or to observe rentcharge-supporting covenants. In addition, the Law of Property Act 1925, s.121, gives further remedies if the rentcharge falls into arrear. We think that, in the case of many land obligations imposed in future in place of estate rentcharges, no remedies will be considered necessary beyond those dealt with in Part XIII of this report. But the charge facility, dealt with in Part XIV, provides a stronger remedy if one is wanted.

<sup>34</sup>Paras. 24.34–24.38 above.

**(i) Pre-existing obligations**

24.44 First we recommend, for reasons given earlier in relation to restrictive covenants, that an estate rentcharge entered into after the commencement date, in discharge of an obligation undertaken before it, should be treated as if it had itself been entered into before that date. In this way it will be exempt from the prohibition recommended earlier and the pre-existing law (including that relating to registration) will apply to it. As before, we think the obligation should be either to enter into the rentcharge or to cause another person to do so and that it should be capable of arising by contract or otherwise. We also make a like recommendation<sup>35</sup> to cover the case of an option or right of pre-emption.

**(ii) Developments already begun**

24.45 The second exception relates to cases in which a property development, involving the imposition of estate rentcharges on individual units within the development, has been begun, by the imposition (or by a contract having been made for the imposition) of at least one rentcharge, before the commencement date. It is obvious that in such a case the development must be allowed to continue as planned, with estate rentcharges being imposed on the remaining units, or serious legal difficulties will arise. We recommend accordingly.

**General adaptation of existing legislation**

24.46 The introduction of land obligations into the general law must inevitably give rise to the need for changes to be made in that law. We have of course been careful to recommend that land obligations shall assume a nature—that of interests in land, capable of subsisting at law or in equity—which allows them to fit comfortably into the existing law. Henceforth, and subject to the express provisions of our draft Bill, what the law says about such interests it will say about land obligations.

24.47 This is, in principle, just as true of the provisions of statute law as it is of the common law and equity. Statute law, however, poses many difficulties of detail. For example, statutes and statutory provisions may deal, not with interests in land generically, but with particular interests in land, and although the context is such that land obligations ought to be dealt with they will of course not be covered because they did not exist when the statute was enacted. For this and similar reasons, a number of detailed amendments are required to existing statutory provisions.

24.48 We have sought to deal with this problem in two ways.

**(a) Amendments in the draft Bill**

24.49 The draft Bill contains, in Schedule 3, a large number of these consequential amendments. They cover statutes which property lawyers recognise as being the most important and fundamental to their subject and, in particular, what is known as the 1925 legislation.

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<sup>35</sup>See para. 24.36 above.

24.50 The amendments now contained in Schedule 3 relate mainly to the statutes which are most extensively affected by our recommendations. Amendments to other statutes will need to be included.<sup>36</sup>

**(b) Lord Chancellor's power to make other amendments**

24.51 Even in its final state, however, Schedule 3 to the draft Bill cannot deal exhaustively with all the enactments which require amendments. Even if it were possible for the Schedule to deal fully with Public General Acts, local Acts would still remain to be dealt with.

24.52 For this reason we recommend that the Lord Chancellor should have power (by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament) to make such modifications of any existing statutory provision as appear to him appropriate for any one of three reasons:

- (a) As a consequence of any of the recommendations made earlier in this part of the report. Thus if the prohibition of future estate rentcharges, or the non-running of future restrictive covenants, were felt to require any consequential changes, these could be made.
- (b) In order to ensure that any enactment currently authorising the creation of restrictive or positive covenants has effect to authorise the creation of land obligations. We have already given an example of the situations in which this power might be used.<sup>37</sup> And we recommend that it should extend to the making of consequential amendments in other enactments (including the Act embodying our own recommendations).<sup>38</sup>
- (c) Generally in order to secure that any existing provision dealing with interests in land, or with any particular kind of interest in land, should—or should not—have effect in relation to land obligations. Any such provision must of course be such that (unaided by any exercise of the Lord Chancellor's power) land obligations fall either within it or outside it. If this result is the right one, the Lord Chancellor will of course leave well alone: otherwise he may intervene in order to reverse it.

24.53 The Lord Chancellor's power will remain available for exercise, not only upon the enactment of our recommendations but subsequently at any time when a need for its exercise should come to light.

24.54 Readers of this report may well know of, or be in a position to ascertain, cases in which existing enactments (including local Acts) should be amended in the light of our recommendations. If so their views, expressed either to the Lord Chancellor's Department or to us, would be most welcome. Account could be taken of them either (depending on matters of timing) in Schedule 3 to the draft Bill or through the exercise of the Lord Chancellor's power.

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<sup>36</sup>One amendment not yet made is that designed to set at rest the possible doubt, arising on the Occupiers' Liability Act 1957, mentioned in the second paragraph of footnote 14 to para. 13.20 above.

<sup>37</sup>Paras. 24.25–24.30 above.

<sup>38</sup>A reason for this extension is given in paras. 24.28–24.30 above.

## PART XXV

### COMMENCEMENT AND CROWN APPLICATION

25.1 This part of the report deals with the coming into force of the Act which embodies our recommendations, and with their applicability to the Crown.

#### **Commencement**

25.2 Some time should elapse between the enactment of our recommendations and their coming into force. These are two reasons for this. One is that legal practitioners should in our view have a substantial period in which to familiarise themselves with the new regime before it comes into operation. We think that the period of one year would be suitable for this purpose.

25.3 The other is that a number of steps will have to be taken before hand in order to provide the necessary official machinery on which our proposals will depend. The most substantial preliminary work will affect the Land Registry, whose rules and practices will have to be revised and adapted and which will have to instruct its personnel in the new system. New rules of court will also have to be made.

25.4 The easiest solution, no doubt, would be for the Act to contain a provision whereby its commencement date would be fixed later by means of a commencement order. But it has been strongly represented to us that it is much more satisfactory if Acts of Parliament can specify their own commencement dates, and we agree with this view. We hope that this practice can be followed in the present case—the commencement date being specified in the Act, but set far enough ahead to provide the year's breathing space mentioned above and to allow the other necessary steps to be taken.

25.5 We have also received requests that the date thus fixed should be an easily memorised one (such as 1 January 1926, on which the 1925 legislation came into force). This would certainly be an added bonus, but the fulfilment of this wish must depend upon the timing of the Bill's passage.

25.6 To illustrate all these desiderata, the draft Bill now provides for commencement on 1 January 1985, but it is safe to say that this date will have to be deleted and a later one substituted in due course.

#### **Crown application**

25.7 The draft Bill contains, in square brackets, a clause saying simply that its provisions bind the Crown. It is clear, however, that this clause will require revision before the Bill is enacted. Although there is thought to be no reason why our recommendations should not, in general, bind the Crown, the necessary consultation on this point has not yet taken place; and there is little doubt but that, even if it confirms that general view, it will reveal several ways in which the provisions of the draft Bill need to be modified in order to adapt them satisfactorily for Crown application. These are matters on which consultation may appropriately be completed after the submission of this report.



## PART XXVI

### MATTERS ON WHICH NO RECOMMENDATIONS ARE MADE

26.1 There are three matters on which we make no recommendations in this report but on which we wish nevertheless to make a brief comment.

#### **Service charges**

26.2 The existing law makes extensive provision, now contained in Schedule 19 to the Housing Act 1980, in relation to variable service charges<sup>1</sup> payable by tenants of flats. These provisions (which are reinforced by criminal sanctions) are designed, broadly, to ensure that flat tenants are not liable to pay service charges which are unreasonable or excessive and that information about such charges is made available to them.

26.3 Even under the law as it now stands, there is perhaps no reason of principle why these or similar provisions should not apply for the protection of the owners of freehold flats, or even for that of the tenants or freeholders of houses comprised in leasehold or freehold housing developments which involve the payment of service charges. The provisions were no doubt devised to solve a particular problem which had arisen, and presumably that problem had not manifested itself to any substantial degree in the other situations just mentioned. So far as freehold flats are concerned, these are of course much more rare under the present law than leasehold ones.

26.4 But the enactment of our recommendations may serve to increase the number of freehold flats and thus to raise more strongly the question whether these special service charge provisions should be extended so as to cover service charges exacted (in future by means of land obligations) from the owners of such flats. It seems to us that there would be much to be said for an extension of this kind. One of our objects in this report has been to ensure that the law no longer treated freehold flat owners less favourably than leasehold ones, and we should be sorry if discrimination in this particular respect were nonetheless to persist in such a way as to cause actual disadvantage to freeholders.

26.5 This is, however, very much a matter of housing policy and, as such, one for Government decision. For this reason we have not thought it appropriate to formulate detailed recommendations of our own, or to include any provisions about it in the draft Bill.

#### **Statutory regime for managers**

26.6 A case could also be made for the enactment of a general framework of statutory rules within which managers of development schemes would be required to operate and which would, among other things, safeguard the financial interests of unit owners by imposing requirements in relation to funds held by a manager. The recommendations made in Part VII of this report

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<sup>1</sup>I.e., charges for "services, repairs, maintenance or insurance or the landlord's costs of management": para. 1(1)(a). "Landlord" includes any person who has a right to enforce the service charge: para. 18.

are designed to allow these matters to be governed by the provisions of individual development schemes; and it may be argued that the enactment of a statutory regime would amount in effect to condominium legislation dealing with only one of the matters which such legislation normally comprehends.<sup>2</sup> On the other hand we are conscious that the Estate Agents Act 1979 has recently applied an analogous statutory regime to the work of estate agents.

26.7 However this may be, we think it would be anomalous if any regime of this kind were to apply to managers of development schemes set up in pursuance of our recommendations, but not to those who play a managerial role in relation to freehold and leasehold developments regulated in other ways (including, perhaps, landlords themselves in so far as they assume functions which are managerial in character). The question is therefore far wider than the scope of this report.

#### **The "end of the life of the building" problem**

26.8 In so far as the enactment of our recommendations results in an increase in freehold flat developments, it may seem likely to exacerbate another problem. This arises whenever the individual ownership of units in a building continues beyond the life of the building itself. The life of a block of flats or maisonettes cannot be prolonged indefinitely; but freehold estates are perpetual, and at some stage the individual freeholders are therefore bound to find themselves the owners of units which are no longer habitable, or even of units which now consist only of airspace.

26.9 The Bill does deal with one aspect of these problems. If, in view of the increasing age of the block, it is no longer economic to maintain the standards of repair and general upkeep for which development obligations, managers' obligations and the scheme originally provided, modification or extinguishment can be sought of scheme or obligations.<sup>3</sup> But this deals only with the difficulties likely to arise during what may be called the twilight period. What is to happen when nightfall comes?

26.10 The fact that individual flat owners come to own uninhabitable flats, or even mere areas of airspace, does not mean that their assets have become valueless. Redevelopment of the site cannot take place without their consent if they continue to hold their interests, and so those interests have a market value and they have an incentive to sell them. The difficulty which does remain is that they may disagree as to the time at which redevelopment is necessary, and that some one or more of them may (perhaps perversely) hold out against sale altogether and so prevent the others from realising their assets. The Bill contains no provisions to deal with this aspect of the problem. Any such provisions would of course be difficult to devise and to frame,<sup>4</sup> but that is not the reason for their omission.

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<sup>2</sup>In paras. 22.10-22.13 above we rejected the idea of comprehensive condominium legislation for the time being.

<sup>3</sup>Paras. 18.47-18.53 above.

<sup>4</sup>The Wilberforce Committee's Report (Cmnd. 2719, para. 49) made a general recommendation that the court should have power to declare the effective life of the building to be at an end and to make orders for sale and for the division of the proceeds amongst those interested. Difficulties lie, of course, in deciding on the precise criteria to be applied by the court to determine this question, especially when the homelessness of a number of people may be at stake.

26.11 The omission is made because the problem is thought to be too wide and too controversial for solution as a part of this project, and because it seems again to involve issues of Government housing policy. It is considered too wide because it is not in fact confined to flat schemes set up on a freehold basis. In a leasehold development the same problem will arise unless the leases all expire at the precise time when redevelopment is appropriate.<sup>5</sup> And even if they do, the tenants will nonetheless normally be entitled to retain possession under the Landlord and Tenant Act 1954, Part I, and the desirability of redevelopment will not be a ground for dispossessing them. There is no real distinction, therefore, to be drawn between freehold and leasehold flats in this respect, and if unacceptable situations do arise in practice they may have to be tackled in due course in this wider context. The element of controversiality arises, of course, because any solution must necessarily involve turning people out of their homes against their will in return for a monetary payment of variable amount. There is one mechanism through which this can happen under the existing law—compulsory purchase—and it may perhaps be that the only suitable solution to the present problem lies through the use of this mechanism.

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<sup>5</sup>Often no attempt is made to ensure that this happens: leases for 999 years are by no means unknown.

## PART XXVII

### SUMMARY OF RECOMMENDATIONS

27.1 In this part of the report we summarise the recommendations for reform which we have made earlier. Where appropriate, we identify the relevant provisions of the draft Land Obligations Bill (contained in Appendix A to this Report) which are intended to give effect to them.

#### **Comprehensive reform according to the easement analogy**

(1) Having considered the existing law of positive and restrictive covenants affecting freehold land (Part III) and its defects (Part IV, paras 4.2–4.20), we recommend comprehensive reform of the whole of this area of the law, taking as our model the existing law of easements. The reforms proposed should enable obligations, whether restrictive or positive in nature, to run with the benefited and the burdened land so as to be directly enforceable by and against the current owners of each. They should also be such as to cater not only for the simple case of an obligation created between two neighbouring landowners, but also for the more complex needs of property developments (including those involving freehold flats).

(Paragraphs 4.21–4.36.)

#### **The “land obligation”**

(2) There should be a new interest in land, to be known as a land obligation, capable of subsisting as a legal interest if it is equivalent to an estate in fee simple in possession or to a term of years absolute.

(Paragraph 5.2 (and paragraphs there cited); and clause 1(1), with Schedule 3, para. 3(1).)

#### **Neighbour obligations and development obligations**

(3) In order to cater satisfactorily for the two different types of case mentioned at the end of paragraph (1) above, there should be two types of land obligation: neighbour obligations and development obligations.

(Paragraph 6.2; and clause 1(1) and (2).)

(4) The following obligations should be capable of subsisting as neighbour obligations (“the servient land” being the land on which the obligation is imposed, and “the dominant land” being the land for the benefit of which it is taken):

##### *Restrictive*

1. An obligation imposing a restriction which benefits the whole or part of the dominant land on the doing of some act on the servient land.

##### *Positive*

2. An obligation requiring the carrying out on the servient land or the dominant land of works which benefit the whole or any part of the dominant land.

3. An obligation requiring the provision of services for the benefit of the whole or any part of the dominant land.

*Reciprocal payment*

4. An obligation requiring the making of payments in a specified manner (whether to a person of a specified description or otherwise) on account of expenditure which has been or is to be incurred by a person in complying with an obligation falling within paragraph 2 or 3 above.

(Paragraphs 6.3–6.6; and clause 1(3) with Schedule 1, Part I.)

(5) The following obligations should be capable of subsisting as development obligations (“the servient land” having the same meaning as before, and “the development land” being the land within a development scheme made under the recommendations summarised in paragraphs (7)–(11) below):

*Restrictive*

1. An obligation imposing a restriction which benefits the whole or part of the development land on the doing of some act on the servient land or any other part of the development land.

*Positive*

2. An obligation requiring the carrying out on the servient land or any other part of the development land of works which benefit the whole or any part of the development land.

3. An obligation requiring the provision of services for the benefit of the whole or any part of the development land.

4. An obligation requiring the servient land to be used in a particular way which benefits the whole or any part of the development land.

*Reciprocal payment*

5. An obligation requiring the making of payments in a specified manner (whether to a person of a specified description or otherwise) on account of expenditure which has been or is to be incurred by a person in complying with an obligation falling within paragraph 2 or 3 above.

*Reimbursement*

6. An obligation requiring the making of payments to the manager of a development scheme in respect of expenditure incurred or to be incurred in the provision of works or services provided by him in pursuance of the scheme.

7. An obligation requiring the making of payments to the manager of a development scheme by way of contribution towards fees, costs or expenses charged or incurred by him in discharging his functions under the scheme, which costs and expenses may include costs or expenses incurred in accordance with the scheme in connection with any application (whether made by the manager or another) to the court or the Lands Tribunal under any provision of this Act.

*Access*

8. An obligation requiring access to the servient land to be afforded, in such circumstances and for such purposes as may be specified, to the manager, to any servant or agent of his or to any other person authorised in writing by him.

(Paragraphs 6.7–6.14; and clause 1(3) with Schedule 1, Part II.)

(6) Certain ancillary provisions, called "supplementary provisions" and summarised in the list which follows, should be capable of taking effect as part of a land obligation:

- (a) *Information*. A provision giving a right to information (for example, as to the current ownership of the servient land) or to the production of documents (for example, those dealing with changes in its ownership).
- (b) *Inspection*. A provision enabling any person entitled to enforce a land obligation to inspect the servient land in order to see whether it has been complied with.
- (c) *Self-help*. A provision enabling anyone entitled to enforce a land obligation requiring the carrying out of works to enter the servient land and carry them out himself in the event of non-compliance. (More will be said about this provision in para. (41) of this summary.)
- (d) *Fund*. A provision relating to the keeping of a fund out of which expenditure on the carrying out of works, or the provision of services, is to be met. A provision of this kind should be capable of being made whenever a works or services obligation is coupled with a reciprocal payment obligation, and of taking effect as part of either obligation.
- (e) *Interest*. A provision requiring the payment of interest if default is made in complying with a reciprocal payment or reimbursement obligation.
- (f) *Charge*. A provision imposing a charge on the servient land for certain money which becomes due as a result of the non-performance of a reciprocal payment or reimbursement obligation or of an obligation requiring the carrying out of works. (This provision, too, will receive more detailed treatment in paras. (45)–(50) of this summary.)

(Paragraphs 6.15 and 6.16; and clause 1(3) with Schedule 1, Part III.)

#### Development schemes

(7) Development obligations should not be capable of creation except under a pre-existing "development scheme". All such schemes should therefore be required to be made with a view to the imposition of development obligations, but they should be capable of achieving a number of other purposes in addition.

(Paragraphs 4.29–4.36.)

(8) The essential requirements for the validity of a development scheme should be as follows:

- (a) It must be contained in a deed executed by the makers of the scheme. Anyone may be a maker of a scheme, but certain persons (that is to say, those who wish to assume makers' obligations under the recommendations summarised in paragraph 9(d) below) are required to be makers.

(Paragraphs 7.4 and 7.12–7.15; and clause 2(2) and (5).)

- (b) It must make provision (not necessarily in detail) for a system of development obligations to be imposed upon land ("the development land") which is, or is to be, divided into two or more separate units. Provided

this requirement is fulfilled, the scheme may provide for different obligations to be imposed on different units or for some units to be free of obligations altogether.

(Paragraphs 7.5-7.9; and clauses 2(1) and 4(b) and 3(3)(a).)

(c) It must describe the development land in sufficient detail to identify it; and all of the land must lie in one locality, though every part of it need not be contiguous with another part.

(Paragraphs 7.10 and 7.11; and clause 2(3) and 4(a).)

(9) The optional features of a development scheme should be as follows:

(a) It may provide for a person who is to be the "manager" of the scheme. Except to the extent that the scheme provides otherwise, the manager should have power to enforce all development obligations imposed under it. His other functions should be those which the scheme prescribes. The scheme may also impose upon him obligations, which will not be land obligations but will be enforceable (through the remedies mentioned in paragraph (37) below) by all unit owners who are currently bound by any development obligation imposed under the scheme. But no one should become a manager without his agreement.

(Paragraphs 7.17-7.25 and 7.48-7.50; and clauses 2(1) and 3(1) and (8).)

(b) Amongst the provisions which the scheme may make in relation to a manager should be provisions for changes in the managership; and if the manager is changed under such provisions:

(i) the manager's functions under the scheme should pass automatically to the new manager, and

(ii) there should be a special facility (taking the form of a statutory provision allowing the scheme to designate an instrument by which the transfer can be made at the time of the change) for the transfer to the new manager of rights and liabilities which have accrued to the old manager under the scheme or under the development obligations, but

(iii) there should be no special provisions about the transfer of the old manager's assets or of his rights and liabilities to and against third parties, which should be dealt with according to the general law.

(Paragraphs 7.26-7.31; and clause 3(7).)

(c) It may provide as to whether and how far development obligations imposed upon units in pursuance of the scheme are to be enforceable against their owners for the time being by the current owners of other units. Broadly speaking, it should be possible to provide, in relation to any particular obligation, that it is to be "enforceable for the benefit of the development land as a whole" or that it is to be enforceable "for the benefit of only a specified part of the development land". The precise results of these provisions is explained in paragraph (25) below but, broadly, the first phrase connotes enforceability by all the unit

owners and the second connotes enforceability only by some one or more of them.

(Paragraphs 7.44–7.47; and clause 3(2).)

- (d) It may impose obligations on makers of the scheme (who will usually be developers of the development land), including an obligation to implement it. These obligations, like those of a manager, will not be land obligations but should be enforceable (through the remedies mentioned in paragraph (37) below) by all unit owners who are currently bound by any development obligation imposed under the scheme. If there is a manager, they should also be enforceable by him.

(Paragraphs 7.35–7.41 and 7.48–7.50;  
and clauses 2(2) and 3(5).)

- (e) It may provide for the assumption by another person of obligations under the scheme corresponding with those of its original makers (as, for example, where the original developer is obliged to hand over the development uncompleted to another developer).

(Paragraph 7.42; and clause 3(3)(d).)

- (f) It may make provision in relation to managers' or makers' obligations:  
(i) restricting the circumstances in which they are to be enforceable,  
(ii) restricting liability for a contravention.

(Paragraph 7.51; and clause 9(2).)

- (g) It may contain provisions for the referral to arbitration of differences between any of the following: makers of the scheme; the manager (if any); and anyone currently bound by, or entitled to enforce, a development obligation imposed under the scheme.

(Paragraphs 7.52–7.54; and clause 3(3)(b) and (6).)

- (h) It may make provision for its variation or extinguishment and for the variation, release or apportionment of any development obligation imposed under it. Among the variations of the scheme for which provision may be made should be variations having the effect of adding land to, or subtracting it from, the original development land.

(Paragraphs 7.59–7.65; and clause 3(3)(c) (and see clause 2(3)).)

- (i) Once a development obligation has been imposed under the scheme it should be impossible to revoke it, and possible to vary or extinguish it only in accordance with provisions made in the scheme itself (or through the exercise of judicial powers dealt with in paras. (65)–(77) of this summary (and see para. (81) (b)).

(Paragraph 7.58; and clause 3(4).)

(10) It should be possible for a development scheme to be created, not only where a developer wishes to sell off land in units, but also where the individual owners of pieces of land which are already separately owned wish to “club together” in order to set up a scheme covering all their properties.

(Paragraphs 7.69–7.71; and clause 2(1).)



(11) It should also be possible for a development scheme to be created in cases where there is a disposal of units, but on a leasehold rather than a freehold basis. A scheme may be of value in that context because of the framework which it provides for the establishment of a manager and for the mutual enforceability of obligations between tenants of the units.

**The creation of land obligations**

(12) Land obligations should be capable of creation only by someone who has a legal estate in the servient land (or is entitled to be registered as a legal estate owner under Land Registration Act 1925, s. 37).

(Paragraph 8.7; and clause 4(1).)

(13) If a land obligation is to subsist as a legal interest it should be required, in addition to complying with the requirement mentioned in paragraph (2) above, to be created by deed, unless the case falls within Law of Property Act 1925, section 52(2) when it should have to be created by written instrument.

(Paragraphs 8.8 and 8.9; and clause 4(2).)

(14) If a land obligation is to subsist as an equitable interest, it should be required to be created by written instrument.

(Paragraphs 8.8 and 8.9; and Clause 4(2).)

(15) In the case of all land obligations the creating instrument should be required to:

- (a) state that the obligation is to be a land obligation (and if a land obligation is created validly but in such a way that it could have effect also as an easement or some other interest, it should have effect only as a land obligation);
- (b) describe the servient land in a way sufficient to identify it; and
- (c) identify (expressly or impliedly) the legal estate in the servient land which enables the creator of the obligation to create it ("the burdened estate"). But if the legal estate of the creator is mortgaged at the time when the land obligation is created it should be sufficient to identify that estate as the burdened one even though (exceptionally) the situation is such that the obligation will bind the mortgagee's estate as well as the mortgagor's.

(Paragraphs 8.13–8.19; and clause 4(2) (a),(b) and (c),(5) and (8).)

(16) In addition, an instrument creating a neighbour obligation should be required to:

- (a) describe the dominant land in a way sufficient to identify it; and
- (b) identify (expressly or impliedly) the legal estate in the dominant land the owner of which is primarily entitled to enforce it ("the benefiting estate").

(Paragraphs 8.21–8.24; and clause 4(2)(d) and (3).)

(17) An instrument creating a development obligation should be required to identify the development scheme under which it is imposed.

(Paragraph 8.25; and Clause 4(2)(d) and (4).)

(18) Nothing in the earlier recommendations summarised under this heading should prevent an agreement to create a land obligation from giving rise to an equitable interest in land.

(Paragraphs 8.29 and 8.30; and clause 4(9).)

(19) Nor should those recommendations prejudice any statutory provisions which may operate so as to give a power to create land obligations.

(Paragraphs 8.29 and 8.30; and clause 4(9).)

(20) The rule against perpetuities should not apply to land obligations.

(Paragraphs 8.31–8.35; and clause 4(7).)

### **Registration**

(21) In the case of unregistered land, a land obligation should be registrable under the Land Charges Act 1972 as a land charge of Class C.

(Paragraphs 9.4–9.6; and clause 5(2) with Schedule 3, para. 7.)

(22) In the case of registered land, the Land Registration Act 1925 should apply in relation to a land obligation broadly as it does in relation to an easement created by instrument, except that a land obligation should not amount to an overriding interest. In regard to neighbour obligations, therefore, not only should the burden be noted on the register of the servient land, but the benefit should be included on the title of the dominant land as appurtenant to that land. But development obligations should be noted on the servient title alone: if they are enforceable by other unit owners it would be impracticable to require entries in respect of the benefit to be made on the titles to all such units.

(Paragraphs 9.14–9.24; and clause 5(1) with Schedule 3, para. 4.)

(23) If the recommendations summarised in the preceding paragraph would give rise to insurmountable manpower difficulties for H.M. Land Registry then, in order to avoid delay in the implementation of this report, it would be acceptable if (at least for the time being) land obligations were registrable, not according to the pattern of easements, but like restrictive covenants under the existing law, with an entry placed only on the title to the servient land and only on a non-guaranteed basis.

(Paragraphs 9.25–9.26.)

### **The running of the benefit**

(24) The benefit of a neighbour obligation should be appurtenant to the benefiting estate in the dominant land and should thus be capable of passing to any person who (in relation to the whole or part of the dominant land) is a successor in title of the person primarily entitled to enforce it or claims under or through him or a successor of his.

(Paragraphs 10.2–10.6; and clause 6(1).)

(25) The enforceability of a development obligation should depend on the provisions of the development scheme. If, as a result of those provisions:

- (a) it is enforceable by the manager of the scheme, it should be enforceable by the manager for the time being;

- (b) it is enforceable “for the benefit of the development land as a whole” (see paragraph 9(c) above), it should be enforceable as if it were a neighbour obligation appurtenant to all those estates in *all* parts of the development land which are the burdened estates in relation to any development obligation imposed under the scheme;
  - (c) it is enforceable “for the benefit of only a specified part of the development land” (see paragraph 9(c) above), it should be enforceable as if it were a neighbour obligation appurtenant to all those estates in *that* part of the development land which are the burdened estates in relation to any development obligation imposed under the scheme.
- (Paragraphs 10.7–10.14; and clause 6(2)–(7).)

#### The running of the burden

(26) For the purpose of deciding who is bound by a land obligation as a result of the running of the burden of that obligation, a distinction should be drawn between restrictive and access obligations on the one hand and other obligations on the other.

(Paragraphs 11.4 and 11.5.)

(27) Restrictive and access obligations should in principle bind:

- (a) everyone who is the owner of any estate or interest in the servient land or part of it; and
- (b) everyone else who is in occupation of the servient land or part of it.

(Paragraph 11.6; and clause 7(1) and (2).)

(28) Land obligations other than restrictive and access obligations should in principle bind:

- (a) freeholders with a right to possession of the servient land or part of it;
- (b) leaseholders (with a similar right to possession) for a term exceeding 21 years;
- (c) owners of the burdened estate in the servient land or part of it; and
- (d) mortgagees of the servient land or part of it.

(Paragraphs 11.8–11.13; and clause 7(3).)

(29) Notwithstanding the two previous paragraphs, the question whether a person is bound by a land obligation is subject to the following considerations:

- (a) Priority. No one should be bound as the owner of an interest in the servient land if (under the rules of land law which govern the priority of one interest over another) his interest has priority over the land obligation. Nor should anyone be bound as an occupier under paragraph (27) (b) above if his right to occupy derives from a person who was not bound by the land obligation when the right was granted.

(Paragraphs 11.15–11.19; and clause 7(1)(b) and (2)(b).)

- (b) The provisions of the Land Registration Act 1925 or the Land Charges Act 1972.

(Paragraphs 11.21–11.23; and clause 7(1)(a).)

- (c) Any contrary provision in the instrument creating a land obligation (or in any later variation of that instrument) which operates to restrict the class of persons who are to be bound by it.

(Paragraphs 11.24–11.25; and clause 7(1)(c).)

(30) For the purpose of deciding whether any estate or interest is held free of a development obligation as against a manager, the manager should be deemed to have acquired the benefit of the obligation for valuable consideration at the time of its creation.

(Paragraphs 11.26–11.27; and clause 7(4).)

**Liability for particular contraventions**

(31) A positive, reciprocal payment or reimbursement obligation should be enforceable, in respect of any contravention, against every person bound by the obligation at the time when the contravention occurs.

(Paragraphs 12.2 and 12.3; and clause 8(1).)

(32) A restrictive or access obligation should be enforceable against any person bound by it in respect of any conduct by that person which amounts to doing the prohibited act (or to permitting or suffering it to be done by another person). In the case of an access obligation, the prohibited act should be taken to consist in restricting or denying the access.

(Paragraphs 12.4–12.6; and clause 8(2) and (6)(a).)

(33) “Conduct” in this context should include omissions as well as acts; and the acts or omissions of a person’s employees or agents, acting as such, should be treated as his own.

(Paragraph 12.7; and clause 8(6)(b).)

(34) A mortgagee should not, however, be liable unless, at the relevant time, he has actually taken possession of the land or has appointed a receiver.

(Paragraph 12.8; and clause 8(3).)

(35) Under the recommendations summarised above, a person will be liable for a contravention only if he is bound by the land obligation at the time when it occurs. An owner of the servient land will not be liable (even if he was an original creating party) for a contravention which occurs after he has disposed of his interest; nor will a new owner be liable for one which occurs before he has acquired his. But some obligations will be such that contraventions are “continuing” contraventions which constantly recur until remedied. If such a contravention continues into a new ownership, both old and new owners will be liable. And for the purpose of determining the liability of new owners (but for no other purpose) any contravention should be *deemed to be* a continuing one so long as either:

- (a) the obligation remains capable of being complied with apart from any requirement as to time, or
- (b) the contravention continues adversely to affect the enjoyment of the dominant land (or, in the case of a development obligation, the development land) or part of it.

(Paragraphs 12.9–12.12; and clause 8(4) and (5).)

(36) It should be possible for provisions contained in the instrument creating a land obligation (or varying the terms of that instrument) to restrict the circumstances in which a person is liable for a contravention of the obligation.

(Paragraph 12.14; and clause 9(1)(b) and (3).)

**Remedies for contravention (including contravention of makers' and managers' obligations)**

(37) The following remedies should be available in the event of a contravention (or, in the case of an injunction, a threatened contravention) of a land obligation, a manager's obligation or a maker's obligation:

- (a) proceedings for an injunction (including a mandatory one) or other equitable relief;
- (b) an action for sums due under the obligation; and
- (c) an action for damages (whether in respect of pecuniary or non-pecuniary kinds of damage).

Re-entry upon the servient land should not, however, be available as a remedy.  
(Paragraphs 13.9–13.13; and clause 10(1) and (2).)

(38) It should, however, be possible for provisions contained in the instrument creating a land obligation (or varying the terms of that instrument) to restrict a person's liability for a contravention of the obligation. Similar restrictive provisions should also be possible in relation to managers' and makers' obligations.

(Paragraphs 13.16 and 13.17; and clause 9(1)(c), (2)(b) and (3).)

(39) No one (save in a case where the contravention causes personal injury or actual damage to property) should be entitled to any remedy for a contravention unless he has been materially prejudiced by it. In considering this question, the court should have particular regard to the nature of the interest (if any) entitling the would-be enforcer to enforce the obligation, and to the situation of the land in which his interest subsists. This recommendation should not require a court to refuse equitable relief to a manager, but a court should have power to refuse such relief if satisfied that *no one* is materially prejudiced by the contravention.

(Paragraphs 13.21–13.23; and clause 10(3)–(5).)

(40) Common law damages should be available for contraventions of restrictive and access obligations only against persons whose estate or interest in the servient land:

- (a) is the burdened estate or the interest of a mortgagee, or
- (b) confers a right to possession and is either freehold or leasehold for a term exceeding 21 years.

(Paragraphs 13.24–13.27; and clause 10(6).)

(41) Where a contravention (of a land obligation or a manager's or maker's obligation) consists in a failure to carry out works, a special self-help remedy should be available. This should entitle anyone who can enforce the obligation and who does the works himself to recover in full their reasonable cost. But:

- (a) The right to recover the cost should be qualified in cases where (because of a reciprocal payment obligation or otherwise) he would have had to meet or contribute to it anyway.
- (b) If, in order to do the work, he needs to enter the servient land, this recommendation does not of itself confer a right to do so; but such a right may be reserved on creation of a land obligation: see paragraph (6) (c) above.

- (c) A decision not to exercise the self-help remedy should not lead (by the application of any rule relating to mitigation of damages) to the reduction of damages otherwise obtainable.

(Paragraphs 13.28–13.31; and clause 10(7) and (8).)

- (42) If a person suffers loss or damage partly through his own fault and partly through the contravention of a land obligation (or manager's or maker's obligation), the Law Reform (Contributory Negligence) Act 1945 and the Fatal Accidents Act 1976 should apply accordingly.

(Paragraph 13.32; and clause 10(9).)

- (43) The limitation period in respect of a contravention of a land obligation (or manager's or maker's obligation) should normally be six years, such period to run from the time of the contravention.

(Paragraphs 13.33–13.38; and Schedule 3, para.8.)

- (44) For the purpose of discovering who is liable, anyone entitled to enforce a land obligation should be entitled to serve a notice on anyone whom he believes to be in occupation of, or the owner of an estate or interest in, or the recipient of rent for (or of analogous payments for the occupation of) the servient land or part of it. The notice would require the person served to state:

- (a) the nature of any estate or interest which he has in the servient land or any part of it,
- (b) the name and address of any other person whom he believes to have such an estate or interest,
- (c) the name and address of anyone whom he believes to be the recipient of rent or other payments as described above, and
- (d) if he is served as "the occupier" and not addressed by name, his own name.

The person served should have a duty to comply with the notice within one month. Detailed recommendations as to service are also made.

(Paragraphs 13.39–13.44; and clause 12.)

#### **The charge facility**

- (45) It should be possible for a land obligation to be imposed as a charge on the servient land in order to assist its enforcement. This charge facility should not, however, be available in respect of all land obligations nor should its imposition be automatic.

(Paragraphs 14.1–14.6.)

- (46) The charge facility should take the form of a power for the parties in creating:

- (a) a reciprocal payment obligation,
- (b) a reimbursement obligation, or
- (c) an obligation requiring the doing of works to make a supplemental provision imposing a charge (having the same priority as the obligation

itself) binding upon every estate or interest in the servient land which is for the time being bound by the obligation in respect of:

- (i) in the case of (a) and (b), any amount from time to time outstanding under the obligation, and
- (ii) in the case of (c), any amount from time to time recoverable as expenses after the exercise of the self-help remedy.

(Paragraphs 14.8–14.14; and clause 11(1) and (2), with Schedule 1, para.18.)

(47) Since a land obligation will itself be registrable under the Land Registration Act 1925 or the Land Charges Act 1972, no charge imposed by an obligation should be separately registrable under either Act. Nor should such a charge need to be registered under Part III of the Companies Act 1948.

(Paragraphs 14.15 and 14.16; and clause 5(3).)

(48) The person entitled to enforce a charge supporting a works obligation should be the person who has incurred the expense. In the case of reciprocal payment or reimbursement obligations, the charge should be enforceable by anyone entitled to enforce the obligation, but only for the benefit of the person to whom the payment should be made.

(Paragraphs 14.17 and 14.18; and clause 11(3) and (4).)

(49) A person who is entitled to enforce a charge supporting a land obligation should have the same powers and remedies for that purpose as if he were a legal mortgagee by deed. Such powers and remedies should not, however, be exercisable except with the court's leave and upon such terms and conditions as the court may impose. To protect derivative interests holders, the court should have power:

- (a) to order that a sale should be subject to specified derivative interests even though the charge had priority to them,
- (b) to order that a specified amount of the sale proceeds should be paid to derivative interest holders by way of compensation.

(Paragraphs 14.19–14.21; and clause 11(5) and (6).)

(50) A purchaser of land sold pursuant to the court's order should not be required to investigate the chargee's right to sell beyond ensuring that the court has ordered the sale and that any terms and conditions precedent to it have been complied with. The land should be subject, in the purchaser's hands, to the land obligation and to the charge (but the charge should no longer secure the debt for which the land was sold).

(Paragraphs 14.22 and 14.23; and clause 11(6)(a) and (b) and (7).)

#### **Extinguishment, variation, etc., in general**

(51) The general status conferred on land obligations— that of interests in land—will of itself ensure that they can be varied or extinguished in the same way as any other comparable interest. No express recommendations (or provisions in the draft Bill) are required for this purpose. The recommendations which immediately follow are therefore concerned with particular cases of extinguishment or variation for which special provision has to be made.

(Paragraphs 15.1–15.4.)

### **Extinguishment by merger**

(52) The extinguishment of a neighbour obligation should occur if:

- (a) the burdened estate in the whole of the servient land and the benefiting estate in the whole of the dominant land come into the ownership of the same person in the same right, and
- (b) no one else has the benefit of the obligation or is bound by it.

(Paragraphs 16.6 and 16.7; and clause 15(2).)

(53) Where the unity of ownership does not extend to the whole of the dominant and servient lands there should, in principle, be no extinguishment of any neighbour obligation. Where, however, the unity of ownership extends to the whole of the dominant land but to part only of the servient land, restrictive neighbour obligations alone should be extinguished in so far as they relate to that part of the servient land.

(Paragraphs 16.8–16.11; and clause 15(3).)

(54) Development obligations should not be extinguished merely because two or more of the units come into the same hands. There should, however, be extinguishment not only of every development obligation but also of the development scheme itself if:

- (a) a legal estate (or legal estates) in every part of the development land is (or are) in the ownership of one person in the same right, and
- (b) no one else (except the manager, if any) has the benefit of, or is bound by, any development obligation imposed under the scheme.

(Paragraphs 16.12 and 16.13; and clause 15 (4).)

(55) No extinguishment of a land obligation or of a development scheme should affect any rights or liabilities already accrued at the time of the extinguishment.

(Paragraph 16.14; and clause 15(6).)

(56) Where there is surrender or merger of a lease, a land obligation binding only the leasehold should continue to bind the person now owning both lease and reversion (or the estate which results from their merger) for so long as it would have bound the tenant.

(Paragraphs 16.16–16.18; and clause 15(5).)

(57) Where, however, a lease is forfeited, any land obligation binding only upon the leasehold estate should thereby terminate (subject to relief).

(Paragraphs 16.19 and 16.20.)

### **Equitable variations**

(58) If it is not possible to procure that all those who have the burden of a land obligation, and all those who have its benefit, join in an appropriate document, the obligation itself cannot be varied (a legal variation). ("Variation" should be read as including apportionment and release.) It should nevertheless be possible for those who are prepared to join (for example, the several servient owners following a division of the servient land) to agree, so as to



bind themselves and their successors, that the obligation is to be treated as varied (an equitable variation).

(Paragraphs 17.1–17.7.)

(59) If a deed provides for a land obligation to be treated as varied, but the deed does not bring about a legal variation because of the non-participation of some interested party, the deed should, subject to the conditions mentioned in the next paragraph, nonetheless be binding upon the successors in title of the original parties to it as well as on the original parties themselves (unless a contrary intention appears).

(Paragraph 17.9; and clause 16(1).)

(60) The successors of an original party should be bound only if the original party:

- (a) has (or is to have) some interest in the land affected and therefore is (or will be) bound by, or entitled to enforce, the obligation, or
- (b) executes the deed as manager of the development scheme by virtue of which the obligation was imposed.

(Paragraph 17.11; and clause 16(2).)

(61) In the case of an original party who is not a manager, the following persons should (if they are for the time being bound by, or entitled to enforce, the land obligation) rank as his successors so as to be bound by the equitable variation:

- (i) anyone who has acquired the original party's interest in the whole or part of his land;
- (ii) anyone who has acquired an interest (in the whole or part of that land) which was created since the deed, and who claims it under or through the original party or a successor described in (i) above; and
- (iii) anyone who has, since the deed, gone into occupation of the whole or part of that land (otherwise than by a right derived from a person not bound by the variation at the time the right was granted).

(Paragraph 17.13; and clause 16(3).)

(62) In the case of an original party who is a manager, the persons bound as successors should be those in whom the functions of manager are currently vested.

(Paragraph 17.14; and clause 16(4).)

(63) The equitable variation should give rise, as between those (whether as original parties or successors) who are currently bound by it, to mutually enforceable duties to ensure that its terms are implemented.

(Paragraphs 17.16 and 17.17; and clause 16(6).)

(64) These recommendations should apply equally to an equitable variation of an equitable variation.

(Paragraph 17.20; and clause 16(7).)

## **Extinguishment and variation by the Lands Tribunal**

### **(a) *The Tribunal's powers***

(65) The Lands Tribunal should have power:

- (a) to extinguish or modify any land obligation,  
or
- (b) to modify a development scheme by modifying or deleting any of its provisions,  
or
- (c) to extinguish a development scheme if, having extinguished all the development obligations imposed under it, the Tribunal considers this appropriate.

(Paragraphs 18.4–18.6; and clause 17 (1) and (2).)

(66) Anyone interested in the servient land (or part of it) should be entitled to apply to the Tribunal in relation to a neighbour obligation.

(Paragraph 18.8; and clause 17(3)(a)(i).)

(67) Anyone interested in the whole or part of land which is servient land in relation to a reciprocal payment obligation should be entitled to apply to the Tribunal in respect of the works or services obligation on which it depends.

(Paragraph 18.9; and clause 17(3)(a)(ii).)

(68) The persons who should be entitled to apply to the Tribunal in respect of development obligations and development schemes are:

- (a) the manager (if any) of the development scheme, and
- (b) any person interested in the whole or part of any land which is servient land in relation to any land obligation imposed pursuant to the scheme.

(Paragraphs 18.10 and 18.11; and clause 17(3)(b).)

(69) The Tribunal's powers of extinguishment or modification should include a power to extinguish or modify upon such terms as the Tribunal may think fit. To give effect to such terms, the Tribunal should have power:

- (a) to add provisions to any existing obligation or to any development scheme;
- (b) to impose new land obligations;
- (c) to give such directions as it may think fit to persons affected by an order relating to a development scheme or a development obligation;
- (d) to give such directions as it may think fit to a person bound by a primary works or services obligation, where the application to discharge or modify that obligation is made by a person interested in land burdened by a reciprocal payment obligation.

(Paragraphs 18.12–18.14; and clause 17(5).)

(70) The Tribunal should have power to order anyone who benefits from its order to compensate anyone bound by it for any loss or disadvantage which he will suffer because of it.

(Paragraphs 18.15–18.18; and clause 17(6).)

(71) No compensation should, however, be payable to the manager as such. But where the Tribunal's order modifies or extinguishes a development obligation enforceable by the manager, those entitled to seek compensation should include anyone whom enforcement of that obligation by the manager was intended to benefit.

(Paragraphs 18.19–18.21; and clause 17(7).)

(72) No order of the Tribunal should impose any new or additional burden on anyone without his consent. However, the Tribunal should, in imposing a burden on a person, have power to dispense with that person's consent if satisfied that the prejudice which the burden causes him does not substantially outweigh the benefits which will accrue to him from the other provisions of the order. But if the Tribunal considers that an order should not be made without such a burden being imposed, and there is no consent and the exception does not apply, the Tribunal should refuse to make the order.

(Paragraphs 18.22–18.25; and clause 17(8).)

(73) Several provisions of a procedural nature contained in section 84 of the Law of Property Act 1925 should apply (suitably modified) to the new land obligation regime. These provisions include subsection (5) which provides as to who shall be bound by the Tribunal's order.

(Paragraphs 18.26–18.28; and clause 18.)

(74) Land obligations created or imposed for naval, military, air force or civil aviation purposes should be excluded from the Tribunal's powers of extinguishment and variation. But such exclusion should cease once the obligations are (broadly) no longer enforceable either by the Crown or by any public or international authority.

(Paragraphs 18.29–18.31; and clause 17(9) and (10).)

(b) *Grounds for exercise of the powers*

(75) The grounds on which the Lands Tribunal should exercise its powers are indicated by the following brief descriptions, which are preceded by a statement of the things to which the particular ground should apply:

- (a) All land obligations and managers' obligations: that the obligation in question is obsolete.
- (b) All land obligations and managers' obligations: that the proposed change is harmless.
- (c) All land obligations and managers' obligations: that those concerned have expressly or impliedly agreed to the change.
- (d) Development obligations, managers' obligations, and other provisions of development schemes (but not makers' obligations): that the proposed change would remove a factor which is prejudicing the general purposes of the scheme.
- (e) Restrictive, access and positive land obligations: that the change is necessary to prevent the obligation impeding some reasonable use of the servient land.
- (f) Positive obligations and managers' obligations: that because of a change of circumstances performance of the obligation is no longer practicable or has become disproportionately expensive.

- (g) All provisions of development schemes (other than managers' and makers' obligations): that a change of circumstances has made the provision obsolete, or impracticable or disproportionately expensive to implement.
- (h) All provisions of development schemes, all development obligations and neighbour obligations which are reciprocal payment obligations: that a change is made necessary by an order of the Tribunal made on any of the other grounds.

(Paragraphs 18.32–18.53; and Schedule 2, paras. 1–6.)

(76) The Tribunal should, in deciding:

- (a) whether a restrictive, access or positive obligation should be extinguished or modified on any ground, or
- (b) whether any land obligation falls within the “impeding reasonable user” ground,

take account of local planning matters and any other material circumstances.

(Paragraphs 18.55 and 18.56; and Schedule 2, para. 7.)

(77) The Tribunal should, in deciding whether to modify any provision of a development scheme or any development obligation, have particular regard to the effect of the change proposed on the development land as a whole, and to whether the change is consistent with the general purposes of the scheme.

(Paragraph 18.57; and Schedule 2, para. 8.)

#### **Powers of the court to make declarations and changes**

(78) The court should have power to declare:

- (a) whether any land is (or would in any given event be) affected by a land obligation or a development scheme, and
- (b) what is the nature and extent of any land obligation or other obligation imposed or varied by or pursuant to any instrument or resolution, and whether the obligation is (or would in any given event be) enforceable (and, if so, by whom).

(Paragraphs 19.2–19.4; and clause 13(1).)

(79) The court should have power to replace an unsatisfactory manager or fill a managership vacancy if it is satisfied that this is expedient and that it is inexpedient, difficult or impracticable for it to be done without the court's assistance. The court should also be able to give supplementary directions as to the transfer of property, rights and liabilities to the new manager.

(Paragraphs 19.5 and 19.6; and clause 13(2).)

(80) If a change of manager has taken place without the court's intervention, but no satisfactory provision has been made for the transfer of property, rights and liabilities to the new manager, the court should have power to put matters right.

(Paragraph 19.6; and clause 13(3).)

(81) If, during any court proceedings, a question arises as to the possible exercise of the Lands Tribunal's jurisdiction to extinguish or modify land obligations and development schemes, the court should be able to:

- (a) give such direction as it thinks fit with respect to the making of an application to the Tribunal, and to stay the court proceedings in the meantime, or
- (b) exercise the Tribunal's jurisdiction itself if this seems appropriate.

(Paragraphs 19.7-19.11; and clause 13(4)-(6).)

(82) Ancillary provisions should be introduced to cover certain procedural matters analogous to those recommended at paragraph (73) above in relation to the powers of the Lands Tribunal.

(Paragraph 19.12; and clause 14.)

#### **The "rescue" of existing freehold flat schemes**

(83) Mainly because of the difficulty of enforcing positive covenants under the existing law, such freehold flats and maisonettes as now exist tend to be considered unsatisfactory securities for mortgage loans and are difficult to sell. If all those interested in the block of flats agree to join in the necessary documents, they can themselves remove this "blight" by means of a development scheme and development obligations or (in the simplest cases) merely by means of neighbour obligations. But such co-operation may often be impossible—not necessarily because of actual dissent by any interested party but perhaps because sheer weight of numbers precludes it. Subject to stringent safeguards, therefore, there should be a means of removing the blight even though the active participation of all those interested cannot be obtained. This should take the form, broadly, of a power for a unit owner, or group of unit owners, to prepare a development scheme for the block, and for the court to approve it and ensure that legal effect is given to it.

(Paragraphs 20.1-20.10.)

(84) The court's powers should be confined to blocks predominantly of residential freehold flats existing at the date when the relevant provisions come into force (but they should not be excluded merely because one or more of the units is or are let to tenants or used for non-residential purposes).

(Paragraph 20.16; and clause 20(1).)

(85) Anyone with a legal estate in any part of the land to which the proposed development scheme is to apply should be entitled to make the necessary court application.

(Paragraph 20.17; and clause 20(3).)

(86) The court should only make an order if satisfied that the following conditions have been fulfilled:

- (a) that the relevant building is still a block of residential freehold flats or maisonettes;
- (b) that the main object of the scheme is to remove some factor which tends to prejudice the maintenance in good repair (or the amenities) of the whole or part of the building, or the disposability of the freehold estate in at least one unit comprised in the building;

- (c) that this object cannot be achieved without the participation of the respondents (that is, broadly, those unit owners who are not proponents of the scheme) in respect of whom the order is sought;
- (d) that any prejudice caused to a respondent by an order would not substantially outweigh the benefits which he would derive through the scheme; and
- (e) that the provisions of the scheme (and of the development obligations to be imposed pursuant to it) are reasonable in all the circumstances.  
(Paragraphs 20.22 to 20.27; and clause 20(4).)

(87) The court's order should have the effect of dispensing with the need for the respondents to participate in the making and implementation of a development scheme.

(Paragraph 20.28; and clause 20(2).)

(88) It should be possible for the court's order to be made not only in relation to the development scheme as proposed but also to that scheme as modified by the court.

(Paragraph 20.29; and clause 20(5).)

(89) The court should have power to include in its order such incidental and supplemental provisions as it thinks fit including any directions necessary for the making and implementation of the scheme and the extinguishment or modification of rights, powers and duties superseded by it.

(Paragraph 20.31; and clause 20(6).)

#### **Compulsory purchase**

(90) In Part XXI of the report we outline our provisional views as to the place which land obligations should occupy in the law of compulsory purchase, but these are not summarised here because they are to be the subject of further consultation.

(Paragraphs 21.1–21.12.)

#### **Model forms**

(91) The Lord Chancellor should be given power to prepare and publish model forms of instruments and examples relating to land obligations and development schemes.

(Paragraphs 22.1–22.9; and clause 22.)

#### **Court jurisdiction**

(92) In Part XXIII of the report, we set out our views about the respective jurisdiction of the High Court and county courts in relation to the various aspects of our proposals but these (like our views about compulsory purchase) are provisional and are not summarised here.

(Paragraphs 23.1–23.9.)

**Consequential changes in the existing law**

(93) The existing rules of law and equity whereby the burden or the benefit of a covenant which touches and concerns land may pass to persons other than the original parties should not apply to covenants entered into after the commencement date of the Act implementing these recommendations. This general recommendation is, however, subject to three main exceptions and to two transitional exceptions.

(Paragraph 24.8; and clause 19(1).)

(94) The first main exception is covenants between landlord and tenant. Thus the general recommendation should not affect the application of any such rules of law and equity to these covenants. This exception should not, however, apply to covenants between landlord and tenant which impose an obligation on land which is not included in the property demised by the lease.

(Paragraphs 24.11–24.24; and clause 19(2).)

(95) The second main exception is covenants entered into under statutory powers. Despite the introduction of land obligations, all these statutory powers should be preserved as powers to create covenants, with the same effect in all respects as they have under the existing law.

(Paragraphs 24.25–24.30.)

(96) The third main exception is the doctrine in the case of *Halsall v. Brizell*. This doctrine will not be affected by the general recommendation about the future running of covenants.

(Paragraphs 24.31–24.33.)

(97) The first of the transitional exceptions is that a restrictive covenant entered into after the commencement date in discharge of an obligation (or pursuant to an option or right of pre-emption) granted before that date should be treated for all purposes (including that of registration) as if it had been entered into before that date.

(Paragraphs 24.35 and 24.36; and clause 19(4) and (6).)

(98) The other transitional exception is that a restrictive covenant entered into after the commencement date pursuant to a building or letting scheme already in operation on the commencement date should be treated for all purposes (including that of registration) as if it had been entered into before that date.

(Paragraphs 24.37 and 24.38; and clause 19(4).)

(99) It should not be possible to create any estate rentcharges after the commencement date. There should, however, be transitional exceptions (analogous to those just mentioned relating to covenants) in respect of pre-existing obligations and developments already begun before the commencement date.

(Paragraphs 24.39–24.45; and clause 19(3), (5) and (6).)

(100) The introduction of land obligations gives rise to the need for consequential changes in existing statute law. Certain of these are contained in Schedule 3 to the draft Bill.

(Paragraphs 24.49 and 24.50; and clause 21(1) and Schedule 3.)

(101) In addition, there should be power for the Lord Chancellor to make such modifications of any existing statutory provision as appear to him appropriate:

- (a) as a consequence of any recommendation made in this report, or
- (b) to ensure that any enactment currently authorising the creation of restrictive or positive covenants has effect to authorise the creation of land obligations, or
- (c) to ensure that any existing provision dealing with interests in land (or with any particular kind of interest in land) should, or should not, have effect in relation to land obligations.

(Paragraphs 24.51–24.53; and clause 21(2) to (4).)

#### **Commencement and Crown application**

(102) The commencement date of the Act implementing these recommendations should be fixed so as to allow sufficient time both for legal practitioners to familiarise themselves with the new regime (and we think that a period of one year would be suitable for this purpose) and for the necessary official machinery (especially at H.M. Land Registry) to be prepared.

(Paragraphs 25.2–25.6; and clause 25(2).)

(103) Whether and to what extent our recommendations should bind the Crown is a matter for further consultation.

(Paragraph 25.7; and clause 24.)

#### **Other matters**

(104) In Part XXVI of the report we mention three matters: the question whether statutory provisions as to service charges, analogous to those in Schedule 19 to the Housing Act 1980, should apply to freehold flats; the possibility of having a special statutory regime to govern the activities of development scheme managers and others who perform managerial functions in relation to property developments; and the problems which arise when the ownership of individual units in a building outlasts the life of the building itself. For the reasons given there, however, we make no recommendations on these matters.

(Paragraphs 26.1–26.11.)

(Signed) RALPH GIBSON, *Chairman*  
STEPHEN M. CRETNEY  
BRIAN DAVENPORT  
STEPHEN EDELL  
PETER NORTH

J. G. H. GASSON, *Secretary*  
17 October 1983



APPENDIX A

**Draft**  
**Land Obligations Bill**

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ARRANGEMENT OF CLAUSES

*A new interest in land*

- Clause  
1. Land obligations: a new interest in land.

*Development schemes*

2. Development schemes.  
3. Provisions of development schemes etc.

*Creation and registration*

4. Manner and effect of creating land obligations.  
5. Registration of land obligations.

*Enforcement*

6. Persons entitled to enforce land obligations.  
7. Persons bound by land obligations.  
8. Extent of enforceability of land obligations.  
9. Restriction of enforceability or liability.  
10. Remedies for enforcing land obligations, etc.  
11. Enforcement by charge on servient land.  
12. Duty to give information as to servient interests.

*Additional powers of the court*

13. Additional powers of the court.  
14. Provisions supplemental to s. 13.

*Extinguishment, variation etc.*

15. Merger.  
16. Equitable variations, releases and apportionments.  
17. Power of Lands Tribunal to modify or extinguish land obligations and development schemes.  
18. Provisions supplemental to section 17.

*Land Obligations*

*Miscellaneous and general*

Clause

19. Restrictions on future covenants and rentcharges.
20. Power to convert existing freehold flat schemes.
21. Consequential amendment of the law.
22. Model forms, etc.
23. Interpretation etc.
24. Application to the Crown.
25. Short title, commencement and extent.

SCHEDULES:

Schedule 1—The scope of land obligations.

Part I—Obligations capable of subsisting as neighbour obligations.

Part II—Obligations capable of subsisting as development obligations.

Part III—Supplementary provisions.

Schedule 2—The exercise of the power of the Lands Tribunal under section 17.

Part I—Relevant grounds.

Part II—Matters to be taken into account.

Schedule 3—Consequential amendments.



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Make provision for, and in relation to, a new interest in land to be known as a land obligation, to restrict the operation of the existing rules relating to covenants which touch and concern land, to prohibit the creation of estate rentcharges and for connected purposes.

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

*A new interest in land*

Land obligations: a new interest in land.

1.—(1) The provisions of this Act have effect with respect to a new form of interest in land to be known as a land obligation which, in accordance with the provisions of this Act, imposes a burden on one piece of land (in this Act referred to as “the servient land”) either—

- (a) for the benefit of another piece of land; or
- (b) in pursuance of a development scheme within the meaning of section 2 below.

(2) In this Act—

- (a) a land obligation falling within paragraph (a) of subsection (1) above is referred to as a “neighbour obligation”;
- (b) a land obligation falling within paragraph (b) of subsection (1) above is referred to as a “development obligation”; and
- (c) in relation to a neighbour obligation, “the dominant land” means the land for the benefit of which the obligation is imposed.

## EXPLANATORY NOTES

### *Clause 1*

1. This clause introduces the land obligation as a new form of interest in land.

### *Subsection (1)*

2. A land obligation can subsist as a legal interest within s.1(2)(a) of the Law of Property Act 1925 provided that it is equivalent to an estate in fee simple absolute in possession or a term of years absolute: see Schedule 3, paragraph 3(1) to this Bill. A land obligation may also subsist as an equitable interest: see note 4 to clause 4 below. This implements paragraph 5.2 of the Report.

3. A land obligation imposes a burden on one piece of land (the servient land) *either* for the benefit of another piece of land (the dominant land) *or* pursuant to a development scheme (as defined in clause 2). This implements paragraphs 6.3 and 6.18 of the Report.

4. A land obligation cannot be used to confer benefits that are unconnected with land. This effectively reproduces the old rule that a covenant must 'touch and concern' the benefited land, and gives effect to paragraph 6.4 of the Report.

### *Subsection (2)*

5. Paragraph (a) describes a land obligation benefiting another piece of land as a "neighbour obligation". As the name implies, such an obligation would usually be created between adjoining land owners who might be either "horizontal" neighbours or "vertical" neighbours (as in the case where a house is divided into two flats). These matters are discussed in paragraph 6.19 of the Report.

6. Paragraph (b) describes a land obligation imposed pursuant to a development scheme as a "development obligation". Again, as the name implies, such an obligation would usually arise where land is being developed. The development obligation could, however, be used in any situation where a substantial area of land (including a block of flats) was, or was to be, divided into a number of separately-owned but interdependent units. These matters are discussed in paragraphs 6.7, 7.69 and 7.71 of the Report.

*Land Obligations*

(3) The land obligations which are capable of subsisting as neighbour obligations are those specified in Part I of Schedule 1 to this Act and those which are capable of subsisting as development obligations are those specified in Part II of that Schedule; and the supplementary provisions in Part III of that Schedule shall have effect.

(4) Where by virtue of any of the supplementary provisions of Part III of Schedule 1 to this Act a provision of any description specified in that Part takes effect as part of an obligation of any description specified in Part I or II of that Schedule any reference in this Act to an obligation of that description includes a reference to that provision.

## EXPLANATORY NOTES

*Clause 1 (continued)*

*Subsections (3) and (4)*

7. These provisions introduce Schedule 1 to the Bill which specifies the types of obligation that can be created as a neighbour obligation or as a development obligation. See the explanatory notes to that Schedule and paragraphs 6.6 and 6.10 of the Report.

8. An instrument creating a land obligation may provide that certain supplementary provisions (such as a right to inspect the servient land to check compliance with the obligation) contained in the instrument should take effect as part of the obligation. Subsection (4) provides that, in such a case, any reference in the Bill to the obligation should be read as including a reference to the appropriate supplementary provision. This implements paragraph 6.16 of the Report.

*Land Obligations*

*Development schemes*

Development schemes.

**2.—(1)** For the purposes of this Act a development scheme is a scheme made in accordance with this section which makes provision for a system of land obligations applicable to land which is or is to be divided into two or more separate parcels with or without provisions imposing other obligations for the purposes of the management of the scheme.

(2) A development scheme may also impose obligations on the maker or any of the makers of the scheme including an obligation to implement the scheme.



## EXPLANATORY NOTES

### *Clause 2*

1. This clause explains the essential requirements of a development scheme. The provisions for development schemes are designed to facilitate the enforceability of land obligations not only in "horizontal" estate developments but also in creating schemes for freehold flats in blocks. They are intended to be very flexible instruments, capable of fulfilling not only all the functions of the "building scheme" under the existing law but other objectives besides.

### *Subsection (1)*

2. This provision shows that a development scheme is one that provides for a system of land obligations to apply to land. Thus the primary purpose of a development scheme is to pave the way for the imposition of land obligations (that is to say, development obligations falling within the class of obligations in Part II of Schedule 1 to the Bill). It does not itself impose those obligations. This implements paragraphs 4.32, 4.35 and 7.6 of the Report.

3. Either the land to which a development scheme is to apply must be already divided into two or more separate parcels at the time the scheme is created or else such division must be envisaged by the scheme. A scheme can operate not only in cases where property development is taking place but also in those where owners of separate pieces of land wish to retain their land but want to club together to set up a scheme covering all their properties. Residents in a block of freehold flats might wish to club together in this way. The minimum of two is necessary to maintain a division between the land that is burdened by the development obligation and other land that is benefited. These matters are discussed in paragraphs 7.70 and 7.71 of the Report.

4. A development scheme may contain obligations as to the management of the scheme. These are not land obligations but are enforceable in accordance with clause 3(5).

### *Subsection (2)*

5. This enables obligations to be imposed on a maker of a scheme. Makers would normally be the developers or the owner of some interest in the land covered by the scheme. The subsection refers specifically to an obligation to implement the scheme (by the maker actually imposing on individual units the development obligations for which the scheme provides) but any sort of obligation could be imposed on a maker—for example, to make up the estate roads. Makers' obligations are not land obligations but are enforceable in accordance with clause 3(5). This implements paragraphs 7.15 and 7.35 to 7.42 of the Report.

*Land Obligations*

(3) All the land to which a development scheme is or, by variation, becomes applicable must lie in one locality but not every part need be contiguous with some other part.

(4) A development scheme—

- (a) must describe in sufficient detail to identify it the land to which the scheme is applicable (whether by reference to a plan or otherwise); but
- (b) need not make detailed provision for the system of land obligations applicable to the land.

(5) A development scheme must be contained in a deed which states that the scheme is a development scheme and is executed by the maker or makers of the scheme.

## EXPLANATORY NOTES

### *Clause 2 (continued)*

#### *Subsection (3)*

6. This ensures that all the land in a development scheme is in the same locality. Under the present law building schemes create a "local law" for a defined area of land. The purpose of the present proposal is to incorporate a similar requirement in relation to development schemes. It does not matter, however, if parts of the land in a scheme are isolated (for example, by road or river) from other parts. This implements paragraph 7.11 of the Report.

#### *Subsection (4)*

7. This requires that a development scheme must describe the land it covers sufficiently well to enable it to be identified. But the location and boundaries of the individual units need not be plotted at the time when the scheme is created; and, provided that it can be said to make provision for a system of land obligations, it need not do so in detail. In practice, however, it may be convenient for the scheme to set out the actual wording of the obligations so that when the units are sold off the individual conveyancing documents can simply refer back numerically to the obligations contained in the scheme. This implements paragraphs 7.7 to 7.10 of the Report.

#### *Subsection (5)*

8. This requires that a development scheme must be contained in a deed which is executed by its maker or makers and which states that the scheme is a development scheme. This implements paragraph 7.4 of the Report.

*Land Obligations*

Provisions of  
development  
schemes etc.

3.—(1) A development scheme may, and if it provides for the imposition of reimbursement obligations must, provide for a person (in this Act referred to as the “manager”) who is to have (apart from any other functions conferred or imposed on him by the scheme) the right of enforcing the development obligations imposed in pursuance of the scheme other than obligations in relation to which the scheme provides that the manager is not to have that right.

## EXPLANATORY NOTES

### *Clause 3*

1. This clause deals with the optional features of a development scheme.

### *Subsection (1)*

2. This provision permits development schemes to provide for the appointment of a manager. The desirability of providing for a manager will be closely linked with the need for a continuing exercise of management functions. A manager could be an individual or a corporate body (such as a limited company, perhaps initially under the control of the developer and subsequently under that of the unit owners) or an unincorporated body (such as a residents' association). A scheme need not identify a particular manager. It will suffice if the scheme provides a means of selecting one. If the manager is to be a company the scheme might also provide for its constitution and shareholding. Provision could also be made for subsequent changes in the managership. This implements paragraphs 7.17 to 7.19 of the Report.

3. A manager *must* be provided for by a development scheme if the scheme provides for the imposition of reimbursement obligations: see Schedule 1, paras. 10 and 11. Such obligations concern the making of payments to a manager and so cannot subsist without one. Access obligations also create rights exercisable only by a manager: see Schedule 1, para. 12. This matter is discussed in paragraph 7.20 of the Report.

4. A manager is given the automatic right of enforcing all development obligations imposed pursuant to the development scheme. This is because it will normally be desirable for a manager to have this right. The right subsists regardless of whether he has any land capable of benefiting from the obligations: he is effectively enforcing on behalf of those unit owners who do have such land. (Even if the manager does have land capable of benefiting from the obligations, the benefit of the obligations will not be appurtenant to it) It will, however, be possible for a scheme to provide that some development obligations are not enforceable by the manager. Indeed, such a provision should be made if a scheme envisages the imposition of reciprocal payment obligations (see Schedule 1, para. 9), since the enforcement of such obligations should be in the hands of the person who is to receive the payment. This implements paragraphs 7.21 and 7.22 of the Report.

5. The manager's automatic right to enforce development obligations is without prejudice to any other functions conferred or imposed on him by the development scheme. See paragraph 7.23 of the Report for examples of such functions.

*Land Obligations*

(2) For the purpose of identifying the persons who, by virtue of section 6 below, are to be entitled to enforce any development obligations imposed in pursuance of it, a development scheme may, in relation to specified development obligations or development obligations of a specified description, provide—

- (a) In the case of any positive or restrictive obligations which (if imposed) will be enforceable by the manager, that the obligations shall also be enforceable for the benefit of the development land as a whole or for the benefit of only a specified part of that land;
- (b) in the case of any obligations which (if imposed) will not be enforceable by a manager, that the obligations shall be enforceable for the benefit of only a specified part of the development land instead of for the benefit of that land as a whole.

## EXPLANATORY NOTES

### *Clause 3 (continued)*

#### *Subsection (2)*

6. This provision permits a development scheme to provide that positive and restrictive obligations which (if imposed) will be enforceable by the manager are to be enforceable also by individual unit owners. Such a provision could relate to all or just some of the positive and restrictive obligations and they could be enforceable either for the benefit of the development land as a whole or for the benefit of only a specified part of that land. (In other words, broadly, the enforcement right could be given to all or just some of the unit owners.) In the absence of such a provision, however, a development obligation enforceable by a manager would not be enforceable by anyone else. This implements paragraph 7.46 of the Report.

7. This provision also permits a development scheme to provide that all or any of the obligations that are *not* enforceable by a manager may be enforced for the benefit of a specified *part* (as opposed to the whole) of the development land. Such a provision should be made in relation to reciprocal payment obligations and any other obligations which are intended to benefit only a limited number of units. If, however, a development scheme does not make any such provision in relation to an obligation that is not enforceable by a manager, the obligation will be enforceable for the benefit of the *whole* of the development land. This last proposition is contained in clause 6(4) and helps prevent a development obligation becoming unenforceable for want of any specific provision in the scheme. This implements paragraph 7.47 of the Report.

*Land Obligations*

(3) Without prejudice to section 9 below, a development scheme may make provision—

- (a) for different land obligations to be imposed on different parcels or parts of the development land or for parcels or parts of the development land to be free of land obligations;
- (b) for the referral to arbitration of differences between any of the following persons, namely, the maker or makers of the scheme, the manager and any persons who become entitled to enforce or bound by any development obligations imposed in pursuance of the scheme;
- (c) for the variation or extinguishment of the scheme and for the variation, release or apportionment of development obligations imposed in pursuance of the scheme;
- (d) for the assumption by another person of obligations under the scheme corresponding with any obligations of the maker or makers of the scheme.



## EXPLANATORY NOTES

### *Clause 3 (continued)*

#### *Subsection (3)*

8. This permits a development scheme to make provision for a number of other specific matters. Thus—

- (a) a scheme can provide for different obligations to be imposed on different units in the development land or for some units to be “obligation-free”. Although the scheme must provide for a system of land obligations, it would clearly be wrong to require that exactly the same obligations be imposed on every unit. If, however, parts of the development land are “obligation-free” the owners of those parts will be unable to enforce obligations, including obligations (if any) imposed on the manager and the maker. These matters are discussed in paragraphs 7.9 and 10.10 to 10.14 of the Report.
- (b) a scheme may contain arbitration provisions. Such provisions are commonly found in leasehold schemes of development under the existing law. See subsection (6) below and the note thereto.
- (c) A scheme may provide for its own variation or extinguishment and for variation, release or apportionment of obligations imposed pursuant to the scheme. Such provision is highly desirable since circumstances may change before, during and after a development and a scheme should be capable of adaptation in the light of such changes. There is no limit to the sort of provision that a scheme may contain as to powers of variation, extinguishment, etc. and such powers may be made exercisable, for example, by the unit owners themselves or by the developer or the manager. Different means of variation, etc. could be provided in relation to different things. An extinguishment of a scheme itself would, however, do no more than render it ineffective for the future since a scheme, once it had been used, could not be nullified retrospectively. In this connection, see subsection (4) below. A development scheme and obligations imposed pursuant to it can be varied, extinguished, etc. otherwise than in accordance with a provision of the scheme. See clauses 13 and 15 to 18 below, and Part XV of the Report. This implements paragraphs 7.55 to 7.63 of the Report.
- (d) A scheme may provide for someone to assume obligations corresponding with those of the maker of the scheme. This envisages the case where a developer, perhaps encountering financial difficulties, disposes of the development with some units still unsold. The new developer can assume similar obligations to those of the original developer in order to facilitate the remaining sales and to ensure that the scheme remains sound. The original developer remains liable for his obligations. This implements paragraph 7.42 of the Report.

*Land Obligations*

(4) Subject to the following provisions of this Act, where a development obligation has been imposed in pursuance of a development scheme—

- (a) the scheme shall no longer be capable of being revoked by the maker or makers; and
- (b) the scheme shall be capable of being varied or extinguished only in accordance with a provision of the scheme.

(5) Obligations imposed by a development scheme on the manager or on the maker or any of the makers of the scheme shall, subject to section 10 below, be enforceable by any person who is for the time being bound by a development obligation imposed in pursuance of the scheme otherwise than as a person falling within section 7(2) below and also, in the case of obligations imposed on the maker or makers of the scheme, by the manager.

(6) Where a development scheme includes provisions for the referral to arbitration of differences of any description between persons of any description those provisions of the scheme shall be treated as an arbitration agreement between all the persons falling within that description at the time the difference arises.

## EXPLANATORY NOTES

### *Clause 3 (continued)*

#### *Subsection (4)*

9. This provides that once a development obligation has been imposed pursuant to a scheme, that scheme shall no longer be revocable by its maker and, subject to any other means of variation provided for in the Bill (see para. 8(c) above), can only be varied or extinguished in accordance with express provisions of the scheme. This provision reflects the fact that although a scheme does not, by itself, create any legal rights or obligations enforceable by or against anyone, such rights and obligations do arise when the first development obligation is imposed. Until that time, therefore, the maker can revoke the scheme if he wishes; but thereafter he has no such right. (It would, however, be possible for a scheme to be rendered inoperative by agreement amongst all those bound by, or entitled to enforce, development obligations imposed under the scheme.) This implements paragraphs 7.55 to 7.58 of the Report.

#### *Subsection (5)*

10. This deals with the right to enforce obligations imposed by a development scheme on the manager or its maker. In general anyone (except mere occupiers with no actual interest in the land) currently bound by any development obligation may enforce a manager's or a maker's obligation. In addition a manager may enforce a maker's obligation. This implements paragraphs 7.48 to 7.50 of the Report.

#### *Subsection (6)*

11. Paragraph (b) of subsection (3) enables a development scheme to provide that disputes between the manager, the maker and persons who are entitled to enforce (or who are bound by) any development obligations imposed pursuant to a scheme must be submitted to arbitration in accordance with the provisions of the scheme. Subsection (6) provides that such arbitration provisions are to be treated as an arbitration agreement under the Arbitration Act 1950 so that they are capable of binding the manager, the maker, unit owners and their successors. This implements paragraphs 7.52 to 7.54 of the Report.

12. This Bill contains no equivalent provision for *neighbour* obligations. This is because the Arbitration Act 1950 will, without more, enable parties to neighbour obligations to enter into arbitration agreements which will bind not only the parties themselves but also their successors. The problem which arises with development obligations (and which necessitates special provision in this Bill) is the difficulties which would be encountered if all the interested parties had to enter into an actual arbitration agreement at the outset. This is especially the case where development obligations are to be mutually enforceable between individual unit owners and where the identity of the purchaser of the last unit will not be ascertainable at the time of sale of the earlier units.

*Land Obligations*

(7) A development scheme may provide that this subsection shall apply to any instrument which—

- (a) is made in accordance with the scheme and in connection with a change in the manager of the scheme, and
- (b) provides for the transfer to the new manager of liabilities or rights incurred by or accrued to the former manager as such, being liabilities or rights arising under the scheme or under a development obligation imposed in pursuance of the scheme;

and where this subsection applies to an instrument, such liabilities and rights shall, to the extent specified in the instrument, be transferred to the new manager by virtue of this subsection.

(8) Nothing in this section or in any development scheme shall enable the appointment of any person as the manager of a development scheme to take effect without the agreement of that person to the appointment.

## EXPLANATORY NOTES

### *Clause 3 (continued)*

#### *Subsection (7)*

13. Unless the manager is capable of perpetual existence, a development scheme should make provision for changes in the managership. This provision would usually take the form of prescribing a means of selecting the new manager. The subsection permits a scheme to contain a provision whereby, upon a change of manager, an instrument made in accordance with the scheme may transfer to the new manager liabilities and rights which, arising under the scheme or under a development obligation, have been incurred by or accrued to the old manager. Such a transfer will, for example, obviate any need for the old manager to stay on to take action as to breaches of development obligations occurring during his managership. This provision will not be effective, however, to pass money or other property to the new manager. Such transfers need to be made separately. This implements paragraphs 7.26 to 7.31 of the Report. See also clause 13(3) for the case where, upon a change of manager, no satisfactory provision has been made for the transfer to the new manager of property, rights or liabilities.

14. The Bill also contains provisions whereby the *Court* may bring about a managership change (clause 13(2)) and whereby the Lands Tribunal may modify a scheme so as to allow for such a change (clause 17). See footnote 11 to paragraph 7.26 of the Report.

#### *Subsection (8)*

15. This ensures that no person can be appointed as a manager without his consent.

*Land Obligations*

*Creation and registration*

Manner and  
effect of  
creating land  
obligations.

1925 c. 21.

4.—(1) A person shall be capable of creating a land obligation only if—

- (a) he is the owner of a legal estate in the servient land, or
- (b) he is capable of disposing of such an estate in pursuance of section 37 of the Land Registration Act 1925;

and, in the case of a development obligation, only so as to burden land comprised in the development land by an obligation contemplated by the scheme.

## EXPLANATORY NOTES

### *Clause 4*

1. This clause sets out the requirements for the creation of a valid land obligation (whether neighbour or development).

### *Subsection (1)*

2. This provides that a person cannot create a land obligation unless he owns a legal estate in the servient land, or is capable of disposing of such an estate under the Land Registration Act 1925, s. 37. (Section 37 authorises persons who are entitled to be registered as proprietors of registered land, but have not yet been so registered, to dispose of the land as if they were the registered proprietors.) However, even if a person does own a legal estate in the servient land (or is entitled to be registered as proprietor) he can only create a *development* obligation if that obligation is contemplated by a development scheme and the land to be burdened lies within it.

3. A land obligation cannot be created by a person owning a mere equitable interest in the servient land. Although land obligations are intended to be in many ways analogous to easements, the extent to which a person with a mere equitable interest can create an easement under the present law is itself far from clear. Furthermore the addition of a provision enabling those with mere equitable interests to create land obligations would add considerably to the complexity of the Bill, and it seems unlikely that there is any real need for such a provision.

4. An *equitable* land obligation may arise, however, in cases *either* where the person with the legal estate creates a land obligation that is not "equivalent to an estate in fee simple absolute in possession or a term of years absolute" (see note 2 to clause 1 above) *or* where the creating instrument fails to comply with the formal requirements necessary for the creation of a legal interest.

This subsection implements paragraphs 8.2 to 8.7 of the Report.

### *Land Obligations*

(2) A land obligation shall not be created otherwise than by a deed or other written instrument (according as the land obligation is to subsist as a legal or as an equitable interest) which—

- (a) states that the obligation is to be a land obligation;
- (b) describes (whether by reference to a plan or otherwise) the servient land in sufficient detail to identify it;
- (c) identifies, expressly or by implication, the legal estate in the servient land (in this Act referred to as “the burdened estate”) the ownership or, as the case may be, the power to dispose of which makes the person creating the obligation capable of doing so; and
- (d) complies with subsection (3) or, as the case may be, subsection (4) below;

except that, in a case falling within section 52(2) of the Law of Property Act 1925 in its application by virtue of section 1(1) of this Act (exceptions to creation of legal interests by deed), a land obligation may be created as a legal interest by a written instrument only.



## EXPLANATORY NOTES

### Clause 4 (continued)

#### Subsections (2) to (4)

5. These provisions contain formal requirements as to the nature and contents of an instrument creating a land obligation. These requirements are essential to avoid uncertainties similar to those which have arisen under the existing law as to restrictive covenants. These formal requirements are to some extent relaxed by subsections (5), (6) and (9).

#### Subsection (2)

6. This provides that no land obligation shall be created except by deed or other written instrument and, if the obligation is to be a legal as opposed to an equitable interest, the instrument must be a deed. This provision reflects the requirements of the existing law that the creation of a legal interest in land must be by deed. There are, however, certain exceptions to this requirement (see Law of Property Act 1925, s. 52(2)) and these will be as applicable to the creation of land obligations as they are to the creation of other interests in land, except that a written instrument will always be required for the creation of a land obligation. This implements paragraphs 8.8 to 8.10 of the Report.

7. The subsection also provides that no land obligation shall be created unless the instrument—

- (a) states that the obligation is to be a land obligation. This requirement is designed to distinguish a land obligation from an easement or a personal covenant since, without some sort of clear identification, it is possible that a land obligation might be mistaken for either of these. See subsection (8) below. This implements paragraphs 8.13 and 8.14 of the Report.
- (b) describes (whether or not by reference to a plan) the *servient* land sufficiently well to enable it to be identified. (See also clause 23(3).) This implements paragraph 8.16 of the Report.
- (c) identifies the legal estate in the *servient* land of the person creating the obligation. Where the obligation is not created by the freeholder, it is important to be able to identify this legal estate (the “burdened” estate) since it indicates who is to be bound by an obligation. Thus, for example, an obligation created by a tenant cannot bind his landlord. Since the identity of the burdened estate will nearly always be apparent from the instrument read as a whole there is no requirement for *express* identification. This implements paragraphs 8.17 and 8.18 of the Report.
- (d) complies with the requirements of subsections (3) or (4). (See notes 8 to 10 below.)

*Land Obligations*

- (3) An instrument by which a neighbour obligation is created—
- (a) shall describe (whether by reference to a plan or otherwise) the dominant land in sufficient detail to identify it; and
  - (b) shall identify, expressly or by implication, the legal estate in the dominant land (in this Act referred to as “the benefiting estate”) the owner of which is primarily to be entitled to enforce the obligation.

(4) An instrument by which a development obligation is created shall identify the development scheme in pursuance of which the obligation is imposed.

(5) Where the intention is to make the interest of a mortgagee, as well as the estate of the mortgagor, subject to a land obligation it shall be sufficient for compliance with subsection (2)(c) above, instead of identifying both the mortgaged estate and the interest of the mortgagee as burdened estates, for the instrument creating the obligation, or a subsequent variation of it, to state that the mortgagee has authorised or, as the case may be, confirms the creation of the obligation and to identify the mortgaged estate alone as the burdened estate.

(6) Nothing in the preceding provisions of this section shall prevent an agreement to create a land obligation from giving rise to an equitable interest in land.

## EXPLANATORY NOTES

### *Clause 4 (continued)*

#### *Subsection (3)*

8. This provides that an instrument creating a *neighbour* obligation must describe (whether or not by reference to a plan) the dominant land sufficiently well to enable it to be identified. This corresponds with the requirement, as to the servient land, in paragraph (b) of subsection (2): see note 7(b) above. It is essential that land with the benefit of a land obligation is readily identifiable if doubt (which exists under the present law with restrictive covenants) as to the person entitled to enforce the obligation is to be avoided. This implements paragraphs 8.21 and 8.22 of the Report.

9. The subsection also provides that an instrument creating a *neighbour* obligation must identify the legal estate in the dominant land of the person primarily entitled to enforce it. This corresponds with the requirement, as to the servient land, in paragraph (c) of subsection (2). And, as in the case of the servient land, it is important to be able to identify this legal estate (the “benefiting” estate) since it is the estate to which the obligation is appurtenant. Again, as with the servient land, the benefiting estate will nearly always be apparent from the creating instrument, so that there is no requirement for express identification. This implements paragraphs 8.23 and 8.24 of the Report.

#### *Subsection (4)*

10. This provides that, in the case of a *development* obligation, the instrument creating it must identify the development scheme pursuant to which it is imposed. This requirement corresponds with the requirement that a *neighbour* obligation shall identify the dominant land: see note 8 above. This implements paragraph 8.25 of the Report.

#### *Subsection (5)*

11. This modifies the effect of paragraph (c) of subsection (2) above in the case where a legal estate owner mortgages his land to a lender and then, with the approval of the lender, burdens his land with a land obligation in such a way that the obligation binds not only the mortgagor but the lender as well. In such a case there are, strictly, two burdened estates for identification in the creating instrument. However, only the mortgagor’s estate need be identified if the instrument states that the lender has authorised or confirms the creation of the obligation. This implements paragraph 8.19 of the Report.

#### *Subsection (6)*

12. This provides that nothing in subsections (1) to (5) shall prevent an agreement to create a land obligation from giving rise to an equitable interest in land. This ensures that the provisions relating to land obligations follow the existing law relating to other sorts of agreement to transfer or create interests in land and implements paragraphs 8.27 and 8.28 of the Report.

### *Land Obligations*

(7) A disposition shall not, in so far as it has effect in accordance with the preceding provisions of this section to create a land obligation, be void by reason of the fact (if it is the case) that the obligation may not, or does not, arise (in whole or in part) until a time after the expiration of the perpetuity period applicable, apart from this subsection, to that disposition.

(8) Notwithstanding that the form and manner of creating an obligation which has come into existence as a land obligation was such that, apart from this subsection, the obligation would also be capable of having effect—

- (a) as an easement or any other description of interest in land, or
- (b) as a personal covenant,

the obligation shall not, by virtue only of the adoption of that form or manner, so have effect.

(9) The preceding provisions of this section shall be without prejudice to the provisions of any enactment conferring power on any person or court to create interests in land (or interests of any particular description) and applying, by virtue of section 1(1) above, to land obligations; and, in relation to a land obligation created in pursuance of any such power, references in this Act to the burdened estate shall have effect as references to the legal estate in the servient land which is primarily to be bound by the obligation.

## EXPLANATORY NOTES

### *Clause 4 (continued)*

#### *Subsection (7)*

13. This prevents an otherwise valid land obligation failing by reason of the rule against perpetuities on account of the possibility that the obligation may not arise within the relevant perpetuity period. Such an obligation might, for example, be one to repair any building for the time being erected on the dominant land. Without this subsection, it is possible (following the application to an easement of the rule against perpetuities in *Dunn v. Blackdown Properties Ltd.* [1961] Ch. 433) that the obligation would fail. This implements paragraphs 8.31 to 8.35 of the Report.

#### *Subsection (8)*

14. This provides that a valid land obligation may not also take effect as any other interest in land or as a personal covenant. As mentioned at note 7(a) above in relation to subsection (2), the requirement that all land obligations must describe themselves as such avoids their being confused with, for example, easements. But the provision that a land obligation cannot also take effect as another interest in land is designed to avoid the confusion that might otherwise arise between the simultaneous operation of the rules peculiar to land obligations and those relating to other interests in land.

15. The provision that a land obligation cannot also take effect as a personal covenant reflects the essential nature of a land obligation in that it binds only persons with an interest in the burdened land at the relevant time. Thus the creator of a land obligation (unlike the creator of a restrictive covenant) will not remain bound by the obligation after he has parted with the burdened land but the obligation can be enforced against the current owner of the land. Accordingly, a land obligation cannot take effect automatically as a personal covenant. It would, however, be open to the parties when creating a land obligation to enter into a personal covenant if they really felt this necessary, provided that the covenant was separate from the obligation. This subsection implements paragraph 8.15 of the Report.

#### *Subsection (9)*

16. This reflects the fact that statutory provisions (existing and future) may enable a person or a court to create land obligations and that the creation requirements in clause 4 must give way to such provisions in so far as they are inconsistent with them. This implements paragraphs 8.29 and 8.30 of the Report.

*Land Obligations*

Registration  
of land  
obligations.  
1925 c. 21.

5.—(1) Land obligations shall not be capable of being overriding interests for the purposes of the Land Registration Act 1925, but subject to that (and the other provisions of this Act) and to rules made under that Act, that Act shall have effect in relation to land obligations as it has effect in relation to easements created by an instrument.

1972 c. 61.

(2) Land obligations, whether legal or equitable, shall be registrable as Class C land charges under the Land Charges Act 1972, but, if and so far as they affect registered land and can be protected under the Land Registration Act 1925, they shall, subject to subsection (3) below, be protected under that Act and not under the Land Charges Act 1972.

1948 c. 38.

(3) The imposition of a land obligation as a charge on the servient land for purposes of enforcement in pursuance of paragraph 18 of Schedule 1 to this Act shall not render the land obligation registrable as a charge to secure money under any provision of the Land Registration Act 1925, Part III of the Companies Act 1948, or the Land Charges Act 1972.

(4) For the avoidance of doubt, it is hereby declared that the Land Registration Act 1925 and the Land Charges Act 1972 shall have effect in relation to an agreement to create a land obligation as a legal interest as they have effect in relation to an estate contract within the meaning of section 2(4) of the said Act of 1972.

## EXPLANATORY NOTES

### *Clause 5*

1. This clause provides for the registration of land obligations under the Land Registration Act 1925 (in the case of registered land) and under the Land Charges Act 1972 (in the case of unregistered land). The general principles of law governing registration will apply to land obligations. This clause implements Part IX and paragraphs 14.15 and 14.16 of the Report.

2. Subsection (1) provides that the Land Registration Act 1925 shall, in general, operate in relation to land obligations as it does in relation to easements created by an instrument. Thus, for example, the burden of an obligation will be noted against the servient title and the benefit of neighbour obligations will be entered on the dominant title. The use of the analogy with easements enables the number of amendments to the Land Registration Act 1925 to be kept to a minimum (see Schedule 3, para. 4). It is necessary to provide, however, that land obligations cannot (unlike certain easements) be overriding interests under section 70(1) of that Act. Whilst most easements may be visible on inspection, this will not be the case with land obligations and it would be wrong for a purchaser of the burdened land to be bound by a land obligation which was not noted on the register.

3. Subsection (2) provides that both legal and equitable land obligations are, in principle, registrable under the Land Charges Act 1972. (See Schedule 3, para. 7.) If, however, a land obligation affects registered land, registration is only possible under the Land Registration Act 1925.

4. Subsection (3) provides that no land obligation that charges (pursuant to Schedule 1, para. 18) the servient land with sums payable under the obligation is to be registrable as a charge to secure money under the Land Registration Act 1925, Part III of the Companies Act 1948 or the Land Charges Act 1972. This provision seeks to avoid unnecessary duplication of registrations.

5. Subsection (4) makes it clear that the Land Registration Act 1925 and the Land Charges Act 1972 are to apply to an agreement to create a legal land obligation in the manner that they apply to an estate contract.

## *Land Obligations*

### *Enforcement*

Persons  
entitled to  
enforce land  
obligations.

6.—(1) A neighbour obligation is appurtenant to the benefiting estate in the dominant land (in like manner as an easement) and accordingly the benefit of the obligation is capable of passing (expressly or by operation of law) to any person who, in relation to the whole or part of the dominant land, claims under or through, or is a successor in title of, the person primarily entitled to enforce the obligation or claims under or through such a successor.

(2) A development obligation imposed in pursuance of a development scheme which provides for a manager shall be enforceable by the manager unless the scheme provides in relation to that obligation, or to obligations of an applicable description, that the manager is not to have the right of enforcing the obligation.

(3) A development obligation which is enforceable by the manager shall also be enforceable, if the development scheme so provides in pursuance of section 3(2)(a) above, in accordance with subsection (5) or (6) below.

(4) A development obligation that is not enforceable by a manager shall, except in so far as the development scheme otherwise provides in pursuance of section 3(2)(b) above, be enforceable for the benefit of the development land as a whole.

(5) A development obligation that is enforceable for the benefit of the development land as a whole shall be enforceable in the same manner (and accordingly to the same extent) as, under subsection (1) above, a neighbour obligation is enforceable, treating as the benefiting estate the relevant estate or estates in every parcel of land (other than the servient land) which is comprised in the development land.

(6) A development obligation that is enforceable for the benefit of only a specified part of the development land shall be enforceable in the same manner (and accordingly to the same extent) as under subsection (1) above, a neighbour obligation is enforceable, treating as the benefiting estate the relevant estate or estates in every parcel of land (other than the servient land) which is comprised in that part of the development land.

(7) In subsections (5) and (6) above “the relevant estate” and “the relevant estates”, in relation to a development obligation and a parcel of land, mean respectively the estate or, as the case may be, every estate in that parcel of land which is the burdened estate in relation to a development obligation imposed on that land in pursuance of the development scheme.



## EXPLANATORY NOTES

### Clause 6

1. This clause is concerned with the persons who are entitled to enforce land obligations (whether neighbour or development obligations).

2. Subsection (1) provides that the benefit of a *neighbour* obligation is, like an easement, a right appurtenant to the benefiting estate in the dominant land and can therefore pass to successive owners of that estate. The benefit will also pass automatically on any disposition (including a lease) of the whole or part of the benefiting estate. Accordingly a neighbour obligation can be enforced not only by an owner of the benefiting estate for the time being but also by any person claiming under or through him. This implements paragraphs 10.2 to 10.6 of the Report.

3. Subsection (2) provides that all development obligations shall be enforceable by the manager unless a development scheme either does not provide for a manager or else provides that he shall not have the right to enforce some or all of the obligations. This reflects the provisions of clause 3(1). (See note 4 to clause 3.) The manager's enforcement rights should run with his office. (See note 13 to clause 3.) This implements paragraphs 10.7 to 10.9 of the Report.

4. Subsection (3) provides that development obligations enforceable by a manager shall, if the development scheme so permits, be enforceable by individual unit owners as well in accordance with subsections (5) and (6). This reflects clause 3(2)(a) and means that positive and restrictive obligations can be made enforceable for the benefit of the development land as a whole (or just of a specified part of it) by the unit owners. (See note 6 to clause 3.)

5. Subsection (4) provides that development obligations *not* enforceable by a manager shall be enforceable for the benefit of the development land as a whole unless the development scheme provides that they are to be enforceable for the benefit of just a specified part of the development land. This reflects clause 3(2)(b). (See note 7 to clause 3.)

6. Subsections (5) and (6) provide that development obligations that are enforceable by persons in addition to, or in lieu of, a manager shall be enforceable as if they were neighbour obligations appurtenant to any 'relevant' estate in the other units comprised in the development land (or, as the case may be, comprised in the specified part). A 'relevant' estate is one which is the burdened estate in relation to any development obligation imposed in a unit pursuant to the scheme.

7. The 'burdened estate in relation to ...' qualification just mentioned is provided for by subsection (7). Since it would be unusual for a unit not to be burdened by at least one obligation, the formula in this subsection will generally enable every unit to enforce obligations imposed on the other units. These provisions implement paragraphs 10.10 to 10.14 of the Report.

*Land Obligations*

Persons  
bound by land  
obligations.

1972 c. 61.  
1925 c. 21.

7.—(1) A land obligation shall (so long as it is enforceable by any person) bind every person who is for the time being the owner of an estate or interest in the servient land or any part of it, subject however—

- (a) to the provisions of the Land Charges Act 1972 and the Land Registration Act 1925;
- (b) to the rules which govern the priority of one interest in land over another;
- (c) to the following provisions of this section and section 9 below.

## EXPLANATORY NOTES

### *Clause 7*

1. This clause deals with the persons who are *bound* by a land obligation (whether neighbour or development) as the result of the running of the burden of that obligation. (The question of who is *liable* for a particular contravention is dealt with in clause 8.)

### *Subsection (1)*

2. This provides that a land obligation shall bind everyone who currently owns any estate or interest in the whole or part of the servient land. This general principle is subject to the following matters:

- (a) Registration. For example, if an obligation is not registered pursuant to the Land Charges Act 1972 or the Land Registration Act 1925, a purchaser for value of the servient land will take the land (and will be able to dispose of it) free of the obligation. This implements paragraphs 11.21 to 11.23 of the Report.
- (b) Priority. No owner of any interest in the servient land should be bound by an obligation if, under the rules of land law which govern the priority of one interest over another, his interest has priority over the obligation. For example, the estate of a sub-tenant who creates an obligation will be burdened but the estates of his landlord and the freeholder will be unaffected by the obligation. Or, if a freeholder grants a lease before burdening his land with an obligation, that obligation will not bind the tenant because his lease has priority. This implements paragraphs 11.15 to 11.20 of the Report.
- (c) The remaining provisions of this clause and clause 9. In particular, the instrument creating the obligation may restrict the class of persons who are to be bound by it. This implements paragraphs 11.24 and 11.25 of the Report.

3. The words 'for the time being' indicate that the original creator of an obligation will not remain bound by it after he has parted with all interest in the servient land. This matter is discussed in paragraph 11.32 of the Report.

*Land Obligations*

(2) A land obligation, if it is a restrictive or access obligation, shall (so long as it is enforceable by any person) also bind every person not bound by virtue of subsection (1) above who is for the time being in occupation of the servient land or any part of it unless he is in occupation by virtue of—

- (a) an estate or interest in the land; or
- (b) a right derived (by contract or otherwise) from a person who was not himself bound by the obligation at the time the right was granted.

## EXPLANATORY NOTES

### *Clause 7 (continued)*

#### *Subsection (2)*

4. This supplements subsection (1) by providing that restrictive and access obligations shall also bind anyone currently in occupation of the whole or any part of the servient land.

5. Restrictive and access obligations (as defined in Schedule 1, paras. 1, 5 and 12) are singled out for special provision in both this subsection and in subsection (3). This is because of their essential differences from other obligations. Compliance with them is not onerous (no positive action or expenditure of money is involved) but they will be ineffective if any single person fails to comply with them. Accordingly it is both reasonable and necessary for restrictive and access obligations to bind as wide a class of persons as possible—not just owners of estates or interests. This implements paragraphs 11.4 to 11.7 of the Report.

6. An occupier without any estate or interest in the servient land will not, however, be bound by an obligation if his right to occupy derives from a person who was himself not bound by the obligation at the time the right was granted.

*Land Obligations*

(3) A land obligation, other than a restrictive or access obligation, shall not be binding on any person by virtue of his ownership of an estate or interest unless the estate or interest—

- (a) is the burdened estate or the interest of a mortgagee; or
- (b) confers a right to possession and is either freehold or leasehold for a term of more than 21 years.

(4) In order to determine for the purposes of subsection (1) above whether any estate or interest in the whole or any part of the servient land is held free of a development obligation as against the manager, the manager shall be deemed to have acquired the benefit of the obligation for valuable consideration at the time of the creation of the obligation.

## EXPLANATORY NOTES

### *Clause 7 (continued)*

#### *Subsection (3)*

7. This provides that no land obligation (other than restrictive and access obligations) shall bind anyone just because he owns an estate or interest in the servient land, unless that estate or interest:

- (a) is the burdened estate, or
- (b) belongs to a mortgagee, or
- (c) is freehold (or leasehold for a term exceeding 21 years) and confers a right to possession.

8. This provision, whilst singling out restrictive and access obligations for special treatment (see note 5), is mainly designed to prevent the burden of performance of what may be an onerous obligation being unfairly imposed on persons whose interest in the servient land consists of a lease for 21 years or some lesser interest. However, it is clear that the owner of the burdened estate in the servient land should always be bound even if it is just a very short leasehold interest. As for a mortgagee, his interest will always be capable of being *bound* by a land obligation, though he will be *liable* for a contravention of the obligation in exceptional circumstances only (see clause 8(3)). Freeholders and long leaseholders will always be bound unless their estates confer no right to possession. (Since a right to possession includes the right to receive rents and profits (section 205(1) of the Law of Property Act 1925), a freeholder does not cease to have a right to possession merely because he has leased his property.) The provision implements paragraphs 11.9 to 11.13 of the Report.

#### *Subsection (4)*

9. This provides that, for the purpose of deciding whether any estate or interest is held free of a development obligation as against a manager, the manager shall be deemed to have acquired the benefit of the obligation for valuable consideration. This provision is necessary to give the manager appropriate priority in cases such as that mentioned in paragraph 11.27 of the Report.

*Land Obligations*

Extent of  
enforceability  
of land  
obligations.

**8.—(1)** Subject to subsection (3) below, a land obligation, other than a restrictive or access obligation, shall be enforceable in respect of any contravention of the obligation against every person bound by the obligation at the time of the contravention.



## EXPLANATORY NOTES

### *Clause 8*

1. This clause deals with the persons who, being bound by a land obligation, are *liable* for a particular contravention of it.

### *Subsection (1)*

2. This provides that any land obligation (other than a restrictive or access obligation) can be enforced against everyone who is bound by it at the time of a contravention. The reason for enforcement against *everyone* who is so bound is that land obligations (other than restrictive and access obligations) require positive action for compliance to be achieved. Because a contravention results from inaction it follows that there is no way of imposing liability for a particular contravention on any one of several persons who are bound, all of whom must have been equally inactive. This implements paragraphs 12.2 and 12.3 of the Report.

### *Land Obligations*

(2) A restrictive or access obligation shall be enforceable against any person in respect of (but only in respect of) conduct of that person while bound by the obligation which consists or, as the case may be, will consist—

- (a) in the doing of an act prohibited by the obligation; or
- (b) in permitting or suffering the doing of such an act by another person (whether or not the other person is bound by the obligation).

(3) A land obligation shall not be enforceable against a person who at any relevant time is or was bound by the obligation by virtue only of his ownership of the interest of a mortgagee in the whole or any part of the servient land unless at that time—

- (a) he is or, as the case may be, was a mortgagee in possession; or
- (b) there is or, as the case may be, was a person acting as a receiver appointed by the mortgagee.

## EXPLANATORY NOTES

### *Clause 8 (continued)*

#### *Subsection (2)*

3. In the case of restrictive and access obligations, on the other hand, subsection (2) provides that they shall only be enforceable against a person bound by the obligation to the extent that the conduct of that person amounts to doing (or permitting or suffering) an act prohibited by the obligation. This is because contravention of restrictive and access obligations can (unlike other obligations) only arise through the taking of positive action. Those who neither contravene the obligation nor permit it to be contravened should not be liable for the contravention. This implements paragraph 12.4 of the Report.

4. That a person may be liable in respect of contraventions that he has merely allowed acknowledges the fact that restrictive covenants under the present law are commonly drafted to extend a person's liability in this way. This implements paragraphs 12.5 and 12.6 of the Report. However, a land obligation can be so drafted as to restrict the circumstances in which a person is liable for a contravention: see clause 9(1)(b).

#### *Subsection (3)*

5. This provides that land obligations shall only be enforceable against a mortgagee if, at the relevant time, he was either in possession or had appointed a receiver. This provision reflects the fact that where a mortgagee of the servient land has not taken possession or appointed a receiver, he will usually be in a position neither to monitor the observance and performance of land obligations nor to take any action necessary to comply with them. This implements paragraph 12.8 of the Report.

*Land Obligations*

(4) For the purposes of this Act, a contravention of a land obligation shall be treated (if it would not otherwise be treated as a continuing contravention) as continuing so long as either—

- (a) the obligation remains capable of being complied with apart from any requirement as to time; or
- (b) the contravention continues adversely to affect the enjoyment of the whole or any part of the dominant land or, as the case may be, of any parcel of the development land.

## EXPLANATORY NOTES

### *Clause 8 (continued)*

#### *Subsection (4)*

6. This deals with continuing contraventions of land obligations. A land obligation may be so framed that any contravention of it will recur continually so long as the wrongful state of affairs continues, with the effect that subsequent owners of the servient land may become liable, not for the original contravention carried out by a previous owner, but for the contraventions that recur daily by virtue of the continuing nature of the contravention. To this extent land obligations reflect the general law of covenants which permits covenants to be framed so that breaches of covenant may be 'continuing' breaches.

7. Subsection (4) extends the concept of continuing contraventions so that certain contraventions which could not strictly be classed as continuing contraventions are nevertheless treated as such for the purpose of extending liability to new owners of the servient land. These new owners would not otherwise be liable since land obligations are only enforceable against a person in respect of contraventions occurring while he is bound by the obligation and a new owner (having no interest in the servient land before he purchased from the previous owner) could not be liable for those contraventions of the previous owner that were non-continuing. Accordingly subsection (4) provides that a contravention of a land obligation is to be treated as continuing so long as either:

- (a) the obligation remains capable of being complied with, regardless of any requirement as to time. For example, there would be a contravention of an obligation to decorate a house 'during the course of 1982' if, by midnight on 31 December 1982, the necessary works had not been completed. The requirement as to 1982 means that compliance with the obligation is thenceforward impossible. Since, however, subsection (4) means that this requirement has to be ignored in determining whether compliance is still possible, the obligation will be treated as continuing so that liability for the contravention will be capable of passing to any new owner of the house; or
- (b) the contravention continues adversely to affect the enjoyment of the whole or any part of the dominant land (or of any unit of the development land). An example of this would be a contravention of an obligation not to build on the servient land.

This provision implements paragraphs 12.9 to 12.11 of the Report.

*Land Obligations*

(5) Nothing in subsection (4) above shall entitle any person to a remedy in respect of a contravention of a land obligation if, by virtue of any enactment relating to the limitation of actions or of analogous principles affecting the exercise of any discretion to grant equitable relief, he would not, apart from that subsection, have been entitled to that remedy.

(6) For the purposes of this section—

(a) the references in subsection (2) above to an act prohibited by an access obligation shall be construed as references to any conduct restricting or denying the access which the obligation requires to be afforded;

(b) references in that subsection and in paragraph (a) above to conduct include references to acts and omissions and, in relation to any person, include references to the acts and omissions of that person's employees or agents acting as such.

(7) The preceding provisions of this section are subject to section 9 below and are without prejudice to section 11 below.

## EXPLANATORY NOTES

### *Clause 8 (continued)*

#### *Subsections (5) and (6)*

8. Subsection (5) ensures that a result of subsection (4) is not to prolong the period for which the contravention may be actionable. Thus the rules as to limitation of actions (and analogous principles affecting the grant of equitable remedies) will apply notwithstanding subsection (4). This implements paragraph 12.13 of the Report.

9. Subsection (6) is explanatory. Paragraph (a) provides that any conduct restricting or denying access will amount to an act prohibited by an access obligation. Paragraph (b) makes it clear that 'conduct' includes omissions as well as acts and covers not only a person's own acts and omissions but also those of his employees and agents. This implements paragraphs 12.4 (footnote 2) and 12.7 of the report.

*Land Obligations*

Restriction of  
enforceability  
or liability.

9.—(1) Notwithstanding sections 7 and 8 above, the instrument creating a land obligation may—

- (a) restrict the class of persons who are to be bound by the obligation;
- (b) restrict the circumstances in which the obligation is to be enforceable against any person;
- (c) restrict a person's liability for a contravention of the obligation.

(2) The instrument containing a development scheme may as respects any maker's obligation or any manager's obligation imposed by the scheme—

- (a) restrict the circumstances in which the obligation is to be enforceable against the maker or manager;
- (b) restrict the maker's or manager's liability for a contravention of the obligation.

(3) Any provision which is capable of being made by virtue of subsection (1) or (2) above in the instruments respectively mentioned in those subsections may also be made by way of variation of the terms of those instruments.



## EXPLANATORY NOTES

### *Clause 9*

1. This clause deals with restricting the enforceability of, and liability in respect of, land and other obligations. It implements recommendations contained in paragraphs 11.24, 11.25, 12.14 and 13.16 to 13.20 of the Report.

### *Subsection (1)*

2. This provision enables an instrument creating a land obligation to restrict the class of persons who are to be bound by it; to restrict the circumstances in which it is to be enforceable, and to restrict liability for contraventions.

3. Thus the principles contained in the Bill as to the persons who are bound by, or who are liable for a particular contravention of, a land obligation (clauses 7 and 8) may yield to a contrary restrictive provision in the instrument creating the obligation, and such a provision may also limit the extent of a person's liability (see clause 10).

### *Subsections (2) and (3)*

4. Subsection (2) similarly provides that an instrument creating a development scheme may restrict the enforceability of any maker's or manager's obligations imposed by the scheme and may restrict liability for contraventions.

5. Subsection (3) provides that the restrictions permitted by this clause can be made as effectively in a subsequent variation of the creating instrument as in that instrument itself.

*Land Obligations*

Remedies for enforcing land obligations, etc.

**10.—(1)** The following remedies, namely—

- (a) proceedings for an injunction (including a mandatory injunction) or other equitable relief,
- (b) an action for sums due under the obligation,
- (c) an action for damages (whether in respect of pecuniary or non-pecuniary kinds of damage),

shall be available in the event of a contravention or, in the case of proceedings for an injunction, a threatened contravention of a land obligation but not entry on the land under a right of entry or re-entry.

(2) The same remedies shall be available in the case of a development scheme in the event of a contravention or, in the case of proceedings for an injunction, a threatened contravention of a maker's obligation or manager's obligation.

## EXPLANATORY NOTES

### *Clause 10*

1. This clause deals with the remedies available in the event of a contravention of a land obligation or of a maker's or manager's obligation.

### *Subsection (1)*

2. This provision prescribes the remedies available in the event of a contravention of a land obligation. These are:

- (a) injunction or other equitable relief. An injunction might well be sought to enforce a restrictive (or, sometimes, even a positive) land obligation;
- (b) action for sums due under the obligation. This would usually be the appropriate remedy for enforcing obligations involving payment;
- (c) action for damages. This would usually be a remedy available to enforce positive obligations and would cover both pecuniary and non-pecuniary loss or damage so that damages could, for example, be recovered for pure economic loss and personal injury.

This implements the recommendations contained in paragraphs 13.9 to 13.12 of the Report.

3. There can, however, be no remedy of re-entry upon the servient land. Such a right is unnecessary in view of the wide range of remedies otherwise available. This matter is discussed in paragraph 13.13 of the Report.

### *Subsection (2)*

4. This provides that the remedies set out in subsection (1) are also available in the case of contravention of a maker's or a manager's obligation. This implements the recommendation in paragraph 13.2 of the Report.

*Land Obligations*

(3) In so far as a contravention of an obligation falling within subsection (1) or (2) above causes other kinds of damage than personal injury or damage to property no person shall, subject to subsection (5) below, be entitled to equitable relief or damages in respect of the contravention except in respect of the extent to which he is materially prejudiced by the contravention in the capacity in which he is, by virtue of section 3(5) or section 6 above, entitled to enforce the obligation.

(4) In considering for the purposes of subsection (3) above whether a person is materially prejudiced in any capacity by a contravention of any obligation, the court shall have regard, in particular, to the nature of the estate or interest (if any) by virtue of the ownership of which that person is entitled to enforce the obligation and to the situation of the land in which that estate or interest subsists.

## EXPLANATORY NOTES

### *Clause 10 (continued)*

#### *Subsections (3) to (5)*

5. Subsection (3) provides that a person shall only be entitled to equitable relief or damages, in respect of a contravention, to the extent to which he is materially prejudiced by it in the capacity in which he is entitled to enforce the obligation. This echoes the present law as to restrictive covenants whereby the benefit of such covenant does not pass to a person incapable of benefiting from it. Since, however, the benefit of a land obligation benefiting only a part of the dominant land devolves automatically with all parts of that land, this provision is necessary to prevent enforcement of an obligation by someone owning no land that actually benefits from it.

6. This provision does not apply, however, to contraventions involving personal injury or damage to property since it would be wrong for the remedy for such contraventions to be dependent upon factors such as (as mentioned in the next subsection) the nature of the plaintiff's interest in the land.

7. Subsection (4) ensures that the court, when considering whether a person is 'materially prejudiced' by a contravention, shall have regard to the nature of that person's interest in the land and the situation of the land in which that interest subsists.

### *Land Obligations*

(5) Subsection (3) above shall not require a court to refuse equitable relief to the manager of a development scheme in respect of a contravention of any obligation, but a court may refuse such relief to the manager if it is satisfied that no one is in any way materially prejudiced by the contravention.

(6) Where there has been a contravention of a restrictive or access obligation, a person against whom the obligation is enforceable in accordance with section 8 above shall not be liable, except by virtue of section 50 of the Supreme Court Act 1981 (damages in lieu of injunction etc.) for damages in respect of the contravention unless at the time of the conduct by virtue of which the obligation is so enforceable against him he was bound by the obligation by virtue of his ownership of an estate or interest in the servient land which—

- (a) is the burdened estate or the interest of a mortgagee; or
- (b) confers a right to possession and is either freehold or leasehold for a term of more than 21 years.

## EXPLANATORY NOTES

### *Clause 10 (continued)*

8. Subsection (5) provides that the “materially prejudiced” requirement shall not prevent a manager of a development scheme obtaining equitable relief. This reflects the possibility that a manager himself may have no interest in any part of the dominant land and so might otherwise be unable to obtain equitable relief. Such relief may, however, be refused him if there is no one who in fact is materially prejudiced.

These provisions implement the recommendations contained in paragraphs 13.21 to 13.23 of the Report.

### *Subsection (6)*

9. This provides that a person can only be liable for common law damages, in the event of a contravention of a restrictive or access obligation, if his interest in the servient land:

- (a) is the burdened estate, or
- (b) is the interest of a mortgagee, or
- (c) is freehold (or leasehold for a term exceeding 21 years) and confers a right to possession.

10. Common law damages are to be available for contravention of restrictive (and access) obligations. This is in contrast to the present law where such damages are not available for breach of restrictive covenants. This provision does, however, restrict the liability for common law damages because earlier provisions of the Bill have the effect of making a wider range of persons liable for their contravention of restrictive and access obligations than for contravention of other obligations.

This provision implements the recommendations in paragraphs 13.24 to 13.26 of the Report.

*Land Obligations*

(7) Where—

(a) in contravention of a land obligation falling within paragraph 2 or 6 of Schedule 1 to this Act or, in the case of a development scheme, of a maker's obligation or manager's obligation there has been a failure to carry out any works, but

(b) those works are carried out (whether in pursuance of a right conferred by virtue of paragraph 15 of that Schedule or otherwise) by a person for the time being entitled to enforce that obligation,

the damages in respect of the contravention shall be or, as the case may require, shall include an amount equal to the expenses reasonably incurred by that person in connection with the carrying out of those works less, where the case so requires, any amount which that person would have been required to pay in respect of the carrying out of the works by the person bound by the obligation.

(8) Where damages are awarded to any person in respect of a contravention of an obligation requiring the carrying out of works, the amount of the damages shall not be reduced, by reference to any rule as to the mitigation of damages, on the ground that he has not carried out the works himself.

1945 c. 28.  
1976 c. 30.

(9) For the purposes of the Law Reform (Contributory Negligence) Act 1945 and the Fatal Accidents Act 1976 a contravention of a land obligation or of a maker's obligation or manager's obligation shall be treated as the fault of the persons against whom the obligation is enforceable; and in this subsection "fault", in relation to the said Act of 1945, means fault within the meaning of that Act.



## EXPLANATORY NOTES

### *Clause 10 (continued)*

#### *Subsection (7)*

11. This provides that where, because of a contravention of an obligation to carry out works, a person entitled to enforce that obligation carries them out himself, his damages shall include the reasonable expenses thereby incurred by him (less any amount which he would have had to pay anyway for the works to be carried out). This implements the recommendations in paragraphs 13.28 to 13.30 of the Report.

#### *Subsection (8)*

12. This ensures that a person entitled to exercise a self-help remedy and carry out works himself is not to suffer, under any rule as to the mitigation of damages, if he chooses not to do so. This implements the recommendation in paragraph 13.31 of the Report.

#### *Subsection (9)*

13. This has the effect of ensuring that the principles of the Law Reform (Contributory Negligence) Act 1945 and the Fatal Accidents Act 1976 apply to contraventions of land obligations, maker's obligations and manager's obligations. Thus where, as a result of a contravention of any such obligation, the loss or damage suffered by a person results partly from his own fault, the damages recoverable by him (or by his estate in the event of a fatal accident) may be reduced accordingly. This implements the recommendation in paragraph 13.32 of the Report.

*Land Obligations*

Enforcement  
by charge on  
servient land.

**11.—(1)** The following provisions of this section shall apply in relation to any provision made in pursuance of paragraph 18 of Schedule 1 to this Act for any land to be charged with amounts from time to time outstanding (whether by way of principal or interest) under, or recoverable in respect of, a land obligation imposed on that land.

## EXPLANATORY NOTES

### *Clause 11*

1. This clause operates in cases where a land obligation is, in order to assist its enforcement, imposed as a charge on the servient land pursuant to Schedule 1, para. 18.

### *Subsection (1)*

2. This shows that the clause must be read in conjunction with Schedule 1, para. 18, which enables obligations to make payments (that is, a reciprocal payment or a reimbursement obligation) or obligations requiring the carrying-out of works, to be a charge on the servient land.

3. The advantage of imposing a land obligation as a charge is that the person with the benefit of the charge may have remedies against the servient land itself as well as against the servient owner. These remedies are intended to be as effective as those available under the existing law to landlords for the enforcement of tenants' covenants in leasehold developments. This implements paragraphs 14.2 and 14.3 of the Report.

4. The charge facility is drawn narrowly. It exists only for the purpose of securing the actual performance of essential land obligations. The reason for this is to avoid, so far as possible, the charge facility operating to the detriment of persons such as mortgagees and tenants who, if they advance money on (or take a lease of) the servient land, will do so subject to any prior charge. (Additional protection for such persons is provided by paragraphs (c) and (d) of subsection (6): see note 9 below.) Thus the charge facility is only to be available for obligations the performance of which may be vital for the continued existence or viability of the property or the development as a whole; the charge can only secure sums which have to do with the actual performance of the obligation and not, for example, damages for consequential loss. 'Actual performance' would include expenses reasonably incurred by a person enforcing a 'works' obligation under Schedule 1, paras. 2 or 6. This implements paragraphs 14.11 to 14.14 of the Report.

*Land Obligations*

(2) The charge shall be a charge on every estate or interest in the servient land by virtue of the ownership of which any person is bound by the land obligation and shall have the same priority as that obligation.

(3) In a case where the amount charged is an amount outstanding under a reciprocal payment or reimbursement obligation, the charge shall be enforceable by any person entitled to enforce the obligation but, if he is not the person to whom the amount is payable, only for the benefit of the person to whom it is payable.

(4) In a case where the amount charged is an amount recoverable in accordance with section 10(7) above, the charge shall be enforceable by the person entitled to recover that amount.

1925 c. 20. (5) Subject to subsection (6) below, the person entitled to enforce the charge shall for the purpose of enforcing it have the same powers and remedies under the Law of Property Act 1925 and otherwise as if the charge were created by deed expressed to be by way of legal mortgage.

## EXPLANATORY NOTES

### *Clause 11 (continued)*

#### *Subsections (2) to (7)*

5. Subsection (2) provides that where a land obligation imposes a charge, the charge shall take effect as a charge on the estate or interest of every person who is bound by the obligation and shall have the same priority as the obligation itself. This follows the general principle that a charge has priority to all interests (such as mortgages and leases) which the person bound by it may subsequently create out of the land.

This implements paragraphs 14.8 and 14.9 of the Report.

6. Subsection (3) provides that, where the charge relates to a reciprocal payment or reimbursement obligation, anyone entitled to enforce the obligation may enforce the charge provided that, if the amount secured by the charge is not payable to him, he does so only for the benefit of the person to whom it is payable. This provision is so worded because a reciprocal payment obligation may be enforceable by someone other than the person to whom the money is payable.

This implements paragraph 14.18 of the Report.

7. Subsection (4) ensures that where the charge supports a works obligation the person entitled to enforce the charge is the person who has incurred the relevant expenses.

This implements paragraph 14.17.

8. Subsection (5) provides that the person entitled to enforce the charge shall, in general, have the same powers and remedies as a legal mortgagee. Principal amongst these is a power to sell the charged property. This implements paragraph 14.19 of the Report.

*Land Obligations*

(6) The powers and remedies so available shall not be exercisable except with the leave of the court and on such terms and conditions (if any) as the court thinks fit to impose and, notwithstanding sections 101, 103, 104 and 105 of the Law of Property Act 1925 (which confer and regulate certain aspects of the power of sale)—

- (a) the leave of the court shall be sufficient authority for the sale;
- (b) no other terms and conditions for the exercise of the power of sale than those imposed by the court need be complied with nor need the purchaser concern himself with compliance by the person exercising the power with any of them which fall to be complied with after the conveyance is made;
- (c) the estate or interest in the servient land that the purchaser acquires may be made subject to such other estates, interests and rights as may be specified by the court; and
- (d) so much of the proceeds of the sale as may be specified by the court shall be applied to compensate such persons from whose estates, interests or rights the land is freed by the sale as may be so specified for any loss occasioned to them by the sale.

(7) Without prejudice to subsection (2) above, a land obligation shall not be affected by the exercise at any time of any power or remedy conferred for the enforcement of the charge except as respects the availability of the charge to secure any amounts outstanding or recoverable at that time.

## EXPLANATORY NOTES

### *Clause 11 (continued)*

9. Subsection (6) provides, however, that the powers and remedies referred to in subsection (5) shall only be exercisable with leave of the court and subject to such terms and conditions as the court may see fit to impose. If the court gives leave for the charged property to be sold, then:

- (i) the purchaser need not investigate the chargee's right to sell beyond ensuring that the court has given leave and that any terms and conditions imposed by the court, which have to be complied with on or before the making of the conveyance, have been so complied with (paras. (a) and (b));
- (ii) the sale may be made subject to such interests as the court may specify (para. (c)). This provision could be used to protect the owners of derivative interests who would otherwise lose their security once the charged property was sold;
- (iii) the court may order that part of the sale proceeds be paid to the owners of derivative interests by way of compensation for any loss arising to them as a result of the sale (para. (d)).

These provisions implement paragraphs 14.19 to 14.22 of the Report.

10. Subsection (7) provides that the exercise of any power or remedy in enforcing a charge shall not have any effect on the land obligation itself. For example, a person buying the charged property pursuant to a court order takes the property subject to the land obligation and the supporting charge. This implements paragraph 14.23 of the Report.

*Land Obligations*

Duty to give information as to servient interests.

12.—(1) A person who is entitled to enforce a land obligation may, for the purpose of facilitating his enforcement of it, serve a notice under this section on any person who is, or whom he believes to be,—

- (a) in occupation of the servient land or any part of it, or
- (b) the owner of an estate or interest in that land or any part of it, or
- (c) the recipient (whether direct or not) of rent payable in respect of that land or any part of it, or of analogous payments made in respect of its occupation.

(2) A notice under this section may require the person on whom it is served to state in writing—

- (a) the nature of any estate or interest that he has in the servient land or any part of it;
- (b) the name and address of any other person whom he knows or believes to have an estate or interest in that land or any part of it;
- (c) the name and address of any person whom he knows or believes to be the recipient (whether direct or not) of rent or other payments of the kind described in subsection (1)(c) above;

and, if he is served as occupier and not addressed by name, his name.



## EXPLANATORY NOTES

### *Clause 12*

1. This clause assists the enforcement of a land obligation by enabling notices to be served on those who are believed to be in occupation of (or to receive rent in respect of), or to have interests in, the servient land, requiring them to give relevant information. This clause implements paragraphs 13.39 to 13.44 of the Report.

### *Subsections (1) and (2)*

2. These provide that anyone entitled to enforce a land obligation may serve a notice on anyone who is (or whom he believes to be)—

- (i) in occupation of, or
- (ii) the owner of an estate or interest in, or
- (iii) the recipient (whether direct or not) of rent, or analogous payments, payable in respect of

the servient land, requiring that person to state the nature of his interest, and the name and address both of any other person whom he knows (or believes) to have an interest in the land and of any person whom he knows (or believes) to be the recipient of rent or analogous payments. A person served merely as “occupier” must also state his name.

3. These provisions are intended to enable a person seeking to enforce a land obligation to discover who is liable for a contravention. Each person served with such a notice can be required to provide the information above. In this way it should eventually be possible to ascertain the identity of all persons who are so liable. However, there is unlikely to be much doubt as to these matters in the case of managers’ and makers’ obligations and the provision accordingly does not cover those.

4. ‘Whether direct or not’ means that notice can be served not only on the person who originally collects the rent or analogous payment but also on any person who receives it from him; and ‘analogous payments’ extends the provision to the receipt of payments made under licence to occupy the land.

*Land Obligations*

(3) It shall be the duty of the person served with a notice under this section to furnish the information required by the notice within one month of the service of the notice.

(4) A notice under this section may be served either—

(a) by delivering it to the person on whom it is to be served; or

(b) by leaving it at his usual or last-known place of abode or business in the United Kingdom; or

(c) by sending it by the recorded delivery service addressed to him at his usual or last-known place of abode or business in the United Kingdom; or

(d) in the case of an incorporated company or body, by delivering it to the secretary or clerk of the company or body at their registered or principal office, or sending it by the recorded delivery service, addressed to the secretary or clerk of the company or body at that office.

(5) A notice served on any person as occupier of the servient land or any part of it shall be taken to be duly served if, being addressed to him either by name or by the description of "the occupier" of the land (describing it), it is delivered or sent in the manner specified in subsection (4)(a), (b) or (c) above.

1972 c. 70.

(6) Where the notice is to be served on a local authority service shall be in accordance with section 231 of the Local Government Act 1972 instead of the preceding provisions of this section.

## EXPLANATORY NOTES

### *Clause 12 (continued)*

5. Subsection (3) imposes a duty on a person served with such a notice to furnish the information within one month. No special sanction is felt necessary for failure to comply with this requirement.

6. Subsections (4), (5) and (6) contain detailed provisions as to what constitutes proper service of the notice. Subsection (5) provides that a notice served on a person as occupier may be addressed to him as "the occupier". Subsection (6) contains special provisions where the notice is to be served on a local authority.

*Land Obligations*

*Additional powers of the court*

Additional powers of the court.

13.—(1) Without prejudice to section 10(1) above, the court shall have power on the application of any person interested—

- (a) to declare whether or not in any particular case any land is, or would in any given event be, affected by a land obligation or a development scheme; and
- (b) to declare what, upon the true construction of any instrument creating or varying a land obligation, or of any instrument containing, or of any instrument or resolution varying, a development scheme, is the nature and extent of any land obligation or other obligation imposed by virtue of or in pursuance of that instrument or resolution, and whether the obligation is, or would in any given event be, enforceable and, if so, by whom.

(2) The court may, whenever it is satisfied—

- (a) that it is expedient that a different person should be the manager of a development scheme or that a vacancy in the position of manager should be filled; and
- (b) that without the assistance of the court it is inexpedient, difficult or impracticable for the existing manager to be removed or for a new manager to be appointed,

by order remove the existing manager and appoint a new manager in his place or appoint a manager to fill the vacancy and (in either case) give such further directions with respect to the transfer to the new manager of property, rights and liabilities as it may think appropriate in consequence of the appointment.

(3) Where the manager of a development scheme has been changed in accordance with the scheme, but the court is satisfied that no provision has been made for the transfer to the new manager of property, rights or liabilities, or that any such provision is unsatisfactory, the court may give such directions with respect to the transfer as it may think appropriate.

## EXPLANATORY NOTES

### *Clause 13*

1. This clause confers on the court power to make certain declarations and to provide for changes in the management of development schemes.

### *Subsections (1) to (3)*

2. Subsection (1) enables the court to declare:—

- (a) whether any land is affected by a land obligation or a development scheme (or would be in any given event); and
- (b) what is the nature and extent of any land obligation or other obligation imposed or varied by or pursuant to any instrument or resolution and whether the obligation is (or would be in any given event) enforceable (and, if so, by whom).

These declaratory powers are analogous to the powers given to the court (in relation to restrictive covenants) by section 84(2) of the Law of Property Act 1925. This implements paragraphs 19.2 to 19.4 of the Report.

3. Subsection (2) enables the court to replace an unsatisfactory manager or fill a managership vacancy if it is satisfied that this is expedient and that it is inexpedient, difficult or impracticable for this to be done without the court's assistance. The court would also be able to give supplementary directions. This provision reflects the importance of the functions that may be vested in a manager by a development scheme.

4. Subsection (3) enables the court to give directions in cases where, although a manager has been changed in accordance with the scheme, no satisfactory provision has been made for the transfer to the new manager of property, rights and liabilities. See also clause 3(7).

These provisions implement paragraphs 19.5 and 19.6 of the Report.

### *Land Obligations*

(4) In any proceedings in which any question arises (whether under the preceding provisions of this section or otherwise) with respect to a land obligation or a development scheme, the court shall have the powers conferred by subsections (5) and (6) below.

(5) In any proceedings falling within subsection (4) above, the court may by order give any such direction as it may think fit with respect to the making in relation to the land obligation in question or, as the case may be, the development scheme in question or any land obligation imposed in pursuance of the scheme, of an application to the Lands Tribunal under section 17 below, including a direction staying the proceedings pending the determination of any matter by the Lands Tribunal.

(6) Where in any proceedings falling within subsection (4) above it appears to the court appropriate to do so, the court may (instead of making an order under subsection (5) above and without prejudice to its other powers) itself by order exercise any power conferred on the Lands Tribunal by section 17 below.

## EXPLANATORY NOTES

### *Clause 13 (continued)*

#### *Subsections (4) to (6)*

5. Under clause 17 the Lands Tribunal is to have extensive jurisdiction to modify or extinguish land obligations and development schemes. It may happen that, during proceedings before the court, it becomes necessary to consider an exercise of this jurisdiction before those proceedings continue further. In such a case the court has two options.

6. The first option is for the court to give such direction as it may think fit with respect to the making of an application to the Lands Tribunal under clause 17. The court proceedings could meanwhile be stayed (subsection (5)). This is analogous to the power given to the court by section 84(9) of the Law of Property Act 1925.

7. The second option is for the court to exercise the Land Tribunal's jurisdiction itself if this appears appropriate (subsection (6)). These provisions implement paragraphs 19.7 to 19.11 of the Report.

*Land Obligations*

Provisions  
supplemental  
to s. 13.

14.—(1) Except as regards so much of an order as imposes a new or adds to an existing land obligation, an order under section 13 above shall be binding on the following persons in addition to those who are or are represented by parties to the proceedings, have notice of the proceedings or (by reason of having a like estate or interest as any party) are to be treated as privy to the proceedings, that is to say—

- (a) in the case of an order making a declaration relating to or modifying or extinguishing a neighbour obligation or development obligation, on all persons, whether ascertained or of full age or capacity or not, then entitled to enforce or bound by or thereafter capable of becoming entitled to enforce or bound by the land obligation and also, in the case of a development obligation, on the maker or makers and the manager (if any) of the scheme;
- (b) in the case of an order making a declaration relating to or modifying or extinguishing a development scheme, on all persons, whether ascertained or of full age or capacity or not, then entitled to enforce or bound by or thereafter capable of becoming entitled to enforce or bound by any development obligation imposed or to be imposed in pursuance of the scheme and on the maker or makers and the manager (if any) of the scheme;

and, in the said excepted case, shall be binding in accordance with sections 6 and 7 above and the terms of the order whether the persons in question are parties to the proceedings or have been served with notice or not.

(2) Where the court under section 13 above makes a declaration relating to or modifies or extinguishes a neighbour obligation or development obligation or imposes a new or adds to an existing land obligation and the land burdened or benefited by the obligation is registered land the registrar shall give effect on the register to the order in accordance with the Land Registration Act 1925.

1925 c. 21.

(3) An order may be made under section 13 above, notwithstanding that any instrument creating or varying a land obligation or containing or varying a development scheme may not have been produced to the court; and the court may act on such evidence of that instrument as it may think sufficient.



## EXPLANATORY NOTES

### *Clause 14*

1. This clause contains several procedural provisions which are supplementary to the court's powers under clause 13. These provisions (which implement paragraph 19.12 of the Report) reflect certain analogous provisions contained in section 84 of the Law of Property Act 1925 which relates to the Lands Tribunal's power to discharge or modify restrictive covenants affecting land. See also clause 18.

2. Subsection (1) deals with the question of who is to be bound by an order made by the court under clause 13. It reflects the approach of section 84(5). Where, however, the order imposes a new, or adds to an existing, land obligation, the court itself will to that extent specify who is to be bound.

3. Subsection (2) requires H.M. Land Registry to give effect on the register to an order made under clause 13 so far as it affects registered land.

4. Subsection (3) provides that certain original documentation need not be produced to the court, and that the court may act on such evidence of the documentation as it may think sufficient. This reflects the approach of section 84(6).

*Land Obligations*

*Extinguishment, variation etc.*

Merger.

15.—(1) Except as provided in this section a land obligation or development scheme shall not be extinguished by any unity of ownership of estates or interests in any land.

(2) If, at any time, in the case of a neighbour obligation—

(a) the burdened estate in the whole of the servient land and the benefiting estate in the whole of the dominant land come into, or are in, the ownership of the same person, in the same right, and

(b) no person, except that person in that right, has the benefit of the obligation or is bound by it,

the obligation shall at that time be extinguished.

## EXPLANATORY NOTES

### *Clause 15*

1. This clause deals with the circumstances in which land obligations and development schemes should be extinguished because previously separate interests in land have come into the ownership of the same person.

### *Subsection (1)*

2. This has the effect that no land obligation or development scheme shall be extinguished just because interests in land have come into the ownership of the same person, except in the circumstances provided for in the remainder of the clause.

### *Subsection (2)*

3. This provides that a *neighbour* obligation shall be extinguished if:

- (a) the burdened estate in the whole of the servient land and the benefiting estate in the whole of the dominant land come into the ownership of the same person in the same right, and
- (b) no one else has the benefit of, or is bound by, the obligation.

Accordingly there could be no revival of the obligation in the event of a subsequent division of the land. This reflects the analogous position in relation to easements.

4. There would, however, be no extinguishment if, even though both estates vest in the same person, they were not held by him "in the same right". For example, he might hold one for his own benefit and one as trustee for somebody else.

This provision implements paragraphs 16.6 and 16.7 of the Report.

*Land Obligations*

(3) If at any time, in the case of a neighbour obligation which is a restrictive obligation—

(a) the burdened estate in part, but not the whole, of the servient land and the benefiting estate in the whole of the dominant land come into, or are in, the ownership of the same person, in the same right, and

(b) no person, except that person in that right, has the benefit of the obligation or, by virtue of an estate or interest in, or occupation of, that part of the servient land, is bound by it,

the obligation shall at that time be extinguished so far as it relates to that part of the servient land.

(4) If at any time, in the case of a development scheme in pursuance of which one or more development obligations have been imposed—

(a) a legal estate, or legal estates, in every part of the development land is, or are, in the ownership of one person, in the same right, and

(b) no person, except that person in that right and the manager (if any), has the benefit of a development obligation imposed in pursuance of the scheme or is bound by such an obligation,

the scheme and every land obligation imposed in pursuance of it shall be extinguished.

## EXPLANATORY NOTES

### *Clause 15 (continued)*

#### *Subsection (3)*

5. This provides that where there is a similar unity of ownership of the whole of the dominant land but of part only of the servient land, any *restrictive* neighbour obligation should be extinguished in so far as it relates to that part. This reflects the analogous position in relation to restrictive covenants.

6. In all other cases where there is unity of ownership extending to part only of the dominant or servient lands, there is to be no extinguishment of a land obligation. Thus there can be no extinguishment where part of the dominant land is “left out of the unity” or, indeed, where part of the servient land is left out—with the limited exception of restrictive obligations referred to in the preceding paragraph. (The reason for the exception is that other types of obligation involve expenditure of money, and there would be a risk that the owner of the “non-extinguished” part of the servient land would be liable to discharge not only his own share of the obligation but the share of the “extinguished” part as well.) This implements paragraphs 16.8 to 16.11 of the Report.

#### *Subsection (4)*

7. This provides for the extinguishment of a development scheme and every development obligation imposed pursuant to it in the event of a legal estate in every part of the development land coming into the ownership of the same person (and in the same right), provided that no one else (other than any manager) had the benefit of, or was bound by, any development obligation imposed under the scheme.

8. Thus extinguishment would not occur just because some individual units came into the same hands. Otherwise, the other unit owners and the manager (if any) would find their enforcement rights prejudiced. This implements paragraphs 16.12 and 16.13 of the Report.

*Land Obligations*

(5) In any case where—

(a) a land obligation is binding on the owner of a leasehold estate or interest in the servient land but not on the owner of an estate or interest which is in reversion thereon, and

(b) the leasehold estate or interest is surrendered to the owner of the estate or interest in reversion or becomes merged in it,

the owner of the estate or interest which was in reversion shall be bound by the land obligation to the like extent as if the leasehold estate or interest continued to have a separate existence.

## EXPLANATORY NOTES

### *Clause 15 (continued)*

#### *Subsection (5)*

9. This provides that where a tenant, but not his landlord, is bound by a land obligation and the tenant's interest is either surrendered to the landlord or else merges into the landlord's interest, then the owner of the landlord's interest will be bound by the obligation as if the tenant's interest still continued.

10. This provision therefore covers two situations—surrender of a lease by a tenant to his landlord on the one hand and merger of a lease by a tenant acquiring the reversion on the other. The provision reflects the existing law that neither surrender nor merger operates to destroy an incumbrance binding only on the leasehold interest. Thus a land obligation would continue to be effective for as long as it would have bound the tenant.

11. No specific provision is needed to cover the converse case, that is where the *benefit* of a land obligation is appurtenant only to a leasehold estate. A result analogous to the burden "situation" is achieved by the general provisions of clause 6. This implements paragraphs 16.15 to 16.18 of the Report.

12. The *forfeiture*, however, by a landlord of a lease previously granted by him will result in the landlord recovering his property unincumbered by any land obligation created by the tenant. Any such obligation will terminate along with the lease. This is in accordance with the general principles of forfeiture and no special provision to this effect is needed in the Bill. This implements paragraphs 16.19 and 16.20 of the Report.

*Land Obligations*

(6) The extinguishment under this section of any land obligation or development scheme shall be without prejudice to any rights or liabilities which have accrued or been incurred thereunder before the extinguishment.

(7) The preceding provisions of this section shall apply in a case where any estate is vested in two or more persons as joint tenants in the same way as they would apply if that estate were vested in one person.



## EXPLANATORY NOTES

### *Clause 15 (continued)*

#### *Subsections (6) and (7)*

13. Subsection (6) provides that no extinguishment of a land obligation or of a development scheme shall affect any rights or liabilities that have accrued at the time of the extinguishment. This implements paragraph 16.14 of the Report.

14. Subsection (7) ensures that the provisions of the clause apply equally to cases where an estate is held by two or more persons as to cases where it is held by one person alone.

*Land Obligations*

Equitable variations, releases and apportionments.

- 16.—(1) Subject to the provisions of this section, a deed which—
- (a) provides, as between parties to the deed, for a land obligation to be treated as, in a specified manner or to a specified extent, varied, released or apportioned, but
  - (b) does not (because one or more relevant persons are not parties to the deed) effect a variation, release or apportionment of the obligation itself,

shall, to the extent that it provides as mentioned in paragraph (a) above, nevertheless bind the successors of those parties (as well as those parties themselves) unless a contrary intention appears.

## EXPLANATORY NOTES

### *Clause 16*

1. This clause provides for the equitable variation of land obligations. Equitable variations are to be distinguished from legal variations. The latter involve the participation of all those interested in the obligation and vary the obligation itself. They require no assistance from the Bill. Equitable variations do neither and require specific provision to ensure, in particular, that successors in title are bound by the variation. The term "variation" in these notes also includes the release and apportionment of land obligations. (As to this type of provision see Law of Property Act 1925, ss. 77, 190.)

### *Subsection (1)*

2. This ensures that if a deed provides for a land obligation to be treated as varied, but does not bring about a legal variation because of the non-participation of some interested party, the deed (and its varying provisions) shall bind the parties to it and their successors, unless a contrary intention appears.

3. The most obvious example of such a situation is a case where the servient land, in relation to a positive land obligation, is subsequently divided into two or more parts which pass into different ownership. Since the whole of the servient land is security for the land obligation (in that anyone owning any interest in that land is, in general, liable for any contravention on any part of it) the individual owners of the divided servient land may wish to arrange that their liability is limited to their own part of the servient land and does not extend to other parts. If the dominant owner joins in the arrangement so that there is a legal variation (a legal apportionment of the land obligation, in this example) the obligation itself will be varied. If, however, the dominant owner refuses, the servient owners can nevertheless effect an equitable variation which will not vary the land obligation itself but will oblige them (and their successors) to act *as between themselves* as if it had been so varied. This implements paragraphs 17.1 to 17.9 of the Report.

### *Land Obligations*

(2) The successors of a person who is a party to a deed (in this section referred to as "the original party") shall be bound in respect of a land obligation by provisions of the deed falling within subsection (1)(a) above (in this section referred to as "the relevant provisions") only if either—

- (a) the relevant provisions have effect in relation to a parcel of land in which the original party has, or is to have, an estate or interest and the original party is or, as the case may be, will be bound by, or entitled to enforce, that obligation by virtue of the ownership of that estate or interest; or
- (b) the original party executes the deed containing the relevant provisions as the manager of the development scheme in pursuance of which the obligation was imposed.

## EXPLANATORY NOTES

### *Clause 16 (continued)*

#### *Subsection (2)*

4. This provision is concerned with the circumstances in which successors of original parties should be bound by equitable variations. It provides that the successors of an original party to a deed of equitable variation of a land obligation shall be bound by it only if the original party:

- (a) has (or is to have) some interest in the land affected and therefore is (or will be) bound by, or entitled to enforce, the obligation,  
or
- (b) executes the deed as manager of the development scheme by virtue of which the obligation was imposed.

5. Normally a variation binding a manager will be a legal variation carried out under a specific provision of the development scheme. However, subject to the specific terms of the scheme, it would be possible for a manager to enter into an equitable variation. This implements paragraph 17.11 of the Report.

### *Land Obligations*

(3) Where the successors of the original party are bound in respect of a land obligation by virtue of paragraph (a) of subsection (2) above, then, for the purposes of this section, those successors shall be every person who is for the time being bound by or entitled to enforce the obligation—

- (a) as a person who, in relation to the whole or part of the parcel referred to in that paragraph, is a successor in title of the original party; or
- (b) as a person who, in relation to an estate or interest created in the whole or part of that parcel since the execution of the deed containing the relevant provisions, claims under or through the original party or such a successor in title; or
- (c) as a person who since the execution of that deed has gone into occupation of the whole or part of that parcel otherwise than by virtue of a right derived from a person who was not bound by the relevant provisions at the time the right was granted.

(4) Where the successors of the original party are bound by the relevant provisions by virtue of paragraph (b) of subsection (2) above, then, for the purposes of this section, those successors shall be every person in whom the functions of the manager are from time to time vested.

(5) A successor of the original party shall not, under this section, be bound by the relevant provisions except in his capacity as such a successor.

(6) Without prejudice to the generality of subsection (1) above, it is hereby declared that the relevant provisions shall, as between the persons bound by them, have effect so as to determine in relation to the land obligation to which they relate—

- (a) the extent to which any person is entitled to enforce, or to be indemnified in respect of liability for contraventions of, that obligation; and
- (b) the extent to which any person is liable for, or to indemnify any other person in respect of liability for, contraventions of that obligation.

(7) The preceding provisions of this section shall apply where the relevant provisions relate to rights or obligations arising under the relevant provisions of an earlier deed as they apply where the relevant provisions relate to a land obligation.

## EXPLANATORY NOTES

### *Clause 16 (continued)*

#### *Subsections (3) and (4)*

6. These subsections identify the persons who are bound by the equitable variation as successors. Subsection (3) deals with "non-manager" successors and provides that the following persons should (if they are for the time being bound by, or entitled to enforce, the land obligation) be successors so as to be bound by the equitable variation:

- (a) Anyone who has acquired the original party's interest in the whole or part of his land;
- (b) Anyone who has acquired an interest (in the whole or part of that land) which was created since the deed, and who claims it under or through the original party or a successor described in (a) above;
- (c) Anyone who has, since the deed, gone into occupation of the whole or part of that land (otherwise than by a right derived from a person not bound by the variation at the time the right was granted).

7. Subsection (4) deals with "manager" successors and provides that the persons bound as successors should be those in whom the functions of manager are currently vested.

These provisions implement paragraphs 17.12 to 17.14 of the Report.

#### *Subsection (5)*

8. This provides that successors are not to be bound by variations except in the capacity which makes them successors. This implements paragraph 17.15 of the Report.

#### *Subsections (6) and (7)*

9. Under subsection (6), the deed of equitable variation gives rise, as between those persons currently bound by it, to directly enforceable mutual duties to ensure that its terms are implemented. This subsection declares that the deed is to have effect so as to determine the extent to which persons bound by the variation can enforce (or be liable in respect of) the land obligation and the extent to which there is a right to be indemnified (or a liability to indemnify) in the event of contravention. This implements paragraphs 17.16 and 17.17 of the Report.

10. Subsection (7) enables the provisions of this clause to apply equally to a deed of equitable variation which operates to vary a previous deed of equitable variation. This implements paragraph 17.20 of the Report.

*Land Obligations*

Power of  
Lands  
Tribunal to  
modify or  
extinguish  
land  
obligations  
and  
development  
schemes.

17.—(1) Subject to the following provisions of this section, and to section 18 below the Lands Tribunal shall have power, if on an application under this section it is satisfied with respect to one or more relevant grounds, by order—

- (a) to extinguish or to modify a land obligation; or
- (b) to modify a development scheme by modifying or deleting any of its provisions.

(2) The Lands Tribunal shall also have power, if it appears to the Tribunal appropriate to do so in consequence of the making by it of an order extinguishing such of the development obligations imposed in pursuance of a development scheme as remain in force, by order to extinguish the scheme.



## EXPLANATORY NOTES

### *Clause 17*

1. This clause empowers the Lands Tribunal to modify or extinguish land obligations and development schemes. It reflects the provisions of section 84 of the Law of Property Act 1925 (which empowers the Tribunal to discharge or modify restrictive covenants affecting land) but goes beyond those provisions not merely because the Bill is concerned with positive as well as restrictive obligations but also because of the various types of obligation (including managers' obligations) arising under development schemes, and the other provisions of such schemes.

### *Subsections (1) and (2)*

2. Subsection (1) accordingly provides that the Lands Tribunal shall be empowered both to extinguish or modify any land obligation and to modify any development scheme. This jurisdiction is exercisable upon the Tribunal being satisfied as to the existence of one or more of the "relevant grounds" set out in Sch. 2 (Part I).

3. Subsection (2) enables the Tribunal to extinguish a development scheme altogether if, having extinguished all the subsisting development obligations imposed under the scheme, the Tribunal considers this appropriate.

These provisions implement paragraphs 18.5 and 18.6 of the Report.

*Land Obligations*

- (3) An application under this section may be made—
- (a) with respect to a neighbour obligation—
    - (i) by any person interested in the land or any part of the land which is burdened with the obligation; and
    - (ii) where the obligation is a positive obligation to which a payment obligation is reciprocal, by any person interested in the land or any part of the land which is burdened with the reciprocal payment obligation;
  - (b) with respect to a development obligation imposed in pursuance of a development scheme or to the development scheme—
    - (i) by the manager (if any); or
    - (ii) by any person interested in land or any part of land which is burdened with a development obligation imposed in pursuance of the scheme.
- (4) The grounds which are relevant grounds in relation to a land obligation or the provisions of a development scheme are the grounds which are specified in Part I of Schedule 2 to this Act as relevant to that obligation or, as the case may be, to those provisions; and Part II of that Schedule shall have effect with respect to the matters to be taken into account by the Lands Tribunal before exercising its power under this section on any of those grounds.

## EXPLANATORY NOTES

### *Clause 17 (continued)*

#### *Subsection (3)*

4. Paragraph (a) provides that an application to extinguish or modify a *neighbour* obligation may be made by anyone interested in the land (or any part of it) burdened by that obligation. Where that obligation is a positive obligation to which a payment obligation is reciprocal, the application may be made by anyone interested in the land (or any part of it) burdened by the reciprocal payment obligation. (See Sch. 1, para. 4, for the definition of “reciprocal payment obligation”.)

5. “Anyone interested” is the expression used by section 84(1) for the analogous application to discharge or modify a restrictive covenant and, in the context of this Bill, is not limited to persons currently bound by the relevant obligation.

6. Persons interested in land burdened by a reciprocal payment obligation are afforded special treatment since they are unlikely to be able to apply successfully for a reduction or discharge of such an obligation unless the primary “works” or “services” obligation which it supports is reduced or discharged correspondingly.

This implements paragraphs 18.7 to 18.9 of the Report.

7. Paragraph (b) provides that an application to extinguish or modify a *development* obligation or to modify a development scheme may be made by the manager (if any) or by anyone interested in the whole or part of any land burdened by a development obligation made under the scheme. This provision reflects the fact that the provisions of a scheme (and every development obligation imposed pursuant to it) are of potential concern not only to the manager but also to every unit owner.

This implements paragraphs 18.10 and 18.11 of the Report.

#### *Subsections (4) to (6)*

8. Subsection (4) introduces Schedule 2 which in Part I sets out the “relevant grounds” and in Part II specifies matters to be taken into account by the Tribunal before exercising its powers under this clause.

*Land Obligations*

(5) Subject to subsection (8) below, the power conferred by this section to modify or extinguish a land obligation or to modify a development scheme shall include power to modify or extinguish the obligation or modify the scheme on such terms and conditions as the Lands Tribunal may think fit; and for the purpose of giving effect to any terms and conditions an order of the Lands Tribunal under this section—

- (a) may add provisions to any existing obligation or to any development scheme;
- (b) may (whether or not in substitution for any land obligation to be extinguished by the order) impose new land obligations as burdens on such land as the order may specify;
- (c) may, in the case of an order made with respect to a development scheme or development obligation, contain such directions to persons affected by the order as the Lands Tribunal may think fit; and
- (d) may, in the case of an application made with respect to a positive obligation under subsection (3)(a)(ii) above, contain such directions to any person bound by that obligation as the Lands Tribunal may think fit.

(6) Without prejudice to subsection (5) above but subject to subsections (7) and (8) below, an order under this section may direct such persons benefiting from the order as the Lands Tribunal may think fit to pay to any person bound by the order who will suffer loss or disadvantage in consequence thereof such compensation in respect of that loss or disadvantage as the Lands Tribunal may think reasonable.

(7) Subsection (6) above shall not authorise a direction requiring compensation to be paid to or by the manager of a development scheme as such; but in the application of that subsection to an order modifying or extinguishing a development obligation which is enforceable by the manager, the reference in that subsection to any person bound by the order shall include a reference to any person whom enforcement of that obligation by the manager is intended to benefit.

## EXPLANATORY NOTES

### *Clause 17 (continued)*

9. Subsection (5) provides that the powers of modification and extinguishment given by this clause to the Tribunal include powers to modify or extinguish on such terms and conditions as the Tribunal may think fit. To give effect to such terms and conditions, the Tribunal is empowered to:

- (a) Add provisions to any existing obligation or development scheme (cf. section 84 (1C));
- (b) Impose new land obligations;
- (c) Give such directions as it may think fit to persons affected by an order relating to a development scheme or a development obligation;
- (d) Give such directions as it may think fit to a person bound by a primary "works" or "services" obligation where the application to discharge or modify that obligation is made by a person interested in land burdened by a reciprocal payment obligation. (See para. 6 above.)

This implements paragraphs 18.12 to 18.14 of the Report.

10. Subsection (6) provides that an order made by the Tribunal under these modification and extinguishment powers may direct that anyone benefiting from the order pay reasonable compensation to anyone bound by it for the loss or disadvantage that he will suffer as a result. This reflects (in part) analogous provisions in section 84(1) and implements paragraphs 18.15 to 18.18 of the Report.

### *Subsection (7)*

11. This provides first that the compensation provisions of the previous subsection should not apply to managers. Thus no compensation is payable to a manager as such.

12. Secondly, however, this subsection provides that, where the Tribunal's order modifies or extinguishes a development obligation enforceable by the manager, the reference in subsection (6) to persons "bound" by the order shall include anyone whom enforcement of that obligation by the manager was intended to benefit. Thus, compensation may be payable to individual unit owners who would otherwise be unable to qualify for it because they were unable to enforce the obligation directly. This implements paragraphs 18.19 to 18.21 of the Report.

*Land Obligations*

(8) An order under this section shall not impose any new or additional burden (including the burden of a direction to pay compensation) on, or on the interest of, any person unless—

(a) in the case of an order made with respect to a development scheme or a development obligation, the Lands Tribunal is satisfied that any prejudice caused to that person by that burden does not substantially outweigh the benefits accruing to that person from the other provisions of the order; or

(b) in any case, that person consents to the imposition of the new or additional burden;

and accordingly where it appears to the Lands Tribunal that an order should not be made under this section without the imposition of such a new or additional burden but neither paragraph (a) nor paragraph (b) above is satisfied in relation to that burden, the Lands Tribunal may refuse to make an order under this section.

(9) Subject to subsection (10) below, this section does not apply to land obligations created or imposed—

(a) for naval, military or air force purposes, or

(b) for civil aviation purposes.

(10) Subsection (9) above—

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

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

## EXPLANATORY NOTES

### *Clause 17 (continued)*

#### *Subsection (8)*

13. This provides that no order under this clause shall impose any new or additional burden on anyone without his consent unless (in the case of an order relating to a development scheme or a development obligation) the Tribunal is satisfied that the prejudice which the burden causes him does not substantially outweigh the benefits accruing to him from the rest of the order.

14. The need for consent to new or additional burdens reflects the provisions of section 84(1C). This principle is, however, qualified in the case of development schemes and obligations so as to obviate the risk that one unit owner (out of perhaps hundreds) might withhold his consent unreasonably.

15. If the Tribunal considers that an order should not be made without the imposition of some new or additional burden, and the necessary consent is not forthcoming (and the exception does not apply), the Tribunal may refuse to make any order.  
This implements paragraphs 18.22 to 18.25 of the Report.

#### *Subsections (9) and (10)*

16. Subsection (9) and (10) have the effect of excluding certain land obligations from the application of this clause. Subsection (9) excludes all land obligations created or imposed for naval, military, air force or civil aviation purposes although subsection (10) limits the duration of this exclusion so that it ceases to apply once such obligations are no longer enforceable either by the Crown or (as the case may be) by the Crown or any public or international authority. These provisions reflect analogous exclusions in section 84(11) and (11A) and implement paragraphs 18.29 to 18.31 of the Report.

*Land Obligations*

Provisions  
supplemental  
to s. 17.

18.—(1) The Lands Tribunal shall, before making any order under section 17 above with respect to a land obligation or development scheme, direct such inquiries (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 have the benefit of the land obligation or to benefit from or otherwise be affected by the development scheme or any land obligation imposed in pursuance of the scheme as, having regard to any inquiries, notices or other proceedings previously made, given or taken, the Lands Tribunal may think fit.

(2) On an application to the Lands Tribunal under section 17 above, the Lands Tribunal shall give any necessary directions as to the persons who are or are not to be admitted (as appearing to have the benefit of any land obligation to which the application relates or to benefit from or otherwise be affected by any development scheme which is relevant to the application or any land obligation imposed in pursuance of such a scheme) to oppose the application and no appeal shall lie against any such direction.

1949 c. 42.

(3) Rules under the Lands Tribunal Act 1949 shall make provision whereby, in cases in which there arises on an application under section 17 above any such question as is mentioned in paragraph (a) or (b) of subsection (1) of section 13 above, 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) Except as regards so much of an order as imposes a new or adds to an existing land obligation, an order under section 17 above shall be binding on the following persons in addition to those who are or are represented by parties to the proceedings, have notice of the proceedings or (by reason of having a like estate or interest as any party) are to be treated as privy to the proceedings, that is to say—

(a) in the case of an order modifying or extinguishing a neighbour obligation or development obligation, on all persons, whether ascertained or of full age or capacity or not, then entitled to enforce or bound by or thereafter capable of becoming entitled to enforce or bound by the land obligation and also, in the case of a development obligation, on the maker or makers and the manager (if any) of the scheme;

(b) in the case of an order modifying or extinguishing a development scheme, on all persons, whether ascertained or of full age or capacity or not, then entitled to enforce or bound by or thereafter capable of becoming entitled to enforce or bound by any development obligation imposed or to be imposed in pursuance of the scheme and on the maker or makers and the manager (if any) of the scheme:

and, in the said excepted case, shall be binding in accordance with sections 6 and 7 above and the terms of the order whether the persons in question are parties to the proceedings or have been served with notice or not.



## EXPLANATORY NOTES

### *Clause 18*

1. This clause contains several procedural provisions which are supplementary to the Lands Tribunal's jurisdiction under clause 17. These provisions reflect the analogous provisions, contained in section 84 of the Law of Property Act 1925, in relation to restrictive covenants affecting land. They implement the recommendations contained in paragraphs 18.26 to 18.28 of the Report.

2. Subsection (1) provides that the Tribunal shall, before making any order under clause 17, direct the making of such inquiries of any government department or local authority and the notification of such persons affected by a land obligation or development scheme as the Tribunal may think fit. This reflects section 84(3).

3. Subsection (2) provides that the Tribunal shall give any necessary directions as to the persons who are, or are not, to be admitted to oppose an application under clause 17. This reflects section 84(3A).

4. Subsection (3) provides that rules shall make provision for proceedings before the Tribunal to be suspended so that certain legal questions can be determined by the court in exercise of its powers contained in clause 13(1). This also reflects section 84(3A).

5. Subsection (4) deals with the question of who is to be bound by the Tribunal's order under clause 17. It reflects the approach of section 84(5). Where, however, the order imposes a new, or adds to an existing land obligation, the Tribunal itself will, to that extent, specify who is to be bound.

*Land Obligations*

(5) Where the Lands Tribunal under section 17 above modifies or extinguishes a neighbour obligation or development obligation or imposes a new or adds to an existing land obligation and the land burdened or benefited by the obligation is registered land the registrar shall give effect on the register to the order in accordance with the Land Registration Act 1925.

1925 c. 21.

(6) An order may be made under section 17 above notwithstanding that any instrument creating or varying a land obligation or containing or varying a development scheme may not have been produced to the Lands Tribunal; and the Lands Tribunal may act on such evidence of that instrument as it may think sufficient.

(7) References in this section to a person affected by a development scheme include references to the manager (if there is one).

## EXPLANATORY NOTES

### *Clause 18 (continued)*

6. Subsection (5) requires H.M. Land Registry to give effect on the register to an order under clause 17 relating to registered land. This reflects section 84(8).

7. Subsection (6) provides that the original instrument creating or varying a land obligation (or containing or varying a development scheme) need not be produced to the Tribunal, and that the Tribunal may act on such evidence of its terms as it may think sufficient. This reflects section 84(6).

8. Subsection (7) treats a manager as a person affected by a development scheme for the purposes of the foregoing provisions.

*Land Obligations*

*Miscellaneous and general*

Restrictions  
on future  
covenants  
and  
rentcharges.

- 19.—(1) Subject to subsection (2) below, any rule of law or equity—
- (a) which is applicable to covenants which touch and concern land but not to other covenants, and
  - (b) by virtue of which the benefit or burden of a covenant which touches and concerns land may pass to a person other than the original covenantor or covenantee,

shall not apply to a covenant which is entered into after the commencement of this Act.

(2) Subsection (1) above shall not affect the application of any such rule of law or equity to covenants between lessor and lessee except covenants imposing obligations on land not included in the demise.

1977 c. 30. (3) No estate rentcharge (within the meaning of section 2 of the Rentcharges Act 1977) may be created whether at law or in equity after the commencement of this Act.

## EXPLANATORY NOTES

### *Clause 19*

1. This clause abolishes certain features of the existing law (subject to transitional provisions).

### *Subsection (1)*

2. This provides that existing rules of law or equity which are applicable only to covenants which touch and concern land and which result in the benefit or burden of such covenants running with the land, shall not apply to covenants entered into after this Bill comes into force. Thus ordinary restrictive covenants as to land (which are to be superseded by land obligations) will no longer be effective. The subsection does not affect rules as to the running of covenants with land which are laid down by statute (see paragraphs 24.25 *et seq* of the Report). It also has no effect on the rule in *Halsall v. Brizell* (see paragraphs 3.40 and 24.31 to 24.33 of the Report). This implements paragraphs 24.8 and 24.9 of the Report.

### *Subsection (2)*

3. This makes it clear, however, that the general rule does not apply to covenants between landlord and tenant. These will continue to run with the land let and with the reversion (as they do at present), except in so far as they impose obligations on land not included in the land let. (Where a lease does impose an obligation on land not included in the demise, it must in future be imposed as a land obligation. This effectively reverses the rule in *Dartstone Ltd. v. Cleveland Petroleum Co. Ltd.*: see paragraphs 3.54 and 3.55 of the Report), and implements paragraphs 24.11 to 24.24 of the Report.

### *Subsection (3)*

4. This prevents the future creation of estate rentcharges. The advent of positive land obligations coupled with the development scheme (clauses 2 and 3) and the charge facility (clause 11) renders the future creation of estate rentcharges unnecessary. This implements paragraphs 24.39 to 24.42 of the Report.

*Land Obligations*

(4) Where, before the commencement of this Act—

- (a) a person has assumed an obligation (whether contractually or otherwise) to enter into or cause another person to enter into a restrictive covenant affecting land, or
- (b) a building or letting scheme operates in relation to land divided into units so as to render restrictive covenants affecting the units mutually enforceable among the estate owners of the units,

any restrictive covenant entered into after that commencement in pursuance of the obligation or the scheme shall be treated for the purposes of subsection (1) above and the provisions for registration of land charges as having been entered into before the commencement of this Act and shall have effect accordingly.

(5) Where, before the commencement of this Act—

- (a) a person has assumed an obligation (whether contractually or otherwise) to create or cause another person to create an estate rentcharge, or
- (b) a scheme of development of any land divided into units involving the imposition of estate rentcharges on the units has been implemented by (or by a binding contract for) the imposition of at least one rentcharge,

any estate rentcharge created after the commencement in pursuance of the obligation or the scheme shall be treated for the purposes of subsection (3) above and the provisions for registration of land charges as having been created before the commencement of this Act and shall have effect accordingly.

(6) Where an obligation to enter into a restrictive covenant or estate rentcharge will arise on the exercise of an option to purchase land or a right of pre-emption over land and the option or right is exercised the obligation shall, for the purposes of subsections (4) and (5) above, be treated as having been assumed when the option or right of pre-emption was granted.

1925 c. 21. (7) In subsections (4) and (5) above the “provisions for registration  
1972 c. 61. of land charges” means the provisions of the Land Registration Act 1925 or the Land Charges Act 1972, as amended by this Act, which are applicable to restrictive covenants and rentcharges.

## EXPLANATORY NOTES

### *Clause 19 (continued)*

#### *Subsection (4)*

5. This provides that where, before the Bill comes into force, there exists either an obligation to enter into a restrictive covenant or an operative building scheme relating to a development which has not been completed, any resultant restrictive covenant entered into after the Bill comes into force will be treated as if the Bill had not yet come into force.

6. This is a transitional provision. So far as it relates to obligations (to enter into restrictive covenants) which exist at the time the Bill comes into force, it is necessary so as to allow pre-existing bargains to be carried out. So far as it concerns building schemes, if some plots have been sold off with the use of restrictive covenants imposed by the scheme, the developer must be able to use restrictive covenants for the remainder of the development.

7. The significance of restrictive covenants being treated as if they were entered into before the Bill had come into force is partly so that the provisions of subsection (1) will not prejudice them and partly to enable them to be registered as restrictive covenants under the Land Charges Act 1972 or the Land Registration Act 1925. (See Sch. 3, paras. 7(2) and 4(7).)

This provision implements paragraphs 24.35 to 24.38 of the Report.

#### *Subsections (5) to (7)*

8. Subsection (5) is also a transitional provision and protects certain estate rentcharges created after the Bill comes into force in the same way (and for the same purpose) as subsection (4) protects certain restrictive covenants entered into after that time. This implements paragraphs 24.44 and 24.45 of the Report.

9. Subsection (6) is a further transitional provision and deals with the case where:

- (a) before the Bill comes into force there has been granted an option to purchase land or a right of pre-emption over land, and
- (b) an obligation to enter into a restrictive covenant or estate rentcharge will arise upon the exercise of that option or right of pre-emption, and
- (c) that option or right of pre-emption is exercised after the Bill comes into force.

In such a case the obligation will be treated (for the purpose of subsections (4) and (5)) as assumed as at the date of the grant of the option or right of pre-emption. This implements a recommendation in paragraphs 24.36 and 24.44 of the Report.

10. Subsection (7) explains the scope of "provisions for registration of land charges" in subsections (4) and (5).

*Land Obligations*

Power to  
convert  
existing  
freehold flat  
schemes.

**20.—(1)** This section applies to any building in relation to which the following conditions are satisfied at the commencement of this Act, that is to say—

- (a) the building is divided into two or more separate units;
- (b) the division is such that at least one unit is situated above or below another;
- (c) the freehold estates in two or more of those units are vested in different persons; and
- (d) the building is used wholly or mainly for residential purposes.

(2) On an application to the court under this section the court may by order dispense, in whole or in part, with any need for the consent or participation of—

- (a) a person having an interest in a unit comprised in a building to which this section applies, or
- (b) a person having an interest in land within the curtilage of such a building,

to or in the making and implementation of a development scheme to be applied to land which consists of or includes that building or that building and its curtilage.

(3) An application may be made under this section with respect to a proposed development scheme by any person having a legal estate in land the whole or part of which is included in the land to which the scheme is to be applied.



## EXPLANATORY NOTES

### *Clause 20*

1. This clause contains provisions enabling development schemes to be applied to existing freehold flat and maisonette schemes in cases where it is not possible or practicable for this to be done by the "clubbing together" referred to in note 3 to clause 2. Sanction of the court will be necessary in each case. The clause is fully explained in Part XX of the Report.

### *Subsection (1)*

2. This limits the operation of these provisions to buildings which, at the commencement of the Act, are divided into separate units, the freehold estates in at least two of which are held by different people. At least one unit must be situated above or below another and the building must be used wholly or mainly for residential purposes.

3. These limitations reflect the main purpose of the clause; that is, to "rescue" existing schemes involving freehold flats etc. There is no need to "rescue" future freehold flat schemes since developers will have the benefit of the other provisions in the Bill as to the setting up of development schemes. This implements paragraph 20.16 of the Report.

### *Subsection (2)*

4. This provision, which contains the main thrust of the clause, empowers the court to dispense with any need for the consent or participation of certain persons (respondents) in relation to the making and implementation of a development scheme. Such respondents might include not only the freehold flat owners themselves but also their mortgagees and tenants and anyone else with interests in the building and its curtilage. This implements paragraph 20.28 of the Report.

5. Respondents will be those persons, whose consent or participation is necessary for the making or implementation of the development scheme, who do not consent or participate as the case may be. Persons whose consent or participation is necessary and who are willing to take the necessary action will not be respondents but will join in the scheme voluntarily. This matter is referred to in paragraphs 20.18 and 20.32 of the Report.

### *Subsection (3)*

6. This provides that the application to the court may be made by anyone with a legal estate in any part of the land to which the proposed development scheme is to apply. This implements paragraph 20.17 of the Report.

*Land Obligations*

(4) The court shall not make an order under this section in relation to a development scheme to be applied to land which consists of or includes a building to which this section applies or such a building and its curtilage unless the court is satisfied—

- (a) that the conditions mentioned in subsection (1) above continue to be satisfied in relation to the building (as well as having been satisfied at the time mentioned in that subsection); and
- (b) that the principal objective of the scheme is the removal of some factor which tends to prejudice the maintenance in good repair or the amenities of the whole or part of the building or the disposability of the freehold estate in a unit comprised in the building; and
- (c) that that objective cannot be achieved without the consent to, or participation in, the making or implementation of the scheme of the person in respect of whose consent or participation the order is sought; and
- (d) that any prejudice caused to that person by the making of the order does not substantially outweigh the benefits which will accrue to that person from the making and implementation of the scheme; and
- (e) that the provisions of the scheme and of the development obligations to be imposed in pursuance of it are, in all the circumstances, reasonable.

## EXPLANATORY NOTES

### *Clause 20 (continued)*

#### *Subsection (4)*

7. This provision ensures that the court shall not make any order unless it is satisfied that certain conditions have been fulfilled. These conditions are:

- (a) That the requirements of subsection (1) are still satisfied, and
- (b) That the main objective of the proposed scheme is to remove a factor which tends to prejudice the maintenance or the amenities of a building or the disposability of the freehold estate in at least one unit within the building. The most obvious example of a prejudicial factor is the non-running of the existing positive covenants, and
- (c) That this main objective cannot be achieved without the consent or participation of the respondents, and
- (d) That any prejudice caused to the respondents by the making of the order does not substantially outweigh the benefits which they will derive through the scheme, and
- (e) That the provisions of the scheme (and of the development obligations to be imposed pursuant to it) are reasonable in all the circumstances.

This implements paragraphs 20.22 to 20.27 of the Report.

*Land Obligations*

- (5) An order under this section may be made either—
- (a) in relation to the proposed development scheme with respect to which the order is sought; or
  - (b) with the consent of every person whose consent or participation is necessary and not the subject of an order under this section, in relation to that scheme with such modifications as the court may direct.
- (6) An order made under this section in relation to a proposed development scheme may contain such incidental and supplemental provision as the court may think fit and, without prejudice to the generality of the foregoing or to rules of court, such an order may—
- (a) contain such directions with respect to the making and implementation of the scheme (including the imposition and registration of development obligations binding the person whose consent or participation is the subject of the order) as the court may think necessary for giving effect to the order;
  - (b) in any case where the need for a person's participation in the making of a development scheme is dispensed with, contain such directions as the court may think appropriate as to the application to that person of any makers' obligations to be imposed by the scheme; and
  - (c) provide for the extinguishment or modification of rights, powers and duties (whether arising under covenants or otherwise) which are wholly or, as the case may be, partly to be superseded by the scheme and by the obligations to be imposed in pursuance of the scheme.

## EXPLANATORY NOTES

*Clause 20 (continued)*

*Subsections (5) and (6)*

8. Subsection (5) provides that the court's order may be made not only in relation to the development scheme as proposed but also to that scheme as modified by the court. This latter point reflects the possibility that the court may require modifications before making an order. In such a case, however, the consent must be obtained of all non-repondents whose consent or participation would ordinarily be required for the setting up of that scheme as modified. This implements paragraph 20.29 of the Report.

9. Subsection (6) provides that the court's order may contain such incidental and supplementary provisions as the court thinks fit including any directions necessary for the making and implementation of the scheme and the extinguishment or modification of rights, powers and duties superseded by the new scheme. This implements paragraph 20.31 of the Report.

*Land Obligations*

Consequential  
amendment  
of the law.

**21.—(1)** The enactments specified in Schedule 3 to this Act shall have effect subject to the amendments there specified, being amendments consequential on the preceding provisions of this Act.

(2) The Lord Chancellor may by order made by statutory instrument make such modifications of any existing statutory provision as appear to him to be appropriate—

- (a) in consequence of the provisions of section 19 above; or
- (b) to secure that any existing statutory provision authorising the creation of restrictive or positive covenants affecting land, with or without related amendments of other enactments, should have effect to authorise the creation of corresponding land obligations and to make consequential amendments of other enactments (including enactments contained in this Act); or
- (c) to secure that any existing statutory provision having effect, in whatever terms, in relation to interests in land or any particular description of interest in land (including a restrictive covenant) should have effect in the like manner, or, if he thinks fit, should not have effect, in relation to land obligations.

(3) A statutory instrument made in the exercise of the power conferred by subsection (2) above shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(4) In subsection (2) above “existing statutory provision” means any enactment contained in a public general or local Act and passed before, or in the same Session as, this Act.

## EXPLANATORY NOTES

### *Clause 21*

1. This clause deals with changes to the existing law that are necessary in the light of the Bill.

### *Subsection (1)*

2. Subsection (1) introduces the statutory amendments contained in Schedule 3. This implements paragraph 24.49 of the Report.

### *Subsections (2) to (4)*

3. Subsection (2) empowers the Lord Chancellor to amend existing statutory provisions (including those in local Acts) either in consequence of clause 19 or so that:—

- (a) any such provision authorising the creation of restrictive or positive covenants may thenceforth authorise the creation of corresponding land obligations, or
- (b) any such provision that relates to any particular interest in land may thenceforth be treated as relating (or treated as not relating) to land obligations.

4. This provision reflects the fact that there exists a very large number of enactments (including many local Acts) which, since they authorise the creation of covenants or relate to particular interests in land, may need amending to take into account land obligations. Whilst the amendments contained in Schedule 3 take into account the most important cases, it is necessary for the Lord Chancellor to have power to amend other statutory provisions as and when the need arises.

5. These provisions implement paragraph 24.52 of the Report.

*Land Obligations*

Model forms, etc. **22.** The Lord Chancellor may, as respects land obligations and development schemes, prepare and publish—

- (a) such model forms of instruments, and
- (b) such examples,

as he thinks fit for use for the purposes of this Act.



## EXPLANATORY NOTES

### *Clause 22*

This clause implements recommendations contained in Part XXII of the Report by empowering the Lord Chancellor to prepare and publish model forms of instruments and examples relating to land obligations and development schemes. The power would cover the preparation not only of the legal "skeleton" but also of the substantive content of those forms. The promulgation of such forms would be for voluntary, rather than compulsory, use.

*Land Obligations*

Interpretation  
etc.

23.—(1) In this Act—

- “access obligation” means an obligation falling within paragraph 12 of Schedule 1 to this Act;
- “the benefiting estate”, in relation to a neighbour obligation, has the meaning given by section 4(3)(b);
- “the burdened estate”, in relation to a land obligation has, subject to subsections (5) and (9) of section 4 above, the meaning given by subsection (2)(c) of that section;
- “the court” means the High Court or a county court;
- “covenant” includes condition or agreement;
- “the development land” in relation to a development scheme, means the land to which, in accordance with section 2 above, the scheme is applicable;
- “development obligation” has the meaning given by section 1(2)(b) above;
- “development scheme” means a development scheme within the meaning of section 2 above and, in relation to a development obligation, means the development scheme in pursuance of which the obligation is or was imposed;
- “dominant land”, in relation to a neighbour obligation, has the meaning given by section 1(2)(c) above;
- “maker’s obligation” in relation to a development scheme, means an obligation imposed on the maker of the scheme;
- “manager”, in relation to a development scheme, has the meaning given by section 3(1) above and, in relation to a development obligation, means the manager of the development scheme in pursuance of which the obligation is or was imposed;
- “manager’s obligation”, in relation to a development scheme which provides for a manager, means an obligation imposed on the manager of the scheme;
- “neighbour obligation” has the meaning given by section 1(2)(a) above;
- “positive obligation” means an obligation falling within paragraph 2, 3, 6, 7 or 8 of Schedule 1 to this Act;
- “reciprocal payment obligation” means an obligation falling within paragraph 4 or 9 of Schedule 1 to this Act;
- “registrar” means the Chief Land Registrar and “registered land” has the same meaning as in the Land Registration Act 1925;
- “reimbursement obligation” means an obligation falling within paragraph 10 or 11 of Schedule 1 to this Act;
- “restrictive obligation” means an obligation falling within paragraph 1 or 5 of Schedule 1 to this Act;
- “services” includes the taking out and keeping up of a policy of insurance;

1925 c. 21.

## EXPLANATORY NOTES

### *Clause 23*

This clause provides for the interpretation of various expressions used in the Bill, explains (subsection (2)) that expressions used in the Bill have the same meaning as in the Law of Property Act 1925 (except where the context otherwise requires) and shows (subsection (3)) that any requirement of the Bill for documents to state, describe or identify any matter can be satisfied by reference to another document. See for example, clause 4(2)(b) and the note thereto.

*Land Obligations*

“servient land” in relation to a land obligation, has the meaning given by section 1(1) above; and

“works” includes works of construction, improvement, maintenance and repair (including decorative repair).

1925 c. 20. (2) Except in so far as the context otherwise requires, expressions used in this Act and in the Law of Property Act 1925 have the same meaning in this Act as in that Act.

(3) It is hereby declared that a requirement imposed in relation to any document by this Act to state, describe or identify any matter shall be capable of being complied with by an appropriate reference in the document in question to another document in which the matter is, as the case may be, stated, described or identified.

EXPLANATORY NOTES

*Land Obligations*

Application to  
the Crown.

24. [This Act shall bind the Crown].

## EXPLANATORY NOTES

### *Clause 24*

The reason for this provision being in square brackets is explained in paragraph 25.7 of the Report.

*Land Obligations*

Short title,  
commence-  
ment and  
extent.

**25.—(1)** This Act may be cited as the Land Obligations Act 1983.

**(2)** This Act shall come into force on 1st January 1985.

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



## EXPLANATORY NOTES

### *Clause 25*

1. This clause provides for the short title of the Act, its commencement and extent.

2. The reference in subsection (2) to 1 January 1985 as the commencement date is considered in paragraphs 25.2 to 25.6 of the Report.

*Land Obligations*  
**SCHEDULES**

Section 1

**SCHEDULE 1**

**THE SCOPE OF LAND OBLIGATIONS**

**PART I**

**OBLIGATIONS CAPABLE OF SUBSISTING AS NEIGHBOUR OBLIGATIONS**

*Restrictive*

1. An obligation imposing a restriction which benefits the whole or part of the dominant land on the doing of some act on the servient land.

*Positive*

2. An obligation requiring the carrying out on the servient land or the dominant land of works which benefit the whole or any part of the dominant land.

3. An obligation requiring the provision of services for the benefit of the whole or any part of the dominant land.

*Reciprocal payment*

4. An obligation requiring the making of payments in a specified manner (whether to a person of a specified description or otherwise) on account of expenditure which has been or is to be incurred by a person in complying with an obligation falling within paragraph 2 or 3 above.

**PART II**

**OBLIGATIONS CAPABLE OF SUBSISTING AS DEVELOPMENT OBLIGATIONS**

*Restrictive*

5. An obligation imposing a restriction which benefits the whole or part of the development land on the doing of some act on the servient land or any other part of the development land.

*Positive*

6. An obligation requiring the carrying out on the servient land or any other part of the development land of works which benefit the whole or any part of the development land.

7. An obligation requiring the provision of services for the benefit of the whole or any part of the development land.

8. An obligation requiring the servient land to be used in a particular way which benefits the whole or any part of the development land.

## EXPLANATORY NOTES

### *Schedule 1*

1. This Schedule specifies the types of obligation that can subsist as land obligations. It also contains supplementary provisions.

### *Part I*

2. This Part specifies the types of obligation that can subsist as *neighbour* obligations. These are restrictive, positive and reciprocal payment obligations. This implements the recommendations contained in paragraph 6.6 of the Report, where they are fully explained.

### *Part II*

3. This Part specifies the types of obligation that can subsist as *development* obligations. These are restrictive, positive, reciprocal payment, reimbursement and access obligations. This implements the recommendations contained in paragraph 6.10 of the Report. (A discussion of these obligations is contained in paragraphs 6.11 to 6.14 of the Report.)

## *Land Obligations*

SCH. 1

### *Reciprocal payment*

9. An obligation requiring the making of payments in a specified manner (whether to a person of a specified description or otherwise) on account of expenditure which has been or is to be incurred by a person in complying with an obligation falling within paragraph 6 or 7 above.

### *Reimbursement*

10. An obligation requiring the making of payments to the manager of a development scheme in respect of expenditure incurred or to be incurred in the provision of works or services provided by him in pursuance of the scheme.

11. An obligation requiring the making of payments to the manager of a development scheme by way of contribution towards fees, costs or expenses charged or incurred by him in discharging his functions under the scheme, which costs and expenses may include costs or expenses incurred in accordance with the scheme in connection with any application (whether made by the manager or another) to the court or the Lands Tribunal under any provision of this Act.

### *Access*

12. An obligation requiring access to the servient land to be afforded, in such circumstances and for such purposes as may be specified, to the manager, to any servant or agent of his or to any other person authorised in writing by him.

## PART III

### SUPPLEMENTARY PROVISIONS

13. Where, for the purpose of facilitating the enforcement of a land obligation, the instrument creating the obligation makes provision conferring a right to information or to the production for inspection or copying of any document, that provision shall be capable of taking effect for that purpose as part of the obligation.

14. Where, for the purpose of enabling a person for the time being entitled to enforce a land obligation to ascertain whether it is being or has been complied with, the instrument creating the obligation makes provision conferring a right to enter and inspect the servient land, that provision shall be capable of taking effect for that purpose as part of the obligation.

## EXPLANATORY NOTES

### *Schedule 1 (continued)*

#### *Part III*

4. This Part allows a land obligation to be supplemented by ancillary provisions which will themselves be capable of taking effect as part of the obligation. This implements recommendations contained in paragraphs 6.15 and 6.16 of the Report.

5. Paragraph 13 permits an ancillary provision giving a right to information or the production of documentation.

6. Paragraph 14 permits an ancillary provision giving a right to enter and inspect the servient land to check compliance with a land obligation.

*Land Obligations*

SCH. 1

15. Where, for the purpose of enabling a person for the time being entitled to enforce a land obligation requiring the carrying out of any works himself to carry out such of those works as fail to be carried out in accordance with the obligation, the instrument creating the obligation makes provision for a right to enter the servient land and there to carry out those works, that provision shall be capable of taking effect for that purpose as part of the obligation.

16. Where, for the purpose of providing the means of meeting expenditure to be incurred in complying with a land obligation falling within any of paragraphs 2, 3, 6 and 7 above, the instrument creating the obligation requiring the making of the payments on account or the obligation requiring the carrying out of the works or the provision of the services on account of which the payments are made makes provision for the keeping of a fund out of which the expenditure is to be met, that provision shall be capable of taking effect for that purpose as part of the obligation requiring the making of the payments or, as the case may be, as part of the obligation requiring the carrying out of the works or the provision of the services.

17. Where a land obligation requires the making of payments and the instrument creating the obligation makes provision imposing an obligation to pay interest if default is made in making the payments in accordance with the obligation that provision shall be capable of taking effect as part of the obligation to make the payments.

18. Where, for the purpose of facilitating the enforcement of a reciprocal payment obligation, a reimbursement obligation or a land obligation requiring the carrying out of works, the instrument creating the obligation contains provision imposing that obligation as a charge on the servient land—

- (a) in the case of a reciprocal payment or reimbursement obligation, to the extent of any amount which may from time to time be outstanding under the obligation (whether by way of principal or interest), or
- (b) in the case of an obligation requiring the carrying out of works, to the extent of any amount from time to time recoverable in respect of the obligation in accordance with section 10(7) of this Act,

that provision shall be capable of taking effect in accordance with section 11 of this Act as part of the obligation.

19. Any provision that is capable of taking effect as part of an obligation by virtue of any of the preceding provisions of this Part of this Schedule if made in the instrument creating the obligation shall be capable of taking effect as part of it if made by way of variation.

20. For the purpose of determining whether a land obligation is a restrictive obligation or a positive obligation regard shall be had to the substance rather than the form of the obligation; and accordingly, without prejudice to the generality of the foregoing, a land obligation which is expressed as an obligation requiring the use of the servient land in a particular way is a restrictive obligation if, on its true construction, it is no more than an obligation requiring the land not to be used in any other way.

## EXPLANATORY NOTES

### *Schedule 1 (continued)*

7. Paragraph 15 permits an ancillary "self-help" provision giving a right to a person entitled to enforce a land obligation requiring the carrying out of works to enter the servient land and carry out the works himself.

8. Paragraph 16 permits an ancillary provision relating to the keeping of a fund out of which works or services expenditure is to be met.

9. Paragraph 17 permits an ancillary provision relating to the charging of interest in the event of non-compliance with an obligation to make payments.

10. Paragraph 18 permits an ancillary provision relating to a charge on the servient land for moneys due as a result of non-compliance with reciprocal payment, reimbursement and "works" obligations. See clause 11.

11. Paragraph 19 provides that such ancillary provisions may be contained not only in the instrument creating the land obligation but also in a subsequent variation.

12. Paragraph 20 provides that regard must be had to substance rather than form in deciding whether an obligation is restrictive or positive.

THE EXERCISE OF THE POWER OF THE LANDS TRIBUNAL  
UNDER SECTION 17

PART I

RELEVANT GROUNDS

*Obsolescence, harmlessness or agreement*

1.—(1) The following grounds are relevant to every description of land obligation and to any provision of a development scheme imposing a manager's obligation, that is to say—

- (a) that, by reason of changes in the character (in the case of any land obligation) of the servient land or (in the case of a development obligation or a provision of a development scheme) of the development land or (in any case) of the locality in which the servient land or the development land is situated or in other circumstances of the case that the Lands Tribunal may think material, the obligation or, as the case may be, the provision is obsolete;
- (b) that the proposed modification, extinguishment or deletion of the obligation or provision in question will not injure the persons having the benefit of the land obligation or, as the case may be, entitled to enforce the manager's obligation;
- (c) that the persons of full age and capacity for the time being, or from time to time, having the benefit of the land obligation or, as the case may be, entitled to enforce the manager's obligation have agreed, either expressly or by implication (by their acts or omissions), to the release or modification of the land obligation or manager's obligation.

(2) For the purposes of this paragraph the persons having the benefit of a development obligation that is enforceable by the manager shall be the persons (if any) by whom the obligation is enforceable in accordance with section 6(5) or (6) of this Act and the persons whom enforcement by the manager is intended to benefit, but not the manager himself.



## EXPLANATORY NOTES

### *Schedule 2*

1. This Schedule sets out in Part I the “relevant grounds” on which the Lands Tribunal should be able to exercise its powers (see clause 17) to extinguish or modify land obligations or development schemes. Some of these grounds are closely modelled on those contained in section 84 of the Law of Property Act 1925. Part II of the Schedule specifies matters to be taken into account by the Tribunal before exercising these powers.

### *Paragraphs 1 to 6*

2. The “relevant grounds” are as follows:

- (i) *Obsolescence*: that the obligation has become obsolete for the specified reasons (paragraph 1).
- (ii) *Harmlessness*: that the change proposed will not injure the persons having the benefit of the obligation (paragraph 1).
- (iii) *Agreement*: that the persons of full age and capacity with the benefit of the obligation have agreed to the change proposed (paragraph 1).

These first three grounds correspond with existing grounds in section 84 (paragraphs (a), (c) and (b) respectively of subsection (1)) and will apply to *all* land obligations as well as to managers' obligations under a development scheme. This implements paragraphs 18.35 to 18.40 of the Report.

## *Land Obligations*

### *Removal of a prejudicial factor*

SCH. 2

2.—(1) The following ground is relevant to the provisions of a development scheme other than any provision imposing a maker's obligation and to any development obligation imposed in pursuance of a development scheme, that is to say, that the proposed modification or the proposed deletion or extinguishment—

- (a) removes some factor which, in relation to the whole or part of the development land, tends substantially to prejudice the fulfilment of the general purposes of that scheme; and
- (b) is for the benefit of the development land or any part of it; and
- (c) is such that any prejudice caused thereby to any person who is bound by a development obligation imposed in pursuance of that scheme does not substantially outweigh the benefits accruing therefrom to that person.

(2) Without prejudice to section 17(5) of this Act, the reference in sub-paragraph (1) above to the removal of any factor includes a reference to the repair of any omission and references in section 17 of this Act and in this paragraph to the modification of any of the provisions of a development scheme shall, for the purposes of this paragraph, include a reference to adding to those provisions and to imposing a development obligation in pursuance of that scheme.

### *Impeding reasonable user*

3.—(1) The following ground is relevant to any land obligation which is a restrictive obligation, access obligation or positive obligation, that is to say, that—

- (a) the continued existence of the obligation would impede some reasonable user of the land for public or private purposes or, as the case may be, would, unless modified, so impede such user; and
- (b) the obligation, in impeding that user, either does not secure to any person having the benefit of the obligation any practical benefits of substantial value or advantage to him or is contrary to the public interest; and
- (c) money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the extinguishment or modification of the obligation.

(2) Sub-paragraph (2) of paragraph 1 above applies for the purposes of this paragraph as it applies for the purposes of that paragraph.

## EXPLANATORY NOTES

### *Schedule 2 (continued)*

- (iv) *Removal of a prejudicial factor*: that the change proposed will:
- (a) remove some factor which tends substantially to prejudice the fulfilment of the general purposes of a development scheme; and
  - (b) benefit the whole or part of the development land; and
  - (c) be such that any prejudice thereby caused to anyone bound by a development obligation will not substantially outweigh the benefits it will give him (paragraph 2).

This ground will apply to the provisions of a development scheme (but not makers' obligations), managers' obligations and development obligations. It will cover the repair of omissions and will permit the imposition of new provisions and obligations. This implements paragraphs 18.41 to 18.44 of the Report.

- (v) *Impeding reasonable user*: that the obligation impedes some reasonable user of the land and that:
- (a) in impeding that user, the obligation secures no practical benefit of substantial value (or else is contrary to the public interest), and
  - (b) money will be an adequate compensation for any loss or disadvantage arising from the change proposed (paragraph 3).

This ground corresponds with the existing ground in section 84(1)(aa) and (1A) and will apply to any land obligation other than one to pay money. This implements paragraphs 18.45 and 18.46 of the Report.

## *Land Obligations*

SCH. 2

### *Change of circumstances*

4.—(1) The following ground is relevant to positive obligations and to any provision of a development scheme imposing a manager's obligation, that is to say, that as a result of changes in circumstances since the creation of the land obligation or, as the case may be, the manager's obligation, performance of the land obligation or of the manager's obligation has—

- (a) ceased to be reasonably practicable; or
- (b) become unreasonably expensive when compared with the benefits that its performance will secure to persons having the benefit of the land obligation or, as the case may be, entitled to enforce the manager's obligation.

(2) Sub-paragraph (2) of paragraph 1 above applies for the purposes of this paragraph as it applies for the purposes of that paragraph.

5. The following ground is relevant to any provision of a development scheme other than a provision imposing a maker's obligation or a manager's obligation, that is to say, that changes in circumstances since the making of that provision have caused it—

- (a) to become obsolete; or
- (b) to cease to be reasonably practicable to give effect to; or
- (c) to give rise to expense which is unreasonable when compared with the advantages of the provision.

### *Consequential changes*

6. The following ground is relevant to any provision of a development scheme, to any development obligation and to any neighbour obligation which is a reciprocal payment obligation, that is to say, that modification or deletion of the provision, or modification or extinguishment of the obligation, is made necessary in consequence of any order which the Lands Tribunal is to make under section 17 of this Act on any of the grounds specified in paragraphs 1 to 5 above.

## EXPLANATORY NOTES

### *Schedule 2 (continued)*

- (vi) *Change of circumstances* (positive and managers' obligations only): that, as a result of changes in circumstances, performance of the obligation has:
  - (a) ceased to be reasonably practicable; or
  - (b) become unreasonably expensive when compared with the benefits it gives (paragraph 4).

This implements paragraphs 18.47 to 18.49 of the Report.

- (vii) *Change of circumstances* (affecting development schemes): this ground is substantially similar to the previous ground and applies to any provision of a development scheme (except managers' and makers' obligations) (paragraph 5).

This implements paragraphs 18.50 and 18.51 of the Report.

- (viii) *Consequential changes*: that the change proposed is made necessary by any order of the Tribunal made on any of the other grounds (paragraph 6). This is concerned with inter-related matters and thus applies to any provision of a development scheme, to any development obligation and to any neighbour reciprocal payment obligation.

This implements paragraphs 18.52 and 18.53 of the Report.

*Land Obligations*

PART II

MATTERS TO BE TAKEN INTO ACCOUNT

SCH. 2

7. In determining—

- (a) whether a restrictive obligation, an access obligation or a positive obligation ought to be extinguished or modified,
- or
- (b) whether the case of a particular land obligation falls within paragraph 3 of this Schedule,

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 the context in which the land obligation was created and any other material circumstances.

8. In determining whether a provision of a development scheme should be modified or deleted or whether a land obligation imposed in pursuance of such a scheme should be modified or extinguished, the Lands Tribunal shall have regard in particular—

- (a) to the effect of the proposed modification, deletion or extinguishment on the development land as a whole; and
- (b) to whether the proposed modification, deletion or extinguishment is consistent with the general purposes of the scheme.

## EXPLANATORY NOTES

*Schedule 2 (continued)*

*Paragraphs 7 and 8*

3. These specify the matters to be taken into account by the Tribunal before exercising its powers under clause 17.

4. Paragraph 7 requires the Tribunal, in deciding:

- (a) whether a restrictive, access or positive obligation should be extinguished or modified on any ground, or
- (b) whether any land obligation falls within the "impeding reasonable user" ground,

to take account of local planning matters and any other material circumstances (including the context in which the particular obligation was created). This provision reflects section 84(1B), and implements paragraphs 18.55 and 18.56 of the Report.

5. Paragraph 8 requires that the Tribunal should, in deciding whether to modify any provision of a development scheme or any development obligation, have particular regard to:

- (a) the effect of the change proposed on the development land as a whole, and
- (b) whether the change is consistent with the general purposes of the scheme.

This reflects the inter-dependence of units comprised in a development and implements paragraph 18.57 of the Report.

*Land Obligations*

Section 21.

SCHEDULE 3

CONSEQUENTIAL AMENDMENTS

1925 c. 18.

*The Settled Land Act 1925*

1.—(1) In section 21(2) of the Settled Land Act 1925 (equitable interests that are not overreachable) in paragraph (iii) after the word “easement” there shall be inserted the words “land obligation”.

(2) In section 38 of that Act (tenants for life’s powers of sale) in paragraph (i) after the word “easement” there shall be inserted the words “land obligation” and in paragraph (iii) after the word “easement” in each place where it occurs shall be inserted the words “land obligation”.

(3) In section 39(2) of that Act (consideration for sale) after the word “easement” there shall be inserted the words “land obligation”.

(4) In section 41 of that Act (tenants for life’s powers of leasing) after the word “easement” there shall be inserted the words “land obligation”.

(5) In section 49(1) of that Act (incidental powers of sale) in paragraph (a) after the word “easement” there shall be inserted the words “land obligation”.

(6) In section 50 of that Act (incidental powers on dealing separately with surface and minerals) after the word “easement” there shall be inserted the words “land obligation”.

(7) In section 51(1) of that Act (powers to grant options) after the word “easement” there shall be inserted the words “land obligation”.

(8) In section 52 of that Act (powers as to surrenders etc.) in subsection (1) after the word “easement” there shall be inserted the words “land obligation” and in subsection (5) after the word “covenants” in each place where it occurs there shall be inserted the words “land obligations”.

(9) In section 53(1) of that Act (power to accept leases) after the word “easement” there shall be inserted the words “land obligation”.

(10) In section 54(1) of that Act (power to grant water rights etc.) after the word “easement” there shall be inserted the words “land obligation”.

(11) In section 55(1) of that Act (power to grant land etc. for public or charitable purposes) after the word “easement” there shall be inserted the words “land obligation”.

(12) In section 57(2) of that Act (power to grant land etc. for small holdings etc.) after the word “easement” there shall be inserted the words “land obligation”.



## EXPLANATORY NOTES

### *Schedule 3*

This Schedule contains statutory amendments that are necessary in consequence of the Bill. It is not, however, an exhaustive list of the amendments that may prove necessary. See note 4 to clause 21.

*Land Obligations*

SCH. 3

(13) In section 58 of that Act (power to compromise claims etc.) in subsection (1) after the word "easements" there shall be inserted the words "land obligations" and in subsection (2) after the word "easement" there shall be inserted the words "land obligation".

(14) In section 59(2) of that Act (power to give consents) after the words "successors in title" there shall be inserted the words "or to any land obligation requiring the licence, consent or approval of the person entitled to enforce the land obligation" and after the words "and the covenant" there shall be inserted the words "or land obligation".

(15) In section 61(2) of that Act (meaning of "consideration" in ss. 58 to 60) after the word "easement" in paragraphs (c) and (e) there shall be inserted the words "land obligation".

(16) In section 68 of that Act (dealing with tenants for life) in subsection (1)(a) after the word "easement" there shall be inserted the words "land obligation" and in subsection (2) after the word "covenants" there shall be inserted the words "or land obligations".

(17) In section 72 of that Act (completion of transactions by conveyance) in subsection (1) after the word "easements" there shall be inserted the words "land obligations" and in subsection (2) after the word "easements" in each place where it occurs there shall be inserted the words "land obligations".

(18) In section 73(1) of that Act (investment of capital money) in paragraph (xii) after the word "easement" there shall be inserted the words "land obligation".

(19) In section 74(1) of that Act (power to acquire land subject to certain incumbrances) after the word "easement" there shall be inserted the words "land obligation".

(20) In section 80 of that Act (application of damages etc. received for breach of covenant) in subsections (1), (2) and (4) after the word "covenant" there shall be inserted the words "or land obligation".

(21) In section 117(1)(ix) of that Act (definition of "land") after the word "easement" there shall be inserted the words "land obligation".

1925 c. 19.

*The Trustee Act 1925*

2. In section 68(6) of the Trustee Act 1925 (definition of "land") after the word "easement" there shall be inserted the words ", land obligation".

1925 c. 20.

*The Law of Property Act 1925*

3.—(1) In section 1(2)(a) of the Law of Property Act 1925 (interests capable of subsisting at law), after the word "easement" there shall be inserted the words ", land obligation".

EXPLANATORY NOTES

*Land Obligations*

SCH. 3

(2) In subsection (3) of section 2 of that Act (equitable interests that are not overreachable)—

(a) in paragraph (ii) after the word “land” there shall be inserted the words “(being either a covenant or agreement entered into before the commencement of the Land Obligations Act 1983 or a covenant or agreement to which section 19(1) of that Act does not apply)”;

(b) after paragraph (iii) there shall be inserted the following paragraph—

“(iiiA) a land obligation taking effect as an equitable interest;”.

(3) In section 62 of that Act (general words implied in conveyances), after the word “easements”, in each place where it occurs, there shall be inserted the words “, land obligations,”.

(4) In section 78 of that Act (benefit of covenants relating to land), after subsection (2) there shall be inserted the following subsection—

“(3) This section does not apply to covenants to which section 19(1) of the Land Obligations Act 1983 (benefit and burden of certain covenants not to run with the land), applies.”.

(5) In section 79 of that Act (burden of covenants relating to land), at the end of subsection (3) there shall be inserted the words “but does not apply to covenants to which section 19(1) of the Land Obligations Act 1983 (benefit and burden of certain covenants not to run with the land) applies.”.

(6) In section 80 of that Act (covenants binding land), at the end of subsection (3) there shall be inserted the words “and section 19(1) of the Land Obligations Act 1983 (benefit and burden of certain covenants not to run with the land) does not apply to the covenant”.

(7) In section 84(1) of that Act (power to discharge or modify restrictive covenants), after the words “building thereon” there shall be inserted the words “(not being a restriction arising under a land obligation or a development scheme within the meaning of the Land Obligations Act 1983)”.

(8) In section 101(2) of that Act (powers incidental to mortgagee’s power of sale)—

(a) in paragraph (i) for the word “covenant” there shall be substituted the words “land obligation”; and

(b) in paragraph (ii) after the word “easements” in each place where it occurs there shall be inserted the words “land obligations”.

(9) In section 187(2) of that Act (easements in common), after the word “easement” in each place where it occurs there shall be inserted the words “, land obligation”.

(10) In section 200(4) of that Act (saving for registration of certain interests), at the end of paragraph (c) there shall be inserted “; or

EXPLANATORY NOTES

*Land Obligations*

SCH. 3 (d) any land obligation.”

(11) In section 205(1)(ix) of that Act (meaning of “land”), after the word “easement” there shall be inserted the words “, land obligation”.

1925 c. 21.

*The Land Registration Act 1925*

4.—(1) In section 3 (viii) and (xxiv) of the Land Registration Act 1925 (meaning of “land” and “registered land”), after the word “easement” there shall be inserted the words “, land obligation”.

(2) In section 18(1)(c), (d) and (e) and (2) of that Act (powers to create easements etc. out of freeholds) after the word “easement” in each place where it occurs there shall be inserted the words “, land obligation”.

(3) In section 19(2) of that Act (completion by registration), in proviso (c) after the word “easement” there shall be inserted the words “, land obligation” and at the end the words “or the entry of notice of the benefit of a development obligation (within the meaning of the Land Obligations Act 1983) against any land”.

(4) In section 21(1)(b), (c) and (d) of that Act (power to create easements etc. out of leaseholds) after the word “easement” in each place where it occurs there shall be inserted the words “, land obligations”.

(5) In section 22(2) of that Act (completion by registration), in proviso (c) after the word “easement” there shall be inserted the words “, land obligation” and at the end the words “or the entry of notice of the benefit of a development obligation (within the meaning of the Land Obligations Act 1983) against any land”.

(6) In section 46(b) of that Act (notifying on register of determination or variation of easements etc.), after the word “easement” there shall be inserted the words “, land obligation”.

(7) In subsection 50(1) of that Act (notifying on register benefit of restrictive covenants) after the words “user of registered land” there shall be inserted the words “and entered into before the commencement of the Land Obligations Act 1983”.

(8) After section 50 of that Act there shall be inserted the following section

“Manner of giving effect to court orders etc. as to land obligations.

50A.—(1) Where a land obligation of which notice is entered on the register is extinguished, modified or dealt with by an order of the court or the Lands Tribunal under the Land Obligations Act 1983, or otherwise, then either the entry shall be cancelled or reference made to the order or, if the order imposes a new land obligation, notice thereof entered in the register and in every case a copy of the order or judgment shall be filed at the registry.

EXPLANATORY NOTES

### *Land Obligations*

SCH. 3

(2) Where the court refuses to grant some relief available under section 10 of the Land Obligations Act 1983 for enforcing a land obligation the registrar shall, if the court so directs, take such action on the register (whether by cancellation of an entry, the entry of a notice, the making of a reference or otherwise) as the court directs and cause a copy of the order or judgment to be filed at the registry".

(9) In section 59(5) of that Act (registration of land charges etc.) after the words "does not include" there shall be inserted the words "a legal land obligation or".

(10) In section 70(2) of that Act (notification on register of burden of easements etc. created by instrument), after the word "easement" there shall be inserted the words ", land obligation".

(11) In section 72 of that Act (existing easements etc. becoming appurtenant on registration of land) after the word "easement" in each place where it occurs there shall be inserted the words "land obligation".

(12) In section 83(11) of that Act (accrual of right to claim indemnity), in proviso (c), after the words "in respect of" there shall be inserted the words "a land obligation or" and after the words "six years from" the words "the contravention of the obligation or".

(13) In section 108 of that Act (capacity of proprietor of land to accept the benefit of easements etc.), after the word "easement" there shall be inserted the words ", land obligation".

(14) In section 144(1) of that Act (power to make general rules), in paragraphs (xvii), (xviii) and (xx) after the word "easement" there shall be inserted the words ", land obligation" and in paragraph (xix) after the word "otherwise" there shall be inserted the words "or to any such land obligation".

1957 c. 56.

### *The Housing Act 1957*

5. In section 165 of the Housing Act 1957 (power of court to order conversion of house into several tenements) before the word "restrictive" there shall be inserted the words "land obligation or".

1962 c. 37.

### *The Building Societies Act 1962*

6. In Schedule 5 to the Building Societies Act 1962 (permitted classes of prior charges), after paragraph 2 there shall be inserted the following paragraph:—

"3. Any charge having effect in accordance with section 11 of the Land Obligations Act 1983 (charges to facilitate the enforcement of certain land obligations)."



## EXPLANATORY NOTES

*Land Obligations*

SCH. 3

*The Land Charges Act 1972*

1972 c. 61.

7.—(1) In section 2 of the Land Charges Act 1972 (the register of land charges) in subsection (4) (Class C land charges) after the first paragraph (iv) there shall be inserted the following paragraph:—

“(v) a land obligation, whether legal or equitable”.

(2) In section 2 of that Act in subsection (5) (Class D land charges) at the end of the second paragraph (ii) (definition of restrictive covenants) there shall be inserted the words “and before the commencement of the Land Obligations Act 1983”.

(3) In section 16(1) of that Act (power to make general rules), in paragraph (b), after the words “restrictive covenant” there shall be inserted the words “, land obligation”.

(4) In section 17(1) of that Act, in the definition of “land”, after the word “easement” there shall be inserted the words “, land obligation”.

1980 c. 58.

*The Limitation Act 1980*

8. After section 9 of the Limitation Act 1980 there shall be inserted the following section:—

“Actions for  
breach of a  
land obligation  
etc.

9A. No action in respect of a contravention of a land obligation subsisting by virtue of any provision of Part I, II or III of Schedule 1 to the Land Obligations Act 1983 or of any obligation imposed by a development scheme made under that Act shall be brought after the expiration of six years from the date of the contravention.”

**EXPLANATORY NOTES**

## APPENDIX B

### PART I

#### **List of persons and organisations who wrote to us commenting on Working Paper No. 36.**

Chancery Bar Association  
General Council of the Bar  
The Law Society  
Institute of Legal Executives  
Northern Ireland Land Law Working Party on Appurtenant Rights  
Office of the Director of Law Reform (N. Ireland)  
Scottish Law Commission  
Building Societies Association  
Country Landowners Association  
Incorporated Society of Valuers and Auctioneers  
Lloyd's  
National Association of Property Owners  
Royal Institution of Chartered Surveyors  
Crown Estate Office  
Department of the Environment  
H. M. Land Registry  
National Coal Board  
Post Office  
Craven Water Board  
Thornhill Estate Corporation  
Mr. B. Anstey  
Mr. E. W. Baigent, Legal Executive  
Mr. A. H. Charlesworth, Solicitor  
Professor J. F. Garner  
Dr. J. Gilchrist Smith, Solicitor  
Mr. L. Harris  
Mr. G. L. Leigh, Solicitor  
Mr. N. E. Osborn, Solicitor  
The Hon. Mr. Justice Pennycuik  
Mr. T. M. Reid, Solicitor  
Mr. S. Robinson  
Professor H. W. R. Wade

### PART 2

#### **List of persons and organisations who assisted us with comments in the course of the consultation referred to in paragraph 1.8 of this Report.**

Senate of the Inns of Court and the Bar  
The Law Society  
Building Societies Association  
Department of the Environment  
Department of Industry  
Department of Trade

H. M. Land Registry  
Lands Tribunal  
Lord Chancellor's Department  
Treasury Solicitor's Department  
The Right Honourable Lord Wilberforce  
Association of County Councils  
Association of District Councils  
Association of Metropolitan Authorities  
Mr. E. M. M. Hatfull, Solicitor  
House-Builders Federation  
Housing Corporation  
Peterborough Development Corporation  
Volume Builders Group