Easements and covenants; reform a possibility

The law of easements and covenants is complex and for many years has been regarded as in need of radical reform. Earlier this year the Law Commission published a consultation paper, "Easements, Covenants and Profits à Prendre", proposing significant changes that would simplify and modernise this area of the law. The reforms would change the way easements and covenants can be created, modified, discharged, extinguished and detected.

The practical implications of easements and covenants for all landowners cannot be underestimated. Land Registry figures suggest approximately two-thirds of freehold titles are subject to at least one easement and approximately four-fifths to one or more restrictive covenants. These interests are fundamental to the use and development of property. The Government's targets for the delivery of new homes makes it concerned to ensure development is not stymied. Balancing the protection of private rights against achievement of public policy objectives lies at the heart of this review.

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The case for reform

The existing law causes problems for buyers and developers of land. For example:

- There is no mechanism by which existing easements (unlike covenants) can be discharged or modified, and it is extremely difficult, some would say virtually impossible, to persuade a court that an easement should be extinguished because it has been abandoned;
- Some easements, such as a right to light, can be created too easily or inadvertently;
- Since 2003 the number of easements that will bind a buyer of land without having been registered has been reduced, but nonetheless it is still possible for an easement to be acquired informally and these types of easement are very hard for a prospective buyer to detect because they are not registered;
- The burden of positive covenants does not automatically bind successors and so complex schemes have to be used to achieve this result;
- It can be difficult to identify the land that benefits from a restrictive covenant, which in turn makes it difficult to have the covenant discharged or modified;
- The benefit of a restrictive covenant does not need to be entered on the register, and this too makes it difficult to identify the beneficiary;
- The original parties to the covenant remain liable for its performance even after they have ceased to own any of the relevant land.

Easements

The Commission considers a myriad of possibilities for both easements acquired by prescription and those acquired by implication. It sets out cogent arguments in favour of a complete abolition of the acquisition of any new easement by prescription, but its preferred option appears to be to see a new statutory scheme introduced which allows for only one (rather than the current three) means of obtaining an easement by prescription.

The proposal would require "qualifying use" by the claimant for a prescriptive period of 20 years. Qualifying use would mean use without force, stealth or consent, so, as now, a landowner could forestall the acquisition of an easement by giving consent to an activity. Completion of the acquisition of the easement would only occur upon registration at the Land Registry where it is possible a landowner's veto could be introduced. This is analogous to an adverse possession claim where notice of the claim must be served on the registered owner before title can be lost; a prescriptive easement could not be acquired and registered without the landowner over whose land the right is claimed receiving a notice which would entitle it to object to the registration.

A further proposal under consideration is expansion of the jurisdiction of the Lands Tribunal so that it can hear applications to discharge or modify easements in addition to such applications in respect of covenants. This is not a new suggestion. The lack of statutory jurisdiction to discharge or modify easements has long attracted criticism, especially as many other Commonwealth jurisdictions have introduced reforms that address this.

Covenants

Most notable among the proposals is that of replacing restrictive and positive covenants by a system of "Land Obligations".

Most notable among the proposals is that of replacing restrictive and positive covenants by a system of "Land Obligations". A Land Obligation could be restrictive, preventing acts from being carried out on property, or positive, for example obliging works to be carried out or services provided at a property. Restrictive Land Obligations would most likely have only one requirement, being that they must be created for the benefit of identified land. As positive Land Obligations could require expenditure they have the potential to be more oppressive. Therefore these may require greater regulation, perhaps in the form of an exhaustive list limiting the types that could be created.

If Land Obligations were introduced it would almost certainly become compulsory to create them by reference to a plan identifying the benefited and burdened land. Failure to do this would mean the Land Obligation was not validly created.

Will it happen?

The consultation closes on 30 June. A report and draft Bill are expected in 2010. The desirability of reform is uncontroversial. However, some erosion of private rights to enable public policy to be satisfied appears inevitable and naturally this will be contentious. The Government's desire to implement the Housing Green Paper is likely to provide the will for reforms which see the law of easements and covenants change to make modification or discharge of both easier where the purpose is to facilitate the development of land.

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