

Law Commission Consultation Paper, Covenants and Profits a Pendre

The purpose of the proposed reform is unclear and the Birmingham Law Society is uncertain that the proposals will improve the current complex legal positions. As with many long established laws, they may seem cumbersome in a modern society but they have worked for a very long time and there is a substantial body of case law around them that gives certainty to a position. With a radical reform, much of that, if not all will become irrelevant and the public will be left to litigate at its own expense to re-establish the certainties which will inevitably be lacking in new legislation.

By way of example in Birmingham, there are many freehold properties with rights of way to the rear of the house. The rights are not referred to in the freehold title, but as nearly all of these houses were originally leasehold, the right of way is contained within the leasehold title. The problem occurs when the titles have been merged, as this is the point at which the appurtenant easements are lost unless they are recreated as freehold easements, which is rare. Although there is a need to simplify the procedure for creating an easement as it is difficult to register a new easement at the Land Registry, if the Land Tribunals powers were increased to cover easements as well as covenants, that could help the present system.

In relation to restrictive covenants, there should be clarification in some form relating to an entry on the register where the original or copy of the document creating the covenants was not sent on first registration. It is common for conveyancers to request an indemnity policy even if the covenants/document are more than one hundred years old, and this is a waste of the client's money and the practitioner's time. A check on the neighbouring property's title can sometimes contain the extract of the document in question, but again this creates unnecessary work, and perhaps there could be a cut off time after which the covenants could not be enforced.

In conclusion, the process could be simplified but a wholesale reform may produce more harm and complexity than if seeks to alleviate.