Northern Ireland
Law Commission
promoting law reform in Northern Ireland

Supplementary Consultation Paper Land Law

NILC 3 (2010)

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SUPPLEMENTARY CONSULTATION PAPER

LAND LAW

Adverse Possession
Ground Rents
Covenants after Redemption

NILC 3 (2010)

Northern Ireland Law Commission
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NORTHERN IRELAND LAW COMMISSION

BACKGROUND

The Northern Ireland Law Commission ("the Commission") was established in 2007 following the recommendations of the Criminal Justice Review Group (2000). Its purpose is to keep the law of Northern Ireland under review and make recommendations for its systematic development and reform.

The Commission was established under the Justice (Northern Ireland) Act 2002. The Act requires the new Commission to consider any proposals for the reform of the law of Northern Ireland referred to it. The Commission must also submit to the Secretary of State programmes for the examination of different branches of the law with a view to reform. The Secretary of State must consult with the Lord Chancellor, the First and deputy First Minister and the Attorney General before approving any programme submitted by the Commission.

MEMBERSHIP

The Northern Ireland Law Commission consists of a Chairman, who must hold the office of judge of the High Court, and four Commissioners, one of whom must be a person from outside the legal professions. The Chairman and Commissioners are appointed on a part-time basis. There is also a Chief Executive, who is appointed from the legal professions.

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THE LAND LAW REFORM PROJECT

The Land Law Reform Project ("the Project") was referred to the Northern Ireland Law Commission in April 2007 by the Department of Finance and Personnel. The Land and Property Services Agency funds two of the legal posts within the project. The Commission gratefully acknowledges this support.

In May 2008 the Commission received a reference from the Minister of Finance and Personnel to undertake a review of the law of ground rent redemption and covenants as part of the Project.

THE NORTHERN IRELAND LAW COMMISSION

LAND LAW REFORM

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EXECUTIVE SUMMARY

CHAPTER 1. INTRODUCTION

Chapter 1 explains the background and sets the context for the proposed reforms. The Commission believes it is now time to modernise land law and conveyancing law in Northern Ireland because the system is both outdated and outmoded. There is no doubt that land law is long overdue for reform and that there is an urgent need for modernisation. The law must be more easily understood and accessible.

Land law in Northern Ireland is based on ancient concepts and a legislative framework that is essentially 19th century in origin, with some parts dating to a much earlier period. Although at one time similar systems would have existed throughout the common law world, extensive reforms have taken place in most other jurisdictions.

It is difficult to define precisely the boundaries of land law or conveyancing law. Nevertheless the Commission has had to work out its priorities and accordingly has concluded that it will focus on the areas of substantive land law that are most in need of reform and modernisation.

The following topics were selected as subject headings which can form a coherent framework of land law and accordingly are the subject of the Consultation Paper on Land Law which was published by the Commission in June 2009: feudal tenure, estates in land, easements and other rights over land, future interests, settlements and trusts, concurrent interests, mortgages, contracts for the sale of land and conveyances. The topics of adverse possession, ground rents and covenants after redemption, are the subject of this separate Supplementary Consultation Paper.

The Commission recognises that there are other topics that might be regarded as coming under the general umbrella of land law and which are worthy of consideration in their own right. After due reflection and taking into account the fact that there are limited resources available, the Commission came to the conclusion that these areas of law could not sensibly or properly be covered by the present Project. Examples of these areas are: land registration,

business tenancies, agricultural tenancies, housing, planning, flats and apartments, wills and succession, the general law of trusts and vesting, compulsory acquisition and compensation. Further, the Commission has not sought to venture into the realms of social policy or to interfere with particular case law issues.

The law and procedures relating to multi unit (domestic) developments (apartments) is in the Commission's First Programme of Law Reform.

CHAPTER 2. ADVERSE POSSESSION

In Chapter 2 the Commission considers the doctrine of adverse possession which in recent times has become one of the most controversial aspects of land law and the conveyancing system. Adverse possession is concerned with actions to recover land from someone who has been in possession of it (the squatter) by the dispossessed owner (the owner of the paper title) after the expiry of a time-limit. It also arises where the squatter is trying to establish title. The doctrine is governed by the Limitation (Northern Ireland) Order 1989 (No. 1339 (N.I. 11)) and, where the land is registered, by provisions in the Land Registration Act (Northern Ireland) 1970 (c. 18). Upon expiry of the time-limit the right of the owner of the paper title to bring an action to recover it is barred and the title is extinguished.

Various controversies surround the doctrine, relating both to its fundamental features and the technical rules relating to particular applications of it. The question of the compatibility of the doctrine with the European Convention of Human Rights has been answered in the affirmative by *J A Pye (Oxford) Ltd. v UK* (2006) 43 EHRR 43; (2007) 46 EHRR 1083. Questions have been raised as to the rationale and justification of adverse possession in a modern system of land ownership. Issues of morality, good faith and compensation have been considered as well as human rights. There has also been debate surrounding the degree of possession which must be shown by the squatter and the relevance of the intentions or motives of each party. Another issue concerns the consequences of application of the doctrine, in particular the effect of extinguishment of the paper owner's title and the extent to which a statutory transfer or parliamentary conveyance of that title takes place in favour of the squatter.

After examining the debates surrounding the doctrine, the Commission concludes that the main justification for its existence lies in its function in dealing with conveyancing problems and that it should apply to both registered and unregistered land in the same way. The Commission believes that it would not be appropriate to import ethical considerations into the operation of the doctrine of adverse possession. Any such attempt would be likely to be very contentious and would militate against the aims of clarity and certainty in the law which the Commission is seeking to promote.

The Commission considered the possibility of recommending a "veto" scheme, similar to that which is being introduced in England and Wales by the Land Registration Act 2002 (c. 9), whereby the owner of the paper title has two years in which to bring proceedings to retrieve their position after the squatter has applied to the Land Registry for registration of ownership. The Commission has considerable reservations about the introduction of such a scheme, ultimately deciding that it is not appropriate to recommend such a substantial change to the operation of the doctrine.

The Commission thought about the possibility of payment of compensation to the owner of the dispossessed title but took the view that the introduction of any such proposals would be very controversial. Adverse possession involves so many different scenarios and each of the parties can potentially have such different status that it would be no easy task to assess qualification on merit and any proposals would necessarily be very complex.

As the Limitation (Northern Ireland) Order 1989 does not define adverse possession, it has been left to the courts to work out its meaning. The subject was reviewed by the House of Lords in *J A Pye (Oxford) Ltd. v Graham* [2000] Ch 676 (HC), [2001] Ch 804 (CA) and [2003] 1 AC 419 (HL) which, confirming views expressed in earlier cases, laid down clear principles for judging whether a claimant had been in adverse possession. This involves establishing factual possession comprising an appropriate degree of physical control, together with an intention to possess the land to the exclusion of all others. The confirmation by the House of Lords in *Pye* of the requirements for adverse possession has since been applied without apparent difficulty by the courts in Northern Ireland. Accordingly, it seems to the Commission that it would not be appropriate to interfere with this aspect of the law by legislation.

The operation of the doctrine of adverse possession can be said to work in a purely negative way in that the title of the paper owner is extinguished. There is no parliamentary conveyance or statutory transfer of the owner's title to the squatter. In practice, the Land Registry treats the squatter as if there has been a transfer and the squatter is registered as the owner of the paper owner's folio (instead of opening a new folio). The Commission proposes to confirm that this should be the case in law and that legislation should be drafted accordingly.

The Commission is not inclined to propose that there should be any alteration to the limitation period, which is currently 12 years in general, but 30 years where the owner is the Crown and 60 years where the claim relates to foreshore. The Commission is not convinced that it would be appropriate to recommend any changes to the doctrine as it operates in relation to mortgagees in possession (12 years), to unincorporated associations (in relation to their legal status which is outside the scope of the Project), or to encroachment (because it is anomalous and difficult to discern). In the case of purchasers in possession under an uncompleted contract, the Commission is inclined to suggest clarification of the position to the effect that adverse possession can be claimed and that time runs when permission to occupy ends or the full purchase price is paid, whichever is the earlier.

In formulating the proposals for reform, particular attention is paid to those which have been implemented or proposed in other jurisdictions, especially neighbouring ones. The Commission has also taken into account the fact that previous Reports in Northern Ireland have contained recommendations for changes in the law.

CHAPTER 3. GROUND RENTS

In Chapter 3 the Commission is concerned with proposals for reform and extinguishment of ground rents. The Minister for Finance and Personnel referred a review of the law relating to ground rent redemption and covenants to the Commission in May 2008 as part of the Project. It is of primary importance to deal with the issue of ground rents in order to achieve a more straightforward model of title and ownership. Chapter 3 sets out the history of reform in Northern Ireland to date and describes the difficulties with the operation of the current scheme. Although the problem of complex pyramid titles and

a wide variation in the size of ground rents is unique to Northern Ireland, it is interesting to look at other jurisdictions to see how they resolved their problems with similar concepts. The Commission also considers the proposals for the reform of ground rents in the context of the European Convention on Human Rights, reaching the conclusion that compatibility should not present any particular difficulties.

The Commission has given considerable thought to devising a scheme which has the potential to be cheaper, faster and easier to administer. The Commission is inclined to propose that the new scheme would apply in general to dwelling houses and would not be administered through the Land Registry, but would be self-administered by the parties themselves. Consequently there should be no fees or costs other than those which the parties choose to incur of their own volition, such as agents fees. The Commission believes that it is quite disproportionate that a rent owner or superior landlord should have a right of re-entry or forfeiture over a house with a substantial capital value in order to protect a small ground rent. Accordingly it proposes that ground rent should no longer be secured on the land and should become a contract debt. As such it would be a personal matter between the rent payer and the rent owner.

One of the most radical proposals made by the Commission is the suggestion to draw a distinction between small ground rents and larger ones, because it is not easy to devise a one-size fits all scheme. Although any dividing line is by its nature arbitrary, the Commission suggests a cut-off point of either £10, £20 or £50 per annum to begin with and is seeking the views of consultees as to which amount is preferred. It is proposed that any ground rents below that threshold should be extinguished on an appointed day. Compensation would be due by the rent payer to the rent owner, but the ground rent would be extinguished whether or not the compensation was paid. It would be the responsibility of the rent owner to take steps to obtain the compensation and there would be a lead in period of sufficient time to enable this to take place – three years is suggested. On the date on which the ground rent is extinguished, the rent payer would automatically acquire statutory ownership equivalent to a fee simple absolute and the estate of the rent owner would be discharged.

In the case of the larger ground rents above the threshold of £10, £20 or £50 per annum the Commission proposes that compulsory redemption should be triggered by events such as the sale of land and other changes of ownership. On the occurrence of a triggering event the ground rent would be automatically extinguished.

The Commission considers it is important that the rent owner should be compensated by the rent payer for the loss of income from the ground rent and the superior interest in the land, as is the case under the existing scheme. After much deliberation as to the most appropriate formula for calculating the compensation, it is suggested that it should be based on a simple multiplier. The figure of nine times the annual ground rent is suggested but, because is recognised that this may not adequately compensate the rent owner, consultees are asked if they would prefer a higher multiplier, such as twelve. The onus of requesting and obtaining the compensation would be placed on the rent owner instead of the rent payer. After the appointed day the ground rent would be completely extinguished and the rent owner would lose the rights to the compensation as well.

The Commission has given some thought to the issue of intermediate interests and rents, but has not reached any conclusion as to how they should be dealt with. It raises the question whether or not intermediate rents should be extinguished simultaneously with the occupational ground rents and sets out the possible consequences of the alternative scenarios.

In cases of ground rents below a specified amount which have not been paid for six years or more, it is proposed that both the right to demand the rent and the title of the rent owner would be extinguished.

CHAPTER 4. COVENANTS AFTER REDEMPTION

In Chapter 4 the Commission seeks to address the problem of meeting one of the expectations of the rent payer on redemption of the ground rent in providing an end product of statutory ownership, equivalent to a fee simple absolute with a reduced number of covenants surviving. Chapter 4 begins with a detailed outline of the general law of covenants and their enforceability. It also details the history of proposals for reform in Northern Ireland and then draws comparisons with the law of covenants in neighbouring jurisdictions.

The Commission summarises the problems with the current position before going on to consider the purpose of restrictive covenants and their function in the context of redemption of ground rents.

In order to make progress with the general policy of simplification of titles and of making ownership of land a more straightforward concept, the Commission raises the question as to whether there is a need to address the problem of the extensive range of restrictive covenants which continue to survive redemption. The Commission considers different types of covenant in turn in order to determine which of the categories should survive and continue to subsist for the benefit of the person whose estate is enlarged into statutory ownership. In summary, the Commission is of the opinion that covenants which are of practical benefit or which protect or enhance amenity should be retained. The Commission separately considers the question of enforcement of covenants by owners of neighbouring land and the former freeholder. It is inclined towards the view that it is important to define the proximity of the benefitted land in relation to the burdened land and looks at the question of definition by measurement in this context.

The Commission considers the position of covenants under a building or development scheme and the criteria which should apply in such cases. It also raises issues concerning the possibility of a register of covenants and the way in which it might operate. The Commission draws attention to the position in Scotland where surviving covenants can be preserved and registered under different headings. For example, neighbour burdens, community burdens and service or facility burdens.

CHAPTER 1. INTRODUCTION

A TIME FOR CHANGE

1.1 This is a Supplementary Consultation Paper which deals with the subjects of adverse possession, ground rents and covenants after redemption. It follows the main Consultation Paper on Land Law Reform (NILC 2 (2009)).

1.2 It has long been recognised that the land law of Northern Ireland is complex, outdated and opaque. Although reform of land law has been on the agenda since the late 1960s, a major reform programme has still to be undertaken and the law has become increasingly out of touch with contemporary needs. The Commission believes that it is time to focus on modernisation of land law. A systematic rationalisation of both legislation and the general law will be necessary in order to achieve a modern and relevant framework for land law and the conveyancing process.

1.3 Many of the basic concepts derive from the feudal system introduced to England in the 11th century and exported to Ireland in the late 12th century. Much of the legislation relating to the subject was enacted centuries ago and, as is explained in Chapter 11 of the Consultation Paper, since the 13th century there have been at least seven different legislative regimes enacting legislation for Northern Ireland.

1.4 Although at one time similar systems would have existed throughout the common law world, extensive reforms have taken place in most other jurisdictions. In England and Wales, sweeping legislative changes took place in 1925 which have been followed by further updates, most recently in 2002 by legislation which has provided for modernisation of land registration. Extensive reforms have also now taken place in Scotland following devolution in 1998 and in the Republic of Ireland major modernisation has recently been undertaken and the Land and Conveyancing Law Reform Act 2009 came into effect on the 1st December 2009. These developments are discussed throughout the following chapters.

1.5 The Commission acknowledges that reform of the law which underpins the conveyancing process is only one part of the wider development of modern systems which will update and improve the transfer of property in general. The move towards more straightforward concepts of land law together with an improved conveyancing process may also help to generate inward investment and to encourage diversification of land use. This is particularly important in the purchase of commercial property which tends to be more valuable but is also structured in a more complex fashion. Currently any large national or international companies interested in coming to Northern Ireland are surprised to find that the law in this jurisdiction remains so antiquated and has not been modernised.

1.6 Now that devolution has come to Northern Ireland again, there is an opportunity to create an agenda and to deal with matters which are of particular concern to this jurisdiction. The Commission should endeavour to bring the law into line with both economic reality and popular perception. Uniquely, there is the chance to make a difference and it should be grasped.

BACKGROUND TO THE PROJECT

1.7 There have already been three major reports reviewing the substantive law of Northern Ireland and making proposals for reform:

(1) Report of the Committee on the Registration of Title to Land (1967) ("the **1967 Lowry Report**")

(2) Survey of the Land Law of Northern Ireland (1971) ("the **1971 Survey**")

(3) Final Report of the Land Law Working Group (1990) ("the **1990 Final Report**")

1.8 Following the **1971 Survey** and the **1990 Final Report**, some new legislative provisions were introduced in a piecemeal fashion but there have been no comprehensive measures.

1.9 That legislation includes:

(1) Leasehold (Enlargement and Extension) Act (Northern Ireland) 1971

(2) Property (Northern Ireland) Order 1978

(3) Registration (Land and Deeds) (Northern Ireland) Order 1992

(4) Property (Northern Ireland) Order 1997

(5) Ground Rents Act (Northern Ireland) 2001

(6) Compulsory Registration of Title (Northern Ireland) Orders 1995 - 2002

(7) Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2005

SCOPE OF THE LAND LAW REFORM PROJECT

1.10 This is the first major reform project for the Commission. The Project was originally set up in the Office of Law Reform before being transferred to the Commission on its establishment. After the project was transferred, the Commission subsequently received a reference from the Minister of Finance and Personnel to undertake a review of the law of ground rents and covenants as part of the Project.

1.11 The Commission published a Consultation Paper on Land Law in June 2009. As it explained in that Consultation Paper, there are many aspects to Northern Ireland's land law but the Commission takes the view that some limits must be imposed on the Project. This is not because the Commission considers that certain areas of land law do not merit reform, but rather that resources are finite. Although it is difficult to define precisely the boundaries of land law or conveyancing law, the Commission has had to work out its priorities. The Consultation Paper concentrates on the basic structure of the land law and conveyancing system.

AREAS COVERED IN THE PROJECT

1.12 The following topics were selected as the areas of land law and conveyancing law which the current Project would cover:

(1) Feudal tenure

(2) Estates in land

(3) Easements and other rights over land

(4) Future interests

(5) Settlements and trusts

(6) Concurrent interests

(7) Mortgages

(8) Contracts for the sale of land

(9) Conveyances

(10) Adverse possession

(11) Ground rents

Topics (1) – (9) were covered by the Consultation Paper on Land Law.

Topics (10) and (11) are covered in this Supplementary Consultation Paper.

The Commission recognises that there are also many other topics which might be regarded as coming within the scope of the Project but which have for various reasons been excluded from it. All of these are well defined areas of law which could be considered under the general umbrella of land law and which are worthy of consideration as separate subjects in their own right. After considering the available resources, the Commission has concluded that the following areas of law cannot be covered by the Project:

(1) Land registration

(2) Landlord and tenant

(3) Housing

(4) Business tenancies

(5) Agricultural tenancies

(6) Wills and succession

(7) General law of trusts

(8) Powers of attorney

(9) Flats and other interdependent buildings (commonhold/condominium ownership). The law and procedures relating to multi unit (domestic) developments (apartments) is in the Commission's First Programme of Law Reform.

(10) Planning and environmental law

(11) Vesting, compulsory acquisition and compensation

It should also be noted that some of these areas, such as land registration and succession, have been the subject of recent legislation.

PHASES OF THE PROJECT

1.14 The Project is divided into five phases:

(1) Publication of the Consultation Paper on Land Law (NILC 2 (2009)) (June 2009)

(2) A consultation process on the questions raised and the proposals made by the Consultation Paper on Land Law (June 2009 – September 2009)

It included:

(a) Review of the substantive law relating to land law and the conveyancing process with regard to its need for reform

(b) Topic by topic approach to the subject

(c) Identification of anomalies and anachronisms

(d) Screening of all statutes currently in force affecting land law and the conveyancing process. It contained a chapter on legislation which is an important strand of the Project.

(3) Publication of this Supplementary Consultation Paper on Land Law (NILC 3 (2010)) (February 2010)

(4) A consultation process on this Supplementary Consultation Paper (February 2010 – April 2010)

(5) Publication of a Final Report containing recommendations on the issues raised by both Consultation Papers and including a draft Bill to give effect to the conclusions reached.

THE CONSULTATION PROCESS

1.15 This Supplementary Consultation Paper sets out and explains the possibilities for reform in relation to the topics of adverse possession, ground rents and covenants after redemption. In some instances, the Commission identifies the policy options which it prefers and in others, it simply poses a series of questions. The Commission would very much welcome the views and thoughts of consultees on the issues raised: including comments on both the general principles and the particular questions raised in each of the chapters. The Commission will then carefully consider the responses and suggestions received before including its recommendations in the Final Report with the draft legislation to implement them.

1.16 The publication of this Supplementary Consultation Paper marks the completion of the third phase of the Project and prepares the ground for the consultation process which forms the fourth phase.

1.17 Any queries regarding the proposals and responses to the questions raised may be made either in writing or electronically and sent to: -

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1.18 The consultation will run until 30 April 2010. All responses should therefore be submitted by that date as the Commission cannot guarantee that it will be able to consider responses received after that date. Responses will be acknowledged on receipt.

1.19 An electronic version of this document is available for download on the Northern Ireland Law Commission website www.nilawcommission.gov.uk. Hard copies will be posted out on request.

If this format does not meet your needs, please contact the Commission.

CONFIDENTIALITY OF RESPONSES

1.20 Unless individual respondents specifically indicate that they wish their response to be treated in confidence or the Commission considers it appropriate to do so, then all responses will be treated as public documents in accordance with the Freedom of Information Act 2000 (c. 36). Comments may be attributed and a list of all respondents' names may be included in any Final Report published by the Commission. If you wish your response to be treated in confidence, please advise the Commission accordingly.

EQUALITY IMPACT ASSESSMENT

1.21 The Commission, in having regard to its statutory duties contained within Section 75 of the Northern Ireland Act 1998 (c. 47), has carried out an Equality Screening Analysis (Appendix B) to assess if the policy proposals for reform of the law of adverse possession and the law of ground rent redemption and related covenants in Northern Ireland potentially impact on equality of opportunity and/or good relations obligations. There was no evidence to suggest that any one section 75 group would be more affected than any other vis à vis the policy. The outcome of this screening exercise indicated that the policy is unlikely to have any significant adverse implications for equality of opportunity and/or good relations and that none of the proposals within this Supplementary Consultation Paper require further consideration and impact assessment.

REGULATORY IMPACT ASSESSMENT

1.22 The Commission has also carried out a Regulatory Screening Analysis (Appendix C) to assess if the policy proposals for reform of the law of adverse possession and the law of ground rent redemption and related covenants in Northern Ireland potentially impact on businesses, charities and community bodies. There was no evidence to suggest that businesses, charities and community bodies would be affected more than any other sector of the community vis à vis the policy. Furthermore, it was difficult to quantify any costs and or savings which would arise from the policy proposals. When viewed as a whole, the policy proposals will have a major positive benefit for the conveyancing process and will contribute greatly to its clarity, efficiency and modernisation. This considerable positive benefit will outweigh any perceived negative impacts. The outcome of this screening exercise indicated that the policy is unlikely to have any significant implications for these sectors of the community and that none of the proposals within this Supplementary Consultation Paper require further consideration and impact assessment.

CHAPTER 2. ADVERSE POSSESSION

INTRODUCTION - DOCTRINE OF ADVERSE POSSESSION

2.1 The doctrine of adverse possession has become in recent times one of the most controversial aspects of land law and the conveyancing system. It is part of the law of limitation of actions, which is a statutory regime currently governed by the Limitation (Northern Ireland) Order 1989 (No. 1339 (N.I. 11)) and, where the land is registered land, provisions in the Land Registration Act (Northern Ireland) 1970 (c. 18). Under this regime, persons initially entitled to bring an action against other persons who have injured them or committed some civil wrong against them, will become barred from pursuing the action in court if proceedings are not instituted before the time-limit prescribed by the Order expires. Adverse possession is concerned with actions to recover land and the provisions governing such actions are set out in Part III of the Order.

2.2 As is common in jurisdictions which recognise the doctrine of adverse possession, upon expiry of the time-limit, not only is the right of the dispossessed owner of the land (the "title owner") to bring an action to recover it barred but also that title is lost or "extinguished". As we shall also discuss later (see paras. 2.66 – 2.70) one of the controversial aspects of the law is the precise effect of such "extinguishment", but what is clear is that the adverse possessor (or "squatter" as such a person is often, albeit somewhat pejoratively, referred to) does obtain as a consequence some title to the land. What lay persons often find difficult to understand is that this title is acquired by a person who has been committing a civil wrong (i.e. trespassing on someone else's land) and who is not required to pay or otherwise compensate the dispossessed title owner for the land lost. It is not surprising, then, that this topic has been the subject of voluminous literature and many attempts at legislative reform in jurisdictions around the world.

2.3 A study of this literature, including papers and reports issued by law reform agencies and legislative reforms, reveals that there are two main branches to the controversies. One branch deals with what might be referred to as "fundamental features" of the doctrine. The other deals with more "technical rules" relating to particular applications of the doctrine. Both branches of controversy were illustrated by the notorious *Pye* case which arose recently in England. As the case was fought through the domestic courts, ultimately to the House of Lords, much discussion took place over the technical requirements for "adverse" possession (see *J A Pye (Oxford) Ltd. v Graham* [2000] Ch 676 (HC), [2001] Ch 804 (CA) and [2003] 1 AC 419 (HL); see further on this paras. 2.59 – 2.65 below). However, there had also been raised, particularly in the High Court, a much more fundamental issue, namely whether the doctrine of adverse possession was compatible with the European Convention on Human Rights, as applied to the UK by the Human Rights Act 1998 (c. 42). This matter was subsequently pursued before the European Court of Human Rights and was eventually resolved by a majority decision of the Grand Chamber in favour of compatibility (*J A Pye (Oxford) Ltd. v UK* (2006) 43 EHRR 43; (2007) 46 EHRR 1083; see further paras. 2.37 – 2.38 below).

FUNDAMENTAL FEATURES

2.4 Controversy over the fundamental features of the doctrine of adverse possession spans a broad spectrum of issues. Some address its very rationale and question its justification in a modern system of land ownership. They raise issues of morality and good faith, human rights and compensation (see, e.g. Anderson "Compensation for Interference with Property" (1999) 6 EHRLR 543; Cobb and Fox "Living outside the system: the (im)morality of urban squatting after the Land Registration Act 2002" (2007) 27(2) LS 236; Dixon "Adverse Possession and Human Rights" [2005] Conv 345; Goodman "Adverse Possession of Land – Morality and Motive" (1970) 33 MLR 281). Various jurisdictions have questioned whether acquisition of title to land by adverse possession is compatible with a registration of title system, the hallmarks of which are principles like the register being

conclusive as to the state of the title and acting as a "mirror" for purchasers and others seeking to acquire an interest in the land (see, e.g. Dixon "The Reform of Property Law and the Land Registration Act 2002: a Risk Assessment" [2003] Conv 136; Griggs "Possessory Title in a System of Title by Registration" (1999) 21 Adel L Rev 157; Hogg "The Relation of Adverse Possession to Registration of Title" (1915) 15 J Soc Comp Legis (ns) 83; McCrimmon "Whose Land is it Anyway? Adverse Possession and Torrens Title" in Grinlinton (ed.) *Torrens in the Twenty-first Century* (LexisNexis Wellington 2003); O'Connor "Registration of Title to Land in England and Australia: A Theoretical and Comparative Analysis" in Cooke (ed.) *Modern Studies in Property Law*, Volume 2 (Hart, Oxford, 2003)). Such issues are considered in paras. 2.10 – 2.58 of this Paper in the context of Northern Ireland law and its possible reform.

TECHNICAL RULES

2.5 The other branch of controversy surrounding the doctrine of adverse possession concerns the various technical rules which govern its operation. These have surfaced in the extensive case law on the subject and raise several issues. One concerns the basic requirements for application of the doctrine to a particular case, such as what constitutes "adverse possession". Connected with this issue are questions about the degree of possession which must be shown by the squatter and the relevance of the intentions or motives of the squatter and the paper title owner (these matters were dealt with by the House of Lords in the *Pye* case: see para. 2.3 above and further paras. 2.59 – 2.65 below). Another issue concerns the consequences of application of the doctrine, in particular the effect of "extinguishment" of the paper owner's title and the extent to which a statutory transfer or "parliamentary conveyance" of that title takes place in favour of the squatter (this issue was dealt with by the House of Lords in *Fairweather v St. Marylebone Property Co. Ltd.* [1963] AC 510; cf the Republic of Ireland's Supreme Court's decision in *Perry v Woodfarm Homes Ltd.* [1975] IR 104; see further, paras. 2.66 – 2.70 below). The issue of whether or not a transfer of title to the squatter occurs has given rise to particular

uncertainties where leasehold land is concerned and causes problems where registered land is concerned (see Wylie "Adverse Possession – An Ailing Concept?" (1965) 16 NILQ 467; Wallace "Adverse Possession of Leaseholds – The Case for Reform" (1975) 10 Ir Jur (ns) 74; see further para. 2.68 below). These uncertainties have led the courts into treating unregistered and registered land differently, a distinction which many regard as unjustifiable (see again para. 2.68 below).

2.6 There are various other controversies concerning application of the technical rules relating to adverse possession. Some concern how the doctrine applies in particular situations such as: certain categories of tenancies (e.g. periodic tenants: see para. 2.76 below); mortgagees in possession (see para. 2.78 below); unincorporated associations (see para. 2.79 below); purchasers in possession under an uncompleted contract for sale (see para. 2.83 below). Connected with the situation where adverse possession concerns leasehold land are the uncertainties which arise when a tenant adversely possesses or "encroaches upon" neighbouring land also belonging to his or her landlord or a third party (see para. 2.81 below).

REFORM

2.7 The remainder of this chapter deals with these various controversies with a view to formulating proposals for reform. In so doing particular attention has been paid to reforms implemented or proposed in other jurisdictions, especially neighbouring ones. In England and Wales, following recommendations made by the Law Commission in 1998 (see: *Land Registration for the Twenty-first Century* Part X, Law Com No. 254), substantial reforms were introduced by the Land Registration Act 2002 (c. 9) (see Part 9 and Schedule 6). However, those reforms are confined to registered land (see further paras. 2.30 and 2.39 – 2.40 below). Further changes were recommended by the Commission, in the context of reform of the general law of limitation of actions, in 2001 (see *Limitation of Actions*, Law Com No. 270), but these have not yet been implemented.

2.8 A review of the law of adverse possession was carried out by the Republic of Ireland's Law Reform Commission. This resulted in a Report published in 2002 (*Report on Title by Adverse Possession*, LRC 67-2002) which contained various recommendations to deal with a number of the problems relating to technical rules mentioned earlier (paras. 2.5 – 2.6 above). These were intended to be implemented by the Land and Conveyancing Law Reform Bill 2006, but the advent of the *Pye* litigation in England at the time of its original drafting led the Law Reform Commission to add more fundamental and radical provisions to the Bill. These proved to be extremely controversial and, once it become clear that the *Pye* case was going to be appealed to the European Court of Human Rights, the Irish Government (which had obtained leave to make a submission to that Court) withdrew from the Bill all the provisions relating to adverse possession (see Buckley "Adverse Possession at the Crossroads" (2006) 11(3) CPLJ 59; "Calling Time on Adverse Possession" (2006) Bar Rev 32; "Pye (Oxford) Ltd. v United Kingdom: Human Rights Violations in the Eye of the Beholder" (2007) 12(4) CPLJ 109). It was contemplated that the Law Reform Commission would revisit the subject following the final outcome of the *Pye* case before the European Court. That is now taking place.

2.9 The Commission has also taken into account the fact that previous Reports on law reform here have contained recommendations for changes in the law. The **1971 Survey** (see paras. 411 – 417) addressed, in particular, the "no parliamentary conveyance" principle (see paras. 2.5 above and 2.66 below) and the matter was taken up again by the **1990 Final Report** (Volume 1, paras. 2.14.7 – 2.14.22). According to this principle the title of the dispossessed owner does not pass to the squatter who has successfully completed the statutory period of adverse possession. Unfortunately, the legislation does not spell out what title the squatter does obtain and the fact that the dispossessed owner's title does not pass causes particular difficulties where that owner was a lessee liable to pay rent and subject to various other covenants in the lease. These matters are discussed below (see 2.66 – 2.70).

FUNDAMENTAL FEATURES

INTRODUCTION

2.10 It may be useful to begin a discussion of the fundamental features of the doctrine of adverse possession with an outline of the basic doctrine. This chapter will then go on to discuss the various controversies surrounding its fundamental features which have arisen over the years. In respect of each of these the Commission will indicate its initial conclusion as to whether some reform is necessary.

THE BASIC DOCTRINE

2.11 In essence the doctrine of adverse possession (operating under the Limitation (Northern Ireland) Order 1989) sanctions a "squatter" (a person who initially has no title to the land in question) obtaining title to the land by possession "adverse" to the paper title owner for the prescribed statutory period (generally 12 years, but 30 years in the case of the Crown and 60 years in the case of the foreshore: 1989 Order Article 21; see further on the limitation periods paras. 2.71 – 2.75 below). Subject to the technical requirements which are discussed later (see paras. 2.59 – 2.65 below), this acquisition of title by the squatter can occur despite the paper title owner not realising that it has occurred until it is too late to bring an action to recover the land (see further paras. 2.31 – 2.33 below). Furthermore, the squatter so acquires title without having to pay any compensation or other money for the land lost by the paper title owner. Such acquisition occurs both where the squatter may have acted "innocently" (in the sense that he or she was unaware of trespassing on someone else's land, e.g., where a mistake occurs as to the boundary between neighbouring properties) and where the squatter deliberately occupies land which he or she knows belongs to another, with or without the intention of acquiring title to it (see further on this aspect of the doctrine paras. 2.39 – 2.45 below).

2.12 This brief outline of the effect of the basic doctrine illustrates what on the face of it amounts to extraordinary law. It appears to sanction illegal activity (the civil wrong of

trespass on land) and to reward the perpetrators for getting away with it over a long period of time. It appears to impose a severe penalty on a landowner who "sleeps on his or her rights" or is disinclined to become involved in the time, trouble and expense of litigation. It also penalizes a landowner who is unaware that the trespass has occurred and for that reason has taken no action to protect his or her interests. This affects, in particular, those who own large areas of land, such as farmers and public bodies. Sometimes the penalty will involve a substantial loss in monetary terms. In the *Pye* case (see paras. 2.3 above and 2.37 – 2.38 below) the land in question comprised some 25 hectares of agricultural land which was considered to have development potential. The loss to the company which was the paper owner and which had long intended to seek planning permission for development must have been considerable. Such considerations clearly lead to the question of what is the justification for such a doctrine.

JUSTIFICATION

2.13 In considering the justification for the doctrine the Commission has borne in mind two further questions. The first is whether arguments which have traditionally been put forward as justification for the doctrine remain valid today. The second leads on from this and involves the issue of whether, assuming arguments in favour of the doctrine remain valid in the sense that the doctrine still achieves useful purposes, the doctrine is the best way of achieving those purposes. This second question has a number of aspects to it. While the doctrine may be performing a useful purpose in a particular category of cases, the view may be taken that it is not the most appropriate vehicle and that reliance should be placed on other doctrines instead (e.g. the doctrine of estoppel: see para. 2.18 below). In other cases, while the doctrine may be viewed as the most appropriate way of dealing with them, flaws or uncertainties in the way it operates hinder or inhibit full achievement of its purpose. Here the view may be taken that what is needed is either clarification of the law or reform to make the doctrine operate in a more efficient manner (see paras. 2.59 – 2.90 below).

2.14 Over the years several justifications have been put forward for the existence of a doctrine of adverse possession. The best known analysis is that given by Dockray in an article published in 1985 ("Why do We Need Adverse Possession" (1985) Conv 272) (for largely variations on the same theme see Epstein "Past and Future: The Temporal Dimension in the Law of Property" (1986) 64 Wash ULQ 667; Griggs "Possessory Titles in a System of Title by Registration" (1999) 21 Adel L Rev 157; Merrill "Property Rules, Liability Rules and Adverse Possession" (1984-85) 79 NWUL Rev 1122; Stake "The Uneasy Case for Adverse Possession" (2001) 89 Geo LJ 2419). In essence Dockray suggested four justifications for the doctrine: (1) preventing "stale" claims; (2) avoiding hardship to someone occupying land unchallenged for a long time; (3) promoting land use; (4) resolving various conveyancing problems. That analysis was adopted by the Law Commission of England and Wales in making its recommendations which led to the changes implemented for registered land by the Land Registration Act 2002 (see Law Com No. 254 para. 10.5). The Commission also considers that this is a useful analysis by which to judge the merits of the doctrine as it operates in Northern Ireland. In making that judgment the Commission has taken into account discussions it has had with experienced conveyancing practitioners and now turns to the various justifications put forward.

STALE CLAIMS

2.15 This justification draws attention to the point made earlier, that the doctrine of adverse possession is part of the law of limitation of actions (see para. 2.1 above). However, as Dockray pointed out, this cannot be a justification for the doctrine in itself. Generally the law of limitation operates on the basis that the person who had the right of action which has become barred knew the circumstances giving rise to the action and the law penalises the failure to act on that knowledge. However it has long been settled that adverse possession can operate in respect of a landowner who has had no knowledge that it was taking place. The typical example of this is where neighbours are mistaken as to where the boundary lies between their respective

lands and one unwittingly encroaches on the other's land, genuinely believing that it was his or her own land (see para. 2.31 below). In such cases the doctrine cannot be justified on the basis that the dispossessed owner slept on his or her rights – he or she did not know his or her rights had been infringed.

2.16 There is also the point that adverse possession involves the law of limitation operating in a special way in the case of land. As pointed out earlier (para. 2.2 above), it does not just bar the right to bring an action (thereby preventing stale claims), it has the positive benefit for the squatter of conferring title to the land in question. The giving of this additional benefit, over-and-above protection from a stale claim, would seem to need further justification.

HARDSHIP

2.17 It has often been said by judges that the doctrine avoids hardship on a squatter who has been in possession of land unchallenged for a long period of time, particularly if the squatter has improved it or otherwise altered his or her position to his or her detriment on the assumption that he or she would remain unchallenged (see *Cholmondeley v Clinton* (1820) 2 Jac & W 139; *A'Court v Cross* (1825) 3 Bing 329). This justification would seem to have merit, however, only in cases where the squatter was reasonable in making the assumption that he or she would be unchallenged. This would again clearly apply in cases of genuine mistake, where the squatter's acting to his or her detriment was also reasonable and gives rise to the element of hardship. However, this justification cannot apply where the squatter was fully aware of the trespassing on another's land. It is difficult to see where the hardship lies for the squatter in such cases in allowing the paper title owner to recover the land; indeed, if anything, conferring title on the squatter in such cases probably involves more hardship on the paper title owner. It is considerations such as these that have led some jurisdictions to draw distinctions between different forms of adverse possession and to import notions like "good faith" (see para. 2.39 below).

2.18 In so far as the doctrine is designed to prevent hardship to the squatter, it is, of course, arguable that the law could achieve this in other ways. Taking the case of a squatter acting to his or her detriment the obvious alternative might seem to be the equitable doctrine of proprietary estoppel. Under this doctrine a person may acquire rights to land if he or she has been induced by words or actions of the landowner to act to his or her detriment, so that it becomes unconscionable for the landowner to continue to assert ownership of the land. This has the considerable advantage that, being an equitable doctrine, the courts have a discretion to fashion the appropriate remedy to satisfy the "equity" claimed by the squatter (for recent applications of the doctrine here (not involving squatters) see *McLaughlin v Murphy* [2007] NICh 5; *Re Johnston* [2008] NICh 11; see also *McKenna v McDonnell* [2008] NICh 17). Thus, instead of the squatter becoming owner of the land and the paper title owner ceasing to be the owner (the "all or nothing" approach of the doctrine of adverse possession), application of the doctrine of proprietary estoppel would enable the court to review the entire circumstances of the case, including the relative merits of the position of both the paper title owner and the squatter and the elements of justice and hardship. The court can then order what it thinks is the appropriate remedy, which may involve giving the squatter title to the land, but might fall short of this (e.g. giving the squatter only a percentage share or requiring some payment by way of compensation). The Commission notes that, as part of the changes for registered land made by the English Land Registration Act 2002, one of the grounds upon which a squatter becomes entitled to be registered as owner after 10 years adverse possession (i.e. where the registered owner does not get a warning notice giving him or her another two years in which to take action against the squatter) is where "it would be unconscionable because of an equity by estoppel for the registered proprietor to seek to dispossess the applicant" (Schedule 6 para. 5(2)(a)).

2.19 It is, however, important to recognise the limitations to the doctrine of estoppel. It operates on the basis that it would be unconscionable for the legal owner of the land to assert

title against the claimant relying upon the estoppel. The courts have long made it clear that for the legal owner to be estopped he or she must have made some promise, assurance or representation which induced the claimant to act to his or her detriment. It is true that the House of Lords has recently confirmed that the "assurance" need not be express and that the legal owner's standing by in silence while the claimant acted to his or her detriment on an implied understanding may be enough to raise an estoppel (*Thorner v Major* [2009] 3 All ER 945). However, for this principle to operate the legal owner must be aware of the circumstances whereby the claimant is acting to his or her detriment. This will not apply again in the case where the paper title owner and squatter are acting under a mistake as to where the boundary lies between their neighbouring properties (paras. 2.15 and 2.17 above and 2.31 below). In such cases the paper title owner has done nothing which renders his or her conduct unconscionable and so the doctrine of proprietary estoppel is unavailable.

PROMOTING LAND USE

2.20 It is arguable that the doctrine of adverse possession promotes land use in the sense that it penalises the landowner who neglects the land and allows a squatter to take it over and benefits the person (squatter) who makes use of it by ultimately conferring title on that person. There is no doubt that much can be said in favour of a public policy which discourages abandonment and failure to make use of a finite resource like land and which encourages positive exploitation of it (see Cobb and Fox "Living outside the system: the (im)morality of urban squatting after the Land Registration Act 2002" (2007) 27(2) LS 236; Fox-O'Mahony and Cobb "Taxonomies of Squatting: Unlawful Occupation in a New Legal Order" (2008) 71(6) MLR 878). Indeed, on this basis it may be argued that in certain circumstances even the deliberate trespassing on abandoned property can be justified as being in the public interest (e.g., where homeless persons take over derelict or otherwise abandoned premises for accommodation purposes). It may be noted that the ultimate decision of the European Court's Grand Chamber in the *Pye* case referred to earlier (see

para. 2.3) was that adverse possession involves a control of the use of land rather than a deprivation of possessions (see para. 2.37 below). The question arises, however, as to whether the doctrine of adverse possession is the appropriate vehicle for dealing with such issues.

2.21 The Commission takes the view that there must be considerable doubts as to whether this justification for the doctrine is valid in itself and, therefore, whether the doctrine should be the vehicle for achieving the purposes in question. The promotion of land use and exploitation of land raises such a wide range of issues to do with social and economic policy generally that it is difficult to believe that the doctrine of adverse possession should be the instrument for addressing them. It raises issues which range over matters to do with planning and housing policy and other aspects of public policy which fall well outside the scope of a relatively narrow field of technical land law. There are many other means of addressing those issues through other forms of legislation, such as the planning and housing legislation.

CONVEYANCING PROBLEMS

2.22 Perhaps the most commonly cited reason for invoking the doctrine of adverse possession amongst practitioners is resolution of title disputes and facilitation of conveyancing transactions. A survey of the case law and discussions with experienced conveyancers reveals that this use of the doctrine occurs in both parts of Ireland in three particular situations:

Doubtful titles

2.23 The doctrine of adverse possession may be useful when there is a doubt over the title to land which might otherwise inhibit its sale or some other transaction like a mortgage. This doubt may arise from the title deeds being lost or mislaid. In this instance, although secondary evidence of the missing deeds may be available if they were registered in the Registry of Deeds (see Wylie and Woods *Irish Conveyancing Law* 3rd ed. (2005) Tottel publishing paras. 14.51 – 14.52 "Wylie and Woods *ICL*"), they may not have

been registered and so no such secondary evidence exists. Sometimes the doubt may exist from apparent defects or ambiguities in the title documents, which might mean that some third party might have a claim to the land. In these sorts of cases the view may be taken that despite these doubts or apparent defects, the person who has been in unchallenged possession has a "good holding" title (see Wylie and Woods *ICL* para. 14.12). In essence this view is based on the doctrine of adverse possession, i.e., the principle that even if some third party had a valid claim to the land, it has since been barred by the lapse of time and the person in possession has acquired title under the doctrine (see *Re Atkinson and Horsell's Contract* [1912] 2 Ch 1; *George Wimpey & Co Ltd. v Sohn* [1967] Ch 487). That view may be sufficient to satisfy a prospective purchaser's solicitor or one acting for a lending institution taking a mortgage of the land as security.

2.24 This aspect of the doctrine underpins the statutory provisions governing title investigation which have existed since the Vendor and Purchaser Act 1874 (37 & 38 Vict.) (c. 78). According to these under an "open" contract for the purchase of land (i.e., where there is no express provision to the contrary) a purchaser is entitled to deduction of title for a limited period of time only (currently 40 years: see Wylie and Woods *ICL* para. 14.54). The Commission's previous Consultation Paper (*Land Law* NILC 2 (2009) paras. 10.6 – 10.7) proposed reducing this period to 15 years (as was done in England and Wales by the Law of Property Act 1969 (c. 59). The reason for choosing such a lower title period is that after 15 years or more have passed any adverse interests or charges on the title are likely to have been barred and the vendor's title is again a good holding one.

2.25 It is important to emphasise that this use of the doctrine is a pragmatic one designed to facilitate conveyancing. In many cases there will, in fact, have been no adverse possession at all because the landowner whose title appears to be in doubt does have a perfectly good title. The problem is that this cannot be proved in the usual way because the vital "paper" proof is missing or is alleged to

be defective in some way. Because there is this element of uncertainty, the doctrine of adverse possession provides a safety net. Some jurisdictions which otherwise restrict the operation of the doctrine of adverse possession allow it to operate in such cases because the claimant can show "colour of title" (see para. 2.39 below). The doctrine, as explained above (para. 2.14), also facilitates conveyancing practice by reducing the amount of title a vendor has to deduce to a purchaser. In theory a vendor would otherwise have to produce deeds relating to transactions that might have occurred many decades, even centuries, ago. Parliament recognised the impracticality of this when enacting the Vendor and Purchaser Act 1874.

2.26 It must be recognised that this use of the doctrine is primarily concerned with unregistered land. Problems relating to lost or missing title deeds or defects or ambiguities in title deeds cannot arise in respect of registered land because it is the register maintained by the Land Registry which sets out the title to the land. Nor do the problems about deducing title based on title deeds executed decades ago arise. The register is designed to mirror the title at any given time and generally the past is irrelevant. One of the primary aims of the registration of title system was to abolish the repetitive perusal of old title deeds every time a transaction takes place.

2.27 What is said in the previous paragraph does not mean, however, that the doctrine does not have a place in a system of registered title. The Law Commission of England and Wales recognised this (Law Com No. 254, paras. 10.11 – 10.16), as have most other jurisdictions operating such a system (see Griggs "Possessory Titles in a System of Title by Registration" (1999) 21 Adel L Rev 157). The essential point is that under few, if any, registration of title systems is the register a complete "mirror" of the title. Few require absolutely every interest in the land to be entered on the register and, instead, recognise a number of "burdens which affect registered land without registration" (Land Registration Act (Northern Ireland) 1970 Schedule 5 Part I; the equivalent in England and Wales are interests which "override": Land Registration Act 2002 Schedules 2 and 3).

Apart from these, various dealings may take place "off the register" (such as informal sales or exchanges which the parties act on over a long period of time). Mistakes may be made between neighbouring landowners as to where the boundary lies between their properties. It is a fundamental principle of the registration of title system that it is not conclusive as to boundaries (unless the adjoining owners make a special application for this, which is rarely done: 1970 Act section 64) (see further para. 2.31 below). The registered owner may disappear or abandon the land which is then taken over by a squatter. In all these cases the doctrine of adverse possession will usually be invoked in order to facilitate a later transaction which a party wishes to register and to ensure that the register once again reflects the position on the ground.

Deceased person's estates

2.28 In the context of registered land it is important to draw attention to a very common use of the doctrine in Ireland. As a result of the operation of the Land Purchase Acts in the late 19th and first half of the 20th century, most farm land became registered land (see Wylie *Irish Land Law* 3rd ed. (1997) Butterworths, paras. 1.51 – 1.56, 1.63 – 1.69 and 21.02 "Wylie *ILL*"). However, it was extremely common for succession to the deceased farmer's estate not to be regularised. Often the farmer would die and no grant of probate would be taken out in respect of the farmer's will (if he left one) or letters of administration would not be applied for (in the case of intestacy). Instead members of the family, usually only some of them, would continue to run the farm. The fact that it was still registered in the name of the deceased farmer, who had died many years previously, would come to light only when it was sought to implement some transaction, such as raising money on the security of the farm or a sale of part of it. The law reports in Ireland are replete with cases involving this scenario and it is the doctrine of adverse possession which has been used to resolve disputes between the deceased farmer's successors (see Pearce "Adverse Possession by the Next-of-kin of an Intestate" (1987) 5 ILT 281; Wylie *ILL* paras. 23.40 – 23.42).

2.29 It might be thought that the above scenario would become less common with the advent of EU grants, payments and regulations in respect of agricultural land, but the schemes covering these generally do not require the applicant to be the "owner" of the land. For example, the Nitrates Action Programme Regulations (Northern Ireland) 2006 (No. 489) apply to the "controller" of the land. It is clear that the doctrine of adverse possession continues to perform a useful function in relation to succession to registered farm land (see *Renaghan v Breen* [2000] NIJB 174; see also *Meyler v Ferris* [2009] NICA 16).

Boundary Mistakes

2.30 There is no doubt that the doctrine of adverse possession plays an important role in resolving boundary disputes which usually arise because neighbouring landowners are unsure as to where the precise boundary lies between their respective properties. The result may be that one owner will unwittingly encroach upon the other's land, perhaps by putting up a building which straddles the boundary (in the *Fairweather* case, para. 2.5 above, it was a garden shed). This mistake may not come to light until many years later and that is when the doctrine may be invoked in order to determine who is entitled to the part of the neighbour's land encroached upon (see *Donnelly v Doyle* [2004] NIQB 66; see also *Re Faulkner* [2003] NICA 5 (1)).

2.31 It seems clear that the doctrine operates in such cases even though the squatter by mistake may genuinely believe that he or she is the owner of the land encroached upon. A recent High Court ruling to the contrary (*Kelleher v Botany Weaving Mills Ltd*. [2008] IEHC 417) in the Republic of Ireland is difficult to reconcile with earlier authorities, in particular views expressed by the Supreme Court in *Murphy v Murphy* [1980] IR 183 (see e.g., Kenny J at p 202, citing Wylie *ILL*: "It is also established that the adverse possession may take place without either party being aware of it"). It is also difficult to reconcile with the requirements for adverse possession as recently confirmed by the House of Lords in the *Pye* case (para. 2.3 above; see also *Buckinghamshire County Council v Moran* [1990] Ch 623) (see further para.

2.63 below). Under these all the squatter has to show is an intention to possess the land, not to own it or to dispossess the true owner, so that it is irrelevant that the squatter believed that he or she owned the encroached upon land or did not realise he or she was trespassing (see also *Pulleyn v Hall Aggregates (Thames Valley) Ltd*. (1992) 65 P & CR 276; *Hughes v Cork* (1994) EGCS 25; *Prudential Assurance Co. Ltd. v Waterloo Real Estate Inc*. [1999] 2 EGLR 85). The *Pye* requirements have recently been applied here (see *Re Faulkner* [2003] NICA 5(1); *Scott-Foxwell & Anor. v Lord Ballyedmond & Ors.* [2005] NICh 3; *Morris v Newell & Anor.* [2007] NICh 2; *Northern Ireland Housing Executive v Gallagher* [2009] NICA 50). In fact the specific point arose here in *Donnelly v Doyle* [2004] NIQB 66 where Sheil LJ (sitting in the High Court) ruled that a mistake as to ownership does not stop the doctrine of adverse possession operating in favour of a squatter (citing *Murphy v Murphy* and *Hughes v Cork* above).

2.32 The Commission takes the view that it would involve a considerable restriction on the scope of the doctrine of adverse possession if it could not operate in such cases of mistaken belief as to ownership. In particular it would deprive the doctrine of its extremely useful function in resolving boundary disputes. The Commission also notes that the doctrine's role in this regard is confirmed by the English Land Registration Act 2002. This is another case where the squatter is entitled to be registered as owner after 10 years' possession and the registered owner is not entitled to a warning notice giving a further two years in which to retrieve his or her position (Schedule 6 para. 5(4)). However, it should be noted that the 2002 Act does contain some restrictions, in particular a requirement that the squatter "…reasonably believed that the land to which the application relates belonged to him…" (Schedule 6 para. 5(4)(c)). We will return to this aspect of the provision later (see para. 2.43 below).

2.33 Like the Law Commission of England and Wales the Commission has concluded that the doctrine of adverse possession continues to fulfil a useful function with respect to registered land in Northern Ireland. That function is wider

than in England and Wales and leads the Commission to the view that the distinction drawn by the Law Commission of England and Wales between the doctrine's role in respect of unregistered land and its role in respect of registered land (see Law Com No. 254 paras. 10.11 – 10.19) cannot be drawn so precisely here. This led the Law Commission of England and Wales to recommend recasting the operation of the doctrine with respect to registered land and, in implementing this, its scope is considerably restricted by the provisions of the Land Registration Act 2002 (Schedule 6). The consequence is that there is now a considerable difference in England and Wales as to how the doctrine operates with respect to registered as opposed to unregistered land. Creation of this distinction has not met with universal approval (see Cobb and Fox "Living outside the system: the (im)morality of urban squatting after the Land Registration Act 2002" (2007) 27(2) LS 236; Dixon "The Reform of Property Law and the Land Registration Act 2002: a Risk Assessment" [2003] Conv 136; Editor's Notebook "Adverse Possession and the Land Registration Act 2002" [2009] 73 Conv 169).

CONCLUSION

2.34 **Question 1:** *The above discussion leads the Commission to the same conclusion that the Law Commission of England and Wales reached (Law Com No. 254); that the main justification for the existence of the doctrine of adverse possession lies in its function in dealing with conveyancing problems. However the Commission is not convinced that it is appropriate in Northern Ireland to draw a clear distinction in relation to this function between unregistered and registered land. The Commission's view is that the doctrine has an equally important role to play with respect to both types of land and that it would be more appropriate to have the doctrine apply to both, basically in the same way (with technical adjustments only to take account of the formal requirements of the registration of title system).* **DO CONSULTEES AGREE?**

REFORM

2.35 This leads to the question whether the fundamental features of the doctrine, as outlined above, have aspects which suggest that reform of the law is needed. In this context the Commission is considering only the fundamental features, including the justification for the doctrine discussed above. Reform concerning more technical rules relating to how the doctrine operates is considered in the next chapter.

Abolition?

2.36 For completeness' sake, the first question which ought to be asked is whether the justification for the doctrine discussed earlier retains sufficient validity to merit retention of the doctrine at all. It will be apparent from the conclusion drawn above (para. 2.34) that the Commission's initial view is that the doctrine continues to perform an important role in facilitating conveyancing and that, on that basis, there is no case for its abolition. Furthermore, as concluded by most other jurisdictions which have considered the matter, the doctrine is not incompatible with a registration of title system and continues to play an important role with respect to registered land.

2.37 Until the Judgment of the Grand Chamber of the European Court of Human Rights in the *Pye* case (see para. 2.3 above), the above conclusion might have been questioned on human rights grounds. The arguments made in that case were that, because the doctrine appears to involve a deprivation of the paper title owner's property without any compensation, it infringed the protection conferred by Article 1, Protocol 1, of the European Convention on Human Rights ("peaceful enjoyment of possessions"). However, the Grand Chamber's judgment rejecting these arguments confirm that there is no case for abolition based on human rights grounds (see Cooke "Adverse Possession after *J A Pye (Oxford) Ltd. v The United Kingdom*" (2006) 57(3) NILQ 429; "A Postscript to *Pye*" (2008) 59 NILQ 149). The Grand Chamber took the view that the doctrine of adverse possession is a proportionate control of the use of land rather than a deprivation of possession (see para. 2.20

above). The English Court of Appeal has since confirmed that there is no basis for pursuing a challenge to the doctrine on human rights grounds (*Ofulue v Bossert* [2009] Ch 1). The subsequent appeal to the House of Lords concentrated on the technical law relating to "acknowledgment of title", but Lord Neuberger did refer to the *Pye* case without suggesting any disagreement with the Court of Appeal's view of the Grand Chamber's ruling ([2009] 3 All ER 93 at 117; significantly he had been the High Court Judge in *Pye* who had expressed doubts about compatibility with the European Convention [2000] Ch 676 at 710).

2.38 **Question 2:** *In view of the Grand Chamber decision in the Pye case and the subsequent stance adopted by the English courts in cases like* Ofulue v Bossert *the Commission takes the view that human rights issues relating to the doctrine of adverse possession have been put to rest for the time being and should not be pursued further.* **DO CONSULTEES AGREE?**

RESTRICTION

2.39 The question remains whether the doctrine should be restricted in its scope or operation so as to remove or mitigate what might be regarded as inappropriate features. A number of jurisdictions have sought to bring into play concepts such as "good faith", so that the doctrine will operate only in favour of a squatter who can show this or has otherwise behaved in an ethical manner or can base a claim on "colour of title" (e.g., under a conveyance which would have transferred title but for some technical flaw). Several states in the USA have introduced such a requirement specifically (see Epstein "Past and Future: The Temporal Dimension in the Law of Property" (1986) 64 Wash ULQ 667; Fennell "Efficient Trespass: The Case for 'Bad Faith' Adverse Possession" (2006) 100 Nw UL Rev 1037; Gardiner "Squatters' Rights and Adverse Possession: A Search for Equitable Application of Property Laws" (1997) 8 Ind Int'l & Comp L Rev 119; Gordley and Mattei "Protecting Possession" (1996) 44 Am J Comp L 293; Stake "The Uneasy Case for Adverse Possession" (2001) 89 Geo

LJ 2419). Indeed, it has been argued that, even where not the subject of specific legislation, the courts in some States tend to import it when applying the doctrine (see the controversy in Helmholz "Adverse Possession and Subjective Intent" (1983-84) 61 Wash ULQ 331; Cunningham "Adverse Possession and Subjective Intent: A Reply to Professor Helmholz" (1986) 64 Wash ULQ 1; Helmholz "More on subjective Intent: A Reply to Professor Cunningham" (1986) 64 Wash ULQ 65).

2.40 Importing such a requirement at first sight might be regarded as getting rid of what some regard as objectionable cases of adverse possession – the deliberate trespassing on another's land with the intention of ultimately acquiring ownership of it. There is, however, a major concern about this approach to the doctrine. Once such ethical considerations are imported, it is important to realise that it is extremely difficult to know where to draw the line.

2.41 Taking the position of squatters, a balance would have to be drawn between, e.g. the squatter who is fully aware that he or she is occupying someone else's land and intends to acquire title by adverse possession, one who is fully aware but does not intend to acquire such title (probably because he or she is unaware of the effect of the doctrine), one who is not sure who the owner is, one who mistakenly believes he or she is the owner but has no good reason for that belief, one who so believes and has reasonable grounds for doing so and one who is not sure of their legal position. Thirdly, if ethical considerations are to be brought into play, it is arguable that they should be applied also to the dispossessed paper title owner. Here again a balance might have to be drawn between, e.g. an owner who abandons the land, one who does not abandon it but nevertheless fails to keep an eye on it, one who turns a blind eye to the squatting in order to avoid a dispute or to promote good neighbourliness, one who fails to discover the squatting despite keeping an eye on the land and one who fails to discover it because he or she is unaware that he or she owns the land in question.

2.42 Such considerations lead the Commission to doubt whether it is appropriate to try to import such ethical considerations into the doctrine. It must be doubted whether a consensus would be reached as to where to draw the line between the "ethical" position of different categories of squatter and paper title owner. The Commission notes that the attempts in the USA have caused much controversy (see the recent legislation in New York, Guardino "Zoning and Land Use Planning: Adverse Possession: Test in New Law is 'All About Good Faith'" New York Law Journal, July 23, 2008). The Commission inclines to the view that an attempt to do so would cause much uncertainty in the law, partly because it would require the courts to consider the motives, intentions and beliefs of the parties. It would be likely to make the law much more complicated and thereby run counter to the Commission's primary aim of simplicity, clarity and certainty (Consultation Paper *Land Law* NILC 2 (2009), para. 1.16).

2.43 The Commission recognises that the English Land Registration Act 2002 does introduce an ethical element for registered land, by importing a good faith requirement in the case of boundary mistakes. A squatter who applies for registration as owner after 10 years' adverse possession will succeed (without the registered owner getting a warning notice giving another two years in which to retrieve the situation) only if the exact line of the boundary has not been determined by the Land Registry (see para. 2.27 above) and he or she (or any predecessor in title) "reasonably believed" that the land in question belonged to him or her (Schedule 6 para. 5(4)(c)). However, this importation of ethical considerations has also proved to be controversial (see Cobb and Fox "Living outside the system: the (im)morality of urban squatting after the Land Registration Act 2002" (2007) 27(2) LS 236; Fox-O'Mahony and Cobb "Taxonomies of Squatting: Unlawful Occupation in a New Legal Order" (2008) 71(6) MLR 878).

2.44 The Commission also notes that the courts in the Republic of Ireland have got into difficulties on the issue of how far the intentions of the dispossessed owner are relevant to the question of whether the squatter has established adverse possession. Much of this controversy has centred around

the principle in *Leigh v Jack* (1879) 5 ExD 264 (that there can be no adverse possession against a paper title owner who has no immediate use for the land, but may have some future plans for it: see further para. 2.61 below). Different views on this have been given by the Republic of Ireland's Courts (see e.g. *Cork Corporation v Lynch* [1995] 2 ILRM 598; *Durack Manufacturing Ltd. v Considine* [1987] IR 677; *Dundalk UDC v Conway* (HC, 15 December 1987); *Feehan v Leamy* [2000] IEHC 118; *Dunne v Iarnród Éireann – Irish Rail and Coras Iompair Éireann* [2007] IEHC 314; see Woods "The Position of the Owner under the Irish Law on Adverse Possession" (2008) 30(1) DULJ 298). This confusion led the Republic of Ireland's Law Reform Commission to recommend statutory enactment of a provision to the effect that adverse possession is possession inconsistent with the title of the paper owner, not inconsistent with that owner's intentions (*Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30-1989), paras. 52 - 53). The Land and Conveyancing Law Reform Bill 2006, as originally drafted, would have implemented this recommendation (see para. 2.8 above). We return to this subject in para. 2.62 below.

2.45 **Question 3:** *The Commission has concluded from the above discussion that it would not be appropriate to import "ethical" considerations into the operation of the doctrine of adverse possession. Any such attempt would be likely to be very contentious and would militate against the aims of clarity and certainty in the law which the Commission is seeking to promote. Just as the European Court of Human Rights rejected a challenge to the doctrine on human rights grounds, the Commission is not convinced that the fundamental features of the doctrine of adverse possession, as it operates in practice, are sufficiently inappropriate to justify interference with them.* **DO CONSULTEES AGREE?**

2.46 **Question 4:** *The Commission is inclined to take the same view with respect to suggestions that some of the functions of the doctrine would be better achieved in other ways. Attention was drawn earlier to the possibility that in certain situations a more flexible remedy might lie in application of*

the equitable (and discretionary) doctrine of proprietary estoppel. However, it was pointed out that that doctrine could only be invoked in very limited circumstances and so is better kept as an alternative to be invoked in particular cases, as the parties choose (see para. 2.19 above), rather than as a substitute for adverse possession. **DO CONSULTEES AGREE?**

2.47 The Commission takes the same view with respect to alternative legislative approaches which some jurisdictions have adopted to deal with certain situations in which the doctrine of adverse possession would otherwise apply. For example, some Australian States and Canadian Provinces require boundary disputes to be resolved by the courts under "mistaken improver" or "building encroachment" legislation (see O'Connor "The Private Taking of Land: Adverse Possession, Encroachment by Buildings and Improvement under a Mistake" (2006) 33 UWAL Rev 31; "An Adjudication Rule for Encroachment Disputes: Adverse Possession or Building Encroachment Statute?" in Cooke (ed.) *Modern Studies in Property Law* Volume 4 (Hart Publishing, Oxford, 2007) Chapter 9). Several States in the USA have introduced "marketable title" legislation to deal with adverse claims arising under investigation of title. Typically such legislation provides that a person who has an unbroken chain of title for a specified period (say, 40 years) is immune to other claims unless from a person in possession of the land (see Jossman "The Forty Year Marketable Title Act: A Reappraisal" (1959-60) 37 U Det LJ 422; Powell "Marketable Record Title Act: Wild, Forged and Void Deeds as Roots of Title" (1969) 22 U Fla L Rev 669). Such legislation is very much linked to the American unregistered land system (and Recording Acts which are akin to our Registry of Deeds system) and is also linked to the system of title insurance which does not operate generally in Northern Ireland.

2.48 **Question 5:** *The Commission is not convinced of the merits of trying to transport such elements of the American conveyancing system to Northern Ireland. In particular, the Commission has doubts about the wisdom of introducing a new scheme for unregistered conveyancing in an era when the clear policy is to move as rapidly as possible to registered conveyancing.* **DO CONSULTEES AGREE?**

2.49 There is another matter which the Commission has considered. This is whether it should recommend the "veto" scheme introduced in England and Wales by the Land Registration Act 2002, with the possibility of extending this to unregistered land. As mentioned previously (see paras. 2.32 and 2.43 above), a squatter on registered land in England and Wales can acquire ownership only by applying to the Land Registry. This can be done after 10 years' adverse possession and, apart from a few exceptional cases (such as where estoppel circumstances might exist (see para. 2.18 above) or a boundary mistake has occurred (see para. 2.32 above)), the application will not be processed and, instead, a warning notice will be served on the registered owner and holders of other registered interests (e.g. chargees and lessees) (Schedule 6, paras. 1 & 2). Such persons then have two years in which to bring proceedings to retrieve their position, but if they fail to do so, the squatter may make a further application and is then entitled to be registered as the new owner (Schedule 6, paras. 3 and 4).

2.50 This clearly changes dramatically the basis upon which the doctrine of adverse possession has operated hitherto and involves a considerable shift in the balance between the interests of the squatter and the owner of the land. It greatly increases the protection of the owner from a failure to keep an eye on the property. That protection is not given only in the exceptional cases referred to in the previous paragraph, where the Law Commission of England and Wales took the view that the claims of the squatter should override those of the owner.

2.51 The Commission has considerable reservations about recommending such a scheme for Northern Ireland for a

number of reasons. First, as indicated earlier (see paras. 2.41 – 2.43 above), the Commission has doubts about the appropriateness of introducing what are, in effect, ethical considerations into the operation of the doctrine of adverse possession. It would certainly not wish to recommend this until after it had carried out a much more detailed analysis of the different considerations applicable to the various scenarios involving adverse possession than has been possible in the preparation of this Consultation Paper. In saying that, it is very conscious of the difficulties which other jurisdictions have run into in trying to incorporate concepts like "good faith".

2.52 Secondly, the England and Wales scheme involves considerable changes to the Land Registry system and this subject is outside the scope of the Commission's current land law Project (see Consultation Paper *Land Law* NILC 2 (2009) para. 1.22). The Commission acknowledges that some of its recommendations will necessarily have an impact on the Land Registry system, including those in this Paper (see para. 2.70 below), but none of these will involve the major structural change which is under consideration.

2.53 Thirdly, the Commission also indicated earlier its reservations about creating the situation which now exists in England and Wales, of having the doctrine of adverse possession operate differently depending on whether the land is registered or unregistered land (see para. 2.33 above). The Commission would wish to avoid creating this sort of complication in the law, but that does beg the question of whether a "veto" system could also be introduced for unregistered conveyancing.

2.54 There would be obvious problems about applying a "veto" system to unregistered land. Such a system depends on serving a warning notice on the owner of the land and other persons with a major interest (such as mortgagees and lessees). In the case of registered land these persons are known, because they are on the register, and so it is a simple procedure for the Registry to send them the requisite notice. In the case of unregistered land, the squatter may have no idea who the owner is and what other interests may

exist in the land. To some extent, this problem might be overcome by requiring the placing of warning notices on the land and advertisements in newspapers circulating in the area, but it would have to be recognised that this falls short of service on the actual intended recipients and runs the risk that the warning will not reach them.

2.55 Extension of a "veto" system could be tied to compulsory registration of title. A claim to ownership by adverse possession could be made a "triggering event" requiring an application for first registration. Since all land in Northern Ireland is now subject to compulsory registration on the occurrence of certain events (e.g. sales and leases exceeding 21 years), this would support the policy of extending the registration of title system. It would also recognise that, in practice, often a voluntary application is made as a means of curing what is perceived to be a defect in a title to unregistered land. In so far as the main justification for the doctrine is seen as resolving conveyancing problems (see paras. 2.22 – 2.34 above), such a scheme is not as radical as it might appear. A conveyancing problem necessarily only arises when a conveyancing transaction is taking place (e.g., a sale, lease or mortgage). Often that will trigger the need to register the title in any event, so that dealing with an adverse possession claim would necessarily arise as part of that. However, under current law, the triggering events do not include mortgaging (see Land Registration Act (Northern Ireland) 1970 Schedule 2, Parts I and III) and often the doctrine is used to resolve title problems which come to light when it is sought to borrow on the security of the land. It seems to the Commission that this would involve consideration as to whether the triggering events for compulsory registration should be extended. That again raises issues relating to the registration of title system which are outside the scope of this Project.

2.56 **Question 6:** *The Commission has concluded that it is not appropriate at this stage to recommend the substantial change which was introduced as the "veto" scheme for registered land in England and Wales by the Land Registration Act 2002. As indicated above, this would raise*

issues relating to operation of the registration of title system which are outside the scope of this Project. The Commission takes the view that this matter should be dealt with in any review of that system, in particular the extension of compulsory registration, which may take place in the future. **DO CONSULTEES AGREE?**

2.57 Finally, the Commission has considered whether it would be appropriate to introduce some requirement that the squatter who acquires title by adverse possession should pay some compensation to the dispossessed owner. Some have argued that whenever an adverse possession claim comes before a court, it should have the power to order compensation (see, e.g., Elfant "Compensation for the Involuntary Transfer of Property between Private Parties: Application of a Liability Rule to the Law of Adverse Possession" (1984) 79 Nw UL Rev 758; Stake "The Uneasy Case for Adverse Possession" (2001) 89 Geo LJ 2419). Indeed, the Republic of Ireland's Law Reform Commission proposed this in its original draft of the Land and Conveyancing Law Reform Bill 2006 (see Report on the Reform and Modernisation of Land Law and Conveyancing Law, LRC 74-2005 paras. 2.04 – 2.07 and Part 11 of the draft Bill especially section 130(2)). However, those proposals were made at a time when there were concerns about the compatibility of the doctrine of adverse possession with the European Convention on Human Rights and Fundamental Freedoms, such as were being raised by the *Pye* litigation which, at the time, was still ongoing (LRC 74-2005, para. 2.04). Issues of compensation would clearly come into play if adverse possession was seen as a "deprivation" of property (see Anderson "Compensation for Interference with Property" (1999) 6 EHRLR 543).

2.58 **Question 7:** *As indicated earlier, the ultimate decision by the Grand Chamber in the* Pye *litigation, where it regarded adverse possession as a control of use rather than a deprivation of land, has, in the Commission's view, removed the human rights issues from the need for further consideration (see para. 2.37 above). With that goes the issue of compensation as perceived by the Republic of*

Ireland's Law Reform Commission. Its proposals proved to be very controversial in any event (see Buckley "Adverse Possession at the crossroads" (2006) 11(3) CPLJ 59; "Calling Time on Adverse Possession" (2006) Bar Rev 32) and the Commission would be concerned that introducing a requirement for compensation would give rise to the same difficulties that introducing ethical considerations would do. The point is that adverse possession involves so many different scenarios and squatters and landowners of such different ethical status, that a line would have to be drawn to indicate when compensation would be appropriate and the basis upon which it would have to be calculated. The Commission takes the view that drawing this line and the parameters for assessing compensation would be no easy task and very controversial. It would certainly make for complicated law and run counter again to one of the Commission's primary aims. On that basis the Commission is not inclined to recommend introduction of an element of compensation to the doctrine of adverse possession. **DO CONSULTEES AGREE?**

TECHNICAL RULES

INTRODUCTION

2.59 In this Chapter the Commission is concerned with various controversies and difficulties which have arisen with respect to the technical rules which govern the operation of the doctrine of adverse possession. Various changes to the law are proposed to deal with some of the issues raised.

REQUIREMENTS FOR ADVERSE POSSESSION

2.60 Over the years there has been much judicial controversy over what constitutes "adverse" possession, which a squatter must establish in order to succeed to a claim to ownership of the land in question (see Limitation (Northern Ireland) Order 1989, Schedule 1 para. 8(1)). The problem is that the Order does not define "adverse possession", nor did its statutory predecessors (such as the Statute of Limitations (Northern Ireland) 1958 (c. 10)), so that it has been left to the courts to work out its meaning. This has resulted in much uncertainty as to the relevance, in

determining whether a particular person has been in adverse possession of a particular piece of land, of such matters as the intention or motives of the claiming squatter and, indeed, of the paper title owner.

2.61 It was mentioned earlier that particular controversy has surrounded the so-called rule in *Leigh v Jack* (1879) 5 ExD 264, which stated, in essence, that a person could not be in adverse possession of land (despite exclusively occupying it) if the paper title owner had no immediate use for it, but had future plans which the squatter might be aware of. This rule was given impetus by the English Court of Appeal decision in *Wallis's Cayton Bay Holiday Camp Ltd. v Shell-Mex and BP Ltd.* [1975] QB 94 (Stamp LJ dissenting). That was a very controversial decision, especially in so far as it suggested that in such cases there was a presumption of an "implied licence" for the squatter to use the land. That notion was specifically reversed by legislation (for England and Wales see Limitation Act 1980 (c. 58) Schedule 1 para. 8(4), stating that there is no presumption of a licence unless the facts of the particular case warrant it; a similar provision was contained in the Limitation Amendment (Northern Ireland) Order 1982 (No. 339 (N.I. 7)) Article 7 and is now in Schedule 1 para. 8(5) and (6) of the 1989 Order). However, the rule in *Leigh v Jack* still surfaced from time to time (see, e.g., *Beaulane Properties Ltd. v Palmer* [2006] Ch 79, where it was invoked to deal with what were thought at the time to be human rights issues).

2.62 This case law caused the Republic of Ireland's courts considerable difficulties, and as was mentioned earlier, resulted in a series of conflicting decisions (see para. 2.44 above). This led the Republic of Ireland's Law Reform Commission to recommend enactment of a provision stating that adverse possession is possession inconsistent with the title of the dispossessed owner, not with the owner's intentions. As also mentioned earlier, that provision was included in the provisions relating to adverse possession contained in the original draft of the Land and Conveyancing Law Reform Bill 2006 which were later dropped (see paras. 2.8 and 2.44 above).

2.63 This subject was reviewed by the House of Lords in the *Pye* case, where, confirming views expressed in earlier English cases (such as *Powell v McFarlane* (1977) 38 P & CR 452 and *Buckinghamshire County Council v Moran* [1990] Ch 623) the law lords laid down clear principles for judging whether a claimant has truly been in adverse possession. In essence, this requires establishing two things: (1) factual possession – which comprises an appropriate degree of physical control of the land exclusive to the claimant (or claimants jointly) and dealing with it as an occupying owner would; (2) intention to possess the land to the exclusion of all others. What is not required is an intention to own the land or an intention to dispossess the owner. Thus, as mentioned earlier, the doctrine encompasses cases where the squatter mistakenly thinks he or she is the owner of the land (see para. 2.32 above). The law lords also castigated as "heretical and wrong" the notion that the paper title owner's intention is relevant, so that the rule in *Leigh v Jack* was rejected so far as it was interpreted as meaning otherwise ([2003] 1 AC 419 at 438 per Lord Browne – Wilkinson).

2.64 The attempt to resurrect the rule in *Leigh v Jack in Beaulane Properties Ltd. v Palmer* as a method of meeting apparent human right infringements (see para. 2.3 above) was clearly thrown in doubt by the subsequent decision of the Grand Chamber of the European Court of Human Rights in the *Pye* case. That decision rejected any incompatibility between the doctrine of adverse possession and the European Convention (see paras. 2.3 and 2.37 above). Since then the English Court of Appeal has disapproved strongly of the use of the rule in the *Beaulane* case (see *Ofulue v Bossert* [2009] Ch 1: see para. 2.37 above).

2.65 **Question 8:** *The law lords' confirmations of the requirements for "adverse" possession have since been applied without apparent difficulty by the courts of Northern Ireland (see Re Faulkner [2003] NICA 5(1); Scott-Foxwell v Lord Ballyedmond [2005] NICh 3; Morris v Newell & Anor. [2007] NICh 2; NI Housing Executive v Gallagher [2009] NICA 50). It seems to the Commission that there the matter*

should rest and that it would be inappropriate to interfere with this aspect of the law by legislation. **DO CONSULTEES AGREE?**

PARLIAMENTARY CONVEYANCE

2.66 As mentioned earlier, one of the most controversial aspects of the operation of the doctrine of adverse possession has been the courts' insistence, after earlier contrary views that it operates in a negative way only (see para. 2.5 above). The Limitation (Northern Ireland) Order 1989, following previous statutes of limitation, simply states that at the expiration of the limitation period, the title of the dispossessed owner is "extinguished". The House of Lords in *Fairweather v St. Marylebone Property Co. Ltd.* [1963] AC 510 confirmed a ruling of the Court of Appeal in the late 19th century (see *Tichborne v Weir* (1892) 67 LT 735), that there is no "parliamentary conveyance" or "statutory transfer" of the dispossessed owner's title to the squatter. Instead, the squatter obtains an independent title (which, it seems, should be assumed to be a fee simple until a better claim by someone else can be established) (see Omotola "The Nature of Interest Acquired by Adverse Possession of Land under the Limitation Act 1939" (1973) 37 Conv 85).

2.67 That ruling was very controversial. While its impact is probably of limited effect where the squatter has been in adverse possession of unregistered freehold land, its effect where the land is leasehold is much more complicated. The *Fairweather* case itself illustrated this and forced the law lords into complex reasoning to explain the effect of application of the doctrine – the squatter bars the lessee, but not the lessor, and the lease remains vested in the lessee, so that it can be surrendered to the lessor, thereby enabling the lessor (who by virtue of the surrender becomes entitled to possession) to eject the lessee and render the adverse possession nugatory (see the critique by Wade "Landlord, Tenant and Squatter" (1962) 78 LQR 541 which the Privy Council recognised as "powerful": *Chung Ping Kwan v Lam Island Development Co Ltd.* [1997] AC 38 at 47, per Lord Nicholls). It was pointed out that this was a most unsatisfactory position in Ireland where so

much land is held under long leases (see Wallace "Adverse Possession of Leaseholds – The Case for Reform" (1975) 10 Ir Jur (ns) 74; Wylie "Adverse Possession: An Ailing Concept?" (1965) 16 NILQ 467). Interestingly, the Republic of Ireland's Supreme Court, although endorsing the general principle of there being no parliamentary conveyance of title, departed from the House of Lords on the issue whether the dispossessed lessee could surrender the lease so as to give the lessor an immediate right to eject the squatter (see *Perry v Woodfarm Homes Ltd.* [1975] IR 104; Wylie *ILL* paras. 23.15 – 23.19).

2.68 It was also pointed out that the principle was difficult to operate with respect to registered land, because of doubts as to how the Land Registry should deal with an application by a squatter, particularly one who had completed the requisite limitation period. In fact, the practice of the Land Registry had long been to treat such a squatter as if a statutory transfer of title should be recognised, so that the squatter should be entered as the new owner on the dispossessed owner's existing folio (rather than having a new folio opened for the squatter) (see the statement of practice by the then Registrar of Titles quoted in the **1971 Survey** para. 413(b); see also Wallace *Land Registry Practice in Northern Ireland* (2nd ed. (1987) SLS Legal Publications (Northern Ireland) pp 71 – 72; Fitzgerald *Land Registry Practice* (2nd ed. (1995) Round Hall Press) Ch 11)). Interestingly, the English courts subsequently held, notwithstanding the *Fairweather* ruling, that this should also have been the practice with respect to registered land in England and Wales (see *Spectrum Investment Co v Holmes* [1981] 1 WLR 221; *Central London Commercial Estates Ltd. v Kato Kagaku Ltd.* [1998] 4 All ER 948). Under the new regime introduced by the Land Registration Act 2002, the squatter can apply to be registered as proprietor of the dispossessed owner's registered estate (Schedule 6 para. 1(1)).

2.69 It is not surprising, then, that proposals for reform have been put forward. The **1971 Survey** proposed that the *Fairweather* ruling should be reversed and that legislation should make provision for a "parliamentary" conveyance in

respect of unregistered land and confirm the appropriateness of a transfer of title in the case of registered land (paras. 411 – 415). The **1990 Final Report** endorsed these proposals (Volume 1, paras. 2.14.7 – 2.14.20) and its draft Property Bill contained provisions dealing with how this would work in the case of leasehold land (Volume 3, pp 962 – 965). The Republic of Ireland's Law Reform Commission later reviewed the subject and came to the same conclusion (see *Report on Title by Adverse Possession of Land* (LRC 67–2002) Ch 3). Its draft Bill also contained provisions showing how a parliamentary conveyance system would operate in respect of leasehold land (essentially the statute would make the transfer in the case of unregistered land and the squatter would be entitled to apply for an alteration in the register to show a transfer in the case of registered land) and where the land was subject to mortgages and charges (see Appendix A of the Report). These provisions would have been implemented by the draft Land and Conveyancing Law Reform Bill later prepared, but they were dropped along with the other adverse possession provisions in the wake of the *Pye* controversy (see para. 2.8 above).

2.70 **Question 9:** *The Commission sees no reason to depart from the proposals for reform of this aspect of the doctrine of adverse possession consistently made both here and in the Republic of Ireland in recent decades. They would have the merit of simplifying the law, rendering it more certain and, in the case of registered land, confirm what has long been the practice of the Land Registry. It would also ensure that the law relating to unregistered land accords with the practice in registered land. The Commission recommends that legislation along the lines previously drafted for here and the Republic of Ireland should now be implemented.* **DO CONSULTEES AGREE?**

LIMITATION PERIODS

2.71 Under the Limitation (Northern Ireland) Order 1989, as under the previous legislation (e.g. the Statute of Limitations (Northern Ireland) 1958), the general period of adverse possession a squatter must establish in order to succeed

in a claim to ownership of the land is 12 years (Article 21(1)). It is settled that a squatter may establish such a claim by adding to his or her own shorter period a period of adverse possession by a predecessor (provided the adverse possession is unbroken) (see *Renaghan v Breen* (2000) NIJB 174). There are longer periods required where the paper title owner is the Crown (30 years) and where the claim relates to the foreshore (60 years) (Article 21(3), (5) and (6)). The running of the period may be postponed where the paper title owner is subject to a disability (Articles 47 – 49). The question is whether any changes should be made to these provisions.

2.72 The Commission notes that the Law Commission of England and Wales, as part of a survey of the whole of the law of limitation of actions, proposed that there should be a long-stop limitation period of 10 years for land actions (*Report on Limitation of Actions* (2001) Law Com No. 270) paras. 4.126 – 4.135). This period accords with the period after which a squatter on registered land can apply for registration of ownership under the new regime introduced by the Land Registration Act 2002 (see para. 2.49 above). The Commission also recommended that the special protection given to the Crown should be removed, but that the 60-year period in respect of the foreshore should remain (paras. 4.138 – 4.147). The view was taken that any government department worried about losing land through oversight for the shorter 10-year period could protect itself by registering its title and thereby obtaining the benefit of the "veto" system introduced by the Land Registration Act 2002 (para. 4.140; see also paras. 2.49 – 2.56 above).

2.73 **Question 10:** *The Commission is not inclined at this stage to recommend adoption of these recommendations or similar ones. It notes that they have not yet been implemented in England and Wales. Furthermore, in so far as they are linked to the provisions of the Land Registration Act 2002, they are not appropriate in view of the Commission's earlier recommendation against adoption of the 2002 Act's regime at this stage (see para. 2.56 above).* **DO CONSULTEES AGREE?**

2.74 The Commission notes also that in some jurisdictions, such as parts of the USA, different periods of limitation apply to different categories of squatter (see, e.g., Backman "The Law of Practical Location of Boundaries and the Need for an Adverse Possession Remedy" (1986) BYUL Rev 957). However, this sort of regime is usually part of a scheme designed to distinguish between the relative merits of different squatters. It is, therefore, bound up with the importation of ethical considerations which the Commission has already regarded as inappropriate (see paras. 2.39 – 2.45 above).

2.75 **Question 11:** *The Commission inclines to the view that the introduction of different limitation periods for different categories of squatters would simply complicate the law without securing any real benefits.* **DO CONSULTEES AGREE?**

PERIODIC TENANCIES

2.76 Under the Limitation (Northern Ireland) Order 1989, an *oral* periodic tenancy is treated as having determined at the end of its first year (or other period, i.e. month in the case of a monthly tenancy, week in the case of a weekly tenancy and so on), so that time runs against the landlord from then (Schedule 1 para. 5(1)). This does not apply where the tenant continues to pay the rent (para. 5(2)). The Republic of Ireland's Law Reform Commission recommended that this distinction between "oral" and "written" periodic tenancies (it must be a proper written grant or lease, not mere written evidence of an agreement: see *Long v Tower Hamlets LBC* [1998] Ch 197) should be abolished and that the same rule should apply to written tenancies. The Law Reform Commission took the view that not applying the same rule was inconsistent with the rationale for the doctrine of adverse possession of "quieting titles". The Supreme Court had recognised the distinction in *Sauerweig v Feeney* [1986] IR 224 (see Brady "Periodic Tenancies in Writing and the Running of Time" (1986) 80 Gaz ILSI 253).

2.77 **Question 12:** *On the other hand,* ***the 1990 Final Report*** *did not agree with this on the ground that "the presence of writing creates a distinct category". It pointed out that it makes it easier to prove the existence of the tenancy, whereas in the case of an oral tenancy entered into many years previously this may be more difficult (Volume 1 para. 2.14.22). This distinction was not altered when a similar regime relating to tenancies at will was removed by the Limitation Amendment (Northern Ireland) Order 1982 (Article 6(2)(a) abrogating section 21 of the Statute of Limitations 1958). On balance the Commission is inclined to agree with the* ***1990 Final Report*** *and not to recommend altering the provisions in the Limitation (Northern Ireland) Order 1989 governing oral periodic tenancies.* **DO CONSULTEES AGREE?**

MORTGAGEES IN POSSESSION

2.78 The Commission reiterates a recommendation relating to mortgagees in possession contained in its earlier Consultation Paper *Land Law* (NILC 2 (2009), para. 8.17). Under Articles 34 & 35 of the Limitation (Northern Ireland) Order 1989 a mortgagor is barred from bringing an action to redeem the mortgage after the mortgagee has been in possession for 12 years. The consequence is that the mortgagor's title is extinguished and the mortgagee becomes owner of the property which may be worth considerably more than the debt owed (see Wylie *ILL* para. 23.33). This is an exception to the rule that title to land can be acquired under the law of limitation of actions only by "adverse" possession. Both the **1971 Survey** and **1990 Final Report** queried whether the mortgagee should be able to acquire title in this way, but in the end concluded that in the light of the restrictions on taking possession they were recommending, this would be a rare scenario (see **Survey** para. 416 and **Report** Volume 1 paras. 2.6.20 – 2.6.21). They therefore recommended no change of this aspect of the law. On balance, the Commission is inclined not to recommend any change in the law which currently provides that the mortgagor is barred from bringing an action to redeem the mortgage after the mortgagee has been in possession for 12 years.

UNINCORPORATED ASSOCIATIONS

2.79 The Commission notes that there are doubts and difficulties in applying the law of adverse possession to unincorporated associations (see the discussion in Dowling "Adverse Possession and Unincorporated Associations" (2003) 54 NILQ 272). These stem from the fact that such a body is not an independent legal entity and so it is often uncertain against whom the adverse possession operates, particularly if there is no clear documentary evidence as to the vesting of the title to the land in particular persons (e.g. trustees).

2.80 **Question 13:** *The Commission takes the view that the problem here relates more to the legal status of unincorporated associations and their inability under current law to hold title to land as an independent legal entity. This concerns the general law relating to such bodies and the Commission is inclined to the view that reform should be left to be dealt with as part of a general review of the status of such bodies.* **DO CONSULTEES AGREE?**

ENCROACHMENT

2.81 Difficult questions can arise where a tenant "encroaches" on neighbouring land and ultimately acquires title to it by adverse possession. In particular, the issue arises as to what happens to that title when the tenancy ends. This becomes an issue when the title acquired to the neighbouring land survives the determination of the tenancy under which the squatting tenant held (e.g., where the encroachment was on freehold land, so that the freehold title to the neighbouring land is acquired). The case law seems to establish a number of presumptions (see Pye "Adverse Possession and Encroachment by Tenants" (1987) 81 Gaz ILSI 5; Wylie *ILT* para. 28.11). In essence, these are, first, that the tenant is presumed to acquire the title to the neighbouring land for the benefit of the landlord, so that, on expiry of the tenancy it passes to the landlord (*Meares v Collis* [1927] IR 397; *Attorney General v Tomline* (1877) 5 ChD 750; *King v Smith* [1950] 1 All ER 553). Secondly, if the neighbouring land encroached upon belonged to the landlord, its title is presumed to attach to the tenancy and again will pass to the landlord on determination of the

tenancy (*Tabor v Godfrey* (1895) 64 LJQB 245; *J F Perrott & Co. Ltd. v Cohen* [1951] 1 KB 705). The principle at play here has been said to be that that the tenant should protect the landlord's title (*Whitmore v Humphries* (1871) LR 7 CP 1 at 5, *per* Willes J) or, perhaps, a branch of the law of estoppel (see Jourdan *Adverse Possession* (Tottel Publishing 2007) (para. 35.027). As with all presumptions, however, they can be rebutted by evidence that the parties intended otherwise, such as the tenant dealing with the acquired title in favour of a third party (see *Kingsmill v Millard* (1855) 11 Exch 313; *Smirk v Lyndale Developments Ltd.* [1975] Ch 317).

2.82 **Question 14:** *Although the basis for this doctrine of encroachment has been variously described as "anomalous" and "difficult to discern" (see Megarry and Wade, The Law of Real Property 7th ed. by Harpum, Bridge and Dixon (2008) Sweet and Maxwell Ltd. para. 35-027) the Commission is not convinced that it would be appropriate to recommend legislative reform. This would seem to be a matter best left to the courts to develop. The Commission is unaware of problems arising from this area of the law in Northern Ireland and so is inclined to leave the matter there.* **DO CONSULTEES AGREE?**

PURCHASERS IN POSSESSION

2.83 The Commission notes that the English Land Registration Act 2002 alludes to another controversial aspect of the doctrine of adverse possession. This relates to the position of a purchaser under a contract for the sale of land which is never formally completed by a conveyance of the title from the vendor or a transfer registered in the Land Registry. It has been held that, where the purchaser has paid the full purchase price and takes possession of the land in question, he or she may acquire title to the land by adverse possession (see *Bridges v Mees* [1957] Ch 475; also *Hyde v Pearce* [1982] 1 All ER 1029). The controversy exists because, at first sight, it seems odd to treat adverse possession as applying to a situation where the law states that a vendor under a contract for sale holds the land on trust for the purchaser (see Wylie and Woods *ICL* ch 12).

Nevertheless the English courts have taken the view that a purchaser, being the beneficiary under a bare trust only (i.e., one where the fully paid vendor has no duties to perform and holds the land entirely at the will and according to whatever instructions the purchaser may issue), can be in adverse possession against the vendor and thereby acquire title after expiration of the limitation period. The Law Commission took the view that this was another situation where a squatter should be entitled to be registered as owner of the land, without the registered owner (the vendor in this context) being given a warning to enable him or her to defeat the adverse possession (see Law Com No. 254 para. 10.53; Land Registration Act 2002 Act Schedule 6 para. 5(3) – this does not refer explicitly to the purchaser situation, but simply to an applicant who "is for some other reason entitled to be registered as the proprietor of the estate").

2.84 Notwithstanding the existence of this principle (it has been recognised in New Zealand: see *Glenny v Rathbone* (1900) 20 NZ LR 1; *Ormond v Portas* [1922] NZLR 570), the reasoning in the English cases has been questioned (see Dockray "What is Adverse Possession: Hyde and Seek" (1983) 46(1) MLR 89; Jourdan *Adverse Possession* (Tottel Publishing 2007) paras. 28.25 – 28.41). Much of the criticism stems from the fact that the English legislation does not deal explicitly enough with the situation giving rise to the principle and so the courts there have been forced into some strained interpretation of provisions dealing with tenants at will and beneficiaries of trusts.

2.85 The courts here did not have the same difficulty because of differences in our legislation. As the Court of Appeal explained in *McLean & Another v McErlean* [1983] NI 258, in so far as a purchaser in possession could be treated as a tenant at will in whose favour the limitation period would run after one year (this provision was in section 21 of the Statute of Limitations (Northern Ireland) 1958, but it was removed by Article 6(2)(a) of the Limitation Amendment (Northern Ireland) Order 1982: see Wylie *ILL* para. 23.31), section 21(2) of the then in force 1958 Statute provided that no beneficiary was to be deemed a tenant at will to his

trustee. Secondly, the provisions dealing with trusts are much more restricted in their application here – in essence they relate to "express" trusts only and do not, unlike the English legislation, apply to implied or constructive trusts (which is what a contract for sale is usually regarded as giving rise to). The definition in the Limitation (Northern Ireland) Order 1989 (Article 2(3)(a), following that in section 74(2)(a) of the 1958 Statute makes this clear. However, as Gibson LJ explained, while in the ordinary case of a beneficiary being in possession of the land, the possession is not to be regarded as "adverse" to the trustee because it is necessary to preserve the trustee's estate so that the trust can continue to be administered, this is not necessary in the case of a bare trust. As the Lord Justice put it "there is no reason to preserve the estate of the trustee for the due protection or performance of the trust" (at p. 270). On that basis, it was ruled that a purchaser who has paid the purchase price and thereby become solely and absolutely entitled to the land will commence to run the limitation period against the vendor and his or her successors in title as from the date of going into possession.

2.86 Notwithstanding what has just been said, the question may be asked whether it is appropriate in such cases to have such application of the doctrine of adverse possession. A purchaser who has paid the full purchase price under a contract for sale is not without other remedies. One obvious remedy would be to seek specific performance of the contract for sale. Even if the contract was unenforceable because it did not meet the written evidence requirements of the Statute of Frauds (Ireland) 1695 (c. 12), the purchaser in such cases would usually get round this by invoking doctrines like part performance or proprietary estoppel (see Wylie and Woods *ICL* paras. 6.48 – 6.60). However, there are two problems about this which relying upon title gained by adverse possession may get round. One is that specific performance is an equitable and, therefore, discretionary remedy. So too is proprietary estoppel. Although there is no limitation period for actions seeking an equitable remedy, the courts often refuse one under the doctrine of laches ("delay defeats equity") (see Lord Lowry LCJ in the *McLean* case at p. 262). A purchaser

seeking an order after 12 years or more from the date when he or she became entitled to a conveyance or transfer of the legal title would be likely to face some resistance from the court. The other problem is that the purchaser would have to incur the trouble and expense of bringing proceedings in court.

2.87 **Question 15:** *The Commission recognises that the situation of a purchaser being in possession under a continuing uncompleted contract after the full purchase price has been paid is probably a very rare occurrence. However, the English case law and the* McLean *case here illustrate that it does arise from time to time. In view of the avoidance of time, trouble and expense which the application of the doctrine of adverse possession achieves for such a purchaser, the Commission is not inclined to recommend abolition or restriction of this application of the doctrine.* **DO CONSULTEES AGREE?**

2.88 This area of the law has recently been reviewed in an Article in the Northern Ireland Legal Quarterly (see Woods "Adverse Possession and Informal Purchasers" (2009) 60(3) NILQ 605). The author points out that there are two aspects of the law outlined above which appear to be in need of clarification. One is that, with the deletion by the Limitation (Northern Ireland) Order 1989 of a provision deeming a tenancy at will to end at the end of one year from being in possession, it may not be clear when time runs in favour of a purchaser in possession. The suggestion is made that there should be a "deeming" provision to the effect that where a purchaser is allowed into possession before obtaining legal title, time runs in his or her favour when the vendor's licence permitting this ends or the purchaser pays the full purchase price, whichever is the earlier. The other suggestion is that a "purchaser" in this context should not include a person who has entered into a contract for the grant of a lease. Time should not run against a landlord who has let such a "purchaser" into possession in such a case because the landlord's right to the benefit of the covenants in the intended lease should be preserved.

2.89 **Question 16:** *The Commission is inclined to the view that the suggestion for clarification of the position of a purchaser allowed into possession early outlined in the previous paragraph would be appropriate. In this case a purchaser does not include a lessee.* **DO CONSULTEES AGREE?**

CHAPTER 3. GROUND RENTS

BACKGROUND

3.1 In Northern Ireland most agricultural land is held in fee simple and the title to it is registered in the Land Registry. These registered freehold titles were created as the result of the nineteenth century Land Purchase Acts which enabled tenant farmers to buy out their freeholds with the assistance of government loans. In contrast to agricultural land, the title to other land in Northern Ireland generally remains unregistered and can be very complex. One of the problems is that several different estates and interests can exist concurrently in the same piece of land, creating a pyramid title with several different layers. Such hierarchies are quite common, particularly in urban areas, and this may cause misunderstandings in conveyancing practice. Only the person in occupation at the foot of the pyramid has possession of the property and it may be difficult to trace the devolution of the different superior interests.

3.2 During the nineteenth and twentieth centuries, when landowners sold their land for residential development, the sales would normally have been by way of fee farm grant or long lease, reserving an annual ground rent. The ground rents which were created would traditionally have been less than five pounds. However, as the twentieth century progressed, the rents gradually became larger until by the time that the creation of new ground rents was prohibited in January 2000, ground rents of several hundred pounds were being created.

3.3 In the past, ground rents served a valuable purpose in facilitating the development of property. A developer could obtain land at a rent for less than its freehold value. The purchaser of the house which was built paid for the cost of the building and took a sub-lease of the site for a small rent. That practice continued for many years, but was gradually eroded as site values increased and developers became able to charge for the full value of the site, even with a ground rent. Another valuable function of ground rents was

that they created a secure form of investment income. It was quite common for property owners and business people to make provision for their family by investing in ground rents which created an annual income for their surviving spouse and then their children. Many of these people would not have been considered wealthy and their ground rent portfolios would have been relatively small.

3.4 Although ground rents were designed to secure an income for the rent owner this has long been considered an anachronism. In a modern democratic property-owning society it is unacceptable that an "owner occupier" should have to account to a ground landlord for a rent; nor is it considered in the public interest that pyramid titles should continue to exist. It is also undeniable that pyramid interests in property together with ground rents complicate title and make the conveyancing process more problematical.

This chapter proceeds to set out the detail of the history of attempts to reform the ground rent system in Northern Ireland. So far there has not been any significant degree of success in eliminating great numbers of ground rents. The reasons for this include the fact that previous proposals for reform and the scheme currently in operation have involved cumbersome administrative procedures, and disproportionate professional fees.

PREVIOUS REPORTS IN NORTHERN IRELAND

The 1971 Survey

3.5 The **1971 Survey** (para. 454) considered that something radical should be done to eliminate some of the variety of rents and interests attaching to land which constitute "a cloud on the title". Many of them belong to a different era of landowning and are a substantial hindrance to commercial dealings with property. It recommended (para. 476(clii) – (clvii)) the abolition of fee farm rents and other superior interests along with the elimination of various periodic rents and other interests.

The 1990 Final Report

3.6 In the **1990 Final Report** the possibility of framing a compulsory redemption scheme for all ground rents was considered for the first time (para. 1.1.2). It was agreed (para. 1.2.2) that the ground rent system was an anachronism – that it had outlived its usefulness and was the cause of needless complication, especially where there were a number of tiers of title so that money collected from the occupier was pushed around between the successive superior rent owners, none of whom had any practical interest in the land; that it was desirable to prohibit the future creation of ground rents and to facilitate the redemption of existing ones as quickly as possible; that there was a need to have the simplest procedure for redemption and that it was important to obtain proper compensation for rent owners whose rents are redeemed.

3.7 The issue of the rent owner's security was examined in some detail (paras.1.2.3 – 1.2.12). Invariably, a fee farm grant or lease would confer an express right of re-entry on the rent owner so that if the ground rent was not paid the rent owner could take possession of the land to the permanent exclusion of the occupier. In the abstract there was a view that the advantage conferred by the right of re-entry was illusory, because the rent owner would never be allowed to exercise the right. If that was the case the right was of no actual value and could be abolished; the ground rent payable could also be separated from the land and become an unsecured debt.

3.8 However, after considering the arguments on both sides it was concluded that it would be an injustice to weaken the position of rent owners by abolishing the right of re-entry. Although the sanction of re-entry might be thought to be disproportionate in principle, any provision to make ground rent an unsecured debt would be inequitable for the rent owner. Ultimately the most certain way of getting rid of re-entry would be to speed up the redemption of ground rents and that would be dependent on the introduction of a compulsory redemption scheme.

3.9 Five possible schemes for the compulsory redemption of ground rents had been considered in the Interim Report published by the Land Law Working Group on Ground Rents and Other Periodic Payments (Department of Finance and Personnel for Northern Ireland Office, Office of Law Reform) (1983 HMSO) but insuperable difficulties were found in all of them. As a result, although it was not happy to contemplate the indefinite prolongation of the ground rent system, the Working Group did not make any recommendation for the introduction of a redemption scheme and confined itself at that point to proposing a prohibition on the future creation of ground rents.

3.10 One of the basic difficulties experienced by the Working Group was in creating a satisfactory formula whereby the redemption money would be invested to produce a similar income to that secured by the ground rent. Eventually, in the **1990 Final Report** (chapter 1.3) the idea of investment in fixed-interest stock was abandoned and it was concluded that a compulsory redemption scheme could work only with a prescribed multiplier of the ground rent which would give an approximate but broadly fair result.

LEGISLATION

Section 65 of the Conveyancing Act 1881 (44 & 45 Vict.) (c. 41)

Enlargement of estate with no or nominal rent

3.11 Section 65 of the Conveyancing Act 1881 enabled a lessee of a lease with an unexpired residue of at least two hundred years without any rent, or with merely a peppercorn rent, or a rent with no monetary value or which has ceased to be payable, to declare by deed that the term shall be enlarged into a fee simple. This power applied to a leasehold term, but not to fee farm grants.

3.12 Section 65 was repealed by schedule 5 of the Property (Northern Ireland) Order 1997 No. 1179 (N.I. 8). It was replaced by a similar provision in Article 35 of the 1997 Order which applies to a leasehold estate where the unexpired residue of the lease is more than 50 years and

there is no rent, or only a nominal rent. (Article 35A inserted by the Ground Rents Act (Northern Ireland) 2001 (Chapter 5) extends the power to a fee farm grant with a nominal rent, except where the land is used wholly for business purposes). The lessee may by deed of declaration declare that the leasehold is enlarged into an estate in fee simple and may apply to the Registrar of Titles for registration of the title to the fee simple estate. (In this context, a nominal rent means a yearly rent of less than one pound or a peppercorn or other rent having no money value).

Leasehold Enlargement and Extension Act (Northern Ireland) 1971 (Chapter 7) ("the 1971 Act")

3.13 Although the leases under which most residential property in Northern Ireland is held are for very long terms such as 999 years or 10,000 years, there are some nineteenth century urban leases which are for terms of 99 years. The 1971 Act was introduced to enable those lessees of residential property whose terms are running out to have their leases extended for up to 50 years; it also empowers lessees under long leases to purchase the fee simple, or fee farm grantees to redeem their fee farm rents. However, it is of limited application because where there is a pyramid title the lessee must trace all the superior owners and buy them each out. The time and the cost of the work involved act as a deterrent except in the most straightforward of cases.

3.14 The criteria for applying for an extension of the lease or to acquire the freehold are fairly restrictive. The lease must be for a term of more than 21 years of which more than 50 years remain unexpired; there must be buildings on the land and the applicant must be in occupation of the building as his sole or principal residence. (Note that this occupation qualification is not the same as that which entitles rent payers to redeem under the Ground Rents Act (Northern Ireland) 2001).

Property (Northern Ireland) Order 1997 (No. 1179 (N.I.8)) ("the 1997 Order")

Estates and interests proscribed

3.15 Measures were introduced in the 1997 Order which took a first step towards simplification of title and, from the appointed day (10 January 2000), it became impossible to create certain types of interest. There was a prohibition on the creation of any new:

(1) fee farm grants and fee farm rents (Article 28);

(2) rentcharges (subject to specified exceptions) (Article 29);

(3) long leases of dwelling-houses in excess of 50 years (subject to specified exceptions) (Article 30);

(4) perpetually renewable leases (Article 36), and

(5) leases for lives (Article 37).

It was also stipulated that any future provision (other than in a building lease) for the increase or review of a ground rent on more than one occasion would be of no effect (Article 31).

3.16 However, there was no attempt in the 1997 Order to take reform any further or to deal with the vast number of existing pyramid titles. A long lease of more than 50 years can still be created in respect of a flat, a mortgage, an equity-sharing lease (e.g. Northern Ireland Co-Ownership Housing Association lease), a concurrent lease and a National Trust lease (Article 30(5)).

Ground rent redemption

3.17 The model for the ground rent redemption scheme set out in the 1997 Order was mainly based on recommendations made by the **1990 Final Report.** It empowered persons who held land subject to ground rents to redeem those rents voluntarily except where the land was used wholly for

business purposes. The 1997 Order also contained provisions for the compulsory redemption of ground rents by a vendor on the sale of a dwelling-house.

3.18 The ground rent redemption scheme was not brought into effect because, after extensive consultation, it became apparent that the scheme providing for the redemption of ground rents was extremely cumbersome. It was thought that the process proposed would prove to be expensive and might cause unnecessary delays in conveyancing procedures. It was also suggested that the obligation for a vendor to first redeem his or her ground rent as a pre-condition of sale might be incompatible with Article 1 of the First Protocol to the European Convention on Human Rights which protects a person's right to the peaceful enjoyment of his or her property. Consequently, the provisions in the 1997 Order relating to ground rent redemption were not implemented and a revised scheme was drafted (see para. 3.58 – 3.74 in relation to ground rents and the ECHR).

Ground Rents Act (Northern Ireland) 2001 ("the 2001 Act") (Chapter 5)

3.19 The original ground rent redemption scheme set out in Part II of the 1997 Order was replaced by the 2001 Act which introduces a simpler and more straightforward procedure.

The 2001 Act (sections 1 & 4) provides initially for a voluntary scheme which allows rent payers under a fee farm grant or a long lease of a dwelling-house to redeem their ground rents by paying a capital sum to the Land Registry, using a multiplier of the ground rent (see para. 3.24). It further provides for a subsequent compulsory scheme (section 2) which requires a purchaser of a dwelling-house to buy out the ground rent on purchase before the title can be registered in the Land Registry.

3.20 Section 3 provides that a rent payer cannot avail of either the voluntary or compulsory redemption schemes where:

(1) there is notice of a proposal to acquire the fee simple under the Leasehold (Enlargement and Extension) Act (Northern Ireland) 1971,

(2) the term of the lease has been extended under the Leasehold Enlargement and Extension Act (Northern Ireland) 1971,

(3) the residuary term of the lease is less than 50 years,

(4) there is a ground rent payable and

(a) the lease is an equity-sharing lease, or

(b) the lease is of agricultural land, or

(c) the rent owner or a superior owner is the National Trust, or

(5) proceedings for recovery of the land are pending in any court,

(6) the ground rent is payable in respect of a flat, being a unit in a development containing at least two such units, there being a substantial degree of dependence for support and shelter, a horizontal boundary between at least two of the units, and sharing in the enjoyment of common parts,

(7) the dwelling-house is subject to a lease from the Northern Ireland Co-Ownership Housing Association or any other housing association.

3.21 The voluntary scheme came into effect on 29 July 2002 and is administered solely by the Land Registry whether the title is registered or unregistered. Section 2 has not become operative and the compulsory scheme has not come into effect.

3.22 The effect of ground rent redemption (section 13) is that the certificate of redemption operates to discharge the rent payer's estate from the estate of the rent owner and all

other superior estates to the extent that those estates carry an entitlement to ground rent or a superior rent. In the case of a leasehold estate, the certificate also operates to enlarge the rent payer's estate into an estate in fee simple and the title of the rent owner or any other superior owner to the fee simple is thereby extinguished.

3.23 The enlargement of a leasehold estate effected by ground rent redemption operates to make the land of the rent payer continue to be subject to all easements, rights and privileges enjoyed by the rent owner so far as they are not extinguished.

3.24 The capital sum payable under Article 2 of the Ground Rents (Multiplier) Order (Northern Ireland) 2002 (S.R. 2002 No. 228) is nine years purchase. The rent owner can claim the compensation money of nine times the annual ground rent from the Land Registry (section 6). It is the rent owner's responsibility to ensure that any superior rent owners receive their share of the redemption monies and in the meantime the rent owner is obliged to hold the money in trust for any superior rent owners.

Review of the Operation of the 2001 Act

3.25 It was agreed, when the 2001 Act was introduced, that the compulsory redemption scheme would not commence until the operation of the voluntary scheme had been reviewed.

The Office of Law Reform (Department of Finance and Personnel) published a Review of the Operation of the Ground Rents Act (Northern Ireland) 2001 (Discussion Paper 1/05) in November 2005 which sought views on the operation of the 2001 Act. It identified the issues which were raised during the initial phase of the voluntary scheme and explained the background to them.

The Review sought responses under the following headings:

(a) the size of the multiplier,

(b) the fee structure,
(c) the recording of apportionments and the endorsement of title deeds,

(d) the effects of redemption on covenants,

(e) leasehold estates with a short residuary term remaining outside the remit of the legislation,

(f) any additional comments or queries.

Analysis of Responses to the Discussion Paper on the Ground Rents Act (Northern Ireland) 2001 (Department of Finance and Personnel) ("the Analysis")

Multiplier

Although there appeared to be a number of different opinions about a more suitable multiplier, the Analysis considered that a multiplier of nine was appropriate and provided reasonable compensation.

Fees

While general dissatisfaction was also expressed in relation to the costs, the Analysis considered that the costs charged by solicitors and by lending institutions were private contractual matters which fell to be agreed between the parties. In relation to the Land Registry fees, it had to be borne in mind that the Land Registry must conduct its business in a cost-effective manner and therefore set its fees at a level that will cover its costs.

Apportionment

The majority of respondents stated that further provision should be made to record the apportionment of rents in a pyramid title, but the Analysis did not anticipate that further provision would be made for recording apportionments.

Covenants

Comments were made that the continuing existence of

covenants complicates the conveyancing process and, for that reason, the Analysis recognised that the law of covenants may merit further consideration.

Intermediate interests

The Analysis pointed out that since there is nothing to prevent intermediate rent owners from redeeming their superior rents this matter does not need to be considered any further.

Despite drawing the conclusion that no fundamental flaws had been revealed in the redemption process, the Analysis did not consider it appropriate to recommend the introduction of compulsory redemption. However, it stated that further efforts would be made to highlight the availability of voluntary redemption and the possibility of a broader review of the law in this area would be considered.

DIFFICULTIES WITH THE CURRENT SCHEME

3.26 The voluntary ground rent redemption scheme has been in operation since 2002 and there has been a fairly low uptake of applications. It is clear from the Analysis that there are a number of misconceptions amongst consumers in relation to the effects of redemption. It is also apparent that there are shortcomings in the operation of the scheme from the perspective of the practitioner.

Land Registry Statistics: Applications by rent payers to redeem the ground rent

2002 – (from August) 901

2003 – 1224

2004 – 572

2005 – 371

2006 – 354

2007 – 351

2008 – 367

2009 – 256

Covenants

3.27 The Analysis found that rent payers frequently believe that ground rent redemption transfers the freehold free from covenants. The continuing existence of such a wide range of covenants under section 16 of the 2001 Act diminishes the effectiveness of the redemption process and has had an adverse impact on the credibility of the scheme. (This issue is considered in detail in Chapter 4).

Land Registry

3.28 The system is currently operated through the Land Registry and various shortcomings have become apparent in its operation. Although the scheme is relatively straightforward in comparison with those which had been proposed prior to it, the fact that a ground rent has to be redeemed through a process operated by the Land Registry may act as a deterrent to an applicant.

Qualified fee simple

3.29 Applicants who redeemed their ground rents had been hoping for a fee simple absolute but in practice have been granted a qualified fee simple instead. The new freehold is regarded as a root of title commencing on the date on which it was issued, regardless of the fact that perfectly good title may go back many years prior to that date. Section 13 of the 2001 Act provides that the certificate of redemption operates to enlarge the rent payer's estate into an estate in fee simple. This should be the fee simple absolute and not a qualified fee simple. The issue of a qualified title is contrary to the spirit of the primary legislation.

3.30 The practice of issuing a qualified title may be based on Rule 23 of the Land Registration Rules (Northern Ireland) 1994 (S.R. 1994 No. 424) which requires a good root of at

least 15 years title to be shown for registration. However, a qualified title can be the cause of difficulties for borrowers who are required to produce title with a root going back a number of years in order to obtain a loan. The effect of a qualified title is that it does not prejudice or affect the enforcement of any estate, appearing from the register, to be excepted (Land Registration Act (Northern Ireland) 1970 section 18(2)). Although arguably, a qualified title should be recognised as good title, many of the lending institutions do not regard it as such.

Merger

3.31 When the rent payer's estate is enlarged into a fee simple under section 13(2) of the 2001 Act, the title of the rent owner or any other superior owner to the fee simple and all other estates which carry entitlement to ground rent or a superior rent are extinguished. However, in practice, unless the applicant applies for merger of the new redeemed freehold with the freehold of the rent owner, and extinguishment of the leasehold estate, two freehold estates appear on the title, both the freehold of the former rent payer and the new freehold of the rent owner. This is confusing for the applicant who finds it difficult to understand that ground rent redemption does not result in the creation of a single fee simple absolute. It does not make any sense to have two freeholds registered on one title; this situation is making titles more complicated in that respect, rather than simplifying them. It is also contrary to the provisions of the statute. Essentially the 2001 Act provides for a statutory transfer of the "full title" and it is not appropriate for secondary legislation to operate in a way which impedes the policy intention of the primary legislation. This point has been made to the Land Registry and the Commission understands that it has agreed to review the secondary legislation with a view to realising the overall legislative intent.

Costs and fees

3.32 Applicants who wish to redeem their ground rents can do so either personally or by instructing a solicitor to act for them. However, many solicitors are reluctant to become involved

in the redemption process because the proper fee for doing so, charged on a time basis, would be considerably in excess of the redemption value. There is also the additional burden of Land Registry fees. The cost of making an application to redeem a ground rent is £50 (Land Registry (Fees) Order (Northern Ireland) 2007 (S.R. 2007 No. 6) paragraph 10(a)). This sum may seem quite substantial to an applicant and disproportionate in the circumstances, especially if the ground rent is very small.

The fee for merger of a leasehold estate with a freehold estate is £150 (Land Registry (Fees) Order (Northern Ireland) 2007 paragraph 5(b)). We believe that this may be acting as another disincentive to applicants and their solicitors who naturally wish to keep the overall costs of any conveyancing or property transaction to a minimum.

When considering the issue of redemption, it is also important to be aware that the applicant may also incur other outlays, whether or not a solicitor is instructed. For example, where the property is subject to a mortgage, a lending institution will charge a fee for production of the title deeds.

No incentives for rent owners

3.33 The redemption money of nine times the ground rent is paid into the Land Registry. The former rent owner no longer has to pay a fee to collect the monies lodged. (The fees for the redemption of ground rents were restructured by the Land Registry (Fees) Order (Northern Ireland) 2007). The £50 fee charged to the rent payer to redeem the ground rent now also covers the rent owner to collect the monies lodged. This provides a little more incentive for the rent owner to collect the compensation, but the owners of large portfolios may wait until there are several claims to be made before making an application to the Land Registry. The administrative effort required and the amount involved may mean that the rent owner does not consider it a worthwhile exercise to make the claim.

The take up of the procedure by the rent owners has been lower than that by the rent payers.

Land Registry Statistics: Applications for compensation by the rent owner

2002 – (from August) 47

2003 – 334

2004 – 371

2005 – 170

2006 – 142

2007 – 206

2008 – 310

2009 – 209

This shows that there was an increase in applications in 2007 after the fee was abolished.

Apportionment

3.34 Rule 221 of the Land Registration Rules (Northern Ireland) 1994 as amended by the Land Registration (Amendment) Rules (Northern Ireland) 2002 (S.R. 2002 No. 229) provides that where the redemption monies are claimed by an intermediate rent payer he or she will make a declaration that all monies paid to him or her shall be held in trust for all superior owners who are entitled to a share of the compensation. Any apportionment required is not calculated or paid out by the Land Registry and the onus of doing so is placed entirely on the person who claims the money. The Commission is informed that, in practice, apportionments are not generally done because no mechanism exists for it to be calculated. Consequently the intermediate owner who has collected the redemption money often continues to pay the superior rent as before. In this way the superior owner does not lose out although it could be said that the amount of the head rent is secured over less land if any of the ground rents have been redeemed.

Conclusion

3.35 Following publication of the Analysis it was recognised that the present ground rent redemption scheme was not either working efficiently or facilitating a move towards freehold ownership. For that reason, in May 2008 the Minister for Finance and Personnel decided that the compulsory redemption scheme for ground rent redemption should not be introduced, but that there would be merit in reconsidering the redemption process and the law relating to associated covenants. Accordingly, he asked the Commission to undertake a review of the law of ground rents and covenants as part of the Land Law Reform Project.

The acknowledgment that more positive action is required to achieve wider freehold ownership leads the Commission to the view that a new approach to the problem is necessary. For comparative purposes it is interesting to see how the matter has been dealt with in other jurisdictions.

ENGLAND AND WALES

3.36 It was not common in England to grant leases as long as those in Ireland (which have terms such as 999 years or 10,000 years) and pyramid titles did not develop there to any great extent. Although hierarchies of ground rents did not exist to the same degree, rentcharges were much more common (see Megarry and Wade, paras. 31-014 to 31-017). A rentcharge is the right to a periodic payment of money charged on or issuing out of land other than under a lease or mortgage.

3.37 Rentcharges are currently in the process of being phased out of existence under the terms of the Rentcharges Act 1977 (c. 30). In general, no new rentcharges can be created after 21 August 1977. The exceptions include family charges on settled land and estate rentcharges created for the purpose of meeting expenses incurred in performing covenants for matters such as services and maintenance of the burdened land.

3.38 Although the owner of a rentcharge may release it by deed or it can be extinguished if it is not paid for 12 years, it may

also be redeemed under the Rentcharges Act 1977, by paying an equivalent capital sum to the owner of the rentcharge or into court. Any rentcharge which continues to exist (subject to specified exemptions) will be extinguished on 21 July 2037, which is a period of 60 years from 22 July 1977.

SCOTLAND

3.39 Although land law in Scotland developed in a very different way from that in Northern Ireland, one feature of it that is of interest to us is 'feu duty' and the steps that were taken to eliminate it. The system of land tenure in Scotland involved a relationship between superior and vassal subject to the payment of money by the vassal in the form of feu duty, which was similar to ground rent. Feu duties were generally small but in many cases they became a valuable source of income. Consequently many superior interests came to be held by insurance companies and others for investment purposes. In that respect, there was some similarity with the position currently existing in Northern Ireland.

3.40 The existence of feu duties was an aspect of the feudal system which continued in Scotland until very recently (see generally Reid, *The Abolition of Feudal Tenure in Scotland* (2003) Tottel Publishing), although its anomalous nature had been recognised in earlier reviews (e.g. the Committee chaired by Professor J M Halliday, "Report on Conveyancing Legislation and Practice", (1966) Cmnd. 3118). The Land Tenure Reform (Scotland) Act 1974 (c. 38) provided for the phasing out of feu duty and the imposition of new duties was prohibited under section 1 of that Act. The first time that an estate was sold after 1 September 1974, the feu duty was automatically extinguished. Compensation was due by the vendor to the superior, but the extinction took place anyway, whether or not the money was paid. In the meantime, any vassal who wished to redeem could do so on a voluntary basis.

3.41 Subsequently the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (2000 asp. 5) extinguished all remaining feu duties from the appointed day (28 November 2004). Any feu duty

still unredeemed on the appointed day became a personal debt which was not secured on the land and was of no concern to any subsequent purchaser. The onus was placed on the superior owner to collect the amount due from the vassal within a period of two years and the vassal was only obliged to pay the compensatory payment on being requested to do so. The amount of the compensation was based on making an investment in 2.5% consolidated stock so that the income produced by the feu duty could, if desired, be reproduced by investment of the compensation in government stock.

Most properties were sold at least once between 1974 and 2004 with the result that the vast majority of feu duties were redeemed before the 2000 Act became operative. The remainder have now all been extinguished.

REPUBLIC OF IRELAND

3.42 Pyramid titles developed in the Republic of Ireland in the same way as in Northern Ireland. However, the ground rents there are generally smaller than in Northern Ireland, because it has not been possible to create any new ones since 1978 (Landlord and Tenant (Ground Rents) Act 1978 (No. 7/1978), section 2). Nevertheless, the redemption scheme in that jurisdiction is of considerable interest to us because of the common origins of land law and the broad similarity in the structures of title that have developed.

3.43 A scheme for the voluntary redemption of ground rents was introduced in the Republic of Ireland in 1967 and the Land Registry of Ireland operates the current Ground Rents Purchase Scheme under the Landlord and Tenant (Ground Rents) (No. 2) Act 1978 (No. 16/1978). The scheme applies to both registered and unregistered properties. It generally applies to dwelling-houses, but is also capable of applying to business premises. There is a further restriction on eligibility in that there must be permanent buildings on the land and there is no right to acquire the fee simple in a lease in a horizontal layer above the ground. Premises divided into four or more flats are also excluded.

3.44 An applicant, who may hold title either under a long lease or a fee farm grant, can purchase the fee simple and any intermediate interest either by following a consent procedure or an arbitration procedure. The Registrar of Titles can only issue a certificate vesting the fee simple in the applicant by the consent procedure where the permanent buildings on the land are used wholly or principally as a dwelling-house. The consent of every person who would be a party to the conveyance of the fee simple free from incumbrances is required. If an application is made without consent, it is referred to a Land Registry arbitrator who has power to determine the person entitled to acquire the fee simple, the purchase price, the persons entitled to the purchase money and the shares to which they are entitled.

3.45 The purchase price for the fee simple is calculated under section 7 of the Landlord and Tenant (Amendment) Act 1984 (No. 4/1984) and in most cases cannot exceed an amount which, if invested in long-term Government stock, would produce annually in gross interest an amount equal to the amount of the ground rent.

When the vesting certificate is issued it is deemed to be a sale and triggers a requirement for compulsory first registration. After it has been registered in the Land Registry, the applicant is given a freehold folio with a fee simple absolute title, which is effectively a statutory freehold. It is not viewed as a qualified title because it is linked to the lease or fee farm grant under which the title was previously held and it is a substantive interest.

The constitutional challenge

3.46 The ground rents legislation was subject to a number of avenues of constitutional challenge in the recent case of *John E Shirley & Ors. v A O'Gorman & Ors.* [2006] IEHC 27 (currently under appeal) (see para. 3.63 below). The Irish High Court applied the test of constitutional proportionality, drawing heavily on the wide margin of appreciation formulated by the European Court of Human Rights in applying the test under Article 1 Protocol 1 of the

European Convention on Human Rights. (For a discussion of ground rents and the ECHR see paras. 3.58 – 3.74).

3.47 The Court recognised that there is a wide range of acceptable balances which may be struck between individual rights to property and the right of the State to control those rights in the interests of the common good. Although the Irish Courts enjoy an ultimate supervisory role in ensuring that legislation is constitutional, the Court should be slow to substitute its own view of what may or may not be required in order to reconcile the exercise of property rights with the exigencies of the common good.

3.48 The general interest or common good does not mean the good of every person without exception. The fact that some anomaly is thrown up by the scheme, such as where the beneficiary is a wealthy entity, does not mean that the legislation fails to address the demands of the common good in a broad sense. The ground rents scheme is one which must be seen as intended to strike a proper balance between the exercise of individual property rights and the wider benefit to society as a whole.

3.49 The other point of interest in that case was the characterisation of the landlord's interest as an "income stream" rather than an interest in property which entitled him or her to future possession (see para. 3.63). That was significant because it meant that the constitutional debate was concerned with monetary compensation rather than interference with a right to property (see Niall F. Buckley "Ground Rents Revisited" (2009) 14(1) CPLJ 13).

MARYLAND

3.50 In Maryland, there have been leasehold deeds for residential property since colonial times. After the American War of Independence (1775 - 1783) when any remaining feudal rights and quit rents were abolished in the United States, (cross ref. to Consultation Paper *Land Law* NILC 2 (2009) paras. 2.49 - 2.53) a system of rents and sub-rents developed in Maryland arising out of leases granted for 99 years renewable forever (see Frank A Kaufman, "The

Maryland Ground Rent – Mysterious but Beneficial", Maryland Law Review, Vol. 5 No. 1, December 1940). The system did not develop to any great extent elsewhere in the United States, although the practice was not unknown for example in Pennsylvania.

3.51 Enterprising investors bought tracts of land from the government and granted leases to tenants who could not otherwise afford to purchase the land, but who could purchase the house on the land and were able to make small annual payments for the land. Gradually over the years, a great deal of dissatisfaction arose with the system and in 1884 legislation was passed prohibiting the future creation of irredeemable ground rents. The 1884 statute also provided that all leases of residential property created in the future for more than fifteen years would be redeemable by the lessee at his option any time after the expiration of 15 years of the term, at the rate of six percent. Revisions were made to that system by further statutes passed in 1888 and 1900 but the legislation did not deter landlords from continuing to create 99 year leases subject to the payment of ground rents.

3.52 Although the rents were not always demanded or collected, it was recognised that ground rents could be a lucrative source of income. In recent years several large real estate firms and property companies purchased thousands of inactive ground rents and tracked down the lessees for payment. They pursued arrears of rent, charged interest and initiated ejectment proceedings against any defaulting lessees, enjoying some degree of success in the courts. The Baltimore Sun (10 December 2006) reported that the courts have awarded possession to ground rent owners at least 521 times between 2000 and the end of March 2006, sometimes for tens of thousands of dollars in profits. In response to public criticism and a series of articles published in The Baltimore Sun in 2006, the Maryland General Assembly was forced to make ground rent a legislative priority. Accordingly, the Real Property Article of the Maryland Code was amended in 2007 to prohibit the creation of any new ground rents (from 22 January 2007) and ground rent owners were also prohibited from collecting

more than three years' arrears of rent.

3.53 The new law has completely abolished the right to ejectment for non payment of ground rent in relation to residential properties. Instead, the revised Code entitles ground rent holders to a lien against the property for the amount owed, whereupon the leaseholder may foreclose upon the lien if the rent goes unpaid after a reasonable time. These foreclosure rights are not unlike those of a bank when it forecloses on a mortgage. The new laws are meant to ensure that when the lien is foreclosed upon, the homeowner retains the equity in his or her home despite the forfeiture of the property. The ground rent owner in that case is awarded only the amount owed and the homeowner gets the balance.

3.54 While the legislation does not do away with the ground rent system, it sets the stage for the gradual elimination of ground rents. A Ground Rent Registry System was set up and from 1 July 2007 ground rent owners were given three years until 30 September 2010 in which to register their leases together with the right to collect the rent in the State Department of Assessment and Taxation (SDAT).

3.55 The onus has been shifted and placed on the ground rent owner who has to give proper notice to the rent payer of the outstanding debt or to provide an avenue for sale of the freehold. If the ground rent owner does not register the rent, the right to future collection is forfeited. Once recorded, the ground rent redemption certificate issued by the SDAT can be recorded in the land records. It is then effective to conclusively vest a fee simple title in the tenant, free and clear of any interest of the landlord. The SDAT works with the State Archives registering, indexing and linking ground rent leases so registered.

3.56 These changes create significant new obligations for the ground rent owner to preserve and enforce existing ground rents. If the owner does not comply with the registration requirements by the deadline of 30 September 2010, the ground rent is extinguished and the leasehold owner can apply for a certificate of extinguishment with the SDAT.

Once the certificate is issued, it becomes effective against the ground rent owner and anyone claiming through him or her, upon it being recorded in the appropriate land records. The leasehold owner then becomes fully vested with the fee simple title to the property.

3.57 It is of interest to us to see the solution that has been found to the problem of ground rents in Maryland together with the structures and procedures that have been established which will result in the gradual elimination of those rents. The only way in which the system and its processes can work is with a substantial investment from the State and a generous amount of political will. It is notable that no action was taken by the State until there was a public outcry in response to the way in which the system was being abused and the perceived injustice inflicted when commercial entities took advantage of defaulting lessees who had benefitted from prior inaction. In Maryland the rights of the rent payers were improved and endorsed by the legislature when the rent owners exercised their legal rights in an aggressive manner that was a threat to the home owners. However, it is clear that the rights of both parties have to be balanced and also that the public interest is taken into account.

THE EUROPEAN CONVENTION ON HUMAN RIGHTS

3.58 It is important to consider the proposals for reform of ground rents in the context of the entitlement to peaceful enjoyment of possessions enshrined in the European Convention on Human Rights.

Article 1

3.59 Article 1 Protocol 1 (A1-P1) provides:

(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possession except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

(2) The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as

it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The Strasbourg Court has noted that A1–P1 comprises three distinct elements:

(1) The general principle of peaceful enjoyment of one's possessions;

(2) A general, but conditional, protection from deprivation of those possessions; and

(3) The limitation of the right by State determination that control of possession is necessary in the general or public interest. (*AGOSI v The United Kingdom* – 9118/80 [1986] ECHR 13, 24 October 1986, see also Harpum, "Property Law – The Human Rights Dimension; Part 2", 4(2) Landlord & Tenant R. 29,29 (2000))

Applicability of Article 1

3.60 While the term "possessions" is not defined, it undoubtedly covers a wide variety of "property" interests, including the rights inherent in the possession of freehold estates and leases, easements, restrictive covenants and options to buy or lease property (see Howell, "Land and Human Rights" (1999) Conv 287). In substance A1-P1 guarantees the right to property (see *Marckx v Belgium* (1979) 2 EHRR 330 para. 63). It implies a right to peaceful enjoyment without State interference which includes the right to buy, sell, mortgage, charge, lease and rent – in short, both the right to own the property and to deal with it within the framework of the laws of each member state. It is clear that both the right to a ground rent charged on land and the right to enforce covenants attached to a residuary interest in land are possessions within the meaning of A1- P1.

Deprivation of rights or control of use

3.61 To prove a deprivation of rights, it is sufficient first to establish an interest in property which has an economic

value; it is not necessary to demonstrate physical possession or the right of access to a particular property (see generally, Clayton and Tomlinson, *The Law of Human Rights* (2nd edition, Oxford University press) paras. 18.75 – 18.131). To show that there has been a deprivation of property involves demonstrating that all the legal rights of the owner have been extinguished (see e.g. *Lithgow v United Kingdom* (1986) 8 EHRR 329, para. 107). Although the vast majority of cases easily satisfy the requirement, it is also necessary that any interference with the peaceful enjoyment of possessions should be lawful (*Iatridis v Greece*, 1999 – II Eur. Ct. H.R. 75, 97).

3.62 One might initially consider that any new proposals to extinguish ground rents would be considered as a deprivation of rights. However, there is a strong argument in the light of recent cases that they might be considered instead as a control of use. Certainly any provisions affecting the enforceability of covenants are more likely to be seen as a control of use. It is of interest in this context that in *J A Pye v United Kingdom* ((2007) 46 EHRR 1083, by a majority of 10 to 7, ("*Pye*") the Grand Chamber held that the legislation at issue was designed to regulate, amongst other things, limitation periods in the context of the use and ownership of land amongst individuals. Consequently the operation of the rules concerning adverse possession of land constituted a control of use and not a deprivation of rights.

3.63 In a similar situation, in *Shirley v O'Gorman*, (currently subject to appeal) the High Court in the Republic of Ireland had to consider whether the ground rents legislation in that jurisdiction was in direct conflict with constitutionally protected property rights (see para. 3.46 – 3.49 above). In that case the landlord's interest in the property was described as being an "income stream". The court recognised that for all practical purposes the landlord no longer had an interest which would ever entitle him or her to possession of the premises. This was significant because it meant that the legislation did not interfere with any property rights (see Niall F. Buckley "Ground Rents Revisited" (2009) 14(1) CPLJ 13).

Legitimate aim of interference in public interest

3.64 An interference must always have a legitimate aim in the public or general interest. The national authorities can make the initial assessment that such a problem exists as warrants an interference with property rights. In *James v United Kingdom*, (*The Duke of Westminster's Case*) (1986) 8 EHRR 123, ("*James*") the Court recognised that a compulsory transfer of property from one individual to another may, depending on the circumstances, constitute a legitimate means of promoting the public interest. It was decided in that case that the right of the tenant to acquire the freehold reversion in accordance with the Leasehold Reform Act 1967 (c. 88) did not contravene the right to property of the owner of the reversion.

3.65 The legislation was framed in pursuance of a policy calculated to enhance social justice within a system of law governing the contractual or property rights of private parties. This was considered to be a matter of public concern and therefore legislative measures intended to bring about such fairness were capable of being "in the public interest" even if they involved the compulsory transfer of property from one individual to another. Any proposals for reform of the ground rents system in Northern Ireland could be viewed in a similar light because there is a public interest in the modernisation of the existing complex and outdated system of title.

Fair balance

3.66 There is a requirement that any interference by the State with possessions will be subjected to a general proportionality test and a requirement to demonstrate that a fair balance has been struck between the demands of the general interests of the community and the requirements of the protection of the individual interests. (*Sporrong and LÖnnroth v Sweden*, 52 Eur. Ct. H.R. (ser. A) (1982)) ("*Sporrong*"). The State is allowed a wide margin of appreciation in determining whether or not the deprivation is in the public interest (see *Hutten-Czapska v Poland* (2007) 45 EHRR 4 (GC) para. 166) ("*Hutten-Czapska*"), The Strasbourg Court will respect the legislature's judgment

as to what is in the public interest and it is very unusual for it to find a violation, unless it is manifestly without reasonable foundation (see *Jahn and Others v Germany* [GC] Nos. 46720/99, 72203/01 and 72552/01, ECHR 2005-VI, §91, with reference back to the cases of *James* and *The Former King of Greece* [GC] No. 25701/94, ECHR 2000-XII). This is particularly true in cases where what is at stake is a longstanding and complex area of law which regulates private law matters between individuals (for example, in *Pye*). It would not be difficult to apply this principle by analogy to proposals for the reform of the ground rents legislation.

3.67 The source of the fair balance test lies outside A1–P1 but is inherent in the whole of the Convention (*Sporrong*). There must be a reasonable proportionality between the means employed and the measures taken to effect the deprivation of possessions (*Hutten-Czapska*). A wide range of factors have been taken into account in assessing whether or not the interference was proportionate and there has been a fair balance. One of the most important is whether the property owner is entitled to compensation for the interference and if so on what terms (see Austin, "Commerce and the European Convention on Human Rights" (2004) 11(9) CLP 223).

Compensation

3.68 Compensation is relevant to the fair balance, although the Court has fallen short of saying that there is a right to compensation (*Sporrong*). Compensation is almost always required in deprivation cases but in cases involving control of use there is no general right to compensation and the State is afforded a wide margin of appreciation. However, the absence of compensation may be an important factor in demonstrating lack of balance, particularly where the control of use affects the very substance of ownership.

3.69 In *James* the Court stated the taking of property without payment of compensation reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable. The terms on

which the compensation was paid was material to the assessment as to whether a fair balance had been struck between the various interests at stake. The Court considered that a fair balance might be struck without providing full compensation, depending on the circumstances. As a matter of general principle, it accepted that compensation should relate to the value of the property, but declared that legitimate objectives of public interest designed to achieve greater social justice might call for less than reimbursement of the full market value.

3.70 The Court also made it clear that it would give a wide margin of appreciation in determining the level of compensation, as it stated that it would respect the legislature's judgment unless that judgment was without reasonable foundation (*James*). In that case, the value of the reversionary interest in the property which the Trustees were being deprived of was quite substantial. (Freehold values (assessed by the applicant) in the 80 transactions which were the subject of the case, varied from £44,000 to £225,000 whereas the price paid for enfranchisement by the tenant varied from £2,500 to £222,000).

3.71 Accordingly, it would seem to be reasonable to suggest that, so long as the new proposals provide for compensation to be payable to ground rent owners, the provisions should not be open to challenge on this ground. It is relevant that in Northern Ireland, the value of residuary interests would be much lower than the equivalent in England, because of the prevalence of fee farm grants and very long leases in this jurisdiction, for terms such as 999 years or 10,000 years.

Applicability of Article 6

3.72 A second major Article of the Convention with application to property law is Article 6, which provides that, in the determination of civil rights, everyone is entitled to a fair and public hearing before an independent and impartial tribunal. It is usually used in conjunction with Article 1 in property law cases, sometimes as a secondary point of violation (see Halstead, "Human Property Rights" (2002) Conv. & Prop. Law. 153, 164 (Mar/Apr 2002). When a person is deprived of

property, such deprivation has to be effected fairly and in a lawful manner. All relevant circumstances must be considered, weighing the particular rights of the individual against the collective rights of the community and achieving a fair balance between them, ensuring that the payment of compensation is made (if appropriate) and that the whole process is undertaken and completed without unreasonable delay. There must also be procedural safeguards in that the property owner must have a reasonable opportunity for putting his or her case to the authorities to challenge the measures interfering with the rights to property.

3.73 Thus in *Pye*, the Grand Chamber held that the paper owners were not without procedural protection because during the limitation period it was open to them to remedy the adverse possession by bringing a court action for repossession of the land. Such an action would have stopped time running. In relation to proposals for legislation relating to ground rent redemption, there is a similarity with the facts in the *James* case. In *James* the applicants complained that they had no means of challenging the tenants' right to enfranchise but the ECtHR held that there was no breach of Article 6. It was noted in that case that the legislation in question did not permit the landlord to challenge the tenants' entitlement to acquire the property compulsorily, but the ECtHR did not find this to be unacceptable because Article 6 does not require that there be a procedure to override national law. As long as the acquisition by the tenants was in conformity with the legislation, the applicants had no ground for complaint, particularly as they had unimpeded access to a tribunal to determine any issue disputing the price or alleging non-compliance with the legislation.

Conclusion on compliance with ECHR

3.74 The purpose of the reforms proposed by the Commission is to modernise and reform an archaic and outdated system of land tenure. Clearly, carefully considered, balanced and proportionate reforms should not encounter problems in complying with the ECHR. In relation to Article 1 Protocol 1, there is a strong argument that proposals to phase out

ground rents would be considered as a control of use rather than a deprivation of rights because the rent owner does not have a right to possession and an interest in a ground rent could be regarded purely as a source of income. The public benefit test will be achieved because it is in the wider general interest to provide a simple straightforward ground rent redemption scheme. The availability of compensation for the rent owner should satisfy the requirement of proportionality between the ends desired and the means employed to achieve them. Since it has been recognised that the State enjoys a wide margin of appreciation when enacting property law, it is very likely that reforms of the ground rent system would be considered to be within acceptable boundaries of the public interest. Further, it is most unlikely that the proposals will give rise to results which are so anomalous as to render the ensuing legislation unacceptable or manifestly without foundation. Finally, it is not anticipated that there will be any difficulty in complying with Article 6 because there is no requirement to have a procedure to protect the rent owner which overrides national law.

PROPOSALS FOR REFORM

Introduction

3.75 As aresult of the difficulties that have become apparent with the operation of the present redemption scheme under the 2001 Act, the Commission has formed the view that a new more straightforward scheme should be devised to accelerate the simplification of titles and actively encourage the move towards unencumbered statutory ownership equivalent to a fee simple absolute. The Commission also considers that the existing scheme should be terminated when an alternative becomes available so that two processes are not simultaneously available. **Question 17:** *Do consultees agree that the present scheme should end when the new proposals are implemented and that there should be appropriate transitional arrangements for applicants already involved in the process?*

3.76 It is also important that any new proposals should meet the expectations of the parties and produce an outcome that is

satisfactory both to the rent payer and to the rent owner. The end result should be that the rent payer obtains statutory ownership equivalent to a fee simple interest in possession free from any ground rent; all superior interests in the land are extinguished, the new interest confers an absolute title and the rent owner is adequately compensated both for the loss of income and the interest in the land.

3.77 Although the Commission would like to be able to make proposals that would address the problems with the present scheme we are aware that this is by no means an easy task. We are very conscious of the need to balance the interests of both the rent payer and the rent owner and to endeavour to find a solution that is considered to be fair to everyone involved. We have given much thought to a range of ideas eventually coming to the conclusion that, because of the great variation in the size of the rents in Northern Ireland, it is difficult to devise a one-size fits all redemption scheme. We are also of the view that it would not be easy to introduce a scheme that can be brought into effect across the board on one appointed day. Accordingly we are seeking the views of consultees on a wide range of proposals.

Applicability of the scheme

3.78 The Commission is provisionally minded to propose that the redemption scheme should operate only in respect of dwelling-houses and that the applicability of the scheme should be similar to that which currently is in place in the 2001 Act. **Question 18:** ***(a)*** *Do consultees consider that, as with the present scheme, the new redemption scheme should apply only to ground rents of dwelling houses?* ***(b)*** *If not, should it apply to all ground rents?* ***(c)*** *Should it apply to commercial premises?*

Accordingly, in general terms: –

(1) The scheme would apply where a rent payer holds a dwelling-house either under a fee farm grant or a long lease subject to a ground rent.

(2) A ground rent means

(a) a fee farm rent; or

(b) the rent payable under a lease granted for a term of more than 50 years, other than a nominal rent

(3) A nominal rent means

(a) a rent of a yearly amount of less than £1; or

(b) a peppercorn or other rent having no money value.

(4) The scheme would also apply to certain other periodic payments including any remaining quit rents, tithe rentcharges and any other rentcharges.

(5) It would be confined to residential property where the land is used wholly for the purposes of a private dwelling and would not extend to cases where the land is used for business purposes.

(6) It would not apply where the ground rent is payable under a lease which has a short residuary term of less than 50 years.

(7) It would not apply where the lease is an equity-sharing lease.

(8) It would not apply where the lease is of agricultural land.

(9) It would not apply where the rent owner or a superior owner is the National Trust.

(10) It would not apply where proceedings are pending in any court for recovery of possession of the land.

(11) It would not apply to a flat, that is

(a) A unit of accommodation in a development containing two or more such units, where –

(b) Each such unit is dependent to a substantial degree on one or more than one other such unit for support or shelter; and

(c) The boundary or part of the boundary, between at least two such units is horizontal; and

(d) The owners or occupiers of such units, or any of them share or may share in the enjoyment of common parts.

(12) It would not apply to a situation where the rent payer is entitled to make an application under the Leasehold (Enlargement and Extension) Act (Northern Ireland) 1971 to apply for a fee simple or to extend a lease. **Question 19:** *Should the 1971 Act be repealed and replaced by a new statutory provision conferring similar powers on those who were able to take advantage of it? If so, would it be reasonable to suggest that the rent owners under leases which have less than 50 years to run would be entitled to compensation based on 1% of the capital value of the property multiplied by nine?*

3.79 The Commission welcomes the views of consultees on the categories of land to which the redemption proposals should apply. **Question 20:** ***(a)*** *How have the definitions under the 2001 Act worked in practice?* ***(b)*** *Should the new proposals make the same exceptions?* ***(c)*** *Should the new proposals apply only to dwelling houses as at present or to all ground rents?* ***(d)*** *Should redemption be permitted in the case of a long lease where the land is used for business purposes?* ***(e)*** *Does there need to be more clarity in the definitions, for example in respect of flats?* ***(f)*** *Should all rentcharges be redeemable including those which are currently excepted under Article 29(3) (b) to (e) of the Property (Northern Ireland) Order 1997 (NI 8)?* ***(g)*** *What about statutory rentcharges and rentcharges created by court order – are these significant?*

Provisions for increase of ground rent

3.80 Article31 of the Property (Northern Ireland) Order 1997 provides that, in relation to any instrument executed after the appointed day (10 January 2000), any provision for the increase or review of a ground rent on one or more than one occasion is of no effect. However this provision does not apply to a building lease or to a fee farm grant (Note that under Article 28 there is a prohibition on the creation of any new fee farm grants) where provision is made for increases in the ground rent which are related to periods or events in the progress of building or related activities. **Question 21:** ***(a)*** *Do consultees consider that this exception continues to be valid?* ***(b)*** *If not, should the Commission recommend that Article 31(4) be repealed and the provision that there should be no increase or review in ground rent be universally applied?*

3.81 The Commission has been impressed by the success of the scheme implemented in Scotland to extinguish feu duties (which are similar to ground rents) under the Abolition of Feudal Tenure etc. (Scotland) Act 2000, and considers that there are elements of it which can be adapted for use in Northern Ireland.

3.82 One of the major causes of complaint about the operation of the current scheme has been that the fees and costs of making an application for redemption are too high. We consider that it is important to address this problem and that it is essential the new redemption scheme is as inexpensive as possible. However, we recognise that there is no prospect of obtaining any Government funding for the process and it would be unrealistic to propose that a Government agency be responsible for the administration.

3.83 With this in mind, the Commission proposes that the new scheme should be designed in a way that redemption is automatic and the process for obtaining the compensation is self-administered between the parties themselves, as was the scheme in Scotland. We take the view that it is not necessary for the process to be administered through the Land Registry, although the Land Registry would naturally

be required to make the necessary amendments to ownership on the register. We also consider that it should not be necessary for applicants to instruct a solicitor if the scheme is sufficiently straightforward. Consequently, there should be no fees or costs other than those which the parties choose to incur of their own volition, such as fees to agents for completing the administration on their behalf.

3.84 Another deficiency of the present scheme has been its low take-up rate. As there have been a limited number of applications to redeem the ground rent and the process has remained a voluntary one, we are of the opinion that any redemption scheme which operates purely on an optional basis is unlikely to be effective in simplifying title on any meaningful scale. We take the view that there must be a greater degree of compulsion in order to achieve more significant results.

Right of re-entry

3.85 A fee farm grant or a lease of land reserving a ground rent is usually subject to a clause in the deed giving a right of re-entry or forfeiture in the event of the rent remaining unpaid for a stipulated period (commonly 21 days) In theory, if the rent payer does not pay the rent before the period expires, the rent owner can take possession of the land to the entire exclusion of the defaulting rent payer and of any sub-tenants who hold title from him or her. In practice the rent owner is subject to severe restraints, such as the risk of committing an offence under the Forcible Entries Acts, and the rent owner is entitled to apply for relief from forfeiture. There is also a statutory right to take possession for non-payment after 40 days under section 44 of the Conveyancing Act 1881. **Question 22:** *Do consultees agree that section 44 of the Conveyancing Act 1881, which provides remedies for the recovery of land where an annual sum is charged on the land or the income of the land, should be repealed and not replaced?*

3.86 The Commission believes that it is quite disproportionate that a rent owner or superior landlord should have a right of re-entry or forfeiture over a house with a substantial capital

value in order to protect a ground rent. We also consider that it is inequitable for a rent owner to be able to threaten a defaulting rent payer with proceedings for forfeiture for non-payment, and that however unlikely it is that forfeiture would be granted at the end of the day, it nevertheless remains a sanction with some real value. Accordingly, we propose that the ground rent should no longer be secured on the land and that it should become a contract debt. As such it would be a personal matter between the rent payer at the date on which the legislation came into operation and the rent owner. There would be a provision in the legislation to ensure that the debt would be enforceable, notwithstanding the fact that there might not be privity of contract between the parties. Subsequently, when the land is sold, the purchaser would not need to be concerned about whether either the ground rent or the compensation had been paid to the rent owner. **Question 23:** *Do consultees agree that the ground rent should cease to be secured on the land and should become a contract debt?*

Smaller ground rents

3.87 The Commission is provisionally minded to suggest making a distinction between smaller ground rents and larger ones, because of the wide variation in the amount of rents and the belief that there are problems in devising a solution that would be suitable for all ground rents. We consider that it may be less controversial to introduce provisions to eliminate smaller ground rents within a shorter time frame because they have less value and generally relate to older properties. There is also the point that rents below a certain amount have a negligible investment value. **Question 24:** *Do consultees consider that there should be a distinction between smaller ground rents and larger ones?* Any dividing line is by its very nature arbitrary, but we suggest that the cut-off point would be either £10, £20 or £50. Any ground rents below that value would come within the scheme for smaller ground rents. **Question 25:** *Which value would consultees prefer as the appropriate maximum for the smaller rents provisions: £10, £20, £50 or a different amount?*

Automatic extinguishment

3.88 The Commission proposes that on an appointed day, all smaller ground rents of £10, £20, £50 or less, per annum should be extinguished. Compensation would be due by the rent payer to the rent owner, but the ground rent would be extinguished whether or not the compensation was paid. As this a fairly radical proposal, we consider that there should be a lead-in period of sufficient time to enable the parties to make the necessary arrangements between themselves for payment of the compensation and we suggest that the appointed day should be three years from the date on which the legislation comes into effect. **Question 26:** ***(a)*** *Do consultees agree?* ***(b)*** *If not, should the lead-in period be shorter or longer and what alternative period is preferred?*

3.89 On the date on which the ground rent is extinguished, we propose that the rent payer would also acquire a statutory ownership equivalent to the fee simple absolute and the estate of the rent owner would be discharged. Further, any other superior interests would be extinguished. The former rent payer would become the owner of the land. On the appointed day the estate of the rent payer would be converted automatically into statutory ownership equivalent to a fee simple absolute. Accordingly there would be no need for a certificate of redemption of the ground rent, nor for there to be any merger of the different estates. The Land Registry would be required to register the new ownership on the register in the name of the former rent payer and to discharge the superior estates from the register. **Question 27:** *Do consultees agree that the rent payer should automatically acquire statutory ownership and that all the superior estates should also be automatically extinguished?*

Raising amount of automatic extinguishment

3.90 The Commission believes that it is necessary to ensure that rent owners realise that there is limited life in income from ground rents and they must take action to obtain the capital sum due to them as compensation for the loss they will suffer if they fail to do anything. Accordingly, we are considering that the scheme for the redemption of small

rents, might be extended or rolled out further in due course. At some point in the future, after all the smaller ground rents have been extinguished, the amount could be raised. For example, all ground rents up to £100 per annum could be extinguished on an appointed day. By that time everyone would have become used to and familiar with both the concept of compulsory redemption and the practice of paying the compensation, so might welcome the automatic elimination of a further tranche of ground rents. It might also encourage the parties to make the necessary arrangements to deal with the ground rent themselves in the meantime on a voluntary basis. **Question 28:** ***(a)*** *Do consultees agree that there should be provision at a future date for larger ground rents to be automatically extinguished?* ***(b)*** *Although it may be difficult to say at this early stage, up to what amount might this be extended?* ***(c)*** *Approximately how far ahead might this provision be made? For example, five years?*

Larger ground rents

3.91 The Commission does not plan to propose the automatic extinguishment of larger rents in the initial phase of the redemption scheme. However, we recognise that a redemption scheme which is purely optional will not work and we consider that there must be some elements of compulsion to drive forward the elimination of ground rents. We believe that the best way to make progress with the phasing out of ground rents is to introduce triggering events upon which the ground rent must be redeemed. Experience to date has shown that under the current scheme there are insufficient benefits perceived in the end result for the parties otherwise to avail themselves of the redemption process.

3.92 If the ground rent is automatically extinguished on sale or another trigger the estate of the rent payer will be automatically converted into statutory ownership equivalent to a fee simple absolute. Again, it will not be necessary to have a certificate of redemption because the ground rent will be extinguished by the legislation and no-one other than the rent payer at the time of sale will have any liability for the

debt. The rent payer will pay the compensation due to the rent owner on completion of the sale. It will be incumbent on the Land Registry to register the purchaser with statutory ownership on application, without requiring proof of the compensation having been paid to the rent owner.

Compensation for both smaller and larger rents

3.93 It is important that the rent owner should be compensated by the rent payer for the loss of the income from the ground rent and the superior interest in the land, as is the case under the existing scheme. However, instead of the process continuing to be at the instigation of the rent payer, we propose that the onus would be placed on the rent owner to request and obtain the compensation. If he or she failed to do so by the appointed day, in addition to the ground rent being extinguished, the rent owner would also lose the right to payment of the compensation. In that event, the rent payer would be under no continuing obligation in this respect and the debt would effectively become statute barred. **Question 29:** *Do consultees agree that the responsibility for obtaining the compensation should lie with the rent owner?* **Question 30:** *Do consultees accept that the rent owner will lose the right to the compensation on the appointed day when the ground rent is extinguished?*

3.94 The Commission has considered the matter of the amount of the compensation that should be paid although this has been debated at length on many previous occasions and differing opinions have been expressed. We examined once again the possibility of compensation calculated according to a formula based on payment of such sum as, if invested in government stock, would produce an annual income equivalent to the ground rent. The idea is that the income stream produced by the ground rent could, if the rent owner so wished, be reproduced by the investment in government stock. However, as interest rates are currently very low, the application of this formula would involve the investment of a capital value of 15 – 20 times the annual ground rent, perhaps more. We consider that this is unacceptably high in the light of the size of some of the higher rents. Although such formulae have been applied successfully in both

Scotland and the Republic of Ireland, the rents there were all of a much lower value in those jurisdictions than is the case in Northern Ireland.

Compensation for smaller ground rents

3.95 In consequence, after much deliberation and, in order to ensure that the process remains as straightforward and uncomplicated as possible, we are inclined to revert to the principle of using a simple multiplier for the smaller ground rents, as is the case for all rents under the current scheme. There is no obvious rationale by which the value of a ground rent can be calculated and everyone is generally already familiar with a multiplier of nine. Accordingly, it seems to us a good starting point and we are inclined to propose, in the case of the smaller rents that the compensation due by the rent payer should continue to be nine times the annual ground rent.

However, we recognise that a multiplier of nine times the rent may not fully compensate the rent owner. At present, a rent owner can save costs by dealing with the process of claiming the redemption money from the Land Registry without involving an agent, but will still incur legal charges from a solicitor for certifying the title and swearing the forms. If, as we suggest, the onus of obtaining the redemption money is placed on the rent owner, this will effectively mean that he or she has to employ an agent which will result in unavoidable charges. For that reason, it may be preferable to suggest a higher multiplier, such as twelve times the ground rent.

Question 31: ***(a)*** *Do consultees agree that the compensation for smaller rents should be calculated by using a simple multiplier?* ***(b)*** *If so, should the compensation be nine times the annual ground rent or is twelve a more acceptable multiplier?* ***(c)*** *If neither, what multiplier do consultees consider would be preferable?* ***(d)*** *Alternatively, should the calculation be made on a different basis such as the investment of a capital sum in government stock?*

3.96 For a smaller ground rent with a top value of £50, using a multiplier of nine, the maximum amount the debt could be is £450. We recognise that the rent owner would also be entitled to any outstanding arrears which should also be paid over and above the basic compensation. We are inclined to add that the rent owner would be entitled to claim interest on any outstanding amount as well. **Question 32:** *It is accepted that any arrears of ground rent due to the rent owner should be paid (subject to statutory limitations), but do consultees agree with the proposal that interest should also be charged?*

Compensation for larger ground rents

3.97 In the case of the larger rents above £10, £20 or £50 the Commission has an open mind and welcomes the views of consultees as to how the compensation for redemption should be calculated. The Commission recognises the investment value of the larger rents but is also aware that the higher the rent is, the bigger the sum that the rent payer is required to find in order to redeem it. It is a question of striking the right balance between the parties.

Question 33: ***(a)*** *On what basis do consultees consider that the compensation for larger rents over £10, £20 or £50 should be calculated: a simple multiplier, investment in government stock or a completely different option?* ***(b)*** *If a simple multiplier, should that multiplier be 9, 12, or a different amount?* ***(c)*** *Should the multiplier vary according to the size of the rent and if so, how would this be done?* ***(d)*** *Should interest be charged on the arrears?*

Trigger points for redemption of both smaller and larger rents

3.98 For smaller rents the Commission is considering whether there should be trigger points within the three year lead-in period on the occurrence of which the ground rent would be extinguished, and would welcome the views of consultees on this point. **Question 34:** ***(a)*** *Do consultees think that a small ground rent under £10, £20 or £50 should be extinguished on the sale or transfer of the land?* ***(b)*** *On voluntary transfer?* ***(c)*** *On mortgage/charge?* ***(d)***

*Transmission on death? **(e)** Any other change of ownership? **(f)** On the occurrence of a triggering event, which party should be responsible for the redemption of the ground rent and the payment of compensation to the rent owner – the previous rent payer or the new rent payer?*

3.99 For larger rents, the Commission proposes that there should be specified triggering events upon the occurrence of which ground rent redemption would be compulsory. This is more important than in the case of the small ground rents which will be subject to automatic extinguishment. **Question 35:** *We suggest that the triggering events for larger rents should be the sale of the land and any other change of ownership including voluntary transfers, transmission on death and mortgage/re-mortgage/charge of the land. **(a)** Do consultees agree? **(b)** If not, what other triggering events do consultees consider would be more appropriate? **(c)** On the occurrence of a triggering event, which party should be responsible for the redemption of the ground rent and the payment of compensation to the rent owner – the previous rent payer or the new rent payer?*

3.100 It is the intention of the Commission that there should be a lead-in period of sufficient length to enable the parties to adjust to the prospect of ground rent redemption on the triggering events. **Question 36:** *The Commission suggests that the lead-in period should be six months. **(a)** Do consultees agree? **(b)** If not, what alternative period would consultees suggest?*

3.101 At present the onus is on the rent payer to initiate the redemption process if he or she (or it, in the case of a company) so wishes but the Commission proposes that this position should be reversed. **Question 37** ***(a)*****:** *On the triggering event the ground rent would be extinguished automatically and it would become the responsibility of the rent owner to obtain the compensation from the rent payer. Do consultees agree? **(b)**: should the rent payer be responsible for informing the rent owner that a triggering event has occured?*

3.102 There is a possibility that the amount required to redeem the larger rents may be quite high. **Question 38:** ***(a)*** *If so, do consultees agree that the rent payer should be given the option to pay it to the rent owner by instalments?* ***(b)*** *If so, above what capital value should the option to pay by instalments be available?* ***(c)*** *Should interest be due on the capital value until all instalments have been paid?*

Intermediate interests

3.103 The Commission proposes that on redemption of both smaller and larger rents the rent payer would be awarded a statutory ownership equivalent to a fee simple absolute. The statutory ownership would be registered in the Land Registry and all superior estates would be extinguished. This leads to the question as to whether the entirety of the intermediate interest above the occupational ground rent and any intermediate rents attached would also be extinguished. **Question 39:** *Do consultees consider that compulsory redemption of smaller ground rents in possession should extend to intermediate rents as well?*

To assist in answering this question, it may be helpful to take an example: in a situation where there are five sub-lessees (5A), each of whom pays a sub-rent of £20 to an intermediate landlord (B), who in turn pays a head rent of £60 to the freehold owner (C), there is a question as to whether B should continue to be responsible for the £60 rent, after one or more of the 5A's sub-rents is redeemed. It appears to the Commission that there are two different options for the intermediate rents in such a case.

Option 1: Applying automatic extinguishment to B's rent

Compulsory redemption applies to B's rent simultaneously with redemption of the 5A sub-rents regardless of whether the sub-rents are below or above the threshold for compulsory extinguishment. This would mean that B would have to pay compensation to C.

Option 2: No automatic extinguishment of B's rent

(i) B continues to be responsible for the head rent even after redemption of the sub-rents. The rent would no longer be secured on the land and would become a contractual debt. The legislation would provide a new power to enforce the debt, notwithstanding the fact that there might not be privity of contract between the parties. The intermediate rent of £60 would continue to be paid to C until such time as it is also redeemed. Any suggested compulsory triggers, such as sale or mortgage, would largely be irrelevant in the context of intermediate interests. In this scenario, B might actually have an incentive to redeem voluntarily because he or she would have lost an income of £100 per annum. B would have obtained compensation from the 5A rent payers, of £180 each (using a multiplier of nine), making total compensation of £900 for five sub-rents. B would have to pay the freehold owner £540 to redeem his own rent.

(ii) If B's intermediate rent is not automatically extinguished, we suggest that the legislation would provide that B could not voluntarily redeem his own rent and pay £540 to C before the compulsory extinguishment of the 5A ground rents which he continues to collect.

Question: 40: ***(a)*** *Should the compensation due for intermediate interests also be on the basis of the same simple multiplier and if not, how would the compensation be calculated? If the multiplier used produces a large capital sum, should there be an option to pay it by instalments over a specified period?* ***(b)*** *Above what level should the option to pay by instalments be introduced?*

Non-payment of ground rent

3.104 In many cases, particularly where the amounts are small, the rents may not have been demanded or collected for several years. In the case of leasehold rents, where the ground rent is not collected for six years or more, under Article 30 of the Limitation (Northern Ireland) Order 1989 only the right to the arrears of rent for that period is extinguished and not the title. A fresh right of action accrues on each occasion that the lessee defaults and the rent never becomes statute barred. Even if the rent has not

been paid for say 20 years, a landlord may at any time enforce payment of the last six years of rent and any future rent as it falls due. On the other hand, in the case of a fee farm rent, the title of the rent owner can be extinguished after 12 years non-payment under the Limitation (Northern Ireland) Order 1989, Article 2(8)(a) and schedule 1, para. 8(4)(a) (see also Re Maunsell's Estate [1911] 1 IR 271).

3.105 The Commission believes that it would facilitate the elimination of ground rents if, as well as the right to demand the rent, the title of the rent owner was also extinguished after six years. **Question 41:** *We propose that this provision would apply to all ground rents regardless of whether the rent in question was reserved by a lease or by a fee farm grant. Do consultees agree?*

3.106 Where the rent has not been demanded or paid for a period of at least six years, the Commission proposes that the estate of the rent payer would be enlarged into statutory ownership. We suggest that there should be a form of statutory declaration by which the rent payer could declare that the rent had not been demanded or paid for six years or more and this would be effective to create the statutory ownership. However we recognise the possibility of unscrupulous rent payers seizing the opportunity to obtain ownership without paying any arrears of rent or any compensation due to the rent owner. We accept that, in order to minimize any injustice to the rent owner, there should be limitations on the ability to unilaterally enlarge an estate into statutory ownership.

3.107 **Question 42:** *Accordingly the Commission suggests that the power to make such a declaration should be restricted to rents below a specified amount. There is no need to limit it to rents below £10 or £20 per annum because of the proposals to automatically extinguish such rents after three years. We are inclined to suggest that where a rent of more than £10 or £20 per annum, but less than £50 per annum, has not been demanded for a period of at least six years, the rent payer might be entitled to enlarge it into ownership by means of a statutory declaration to that effect. Do consultees agree?*

3.108 As in other cases, where the ground rent has been extinguished, the title would be statutory ownership and the interests of all the superior owners would be extinguished. The rent owner would not be entitled to claim any compensation from the rent payer. All intermediate interests in respect of the land would also be extinguished automatically.

CHAPTER 4. COVENANTS AFTER REDEMPTION

INTRODUCTION

4.1 It may be useful to begin with an outline of the general law governing covenants because of its complexity. Although the Commission is only considering the position of covenants which survive redemption of a ground rent and enfranchisement of a rent payer's estate in land, it is important to understand the context in which the proposals for reform are made.

4.2 A covenant may be created in a conveyance of a freehold, a fee farm grant, a lease or an assignment. It may also be created in a deed of covenant. A covenant is an agreement containing an obligation in a deed. It may be positive; stipulating the performance of an act such as a covenant to repair; or it may be negative or restrictive, forbidding the commission of an act, such as a covenant not to use the land for the purposes of a business.

4.3 Whilst ground rents were originally designed to secure an income for rent owners, the purpose of covenants was to enable rent owners or landlords to retain a degree of control over the property. By retaining the freehold ownership of the land and preserving residual rights, rent owners and landlords were able to enforce the covenants and thus continue to exercise specified rights over the land.

4.4 Although landlord and tenant law is outside the scope of the current Land Law Reform Project (Consultation Paper *Land Law*, NILC 2 (2009) para. 1.22), because of the referral to the Commission of the matter of ground rents and covenants from the Minister for Finance and Personnel (see Ground Rents para. 3.35), we are unable to avoid venturing over the dividing line and making a slight encroachment into that area of law. As we have stated, (para. 3.76), we propose that the new provisions for the redemption of ground rent should be confined to residential property. Consequently, because most residential property

has traditionally been held under long lease or fee farm grant, leasehold law is of wide application.

Leasehold covenants

4.5 One of the reasons for the preponderance of leases and fee farm grants in Northern Ireland was the fact that both at common law and by statute, leasehold covenants were easier to enforce than freehold covenants. In general, the law of leasehold covenants extends to fee farm grants as well. Much land is subject to covenants affecting its use and leases, whether of residential or commercial property, commonly contain a myriad of covenants. In addition to those expressly set out in the lease, other covenants are implied by the common law (such as the principle that a grantor may not derogate from his grant) and by statute (for example under Landlord and Tenant Law (Amendment) (Ireland) Act 1860 (23 & 24 Vict.) (c. 154) ("Deasy's Act") section 42(1) the tenant covenants that all the rent and impositions due under the lease will be paid).

4.6 In long leases of dwelling-houses there are generally very few covenants made expressly on behalf of the lessor. Sometimes there may only be a covenant for quiet enjoyment. Most of the express covenants in a long lease are those which place an obligation on the lessee and they vary according to the characteristics of the particular property. The positive covenants which the lessee enters into may relate to matters such as payment of the ground rent, payment of other outgoings and keeping the premises in good repair. The negative covenants may relate to matters such as user, structural alterations and additions, assignment and subletting.

Freehold covenants

4.7 The law governing freehold covenants has developed quite separately and differently from that governing leasehold covenants. The law of freehold covenants applies to freeholds other than fee farm grants which are generally governed by leasehold law. In a deed of conveyance the express covenants, of which there are usually very few, are set out in the deed. The only covenants which may be

implied are those under the Conveyancing Act 1881, section 7, which are known as the covenants for title. Proposals for the reform of those covenants are set out in our Consultation Paper *Land Law* (NILC 2 (2009)), (paras. 10.24 - 10.27). There we suggest that section 7 should be recast in more modern language.

Enforceability

4.8 When there has been a breach of covenant the most important question is whether or not the covenant is enforceable. In considering whether or not it is enforceable, the relevant principles of equity or common law and statutory provisions, in Deasy's Act, the Conveyancing Act 1881, the Property (Northern Ireland) Order 1997, or even the Ground Rents Act (Northern Ireland) 2001, may apply.

4.9 Covenants are enforceable at common law according to the ordinary law of contract. Therefore, if there is privity of contract between the parties, all the covenants are enforceable between them. The covenants can be enforced both at law, by an action for damages, and in equity, by an injunction or specific performance.

4.10 At common law it is considerably easier for covenants to be enforced between the successors in title of the original parties under a lease than under a freehold title. Once the interest of either of the original parties has been transferred there is no longer privity of contract. It is here that the doctrine of privity of estates becomes important. Privity of estate means that there is tenure, in effect a landlord and tenant relationship between the parties. Generally, as long as privity of estates exists between the parties, the covenants continue to be enforceable.

Enforcement of leasehold covenants at common law

4.11 At common law generally the benefit and burden of the lessor's and the lessee's covenants run with the land and the reversion respectively. A successor in title to the lessor can sue a successor in title to the lessee on the lessee's covenants and vice versa as long as there is privity of estate and the covenants "touch and concern" the land, thereby

excluding those covenants dependent on the personal characteristics of the parties.

4.12 Both Deasy's Act and the Conveyancing Act 1881 also make provision for the running of the benefit and burden of covenants. There is an overlap to some extent, but in the context of the landlord and tenant relationship, the 1881 Act applies to leases made by deed only; whereas Deasy's Act applies to all tenancies in consideration of a rent which meet with the required formalities including fee farm grants.

Benefit

4.13 Deasy's Act, section 12, provides that the benefit of the covenants in the lease can be enforced against the lessee and his successors by the lessor and his successors if this was the intention of the parties. The Conveyancing Act 1881, section 10, states that the benefit only runs if the covenants have "reference to the subject matter of the lease" which is similar in meaning to "touch and concern" the land. The 1881 Act did not expressly repeal sections 12 and 13 of Deasy's Act. The two conflicting enactments co-exist, although the courts have generally chosen to prefer Deasy's Act.

Burden

4.14 Deasy's Act section 13 and the Conveyancing Act 1881 section 11, provide that the burden of covenants in a lease which concern the land (section 13) or "have reference to the subject matter of the lease" (section 11) may be enforced against the lessor and his successors by the lessee and his successors. Here the statutory provisions coincide and together restrict the running of the burden against an assignee of the lessee. Section 11 has been repealed by the Property (Northern Ireland) Order 1997.

Assignment

4.15 There is privity of contract between the parties to an assignment but there is no privity of estate. Any covenants created by the assignment are personal to the original parties and can be enforced between them, but not between

any successors in title. Under Deasy's Act section 16 the original tenant ceases to have any continuing liability under the lease after he has assigned his interest to someone else with the landlord's consent. This negation of the contractual liability which would otherwise apply means that there have not been the practical problems that arise in other jurisdictions. (For example, in England and Wales: see the Law Commission's Report, Landlord and Tenant Law: Privity of Contract and Estate (1988 Law Com No. 174). Its recommendations were put into effect by the Landlord and Tenant (Covenants) Act 1995 (c. 30), especially section 5).

Sub-lease

4.16 There is privity of estate between a lessor and a lessee; between a lessee and a sub-lessee, and the successor in title of each of them. However, there is no privity of estate between the lessor and the sub-lessee. The lessee may be responsible to the lessor for any breaches in covenant by the sub-lessee.

Enforcement of leasehold covenants in equity

4.17 In equity the rules are of more recent origin and have a wider effect on the land, enabling the burden of restrictive covenants to run with the land where there is neither privity of contract nor privity of estate. In *Tulk v Moxhay* (1848) 2 Ph 774 it was held that the burden of a covenant would, in some circumstances, be enforced by the courts of equity against a successor in title of the original covenantor. That case established that a restrictive covenant could only run with the land where the covenant was restrictive, two plots of land were concerned (one for the benefit and one for the burden) and there was no defence of purchase for value without notice.

4.18 Further, a landowner may have the burden of restrictive covenants enforced against him or her where he or she has a reciprocal right to enforce the benefit of related covenants (*Halsall v Brizell* [1957] Ch 169 - see Wylie's *ILL* 19.23). However it is not necessary that any party deriving benefit from a conveyance must necessarily accept any burden by the same conveyance (*Rhone v Stephens* [1994] 2 AC 310

HL). There must be a close link between the benefit and the burden, such that the performance of the burden covenant is a condition of the exercise of the benefit rights.

Enforcement of freehold covenants

4.19 At common law the original parties to a conveyance of freehold land are bound by the covenants because there is privity of contract between them. The original covenantee can usually enforce the covenant against the original covenantor both at common law and in equity. However, the common law took a very restrictive view of enforceability against successors in title. It is difficult for successors in title to enforce the burden of freehold covenants because privity of contract no longer exists and privity of estate is not an applicable concept.

4.20 The basic rule was that the benefit of the covenant (the right to enforce it) could, in certain circumstances, pass to a successor in title of the covenantee, whereas the burden (the obligation to comply with it) could not pass to the successor in title of the covenantor. There were ways of circumventing these restrictions such as creating successive chains of indemnity or reciprocal mutual covenants, but these were of limited application and did not displace the general rule that the burden did not run. There were no statutory provisions governing enforceability of freehold covenants and equitable principles (e.g. *Tulk v Moxhay* above) only partially alleviated the problems.

Benefit

4.21 At common law the benefit of a covenant passes to the successors in title of a covenantee if the covenant touches and concerns the land of the covenantee and the successor in title has the same legal estate in the land as the original covenantee. Equity adopts the same principles but the covenantee must also show that the benefit has actually passed to him or her.

Burden

4.22 At common law the burden does not pass to successors in title of the covenantor. It may do in equity if the covenant is restrictive, the covenantee is the owner of the land intended to be benefitted and there is a clear intention that the burden was intended to run. In relation to a positive covenant, the burden does not run with the land at all and it is not possible to directly enforce it against a successor of the covenantor unless, on a true construction, the covenant amounts to a grant of easement.

4.23 However, it may be possible to enforce the covenants indirectly against the successors in title of the covenantor because, when land subject to covenants is conveyed, the deed invariably contains an undertaking by the purchaser to indemnify the vendor against future breaches of covenant. So if the vendor is sued by the covenantor, he or she can in turn sue the purchaser. This type of chain of personal covenants is unsatisfactory because it is likely to be broken by the disappearance or death of one of the successors (see Wylie's *ILL* 19.22, Megarry and Wade, para. 32-020).

Building Schemes

4.24 In a housing development it is to the mutual benefit of the site owners for the covenants to be consistent and uniform. It is commonly the case that, where the sites have been sold by way of long lease, the developer may have retained a reversionary interest in the development land. Afterwards, the covenants are enforceable between the successors in title of both the lessee and the lessor in accordance with the normal rules governing leasehold covenants. However, where the sites were sold by way of freehold there was more difficulty in enforcement before 10 January 2000 when new provisions in Article 34 of the Property (Northern Ireland) Order 1997 relating to the running of freehold covenants became operative. In either case, whether the title is freehold or leasehold, there is no direct mechanism for the lessees to enforce the covenants against each other, even though a neighbour is the most likely person to be affected by another site owner's breach of covenant.

Elliston v Reacher [1908] 2 Ch 374

4.25 On a practical level, it obviously causes problems if there is no reciprocity of obligation between neighbours in a building development. As a means of addressing this problem and as a matter of some necessity, the courts devised special rules for building schemes to ensure continued enforceability of positive obligations between neighbours in a development. Consequently, where there is a building or estate scheme it may be possible to establish reciprocity of obligation under the rules laid down in the case of *Elliston v Reacher.* Where specified conditions are met and the requisites for an estate scheme are present, the covenants entered into by one resident on the estate may be enforceable by any other resident on the same estate. (However, it is recognised that in practice it is very difficult to establish that a building scheme is in existence).

4.26 The rules are:

(1) The parties must derive title from a common vendor;

(2) Prior to selling the land, the vendor must have laid it out for sale in lots and intended those lots to be subject to restrictions consistent with a general development scheme;

(3) The restrictions must be for the benefit of all the plots to be sold;

(4) The parties must have purchased their plots on the understanding that the restrictions imposed would be for the benefit of all the other plots included in the general scheme.

4.27 As well as housing developments, there are other types of development with a greater degree of interdependence than houses, such as blocks of flats, shops and offices, where the continued enforceability of obligations against successive owners is vital. Reform of the law in respect of these multi-unit developments, is outside the scope of the current project.

Previous Reports and Legislation in Northern Ireland

The 1971 Survey

4.28 The **1971 Survey** (Chapter 16) considered appurtenant rights in general, putting forward the proposal that the law concerning restrictive or positive covenants and the law of easements should be assimilated to give a new class of legal interests to be known as "land obligations". Some land obligations would be statutory (for example a right of support for buildings) and would apply automatically; others would be created by the parties (this category included both positive and restrictive covenants). The basic characteristic of a land obligation would be that it would run with the land. Both the burden and the benefit would run with the land. The obligations would be enforceable by and against the occupiers or owners of interests in the benefitted and burdened land (para. 389). Covenants created by deed would require registration in the Statutory Charges Register if the title was unregistered and in the Land Registry if it was registered (para. 384).

4.29 Around that time there had been some criticism that there was no mechanism by which covenants could be discharged, even if they had become obsolete, without the consent of the owner of the benefit. In order to address that issue, the **1971 Survey** proposed that the Lands Tribunal be empowered to make orders discharging or modifying land obligations (para. 392).

Leasehold (Enlargement and Extension) Act (Northern Ireland) 1971

4.30 Under section 28 of the Leasehold (Enlargement and Extension) Act (Northern Ireland) 1971 the covenants and conditions which survive leasehold enfranchisement are:-

(1) those protecting or enhancing the amenities of the neighbouring land

(2) those relating to the performance of a duty imposed by statute on a neighbouring owner

(3) those relating to an easement over or appurtenant to the enfranchised land

(4) those relating to a right of drainage or other right necessary to secure or assist the development of other land.

Ground Rents and Other Payments – Land Law Working Group Discussion Document No.1 (Department of Finance for Northern Ireland, Office of Law Reform) (1980 HMSO)

4.31 In Discussion Document No. 1 the Land Law Working Group aired the subject of ground rents generally with a view to provoking discussion and comment. It sought views about the extent to which periodic rents should be eliminated and the manner in which that ought to be done. It pointed out (para. 6.1) that if the object of converting fee farm grant estates into fees simple absolute was to be achieved, it would not be sufficient merely to dispose of the rents. It was recognised that covenants and conditions in fee farm grants can impose a cloud on the title which is all the more insidious for being at times nebulous (para. 6.1). As a result, it seemed obvious that any covenants which were essentially concerned with the relationship of landlord and tenant should not survive.

4.32 Equally obviously it was recognised that covenants for the benefit of neighbours should be preserved; but it was suggested that instead of being enforceable by the grantor they should be enforceable by neighbouring owners of property and protected by them on the same lines as covenants under an *Elliston v Reacher* type building scheme. It was also proposed that unidentified covenants binding the covenantee in general terms should disappear (para. 6.2).

4.33 In considering the covenants which survive leasehold enfranchisement, the inclination expressed in the Discussion Document was to adopt the list in section 28 of the Leasehold (Enlargement and Extension) Act (Northern Ireland) 1971 in principle (para. 6.4), along with an express statement of who may enforce the preserved covenants. It

was also suggested that as in sections 28(2) of the Landlord and Tenant (Ground Rents) (No. 2) Act 1978 in the Republic of Ireland, covenants relating to easements and positive covenants should be enforceable by any person aggrieved by a breach of covenant and that other covenants should be enforceable by the covenantee or successors in title as if the acquisition of the fee simple by the tenant had not occurred.

Ground Rents and Other Periodic Payments – An Interim Report by the Land Law Working Group (Department of Finance and Personnel for Northern Ireland, Office of Law Reform) (1983 HMSO)

4.34 In the Interim Report it was considered that there were two possible ways of tackling the question of which covenants would survive the redemption of the ground rent and which should not (para. 5.9). The first way, in the case of leaseholds, would involve applying the doctrine of merger, with the result that the lease would simply be absorbed by the reversion and destroyed and all its covenants with it. This would be a very severe course of action. The second possibility would be for a specific indication to be given of which covenants survive and which do not. This would give certainty in relation to the covenants expressly mentioned, but it runs the risk that some kind of covenant which ought to be listed is not, though it was thought that this risk could largely be overcome. It was suggested that legislation should provide that all covenants should terminate except those expressly stated to survive. Bearing in mind that the object of the whole exercise was to give the occupier a fee simple – which on principle should be as unrestricted as possible – it was emphasised the basic approach should be that a covenant should terminate unless a positive case can be made for its survival.

4.35 It was also considered that the list of covenants which survive which is set out in the Leasehold (Enlargement and Extension) Act (Northern Ireland) 1971 section 28, was all very well so far as it goes; but there were a number of other obligations that called for consideration. It seemed that the covenants which survive enfranchisement would at least

have included those relating to the following (para. 5.11):-

(1) Title – the covenants that the lessor had the right to grant the lease and the covenant for quiet enjoyment;

(2) Indemnities – for example, as to the cost of street works;

(3) Amenities – for example, not to use any building for any purpose other than a private dwelling and covenants against causing nuisance, annoyance, damage or inconvenience to neighbours;

(4) Easements – for example, for the free passage of water, sewage, gas or electricity though pipes or cables under the land;

(5) Positive obligations – involving either work or expenditure, for example to pay for or contribute towards the cost of repairs to a wall or driveway;

(6) Development schemes – any covenants which were mutually enforceable between tenants prior to enfranchisement by virtue of a leasehold development scheme. It was also recommended that covenants which remain enforceable should, so far as their nature permits, be enforceable between neighbouring lessees and enfranchised lessees whose leases were granted under a common scheme of development (whether expressly or not), but should be enforceable against an enfranchised lessee by the lessor only so long as he or she occupies property which is within the contemplation of the covenants either himself or herself or by his or her lessee or licensee. The existence of a common scheme of development should be inferred, if leases of adjacent properties granted by a common lessor or his or her successors contain corresponding provisions.

4.36 Equally, it was thought that there were a number of covenants which should not survive enfranchisement (para. 5.12). The most important of those were the covenants

which were directly concerned with the relationship of landlord and tenant or which were included in the lease for the benefit of the landlord. They were any covenants relating to:-

(1) The lease as such or its term;

(2) Rent;

(3) Taxes or outgoings;

(4) Repairs, insurance, rebuilding;

(5) The occupation, alienation or parting with possession of the premises;

(6) Any covenant ancillary to the above, including those dealing with rights of re-entry;

That classification left some usual covenants which did not obviously fall into either group and therefore called for further thought (para. 5.13). Under this head were included:

(a) Covenants restricting user (other than as a private dwelling-house);

(b) Covenants about building works (other than those protecting amenity land).

Conveyancing and Miscellaneous Matters – Land Law Working Group Discussion Document No.4 (Department of Finance and Personnel for Northern Ireland, Office of Law Reform) (1983 HMSO)

4.37 In Discussion Document No. 4 the Land Law Working Group confined itself to questions which arose out of the **1971 Survey** but which had not already been dealt with elsewhere. In that Discussion Document some reservations were expressed about the scheme that had been proposed in the **1971 Survey** for land obligations (para. 4.5). Amongst others, there were misgivings because it was

thought that the formal classification was too rigid and inflexible and the desirability of fusing negative easements with restrictive covenants was doubted. Although the concept of land obligations in the **1971 Survey** corresponded with the approach then taken by the Law Commission of England and Wales the subsequent Report on the Law of Positive and Restrictive Covenants (1984) Law Com. No. 127, expressed the view that the original proposal had been too ambitious, and while not ruling out the possibility of eventual assimilation, preferred a more piecemeal approach. Note the most recent Consultation Paper published by the Law Commission of England and Wales on Easements, Covenants and Profits a Prendre (Consultation Paper No. 186, see para. 4.58).

The 1990 Final Report

4.38 In relation to covenants in general, after summarising the criticisms set out in Discussion document No. 4, the conclusion reached in the **1990 Final Report** (para. 2.7.5) regarding the proposals in the **1971 Survey** to introduce a scheme of land obligations, was that the suggestion to bring a number of disparate interests within a single general classification would import a deceptive simplicity. It was recommended that the scheme should not be implemented as such; instead the system of land obligations recommended by the Law Commission of England and Wales in its Report on the Law of Positive and Restrictive Covenants (1984) Law Com. No. 127 was preferred.

4.39 That system consisted of neighbour obligations which were designed for the simple case of two (or perhaps a few) neighbouring landowners, and development obligations, which were aimed at the more complicated cases involving property development where a number of parcel owners were involved. The Law Commission expressed the view that a better and simpler result would be obtained if the two types of case were to some extent kept separate – both conceptually and in legislation (para. 6.1). Neighbour obligations could be either positive or negative. Development obligations would be imposed in pursuance of a development scheme and would be enforceable

between the various participants in the scheme. They would be a distinct species calling for separate treatment. (Note again the Law Commission of England and Wales Consultation Paper on Easements, Covenants and Profits a Prendre (2008) Consultation Paper No. 186, see para 4.58).

4.40 It was recommended in the **1990 Final Report** (para. 2.7.57) that provision be made for a system of neighbour obligations which would be capable of being either restrictive or positive. Neighbour obligations would be created by deed and be appurtenant to the estate in the dominant land which they were designed to benefit. Express provision would be made about who could enforce a neighbour obligation and the manner of enforcement. It was recognised that some covenants were essential, whilst others were obsolete or no longer required preservation. Any scheme for the abolition would need to ensure the survival of those that still have a useful purpose. For rent owners and landlords, covenants might be a means of continuing to control land which they no longer owned or land which they no longer lived in the vicinity of.

The Property (Northern Ireland) Order 1978 (No. 459 (N.I. 4)) (the "1978 Order")

4.41 Article 5 confers on the Lands Tribunal power to make an order modifying, or wholly or partially extinguishing, impediments which unreasonably impede the enjoyment of the land. An impediment includes a restriction arising under a covenant, condition or agreement contained in a deed or other instrument (Article 3(1)).

4.42 In relation to leases only, an application cannot be made without the permission of the Lands Tribunal, until the expiration of 21 years from the beginning of the term created by the lease (Article 5(2)). In determining whether an impediment affecting any land ought to be modified or extinguished, the Lands Tribunal shall take into account (Article 5(5)) :-

(a) the period, the circumstances in and the purposes for which the impediment was created or imposed;

(b) any change in the character of the land or neighbourhood;

(c) any public interest in the land;

(d) any trend shown by planning permissions;

(e) whether the impediment secures any practical benefit to anyone;

(f) whether the obligation has become unduly onerous;

(g) whether there is agreement to the modification or extinguishment;

(h) any other material circumstances.

The Property (Northern Ireland) Order 1997 (No. 1179 (N.I.8)) (the "1997 Order")

4.43 With the abolition of the creation of new leases of dwelling-houses and the shift towards freehold title it became particularly important that there were practical rules for the enforcement of freehold covenants between the relevant parties, notwithstanding that there was no privity of contract between them. The introduction of the provisions set out in Article 34 replaced the previous common law rules relating to enforceability between the owners of estates in fee simple and laid down a more viable statutory framework for the running of freehold covenants created in deeds created after 10 January 2000.

4.44 However, the new rules for enforceability do not apply to any covenant contained in a deed made before 10 January 2000 (Article 34(2)(a)). The old rules continue to apply to pre-existing deeds and the two systems operate alongside each other, which only serves to cause confusion. Article 34(2)

provides further that the new rules do not apply to any covenant for title, any covenant that is expressed to bind only the covenantor, or any covenant which still subsists after the rent payer has redeemed the ground rent. Nothing in Article 34 affects the enforceability of any covenant as between the original parties to the covenant.

4.45 Section 34 sets out a very comprehensive list of the kinds of covenant which are enforceable. It also provides that a covenantee and his successors are entitled to enforce a covenant against a covenantor and his successors where it would not have previously been possible. However, it only affects the running of the benefit and burden of the covenant to successors in title of the original parties. (Arguably, this means that contrary to Deasy's Act, section 16, liability may continue after the sale of the property). Accordingly the new provisions have not completely removed the need for chains of indemnity between a covenantor and his successors, particularly when the person owning the land burdened by the covenant remains liable for any breach arising during the period of his ownership.

NEW DEVELOPMENTS

4.46 Article 34(6) provides that where there is a development the covenants made by parcel owners with the developer are enforceable as if they had been made also with other parcel owners to the extent that those covenants are capable of reciprocally benefiting and burdening the parcels of the various parcel owners.

4.47 A development is defined in Article 34(7) as arising where –

(1) the land is divided into two or more parcels for conveyance to parcel owners; and

(2) there is an intention between the developer and parcel owners to create reciprocity of covenants; and

(3) that intention is shown expressly in conveyances to parcel owners or by implication from the parcels and

covenants in question and the proximity of the relationship between parcel owners.

(A developer is an owner who conveys parcels of land under a development and his successors in title; a parcel owner means a person who acquires or holds a parcel of land within a development).

4.48 It is confusing that there are potentially two schemes for the enforcement of covenants in a development. It may be that the criteria under Article 34 are marginally less strict than those laid down by the *Elliston v Reacher* rules which apply in the case of older developments.

Ground Rents Act (Northern Ireland) 2001 (Chapter 5) ("the 2001 Act")

4.49 The 2001 Act introduces a scheme for the redemption of ground rents of dwelling-houses see paras. 3.19 – 3.24. As a corollary of redemption, it was considered important to have provision for the mutual enforceability of covenants between neighbours if one of them had taken the opportunity to redeem their ground rent and acquire a freehold title. Although it may not have intended to be so, this list is fairly exhaustive and also includes any covenants which were reciprocally enforceable between participants in a building scheme, prior to redemption.

4.50 Section 17 relates to enforceability of covenants after redemption. Section 17(6) provides that for the purposes of the enforcement of covenants for the protection of amenities (section 16(2)(g)), after one of the plot owners has redeemed the ground rent, a building scheme is taken to subsist in which all the person holding parcels under dispositions in *substantially similar terms* from the same rent owner, and their successors, are participants. Those covenants continue to be enforceable by and against the rent owner and his successors, but also by and against each of the various participants amongst themselves, whether or not their ground rents have been redeemed.

4.51 The question as to the nature of the building scheme which is created by section 17(6) was considered by the Lands Tribunal in the Cleaver case, *(Hewitt and others (applicants), O'Neill and another (first and second respondents) and Thompson (third respondent)* (Lands Tribunal R/17/2006). In that case it was accepted that section 17(6) introduces a statutory building scheme which is separate and distinct from an *Elliston v Reacher* contractual building scheme. It was also agreed that *substantially similar terms* (section 17(6)) was a broader concept than *uniformity with some possible variation (Elliston v Reacher).* The Tribunal concluded on the facts of the case that there was not a relevant contractual building scheme. None of the applicants, who were neighbours, were entitled to enforce the covenants for the protection of amenities because there was no section 17 scheme incorporating their parcels, although there may have been elsewhere. It also decided that the third respondent, who was the immediate lessor of the applicants, continued to be entitled to the benefit of the covenants for the protection of amenities in accordance with the terms of the leases under which the properties were held. This case has not been appealed.

Review of the operation of the Ground Rents Act (Northern Ireland) 2001 (Department of Finance and Personnel, Discussion Paper 1/05 November 2005)

4.52 It was always intended that there would be a review of the operation of the 2001 Act on a voluntary basis before the compulsory element was introduced (see para. 3.25). When the Review was carried out in 2005 it sought responses to questions on a range of administrative matters. It also requested comments on the effects of ground rent redemption on covenants.

Analysis of Responses to Discussion Paper on the Ground Rents Act (Northern Ireland) Department of Finance and Personnel)

4.53 Comments were received from consultees to the Review suggesting that covenants should completely disappear on redemption, or that they should be redeemable; whilst some suggested that the scope of covenants should be narrowed.

When these responses were analysed, it was noted that there are misconceptions which have grown up around the issue of covenants. These mistaken beliefs have adversely impacted on the redemption process and prevented the legislation operating to the full.

4.54 All the respondents stated that a number of misconceptions existed as to the effects of redemption, particularly amongst rent payers; rent payers frequently believed that ground rent redemption transfers the freehold free from covenants, they were not aware that the rent owner's freehold still exists, nor that the covenants survive. Several respondents suggested that there should be a register of enforceable covenants.

Comparisons with other jurisdictions

England and Wales

COVENANTS IN GENERAL

4.55 The case for reform of the law of positive and restrictive covenants has long been recognised and the Committee on Positive Covenants (in England and Wales the Wilberforce Committee, Report of the Committee on Positive Covenants Affecting Land (1965) Cmnd 2719) was the first to examine whether it would be desirable to reform the law of positive covenants. The main problem identified was that the burden of positive covenants cannot run with the land. This created practical difficulties for many landowners. Although various devices had been developed to circumvent these obstacles, they were recognised as inadequate. The Wilberforce Committee recommended that the benefit and the burden of positive covenants should run with the land and that the Lands Tribunal should have power to modify or discharge positive covenants. It also recommended schemes for flats and other multiple developments.

4.56 Subsequently, the Law Commission Report on Restrictive Covenants ((1967) Law Com No. 11) recommended that positive and restrictive covenants be reformed simultaneously and a common code devised for both. It proposed that a new interest in land be created, to be called a "land obligation". A land obligation could be created over specified land for the benefit of other specified land so that

the burden and benefit respectively would run automatically with the land. Land obligations would be enforceable only by and against the persons currently concerned with the land, as owners or interests in it or occupiers of it. In nature they would be more akin to easements than to covenants. The Lands Tribunal would have wide powers to modify or discharge covenants. Chancery practitioners responded to the proposals in that Report expressing concern about the interaction of land obligations with the general law and the 1925 property legislation. As a result the proposals for reform were not implemented.

4.57 After further consideration, the Law Commission produced a Working Paper on Appurtenant Rights (Transfer of Land: Appurtenant Rights (1971) Law Com No. 11, para. 27) which proposed that comprehensive reform should cover not only the law of covenants, but also easements, profits and other analogous rights. This approach was viewed in retrospect as being too ambitious. The Law Commission then narrowed its focus by re-examining the law of covenants only and published a Report in 1984 recommending the replacement of the current law of covenants with a new land obligations scheme. This Report was not implemented because of the need to consider the effect on the recommendations of certain future developments in property law. Consequently, following on from the 1984 Report, the Law Commission was asked in 1988 to consider how the introduction of commonhold would affect its proposals for land obligations.

4.58 A system of commonhold for flats and other interdependent properties was eventually established by the Commonhold and Leasehold Reform Act 2002 (c. 15) and further wide-ranging reforms were implemented by the Land Registration Act 2002. Subsequently the Law Commission undertook an examination of easements, analogous rights and covenants as a whole along with a reconsideration of its earlier work on land obligations which was published in its Consultation Paper on Easements, Covenants and Profits a Prendre ((2008) Consultation Paper No.186). In explaining that its aim was to produce a coherent scheme of land obligations and easements which would be compatible with

both the commonhold system and the system of registration introduced by the Land Registration Act 2002, the Law Commission made clear that it considered the distinction between easements, profits and covenants was valuable and should be retained. Although it rejected the complete assimilation of those interests, it believed that it should not limit itself to an entirely piecemeal, ameliorative approach that only addressed specific problems within the existing law.

4.59 The Law Commission emphasised that the law of positive and restrictive covenants affecting land was in urgent need of reform which it considered could not be achieved by simple amendment of the current law. It believed that it would be necessary to create the land obligation as a new legal interest in land which would take over the role and function of positive and negative covenants.

4.60 A land obligation would be an interest appurtenant to an estate in land, analogous to an easement. It could be restrictive or positive. There would have to be a dominant and servient tenement; the benefit of the land obligation would attach to the dominant land and the burden would attach to the servient land. land obligations could only be created expressly and only where the relevant titles were registered. Following the introduction of land obligations, it would no longer be possible to create new covenants which would run with the land where the title to that land was registered. The Lands Tribunal would have jurisdiction to discharge and modify land obligations as well as restrictive covenants, easements and profits.

4.61 The Law Commission is in the process of reviewing the responses to the Consultation Paper, with a view to finalising its policy on this project. It hopes to publish a report and draft Bill setting out final recommendations for reform of this area of law by the end of 2010.

ENFORCEMENT OF LEASEHOLD COVENANTS

4.62 There is privity of contract between a landlord and a tenant in a lease granted prior to 1996. However, for leases granted after 1995 the general principles of privity of

contract and estate have no application. The Landlord and Tenant (Covenants) Act 1995 provides a statutory code which governs leases and supersedes the previous common law and statutory provisions. Under that code, the landlord may enforce all the covenants in the lease against the tenant throughout the term, provided that the landlord retains the reversion. Generally, the tenant's liability continues notwithstanding any assignment of the lease. The extent of the tenant's liability can be onerous because the tenant is severally liable with the assignees for any breach of covenant. The tenant can be discharged from liability by the landlord.

COVENANTS AFTER ENFRANCHISEMENT

4.63 Where a lease was originally created for a term of at least 300 years, and there are at least 200 years remaining unexpired, the tenant may enlarge the term into a fee simple under the Leasehold Reform Act 1967 if specified conditions are met. It is interesting to note the approach taken which appears to have been widely accepted. Restrictive covenants are not listed according to type, but are referred to according to their purpose, in more general terms.

Section 10 of that Act provides:

Rights to be conveyed to tenant on enfranchisement.

> (1) Except for the purpose of preserving or recognising any existing interest of the landlord in tenant's incumbrances or any existing right or interest of any other person, a conveyance executed to give effect to section 8 above shall not be framed so as to exclude or restrict the general words implied in conveyances under section 62 of the Law of Property Act 1925, or the all-estate clause implied under section 63, unless the tenant consents to the exclusion or restriction; but the landlord shall not be bound to convey to the tenant any better title than that which he has or could require to be vested in him,
>
> (1A) The landlord shall not be required to enter into

any covenant for title beyond those implied under Part I of the Law of Property (Miscellaneous Provisions) Act 1994 in a case where a disposition is expressed to be made with limited title guarantee; and in the absence of agreement to the contrary he shall be entitled to be indemnified by the tenant in respect of any costs incurred by him in complying with the covenant implied by virtue of section 2(1)(b) of that Act (covenant for further assurance).

(2) As regards rights of any of the following descriptions, that is to say,—

(a) rights of support for any building or part of a building;

(b) rights to the access of light and air to any building or part of a building;

(c) rights to the passage of water or of gas or other piped fuel, or to the drainage or disposal of water, sewage, smoke or fumes, or to the use or maintenance of pipes or other installations for such passage, drainage or disposal;

(d) rights to the use or maintenance of cables or other installations for the supply of electricity, for the telephone or for the receipt directly or by landline of visual or other wireless transmissions;

a conveyance executed to give effect to section 8 above shall by virtue of this subsection (but without prejudice to any larger operation it may have apart from this subsection) have effect—

(i) to grant with the house and premises all such easements and rights over other property, so far as the landlord is capable of granting them, as are necessary to secure to the tenant as nearly as may be the same rights as at the relevant time

were available to him under or by virtue of the tenancy or any agreement collateral thereto, or under or by virtue of any grant, reservation or agreement made on the severance of the house and premises or any part thereof from other property then comprised in the same tenancy; and

(ii) to make the house and premises subject to all such easements and rights for the benefit of other property as are capable of existing in law and are necessary to secure to the person interested in the other property as nearly as may be the same rights as at the relevant time were available against the tenant under or by virtue of the tenancy or any agreement collateral thereto, or under or by virtue of any grant, reservation or agreement made as is mentioned in paragraph (i) above.

(3) As regards right of way, a conveyance executed to give effect to section 8 above shall include—

(a) such provisions (if any) as the tenant may require for the purpose of securing to him rights of way over property not conveyed, so far as the landlord is capable of granting them, being rights of way which are necessary for the reasonable enjoyment of the house and premises as they have been enjoyed during the tenancy and in accordance with its provisions; and

(b) such provisions (if any) as the landlord may require for the purpose of making the property conveyed subject to rights of way necessary for the reasonable enjoyment of other property, being property in which at the relevant time the landlord has an interest, or to rights of way

granted or agreed to be granted before the relevant time by the landlord or by the person then entitled to the reversion on the tenancy.

(4) As regards restrictive covenants (that is to say, any covenant or agreement restrictive of the user of any land or premises), a conveyance executed to give effect to section 8 above shall include—

(a) such provisions (if any) as the landlord may require to secure that the tenant is bound by, or to indemnify the landlord against breaches of, restrictive covenants which affect the house and premises otherwise than by virtue of the tenancy or any agreement collateral thereto and are enforceable for the benefit of other property; and

(b) such provisions (if any) as the landlord or the tenant may require to secure the continuance (with suitable adaptations) of restrictions arising by virtue of the tenancy or any agreement collateral thereto, being either—

(i) restrictions affecting the house and premises which are capable of benefiting other property and (if enforceable only by the landlord) are such as materially to enhance the value of the other property; or

(ii) restrictions affecting other property which are such as materially to enhance the value of the house and premises;

(c) such further provisions (if any) as the landlord may require to restrict the use of the house and premises in any way which will not interfere with the reasonable enjoyment of the house and premises as they have been enjoyed during the tenancy but will materially enhance the value of other property in which the landlord has an interest.

(5) Neither the landlord nor the tenant shall be entitled under subsection (3) or (4) above to require the inclusion in a conveyance of any provision which is unreasonable in all the circumstances, in view—

(a) of the date at which the tenancy commenced, and changes since that date which affect the suitability at the relevant time of the provisions of the tenancy; and

(b) where the tenancy is or was one of a number of tenancies of neighbouring houses, of the interests of those affected in respect of other houses.

Republic of Ireland

LANDLORD AND TENANT (GROUND RENTS) (NO. 2) ACT 1978 (16/1978)

4.64 As land law in Northern Ireland and the Republic of Ireland share common origins, there are many common features in the systems of title that have developed in both jurisdictions. Similar problems arose in both places in relation to the proliferation of ground rents under long leases and fee farm grants. However, there was greater political will for change in the Republic of Ireland at an earlier date and a scheme for the redemption of ground rents was first introduced there in 1967 (see para. 3.43). The position is now governed by the Landlord and Tenant (Ground Rents) (No. 2) Act 1978.

4.65 In relation to covenants which survive after redemption, section 28 provides that when a person having an interest in land acquires the fee simple, all covenants subject to which the land was held, other than certain specified covenants, would cease to have effect and no new covenants would be created in conveying the fee simple. The covenants which survived were covenants protecting or enhancing the amenities of the land occupied by the immediate lessor, which relate to the performance of a duty imposed by statute or which relate to a right of way necessary to secure or assist the development of other land. The surviving covenants continue to be enforceable

as if the acquisition of the freehold had not occurred. An exception was made for covenants which relate to a right of way, a right of drainage, or other right necessary to secure or assist the development of other land, all of which can be enforced by any person aggrieved by the breach of covenant.

4.66 The law of covenants in the Republic of Ireland shares many common characteristics with that in this jurisdiction. The Irish Law Reform Commission Report on Land Law and Conveyancing Law: (7) Positive Covenants over Freehold Land and Other Proposals (LRC 70-2003) recommended that statutory provision should be made for the enforceability of freehold covenants by and against successors in title (para. 1.14) and included draft legislation to that effect. It also recommended the introduction of a procedure to make application for the variation of covenants through the court, but in a more limited way than in Northern Ireland. These proposals were subsequently contained in sections 48 – 50 of the Land and Conveyancing Law Reform Act 2009.

Scotland

4.67 Although the system of ownership in land in Scotland is quite different, there are aspects of it that offer useful comparisons, particularly in relation to the development and application of real burdens which are the approximate equivalent of restrictive covenants in Scotland. From the late eighteenth century onwards in Scotland, landowners selling their land for development imposed restrictions and obligations on the use of the land sold. Those restrictions could be either positive or negative and they came to be referred to as real burdens. Both the benefit and the burden of the real burden ran with the land and passed to successors in title, so there was no difficulty with enforcement.

4.68 The position of real burdens was reconsidered with the abolition of the feudal system because they had originated under grants of subinfeudation. (These were feudal real burdens which should not be confused with the new real

burdens described in para. 4.78 below). Although feudal real burdens were basically analogous with freehold covenants, they were nevertheless normally appurtenant to the land of a superior owner (in a manner similar to a fee farm grant interest in this jurisdiction). When it was proposed that superior interests in land would be abolished, (see Scottish Law Commission Report on Real Burdens (2000) (Scot Law Com No. 181)) it was recognised that one of the consequences would be that the interest of the owner of any real burden would also disappear unless some alternative provision was made (see generally Reid, *The Abolition of Feudal Tenure in Scotland (2003) Tottel Publishing)*.

4.69 For the superior owners, feudal real burdens in recent times had come to be a means of controlling land which they no longer owned and also providing a source of income because they could extract sums of money for giving consent to waiver of the conditions. Although this position was not considered acceptable in any way, the right of the owners to protection of their possessions guaranteed by the European Convention of Human Rights, Article 1, Protocol 1 had to be acknowledged and it was recognised that the rights could probably not be abolished without the owners being given an opportunity to preserve them.

4.70 When the recommendations in the 2000 Report were implemented in the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5), there was a three year lead-in period for some of its provisions. On the appointed day (28 November 2004) any real burden which was enforceable only by a superior owner was extinguished. The legislation gave superior owners the opportunity to reallot the real burdens to other land owned by them if they wished to preserve their enforcement rights. The conditions on which this could be done included a requirement that the alternative land had on it a permanent building used as a place of human habitation or resort and that building was at some point within one hundred metres of the land that would be the burdened land.

4.71 The burden could be reallotted by agreement, following a prescribed procedure, between the owners of the benefitted (dominant) land and the owners of the burdened (servient) land. The agreement would then be registered in the Register of Sasines (if the title was unregistered) or in the Land Register of Scotland (if the title was registered). Where the parties failed to reach agreement, a superior owner could apply to the Lands Tribunal for an order to reallot the burden against other land.

4.72 Some real burdens were converted on the appointed day into neighbour burdens, community burdens or personal real burdens. For conversion into a neighbour burden, the superior had to serve and register a preservation notice nominating other land which he or she owned to be the new benefitted property. On the appointed day, the right to enforce then passed from the superior interest to the benefitted property and the burden became a neighbour burden. This method of conversion was limited to land with a building used as a place of human habitation or resort lying within 100 metres.

4.73 Other burdens could be converted into personal real burdens of the appropriate type if the superior served and registered a preservation notice. The point to note about this procedure was that on the appointed day the right to enforce passed from the land owned by the superior to the superior in person. The focus has therefore moved from the right of the superior owner to own and enforce the burden to an emphasis on the burden itself. The right is no longer attached to the land and has become a personal right. After the appointed day the right may be assigned, though usually with some restrictions.

4.74 Only burdens which qualified by subject matter as potential real burdens could be converted under this method. Eight such categories of burden are recognised: conservation burdens, economic burdens, health care burdens, personal pre-emption burdens, rural housing burdens, personal redemption burdens, manager burdens and maritime burdens. New burdens of these categories can also be created under the Title Conditions (Scotland) Act 2003 (asp

9). If a burden did not fall into one of those categories into which it could be converted, it was extinguished.

4.75 Also on the appointed day real burdens which had been imposed on a group of related properties under a common plan were converted into community burdens. The right to enforce them then passed from the superior interest to the owners of each of the properties in the community. The conversion occurred automatically and without the need for action on the part of the superior owner. The superior owner took no benefit unless he or she happened to own one of the properties in the community.

4.76 Burdens which qualified as facility burdens or service burdens were also automatically converted. A facility burden is a burden which regulates the maintenance, management, reinstatement or use of a facility such as a shared part of a tenement building, shared recreational area or a private road. A service burden relates to the provision of services, such as water or electricity, to another property. On the appointed day the right to enforce passed from the superior interest to the owners of the properties which took the benefit from the facility or the service.

4.77 Depending on the category of enforcers, the burdens are then community burdens or neighbour burdens or even both. Community burdens, facility burdens and service burdens are not mutually exclusive. If the burdens are registered under more than one category, they are potentially doubly enforceable – by the owners within the community and by the superior owner, outside the community, either as the owner of neighbouring property or as the holder of a personal real burden. There is a substantial degree of overlap between community burdens, facility and service burdens, because facility burdens are often imposed on a common plan or a group of related properties and are mutually enforceable within the community. Where such burdens are imposed otherwise than under a common plan, new neighbour burdens are created. This would occur, for example, in the case of a maintenance obligation imposed on the owners of a private road for the benefit of owners of neighbouring property who

had the benefit of a right of way.

4.78 Under the provisions of the Title Conditions (Scotland) Act 2003, new real burdens can now be created by deed. Section 1 states that a real burden is an encumbrance on land constituted in favour of the owner of other land in that person's capacity as owner of that other land. It can be an affirmative, negative or ancillary burden and must relate in some way to the burdened property. The duration of a real burden is perpetual unless the deed creating it provides to the contrary. A real burden is enforceable by anyone who has both title (by being the owner of the benefitted property) and interest (if failure to comply with the real burden would result in material detriment to the value or enjoyment of the person's ownership or there is some obligation to contribute towards costs sought) to enforce it. An affirmative burden is enforceable against the owner of the burdened property. A negative burden is enforceable against the owner or tenant of the burdened property or any other person having use of that property. Any previous owner continues to be liable for the performance of the obligations during the period of their ownership even after sale of the property.

Difficulties with the current position

4.79 Following the Review of the Operation of the Ground Rents Act (Northern Ireland) 2001 Department of Finance and Personnel, Discussion Paper 1/05 November 2005 and the Analysis of Responses to Discussion Paper on the Ground Rents Act (Northern Ireland) 2001 (Department of Finance and Personnel), (see para. 3.25 – 3.35), the Minister referred to the Commission the issue of the law relating to ground rent redemption and covenants. Accordingly we now have to address the issue of covenants which survive the redemption of ground rent.

4.80 It is widely acknowledged that one of the main problems with the operation of the current ground rent redemption scheme is that far too many covenants survive redemption. In this respect, the expectation of the public in obtaining a fee simple absolute without any superior owner retaining any interest or benefit in the land, has not been met.

Therefore, the primary aim of the Commission, in framing a new scheme, should be to address this problem and to endeavour to ensure that the public can have confidence in the new proposals.

4.81 There are currently several different regimes of covenants in operation. For example, freehold covenants created before 1 January 2000, freehold covenants created after 1 January 2000, leasehold covenants, covenants imposed under an *Elliston v Reacher* building scheme and covenants enforceable under a scheme where section 17 of the Ground Rents Act (Northern Ireland) 2001 applies. The Commission has to bear in mind that the position of enforceability of covenants is already very complex and that it must be careful not to superimpose another layer of rules on to the top of a system that lacks clarity and is considerably overburdened with difficulty. In the light of this the Commission welcomes the views of consultees as to whether the issue of ground rent redemption can be addressed without simultaneously also dealing with the question of covenants after redemption. **Question 43:** *Do consultees consider that the matter of covenants should or should not be addressed at the same time as ground rents?*

Purpose of covenants

4.82 As a starting point, it may be useful to think about the purpose of restrictive covenants and their function in the context of redemption of ground rents as well as their place in the wider legal environment and the relevance of the characteristics of the property to which they relate. Generally, restrictive covenants were designed to preserve the character and amenity of the locality for the mutual benefit of the inhabitants and their landlord. It may be said that restrictive covenants were the forerunner of planning control and that they are similar in the sense that both are constraints imposed in the interests of the community. However, there are tensions and conflicts between the two in other respects because covenants are of a private contractual nature whilst planning law is a form of public control. Restrictive covenants which are for the benefit of private landowners may clash with planning laws which

would encourage competition; covenants may protect amenity by preventing building, contrary to the public interest in a particular location where planning policy may encourage high density which results in more building. A balance has to be achieved between the interests of the owners in being able to tie up and control the land as they please against the interests of the community in having land freely marketable and transferable.

4.83 Restrictive covenants and planning are very similar in the sense that they both control the use of land; but they are very dissimilar in that the control of one is based on the interests of the community and the control of the other is imposed by private individuals with no necessary regard for the community. To this extent, planning and restrictive covenants are opposites, but the controls that they impose are cumulative. It is generally accepted that ideally the planning system should be sufficiently robust to protect the character of a locality by its control of use but unfortunately the reality is that it does not do so. That is one of the reasons why restrictive covenants are still important and can continue to serve a useful purpose, albeit on a narrower basis than planning control.

4.84 In order to make progress with the general policy of simplification of titles and of making ownership of land a more straightforward concept, there is no doubt that the problem of the extensive range of restrictive covenants which continue to survive after redemption of the ground rent has to be addressed. Although section 16(1)(a) of the 2001 Act provides that all covenants concerning the land cease to have effect after redemption, that provision creates a very misleading impression because section 16(2) goes on to list comprehensively those which continue to benefit or burden the land as the case may be.

Types of Covenant

4.85 In order to consider which types of covenant should be extinguished and which should be retained we will consider the categories of covenants set out in section 16(2)(a) – (j) of the Ground Rents Act (Northern Ireland) 2001. Section

16(2)(a) relates to covenants for title which continue to subsist for the benefit of the person whose estate is enlarged into a fee simple. In our view the covenants for title are not necessary when the former rent payer redeems the ground rent and acquires the fee simple absolute, because the title which is obtained is a statutory fee simple and covenants by former owners or vendors are of little relevance to the new estate. We suggest that it would be more appropriate for a provision relating to the benefit of covenants for title to be included in the section which sets out the consequences of redemption and the effect of redemption on the title.

4.86 Section 16(2)(b) provides that covenants for indemnities (except those relating to a ground rent or superior rent which has been redeemed) also survive redemption and this does not appear to us to be necessary because we find it difficult to envisage a situation where an indemnity might be required between a former rent owner and a former rent payer.

4.87 There is a more persuasive argument that the covenants comprised in section 16 (2)(c), (d) and (e) should survive in some form. These relate to more practical issues such as the maintenance, repair or renewal of boundary walls or fences, and works on the land. We believe that there is merit in preserving covenants of this nature, particularly because the existence of such obligations can establish a framework for a mutually beneficial relationship between the owners of neighbouring properties. As against this, we suggest that there is insufficient justification for the retention of section 16(2)(f), which provides for the preservation of covenants to reinstate in the event of damage or destruction.

4.88 It should be borne in mind that there is already in existence a power under Article 5 of the Property (Northern Ireland) Order 1978 for the Lands Tribunal to modify or extinguish covenants which unreasonably impede the enjoyment of land. Generally the compensation awarded to the party losing the benefit of the covenant is very modest. For example, see *McGrath and another (applicant) and O'Neill*

and others (respondent) (Lands Tribunal R/41/2004) where the Lands Tribunal awarded a sum of £100 compensation for removal of covenants restricting building and user.

4.89 In the case of *Castlereagh Borough Council (applicant) and the Northern Ireland Housing Executive (respondent) (Lands Tribunal R/30/2002 and R/32/2002)* the parties agreed that the covenants qualified for modification or extinguishment and the Lands Tribunal assessed the compensation only as a sum to make up for any effect which the impediment had at the time when it was imposed in reducing the consideration then received for the land effected by it. In that case the reduction in value was £100,000 but negotiations between the parties led to an agreement in the sum of £81,000. The Lands Tribunal concluded that the reduction in consideration would not be adjusted by an amount equivalent to the increase in retail prices between the time when the covenants were imposed and the time of the hearing.

4.90 Section 16(2)(g) is potentially the broadest of all the provisions and it provides for the protection of amenities. We take the view that it is important to retain this or a similar clause because this goes to the heart of the issues which we feel should be safeguarded by a framework of restrictive covenants. However, we recognise that the wording is rather nebulous and that "protection of amenities" is difficult to define.

4.91 In our opinion section 16(2)(h) should not be replicated because it relates to covenants in relation to a body corporate formed for the management of land. In circumstances where such a body corporate existed such as a flat management company, the rent payers would not be in a position to qualify for ground rent redemption.

4.92 The situation covered by section 16(2)(i) is essential because it states that covenants which were reciprocally enforceable between the rent payer and other participants in a relevant building scheme should continue to be enforceable. We regard it as fundamental that there should generally be mutual enforceability of relevant covenants

between neighbours holding under the same title.

4.93 Section 16(2 (j) applies to Northern Ireland Housing Executive covenants which we would suggest have either now expired or are no longer relevant in any case.

4.94 **Question 44:** *In conclusion we propose that covenants which survive redemption of the ground rent should be limited to those which are considered to be of "practical benefit" or those which "protect the amenity" of the land. The definition would be sufficiently broad to encompass the type of obligation currently set out in section 16(2)(c) – (e) which are practical in nature and involve issues such as repair and maintenance of party walls. Do consultees agree?*

4.95 The difference in the terminology may be important. Section 34 of the Property (Northern Ireland) Order 1978 provides for the Lands Tribunal, in determining whether a covenant ought to be modified or extinguished, to take into account whether the impediment in question secures any "practical benefit". Section 28 of the Leasehold (Enlargement and Extension) Act (Northern Ireland) 1971 provides that a covenant which "protects or enhances the amenity" of the land will survive enfranchisement by the lessee. Section 16(2)(g) of the Ground Rents Act (Northern Ireland) 2001 allows covenants "for the protection of amenities" to continue to benefit or burden the land. **Question 45:** *It is difficult to generalise but, when considering a covenant, it may be easier to determine whether it is of "practical benefit" rather than whether it "protects or enhances the amenity" of land. We have not reached a conclusion on this difficult issue and it may be there is some merit in both tests. Do consultees consider that the statutory provisions should be recast so that there is consistency of application in all circumstances? If so, which test is preferred: "practical benefit", "protect or enhance amenity", or a new suggestion - "protect amenity land" (such land to be defined)?*

4.96 **Question 46:** *It occurs to us that it is possible that there may be other types of covenant which are not included in*

section 16(2) but which should survive redemption of the ground rent. For example, covenants relating to financial obligations. The Commission would welcome the views of consultees on this point. ***(a)*** *Do consultees consider that there are other types of covenants which should be preserved, notwithstanding that they may not be of practical benefit or protect or enhance amenity?* ***(b)*** *In relation to those set out in section 16(2), we are not convinced that there are any persuasive arguments for the retention of covenants which cannot be brought within the chosen general definition and we therefore propose that they should be automatically extinguished. Do consultees agree?*

Land benefitted

4.97 Another question to consider is ownership of the land which is benefitted by covenants. Historically, covenants developed and were used principally to benefit land retained by the ground landlord or superior owner of the property, whether or not that person continued to live in the vicinity. Later, the desirability for reciprocity of obligations between neighbours was recognised (see para. 4.25 – 4.27) and, from a social perspective, is perhaps today considered the most important function of restrictive covenants.

4.98 One of the most significant issues that the Commission now has to consider in the context of redemption of ground rents is the basis on which such a person should continue to have the benefit of any covenants. However, we recognise that we have to be cautious in ensuring that we are not proposing to confer new rights on anyone where they would not have had rights previously. We are conscious in this context of section 17 of the Ground Rents Act (Northern Ireland) 2001, (see paras. 4.49 - 4.51), which may potentially give enforcement rights after redemption to the owners of other parcels of land held under substantially similar terms and may introduce a statutory building scheme where there had not been one. As against that there is the argument that neighbours holding from a common ground landlord have always had the expectation that the restrictive covenants could be enforced indirectly through the landlord and it is not unreasonable in such

cases that neighbours should now be given a more direct right of enforcement.

4.99 The Commission is inclined to the view that the way forward may be to move towards benefit and enforceability for those living nearby who would be affected by a breach of a restrictive covenant. Accordingly, we would be interested to receive the views of consultees on the following:

Neighbours

Question 47: *Do consultees agree that there are some types of covenant which should continue to be enforceable by neighbours for the benefit of adjoining land?*

Question 48: *The Commission believes that it is important to define the proximity of the benefitted land in relation to the burdened land. For this purpose, how should the vicinity, locality or neighbourhood be defined?*

Question 49: *On the question of measurement of the physical proximity to the burdened land, is 100m attractive as a rule of thumb (as in Scotland, see para. 4.72)? Alternatively, would 500m or another measurement be considered more appropriate?*

Question 50: ***(a)*** *Should the criteria for qualification as a building or development scheme be statutorily defined? If so, should there be a requirement that the neighbours originally derived their title from a common vendor in "substantially similar terms", or "enjoy a degree of uniformity with some possible variation" and be "consistent only with a general scheme of development"?* ***(b)*** *Should it also be necessary to prove that the restrictions imposed "were intended to be and were for the benefit of all the sites sold"?*

Question 51: *Is it important that the land to which the benefit of the covenant is attached should have on it a permanent building which is in use as a place of human habitation or resort and that the neighbour should actually (or mainly?) live there?*

Question 52: *When a ground rent is redeemed should the former rent owner be required to register the neighbour covenants in a register of covenants in the Land Registry?*

Former freeholder

Question 53: *Is it justified for a former ground landlord or superior owner to continue to enjoy the benefit of a covenant and to have rights of enforcement of that benefit?*

Question 54: *If so, should the rights depend on whether that person continues to actually (or mainly?) live near to the burdened land?*

Question 55: *If so, should there be the same qualification as for a neighbour (above)?*

Question 56: *Would the same definition of proximity be appropriate?*

Question 57: *Should the benefit of the covenant attach to the person instead of to the land?*

Question 58: *On redemption of a ground rent should the onus be placed on the former superior owner to register the benefit of the surviving covenants in a register of covenants in the Land Registry?*

General

Question 59: *Should redemption of ground rent be designated an event which triggers compulsory first registration in the Land Registry so that it is not necessary to consider the position of registering surviving covenants in respect of unregistered land?*

Question 60: *Should it be possible for the benefit of a covenant to be enforceable by both a neighbour and by a former freeholder if it is registered separately by both?*

Question 61: *Should surviving covenants be classified according to type under different headings (as in Scotland),*

such as neighbour covenants and community covenants?
Question 62: *In many cases the wording of a covenant created by a lease or deed is not absolute, but confers discretion on the covenantee to consent to a release or partial release of the covenant if requested, such consent not be unreasonably withheld or delayed. In the event of a dispute, the matter can be referred to the Lands Tribunal under Article 5 of the Property (Northern Ireland) Order 1978. Do consultees consider that such discretion should continue in respect of those covenants which survive redemption?*

Compensation

4.100 If the Commission is proposing that certain types of restrictive covenant will be extinguished and will not survive redemption, the question arises as to whether there is any value in the loss of the benefit of those covenants to the former rent owner. The rent owner will be entitled to compensation for the loss of the income from the ground rent (see paras. 3.88 and 3.94). Until now, it has been recognised that the former rent owner has not been compensated for loss of the superior interest nor for the right to enforce the covenants, because in practice these interests have not been affected by the redemption of the ground rent. However, that position will change as a result of the Commission's new proposals for the superior interest to be extinguished (see para. 3.75) We are now suggesting that in order to make progress towards achieving more straightforward titles the effects of redemption should extend to enabling the former rent payer to obtain statutory ownership burdened by a minimum number of restrictive covenants. Effectively the result of this will be that the entire interest of the former rent owner will be extinguished.

4.101 However, we are not suggesting that the former rent owner would be entitled to any enhanced compensation because the actual loss in practice is the same as it was under the Ground Rents Act (Northern Ireland) 2001. Economically, the rent owner would not be in a position to argue that there was a deprivation of any real value. In the context of the European Convention on Human Rights it would be difficult

to establish that the rent owner was losing an interest in property which had any real economic value (see paras. 3.58 - 3.74). The proposals for reform are clearly in the public interest because the value of enabling owner occupiers to acquire statutory ownership equivalent to a fee simple absolute in possession outweighs any argument for retention of an interest or power to enforce covenants vested in a ground landlord who has no reason to have any interest in the land. We would also maintain that the proposals can be viewed more as a control of use than a deprivation of rights.

4.102 There is a further argument that affording any greater recognition to the rights of the landlord might be misplaced. In recent years, as the value of property increased, it became possible for owners of land to extract substantial sums of money from developers who wished to purchase and build on particular sites but were prevented from fulfilling their plans by restrictive covenants. From anecdotal evidence we are led to believe that the price for the release of a covenant in a prime residential location could be as much as £10,000. In our opinion, it was never intended that restrictive covenants would become a source of income; and allowing the market to place such a high value on them could be construed as rewarding an attempt at blackmail, which is an outcome that ought to be avoided. We concede it is possible that the enhanced value of restrictive covenants may have already peaked because property values have fallen sharply, but it is clear that the problem still exists in principle. The ground landlord will be compensated for the loss of income (see paras. 3.88 – 3.90 and 3.94).

Enforcement

4.103 **Question 63:** *On the question of enforcement of breach of covenants, the Commission is inclined to suggest in principle that there should be a procedure for enforcing covenants through the Lands Tribunal. Do consultees agree?*

4.104 **Question 64:** ***(a)*** *What remedies do consultees consider would be appropriate for breach of covenant? (For example damages or an injunction)* ***(b)*** *Would it be appropriate to propose that the jurisdiction of the Lands Tribunal be extended for this purpose?*

QUESTIONS

CHAPTER 2 ADVERSE POSSESSION

FUNDAMENTAL FEATURES

CONVEYANCING PROBLEMS

1. The Commission concludes that the main justification for the doctrine of adverse possession is its function in dealing with conveyancing problems. The Commission believes that the doctrine has an equally important role to play with respect to both registered and unregistered land and that it would be preferable to have the doctrine apply to both basically in the same way (with technical adjustments only to take account of the formal requirements of the registration of title system). Do consultees agree? (para. 2.34).

REFORM

Abolition?

2. In view of the Grand Chamber decision in the *Pye* case and the subsequent stance adopted by the English courts in cases like *Ofulue v Bossert* the Commission takes the view that human rights issues relating to the doctrine of adverse possession have been put to rest for the time being and should not be pursued further. Do consultees agree? (para. 2.38).

RESTRICTION

3. The Commission concludes that it would not be appropriate to import "ethical" considerations into the operation of the doctrine of adverse possession. This could be very contentious and would militate against the aims of clarity and certainty in the law which the Commission is seeking to promote. The Commission is not convinced that the fundamental features of the doctrine of adverse possession as it operates in practice are sufficiently inappropriate to justify interference with them. Do consultees agree? (para. 2.45).

4. The Commission is inclined to take the same view with respect to suggestions that some of the functions of the doctrine would be better achieved in other ways. For example, there is a possibility that in certain situations a more flexible remedy might lie in application of the equitable (and discretionary) doctrine of proprietary estoppel.

However, that doctrine can only be invoked in very limited circumstances and is better kept as an alternative to be used in particular cases, as the parties choose, rather than as a substitute for adverse possession. Do consultees agree? (para. 2.46).

5. The Commission has looked at other jurisdictions, particularly America, which has introduced "marketable title" legislation to deal with adverse claims arising under investigation of title. The Commission is not convinced of the merits of trying to transport such elements of the American conveyancing system to Northern Ireland. In particular the Commission has doubts about the wisdom of introducing a new scheme for unregistered conveyancing in an era when the clear policy is to move as rapidly as possible to registered conveyancing. Do consultees agree? (para. 2.48).

6. The Commission concludes that it is not appropriate at this stage to recommend the substantial change which was introduced as the "veto" scheme for registered land in England and Wales by the Land Registration Act 2002. It considers that this would raise issues relating to operation of the registration of title system which are outside the scope of this Project. The Commission takes the view that this matter should be dealt with in any review of that system, in particular the extension of compulsory registration, which may take place in the future. Do consultees agree? (para. 2.56).

7. The Commission looked at introducing a requirement for compensation but concludes that this would give rise to the same difficulties as the introduction of ethical considerations. As adverse possession involves so many different scenarios and squatters and landowners of such different ethical status, a line would have to be drawn to indicate when compensation would be appropriate and the basis upon which it would have to be calculated. Drawing a line and the parameters for assessing compensation would be no easy task and very controversial. It would introduce complexity and run counter again to one of the Commission's primary aims. On that basis the Commission is not inclined to recommend payment of compensation to a dispossessed owner. Do consultees agree? (para. 2.58).

TECHINCAL RULES

REQUIREMENTS FOR ADVERSE POSSESSION

8. In the *Pye* case, the House of Lords confirmed the requirements for "adverse" possession and these have been applied without apparent difficulty by the courts of Northern Ireland. Accordingly it seems to the Commission that it would be inappropriate to interfere with this aspect of the law by legislation. Do consultees agree? (para. 2.65).

PARLIAMENTARY CONVEYANCE

9. The Commission recommends following the proposals for reform of this aspect of the doctrine of adverse possession consistently made both in Northern Ireland and in the Republic of Ireland in recent decades. The most important proposal is for the dispossessed owner's title to pass to the squatter; by way of a parliamentary conveyance in respect of unregistered land and a statutory transfer of title in respect of registered land. This has the merit of simplifying the law, rendering it more certain and, in the case of registered land, confirming what has long been the practice of the Land Registry. It would also ensure that the law relating to unregistered land accords with the practice in registered land. The Commission recommends that legislation along the lines previously drafted for Northern Ireland and the Republic of Ireland should now be implemented. Do consultees agree? (para. 2.70).

LIMITATION PERIODS

10. The Commission is not inclined to recommend a reduction in or changes to existing limitation periods. Changes made by England and Wales are linked to the provisions of the Land Registration Act 2002 and are not considered appropriate in view of the Commission's earlier recommendation against adoption of the 2002 Act's regime at this stage. Do consultees agree? (para. 2.73).

11. The Commission inclines to the view that the introduction of different limitation periods for different categories of squatters would simply complicate the law without securing any real benefits. Do consultees agree? (para. 2.75).

PERIODIC TENANCIES

12. On balance the Commission is inclined to retain the distinction between oral and written periodic tenancies and not to recommend altering the provisions in the Limitation (Northern Ireland) Order 1989 governing oral periodic tenancies. Do consultees agree? (para. 2.77).

UNICORPORATED ASSOCIATIONS

13. The Commission takes the view that the problem with applying the doctrine of adverse possession to unincorporated associations relates more to the legal status of unincorporated associations and their inability under current law to hold title to land as an independent legal entity. The Commission considers that reform should be dealt with as part of a general review of the status of such bodies. Do consultees agree? (para. 2.80).

ENCROACHMENT

14. The Commission is not convinced that it would be appropriate to recommend legislative reform on the issue of encroachment and this would seem to be a matter best left to the courts to develop. Do consultees agree? (para. 2.82).

PURCHASERS IN POSSESSION

15. The Commission is not inclined to recommend abolition or restriction of the doctrine of adverse possession where it operates in the situation of a purchaser in possession. Do consultees agree? (para. 2.87).

16. The Commission takes the view that it would be appropriate to clarify the position in relation to adverse possession in favour of a purchaser in possession after payment of the full purchase price but without completion of a formal conveyance. In this case a purchaser does not include a lessee. Do consultees agree? (para. 2.89).

CHAPTER 3 GROUND RENTS

PROPOSALS FOR REFORM

Introduction

As a result of the difficulties that have become apparent with the operation of the present redemption scheme under the Ground Rents Act (Northern Ireland) 2001, the Commission believes that a new more straightforward scheme should be devised to accelerate the simplification of titles and actively encourage the move towards unencumbered freehold ownership. It is also important that any new proposals should meet the expectations of the parties and produce an outcome that is satisfactory both to the rent payer and to the rent owner. The end result should be that the rent payer obtains a fee simple interest in possession free from any ground rent; all superior interests in the land are extinguished, the new interest confers an absolute title and the rent owner is adequately compensated both for the loss of income and the interest in the land.

17. Do consultees agree that the present redemption scheme should end when the new proposals are implemented and that there should be appropriate transitional arrangements for applicants already involved in the process? (para. 3.75)

18. The Commission is provisionally minded to propose that, as with the present scheme, the new redemption scheme should apply only to ground rents of dwelling houses? (a) Do consultees agree? (b) If not, should it apply to all ground rents? (c) Should it apply to commercial premises? (para. 3.78)

19. Should the Leasehold (Enlargement and Extension) Act (Northern Ireland) 1971 be repealed and replaced by a new statutory provision conferring similar powers on those who were able to take advantage of it? If so, would it be reasonable to suggest that the rent owners under leases which have less than 50 years to run would be entitled to compensation based on 1% of the capital value of the property multiplied by nine? (para. 3.78(12))

Applicability of the scheme

20. The Commission considers that the applicability of the scheme should be similar to that which currently is in place in the 2001 Act and welcomes the views of consultees on the categories of land to

which the redemption proposals should apply. (a) How have the definitions under the 2001 Act worked in practice? (b) Should the new proposals make the same exceptions? (c) Should the new proposals apply only to dwelling houses as at present, or to all ground rents? (d) Should redemption be permitted in the case of a long lease where the land is used for business purposes? (e) Does there need to be more clarity in the definitions, for example in respect of flats? (f) Should all rentcharges be redeemable including those which are currently excepted under article 29(3) (b) to (e) of the Property (Northern Ireland) Order 1997 (NI 8)? (g) What about statutory rent charges and rentcharges created by court order – are these significant? (para. 3.75 – 3.79)

Provisions for increase of ground rent

21. Article 31 of the Property (Northern Ireland) Order 1997 provides that any provision for the increase or review of a ground rent on one or more than one occasion is of no effect. However this provision does not apply to a building lease or to a fee farm grant where provision is made for increases in the ground rent which are related to periods or events in the progress of building or related activities. (a) Do consultees consider that this exception continues to be valid? (b) If not, should the Commission recommend that Article 31(4) be repealed and the provision that there should be no increase or review in ground rent be universally applied.

Right of re-entry

22. A fee farm grant or a lease of land reserving a ground rent is usually subject to a clause in the deed giving a right of re-entry or forfeiture in the event of the rent remaining unpaid for a stipulated period (commonly 21 days). In theory, if the rent payer does not pay the rent before the period expires, the rent owner can take possession of the land to the entire exclusion of the defaulting rent payer and of any sub-tenants who hold title from him or her. Do consultees agree that section 44 of the Conveyancing Act 1881, which provides remedies for the recovery of land where an annual sum is charged on the land or the income of the land, should be repealed and not replaced? (para. 3.85)

23. The Commission believes that it is quite disproportionate that a rent owner or superior landlord should have a right of re-entry or forfeiture over a house with a substantial capital value in order to

protect a small ground rent. Accordingly, the Commission proposes that the ground rent should no longer be secured on the land and that it should become a contract debt. As such it would be a personal matter between the rent payer at the date on which the legislation came into operation and the rent owner. Do consultees agree that the ground rent should cease to be secured on the land and should become a contract debt? (para. 3.86)

Smaller ground rents

24. The Commission is provisionally minded to suggest making a distinction between smaller ground rents and larger ones, because of the wide variation in the amount of rents and its belief that there are problems in devising a one-size fits all scheme. Do consultees consider that there should be a distinction between smaller ground rents and larger ones? (para.3.87)

25. Any dividing line is by its very nature arbitrary, but we suggest that the cut-off point would be either £10, £20 or £50. Any ground rents below that value would come within the scheme for smaller ground rents. Which value would consultees prefer as the appropriate maximum for the smaller rents provisions: £10, £20, £50 or a different amount? (para. 3.87).

Automatic extinguishment

26. The Commission suggests that on an appointed day all ground rents of £10, £20, £50 or less, per annum should be extinguished. Compensation would be due by the rent payer to the rent owner, but the ground rent would be extinguished whether or not the compensation was paid. As this is a fairly radical proposal, the Commission considers that there should be a lead-in period of sufficient time to enable the parties to make the necessary arrangements between themselves for payment of the compensation. It is therefore proposed that the appointed day should be three years from the date on which the legislation comes into effect. (a) Do consultees agree? (b) If not, should the lead-in period be shorter or longer and what alternative period is preferred? (para. 3.88).

27. On the date on which the ground rent is extinguished, the rent payer would acquire statutory ownership equivalent to the fee simple absolute and the estate of the rent owner would be discharged.

Further, any other superior interests would be extinguished. The estate of the rent payer would be converted automatically into a statutory freehold. Do consultees agree that the rent payer should automatically acquire statutory ownership and that all the superior estates should also be automatically extinguished? (para. 3.89).

Raising amount of automatic extinguishment

28. The Commission believes that it is necessary to ensure that all rent owners realise that there is limited life in income from ground rents. Accordingly it is considering that the scheme for the redemption of small rents might be extended or rolled out further in due course. (a) Do consultees agree that there should be provision at a future date for larger ground rents to be automatically extinguished? (b) Although it may be difficult to say at this early stage, up to what amount might this be extended? (c) Approximately how far ahead might this provision be made? For example, five years? (para. 3.90).

Compensation for smaller and larger ground rents

29. It is important that the rent owner should be compensated by the rent payer for the loss of the income from the ground rent and the superior interest in the land, as is the case under the existing scheme. Under the new proposals the onus would be placed on the rent owner to request and obtain the compensation. If he or she failed to do so by the appointed day, the right to payment of the compensation would be lost. In that event, the rent payer would be under no continuing obligation and the debt would effectively become statute barred. Do consultees agree that the responsibility for obtaining the compensation should lie with the rent owner? (para. 3.93).

30. Do consultees accept that the rent owner will lose the right to the compensation on the appointed day when the ground rent is extinguished? (para. 3.93).

Compensation for smaller ground rents

The Commission considered the matter of the amount of the compensation that should be paid although this has been debated at length on many previous occasions and differing opinions have been expressed. After much deliberation and, to ensure that the process

remains as straightforward and uncomplicated as possible, the Commission is inclined to revert to the principle of using a simple multiplier.

31. (a) Do consultees agree that the compensation for smaller rents under £10, £20 or £50 should be calculated by using a simple multiplier? (b) If so, should the compensation be nine times the annual ground rent or is twelve a more acceptable multiplier? (c) If neither, what multiplier do consultees consider would be preferable? (d) Alternatively, should the calculation be made on a different basis such as the investment of a capital sum in government stock? (para.3.95)

32. It is accepted that any arrears of ground rent due to the rent owner should be paid, but do consultees agree with the proposal that interest should also be charged? (para.3.96)

Compensation for larger ground rents

33. (a) On what basis do consultees consider that the compensation for larger rents over £10, £20 or £50 should be calculated: a simple multiplier, investment in government stock or a completely different option? (b) If a simple multiplier, should that multiplier be 9, 12, or a different amount? (c) Should the multiplier vary according to the size of the rent and if so, how would this be done? (d) Again, should interest be charged on the arrears? (para.3.97)

Trigger points for redemption of both small and large rents

34. For small rents the Commission is considering whether there should be trigger points within the three year lead-in period on the occurrence of which the ground rent would be extinguished, and would welcome the views of consultees on this point. (a) Do consultees think that a small ground rent under £10, £20 or £50 should be extinguished on the sale or transfer of the land? (b) On voluntary transfer? (c) On mortgage/charge? (d) Transmission on death? (e) Any other change of ownership? (f) On the occurrence of a triggering event, which party should be responsible for the redemption of the ground rent – the previous rent payer or the new rent payer? (para. 3.98).

35. For larger rents, the Commission proposes that there should be specified triggering events upon the occurrence of which ground rent

redemption would be compulsory. It suggests that the triggering events for larger rents should be the sale of the land and any other change of ownership including voluntary transfers, transmission on death and mortgage / re-mortgage / charge of the land. (a) Do consultees agree? (b) If not, what other triggering events do consultees consider would be more appropriate? (c) On the occurrence of a triggering event, which party should be responsible for the redemption of the ground rent – the previous rent payer or the new rent payer? (para. 3.99)

36. The Commission suggests that the lead-in period for introduction of the triggering events should be six months. (a) Do consultees agree? (b) If not, what alternative period would consultees suggest? (para. 3.100)

37. (a) On the triggering event it is proposed that the ground rent would be extinguished automatically and it would become the responsibility of the rent owner to obtain the compensation from the rent payer. Do consultees agree? (b) should the rent payer be responsible for informing the rent owner that a triggering event has occured? (para. 3.101)

38. There is a possibility that the amount required to redeem the larger rents may be quite high. (a) If so, do consultees agree that the rent payer should be given the option to pay it to the rent owner by instalments? (b) If so, above what capital value should the option to pay by instalments be available? (c) Should interest be due on the capital value until all instalments have been paid? (para. 3.102)

Intermediate interests

39. Do consultees consider that compulsory redemption of smaller ground rents in possession should extend to intermediate rents as well? (para. 3.103)

40. (a) Should the compensation due for intermediate interests also be on the basis of the same simple multiplier and if not, how would the compensation be calculated? if the multiplier used produces a large capital sum, should there be an option to pay it by instalments over a specified period? (b) Above what level should the option to pay by instalments be introduced? (para. 3.103)

Non-payment of ground rent

41. The Commission believes that it would facilitate the elimination of ground rents if, where the rent has not been demanded or paid for six years, not only the right to demand the rent, but also the title of the rent owner is extinguished after six years. It is proposes that this provision would apply to all ground rents regardless of size and whether the rent in question was reserved by a lease or by a fee farm grant. Do consultees agree? (para. 3.105).

42. Where the rent has not been demanded or paid for a period of at least six years, the Commission proposes that the estate of the rent payer could be enlarged into statutory ownership by statutory declaration. It is inclined to suggest that this would apply to rents of more than £10 or £20 per annum, but less than £50 per annum. Do consultees agree? (para. 3.107).

CHAPTER 4 COVENANTS AFTER REDEMPTION

Difficulties with the current position

43. In the light of the fact that the position in relation to covenants in general is already very complex and the Commission is mindful of the possibility of superimposing another layer of rules on to the top of a system that lacks clarity and is considerably overburdened with difficulty, the Commission welcomes the views as to whether the issue of ground rent redemption can be addressed without simultaneously also dealing with the question of covenants after redemption. Do consultees consider that the matter of covenants should or should not be addressed at the same time as ground rents? (para. 4.81)

Types of Covenant

44. In order to consider which types of covenant should be extinguished and which should be retained the Commission examines each of the categories of covenants set out in section 16(2)(a) – (j) of the Ground Rents Act (Northern Ireland) 2001. In conclusion it proposes that covenants which survive redemption of the ground rent should be limited to those which are considered to be of "practical benefit" or those which "protect the amenity" of the land. Do Consultees agree? (para. 4.85 – 4.94).

45. It is difficult to generalise but, when considering a covenant, it may be easier to determine whether it is of "practical benefit" rather than whether it "protects or enhances the amenity" of land. The Commission has not reached a conclusion on this difficult issue and it may be there is some merit in both tests. Do consultees consider that the statutory provisions should be recast so that there is consistency of application in all circumstances? If so, which test is preferred: "practical benefit", or "protect or enhance amenity?" or a new suggestion - "protect amenity land" (such land to be defined)? (para. 4.95)

Land benefitted

46. It is possible that there may be other types of covenant which are not included in section 16 (2) but which should survive redemption of the ground rent. For example, covenants relating to financial obligations. (a) Do consultees consider that there are other types of covenants which should be preserved, notwithstanding that they may not be of practical benefit or protect or enhance amenity? (b) The Commission suggests that the categories of covenant set out in section 16 (2), which cannot be brought within the chosen general definition should be automatically extinguished. Do consultees agree? (para. 4.96).

Neighbours

47. Do consultees agree that there are some types of covenant which should continue to be enforceable by neighbours for the benefit of adjoining land? (para. 4.99).

48. The Commission believes that it is important to define the proximity of the benefitted land in relation to the burdened land. For this purpose, how should the vicinity, locality or neighbourhood be defined? (para. 4.99).

49. On the question of measurement of the physical proximity to the burdened land, is 100m attractive as a rule of thumb (as in Scotland, see para 3.72)? Alternatively, would 500m or another measurement be considered more appropriate? (para. 4.99).

50. (a) Should the criteria for qualification as a building or development scheme be statutorily defined? If so, should there be a requirement that the neighbours originally derived their title from a

common vendor in "substantially similar terms", or "enjoy a degree of uniformity with some possible variation" and be "consistent only with a general scheme of development?" (b) Should it also be necessary to prove that the restrictions imposed "were intended to be and were for the benefit of all the sites sold?" (para. 4.99).

51. Is it important that the land to which the benefit of the covenant is attached should have on it a permanent building which is in use as a place of human habitation or resort and that the neighbour should actually (or mainly?) live there? (para. 4.99).

52. When a ground rent is redeemed should the owner of the benefitted land be obliged to register the neighbour covenants in a register of covenants in the Land Registry? [If this is thought to be the way forward, we can then think about the practicalities and the procedure in conjunction with the Land Registry] (para. 4.99).

Former freeholder

53. Is it justified for a former ground landlord or superior owner to continue to enjoy the benefit of a covenant and to have rights of enforcement of that benefit? (para. 4.99).

54. If so, should the rights depend on whether that person continues to actually (or mainly?) live near to the burdened land? (para. 4.99).

55. If so, should there be the same qualification as for a neighbour (above)? (para. 4.99).

56. Would the same definition of proximity be appropriate? (para. 4.99).

57. Should the benefit of the covenant attach to the person instead of to the land? (para. 4.99).

58. On redemption of a ground rent should the onus be placed on the former superior owner to register the benefit of the surviving covenants in a register of covenants in the Land Registry? (para. 4.99).

General

59. Should redemption of ground rent be designated an event which

triggers compulsory first registration in the Land Registry so that it is not necessary to consider the position of registering surviving covenants in respect of unregistered land? (para. 4.99).
60. Should it be possible for the benefit of a covenant to be enforceable by both a neighbour and by a former freeholder if it is registered separately by both? (para. 4.99).

61. Should surviving covenants be classified according to type under different headings (as in Scotland), such as neighbour covenants and community covenants? (para. 4.99).

62. In many cases the wording of a covenant created by a lease or deed is not absolute, but confers discretion on the covenantee to consent to a release or partial release of the covenant if requested, such consent not be unreasonably withheld or delayed. In the event of a dispute, the matter can be referred to the Lands Tribunal under Article 5 of the Property (Northern Ireland) Order 1978. Do consultees consider that such discretion should continue to apply to those covenants which survive redemption? (para. 4.99.

Enforcement

63. On the question of enforcement of breach of covenants, the Commission is inclined to suggest in principle that there should be a procedure for enforcing covenants through the Lands Tribunal. Do consultees agree? (para. 4.103).

64. What remedies do consultees consider would be appropriate for breach of covenant? (For example damages or an injunction)? (b) Would it be appropriate to propose that the jurisdiction of the Lands Tribunal be extended for this purpose? (para. 4.104).

APPENDIX A

A.1 ABBREVIATIONS

1967 Lowry Report: Report of the Committee on the Registration of Title to Land (1967).

1971 Survey: Survey of the Land Law of Northern Ireland (1971).

1990 Final Report: Final Report of the Land Law Working Group (1990).

A.2 BOOKS

Clayton and Tomlinson, *The Law of Human Rights*, 2nd edition, Oxford University press: 3.61

Fitzgerald *Land Registry Practice*, 2nd ed. (1995) Round Hall Press: 2.68

Jourdan, *Adverse Possession*, (2007) Tottel Publishing: 2.81, 2.84

Megarry and Wade, *The Law of Real Property*, 7th ed. By Harpum, Bridge and Dixon (2008) Sweet and Maxwell Ltd.: 2.82, 3.36, 4.23

Reid, *The Abolition of Feudal Tenure in Scotland*, (2003) Tottel Publishing: 3.40, 4.68

Wallace, *Land Registry Practice in Northern Ireland*, 2nd ed. (1987) SLS Legal Publications (Northern Ireland): 2.68

Wylie, *Irish Land Law*, 3rd ed. (1997) Butterworths: 2.28, 2.31, 2.67, 2.78, 2.85, 4.18, 4.23

Wylie, *Irish Landlord and Tenant*, 2nd ed. (1998) Butterworths: 2.81

Wylie and Woods, *Irish Conveyancing Law*, 3rd ed. (2005) Tottel publishing: 2.23 – 2.24, 2.83, 2.86

A.3 ARTICLES

Anderson, “Compensation for Interference with Property” (1999) 6 EHRLR 543: 2.4, 2.57

Austin, “Commerce and the European Convention on Human Rights” (2004) 11(9) CLP 223: 3.67

Backman, “The Law of Practical Location of Boundaries and the Need for an Adverse Possession Remedy” (1986) BYUL Rev 957: 2.74

Brady, “Periodic Tenancies in Writing and the Running of Time” (1986) 80 Gaz ILSI 253: 2.76

Buckley, “Adverse Possession at the Crossroads” (2006) 11(3) CPLJ 59: 2.8, 2.58

Buckley, “Calling Time on Adverse Possession” (2006) Bar Rev 32: 2.8, 2.58

Buckley, “Ground Rents Revisited” (2009) 14(1) CPLJ 13: 3.49, 3.63

Buckley, “Pye (Oxford) Ltd. v United Kingdom: Human Rights Violations in the Eye of the Beholder” (2007) 12(4) CPLJ 109: 2.8

Cobb and Fox, “Living outside the system: the (im)morality of urban squatting after the Land Registration Act 2002” (2007) 27(2) LS 236: 2.4, 2.20, 2.33, 2.43

Cooke, “A Postscript to *Pye*” (2008) 59 NILQ 149: 2.37

Cooke, “Adverse Possession after *J A Pye (Oxford) Ltd. v The United Kingdom*” (2006) 57(3) NILQ 429: 2.37

Cunningham, “Adverse Possession and Subjective Intent: A Reply to Professor Helmholz” (1986) 64 Wash ULQ 1: 2.39

Dixon, “Adverse Possession and Human Rights” [2005] Conv 345: 2.4

Dixon, “The Reform of Property Law and the Land Registration Act 2002: a Risk Assessment” [2003] Conv 136: 2.4, 2.33

Dockray, “What is Adverse Possession: Hyde and Seek” (1983) 46(1) MLR 89: 2.84

Dockray, “Why do We Need Adverse Possession” (1985) Conv 272: 2.14

Dowling, “Adverse Possession and Unincorporated Associations” (2003) 54 NILQ 272: 2.79

Editor’s Notebook, “Adverse Possession and the Land Registration Act 2002” [2009] 73 Conv 169: 2.33

Elfant, “Compensation for the Involuntary Transfer of Property between Private Parties: Application of a Liability Rule to the Law of Adverse Possession” (1984) 79 Nw UL Rev 758: 2.57

Epstein, “Past and Future: The Temporal Dimension in the Law of Property” (1986) 64 Wash ULQ 667: 2.14, 2.39

Fennell, “Efficient Trespass : The Case for ‘Bad Faith’ Adverse Possession” (2006) 100 Nw UL Rev 1037: 2.39

Fox-O’Mahony and Cobb, “Taxonomies of Squatting : Unlawful Occupation in a New Legal Order” (2008) 71(6) MLR 878: 2.20, 2.43

Frank A Kaufman, “The Maryland Ground Rent – Mysterious but Beneficial”, Maryland Law Review, Vol. 5 No. 1, December 1940: 3.50

Gardiner, “Squatters’ Rights and Adverse Possession: A Search for Equitable Application of Property Laws” (1997) 8 Ind Int’l & Comp L Rev 119: 2.39

Goodman, “Adverse Possession of Land – Morality and Motive” (1970) 33 MLR 281: 2.4

Gordley and Mattei, “Protecting Possession” (1996) 44 Am J Comp L 293: 2.39

Griggs, “Possessory Titles in a System of Title by Registration” (1999) 21 Adel L Rev 157: 2.4, 2.14, 2.27

Guardino, “Zoning and Land Use Planning: Adverse Possession: Test in New Law is ‘All About Good Faith’” New York Law Journal, July 23, 2008: 2.42

Halstead, “Human Property Rights” (2002) Conv. & Prop. Law. 153: 3.72

Harpum, “Property Law – The Human Rights Dimension; Part 2”, (2000) 4(2) Landlord & Tenant R. 29, 29: 3.59

Helmholz, “Adverse Possession and Subjective Intent” (1983-84) 61 Wash ULQ 331: 2.39

Helmholz, “More on subjective Intent: A Reply to Professor Cunningham” (1986) 64 Wash ULQ 65: 2.39

Hogg, “The Relation of Adverse Possession to Registration of Title” (1915) 15 J Soc Comp Legis (ns) 83: 2.4

Howell, “Land and Human Rights”, (1999) Conv 287: 3.60

Jossman, “The Forty Year Marketable Title Act: A Reappraisal” (1959-60) 37 U Det LJ 422: 2.47

McCrimmon, “Whose Land is it Anyway? Adverse Possession and Torrens Title” in Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis Wellington 2003): 2.4

Merrill, “Property Rules, Liability Rules and Adverse Possession” (1984-85) 79 NWUL Rev 1122 :2.14

O’Connor, “An Adjudication Rule for Encroachment Disputes: Adverse Possession or Building Encroachment Statute?” in Cooke (ed) *Modern Studies in Property Law* Volume 4 (Hart Publishing, Oxford, 2007) Chapter 9: 2.47

O'Connor, "Registration of Title to Land in England and Australia: A Theoretical and Comparative Analysis" in Cooke (ed) *Modern Studies in Property Law*, Volume 2 (Hart, Oxford, 2003)): 2.4

O'Connor, "The Private Taking of Land: Adverse Possession, Encroachment by Buildings and Improvement under a Mistake" (2006) 33 UWAL Rev 31: 2.47

Omotola, "The Nature of Interest Acquired by Adverse Possession of Land under the Limitation Act 1939" (1973) 37 Conv 85: 2.66

Pearce, "Adverse Possession by the Next-of-kin of an Intestate" (1987) 5 ILT 281: 2.28

Powell, "Marketable Record Title Act: Wild, Forged and Void Deeds as Roots of Title" (1969) 22 U Fla L Rev 669: 2.47

Pye, "Adverse Possession and Encroachment by Tenants" (1987) 81 Gaz ILSI 5: 2.81

Stake, "The Uneasy Case for Adverse Possession" (2001) 89 Geo LJ 2419: 2.14, 2.39, 2.57

The Baltimore Sun, (Various articles), 2006: 3.52

Wade, "Landlord, Tenant and Squatter" (1962) 78 LQR 541: 2.67

Wallace, "Adverse Possession of Leaseholds – The Case for Reform" (1975) 10 Ir Jur (ns) 74: 2.5, 2.67

Woods, "Adverse Possession and Informal Purchasers" (2009) 60(3) NILQ 605: 2.88

Woods, "The Position of the Owner under the Irish Law on Adverse Possession" (2008) 30(1) DULJ 298: 2.44

Wylie, "Adverse Possession – An Ailing Concept?" (1965) 16 NILQ 467: 2.5, 2.67

A.4 CASES

A.5 REPORTS AND CONSULTATION PAPERS BY JURISDICITON

England and Wales

Reports

The Wilberforce Committee , "Report of the Committee on Positive Covenants Affecting Land" (1965) Cmnd 2719: 4.55

Committee chaired by Professor J M Halliday, "Report on Conveyancing Legislation and Practice", (1966) Cmnd. 3118: 3.40

Report on Restrictive Covenants (1967) Law Com No. 11: 4.56

Working Paper on the Transfer of Land: Appurtenant Rights (1971) Law Com No. 11: 4.57

Report on the Law of Positive and Restrictive Covenants, (1984) Law Com. No. 127: 4.37, 4.38

Landlord and Tenant Law: Privity of Contract and Estate (1988) Law Com No. 174: 4.15

Land Registration for the Twenty-first Century, Part X, (1998) Law Com No. 254: 2.7, 2.14, 2.27, 2.33 - 2.34, 2.83

Limitation of Actions (2001) Law Com No. 270: 2.7, 2.72

Consultation Papers

Easements, Covenants and Profits a Prendre (2008) Consultation Paper No. 186: 4.37, 4.39, 4.58

Republic of Ireland

Reports

Report on Land Law and Conveyancing Law: (1) General Proposals (LRC 30-1989): 2.44

Report on Title by Adverse Possession (LRC 67-2002): 2.8, 2.69

Report on Land Law and Conveyancing Law: (7) Positive Covenants over Freehold Land and Other Proposals (LRC 70-2003): 4.66

Report on the Reform and Modernisation of Land Law and Conveyancing Law (LRC 74-2005): 2.57

Scotland

Reports

Report on Real Burdens (2000) (Scot Law Com No. 181): 4.68

Northern Ireland

Northern Ireland Law Commission

Consultation Paper *Land Law* NILC 2 (2009): 2.24, 2.42, 2.52, 2.78, 3.50, 4.4, 4.7

Land Law Working Group

Discussion Document No.1 published by the Land Law Working Group on Ground Rents and Other Payments (Department of Finance for Northern Ireland, Office of Law Reform) (1980 HMSO): 4.31 – 4.33

Discussion Document No.4 published by the Land Law Working Group on Conveyancing and Miscellaneous Matters (Department of Finance and Personnel for Northern Ireland, Office of Law Reform) (1983 HMSO): 4.37.

Interim Report published by the Land Law Working Group on Ground Rents and Other Periodic Payments (Department of Finance and Personnel for Northern Ireland Office, Office of Law Reform)(1983 HMSO): 3.9, 4.34 – 4.36.

Review of the Operation of the Ground Rents Act (Northern Ireland) 2001 (Discussion Paper 1/05) November 2005, Office of Law Reform (Department of Finance and Personnel): 3.25, 4.52, 4.79,

APPENDIX B

EQUALITY OF OPPORTUNITY SCREENING ANALYSIS FORM

Policy to be screened

B.1 Title

Proposals for reform of the law of adverse possession and the law of ground rent redemption and related covenants in Northern Ireland.

B.2 Aims of the policy to be screened

Aims: To reform, modernise and clarify existing land law in Northern Ireland

Objectives: To make recommendations to DFP to reform, modernise and simplify existing common law principles and statutes that relate to the law of adverse possession and the law of ground rent redemption and related covenants.

Context: This policy is one of the policies/projects contained within the Northern Ireland Law Commission's (NILC) First programme of reform (2009 – 2011). The policy is being taken forward by the Land Law Project team, within the Northern Ireland Law Commission. The policy relating to ground rent redemption and related covenants comes from a reference dated May 2008 by the then Minister for Finance and Personnel, the Rt Hon Peter Robinson MP MLA.

There are no EU obligations specifically relating to land law (see Treaty of Amsterdam 1997, Article 295 - "This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.")

Desired outcomes: To create a legal framework of land law for the 21st century that is responsive to legal obligations and yet accommodates personal and commercial requirements, needs and circumstances.

B.3 On whom will the policy impact? Please specify

The policy will impact on the general population i.e. anyone who holds or deals with land and also on service providers (e.g. Solicitors; Land and Property Services; other property professionals e.g. surveyors, estates agents; Mortgage lenders; Academics, Barristers and the Judiciary).

B.4 Who is responsible for (a) devising and (b) delivering the policy? What is the relationship and have they considered this issue and any equality issues?

(a) NILC is responsible for devising the policy, although, as stated above, the policy relating to ground rent redemption and related covenants comes from a reference dated May 2008 by the then Minister for Finance and Personnel, the Rt Hon Peter Robinson MP MLA.

(b) The Northern Ireland Executive and DFP is responsible the implementation of the policy.

DFP is a joint sponsoring body of NILC with the Northern Ireland Office (NIO). DFP will be presented with recommendations emanating from the policy and will consider taking these forward through the legislative process.

B.5 What linkages are there to other NI Departments/NDPBs in relation to this policy?

NIO (as sponsoring body), DFP (as sponsoring body, author of reference in relation to ground rent redemption and related covenants and leading department), Land Registers (Northern Ireland) within the Land and Property Services (key stakeholder involved in the registration of land and the conveyancing process).

B.6 What data is available to facilitate the screening of this policy?

(1) Report of the Committee on the Registration of Title to Land (1967).

(2) Survey of the Land Law of Northern Ireland (1971).

(3) Final Report of the Land Law Working Group (1990).

(4) The Reform and Modernisation of Land Law and Conveyancing Law, Law Reform Commission, Republic of Ireland, Consultation Paper 34 – 2004.

(5) Reform and Modernisation of Land Law and Conveyancing Law, Law Reform Commission, Republic of Ireland, Report 74 – 2005.

(6) Information and data on relevant transactions which relate to the policy from the Land Registers of Northern Ireland i.e. the number of applications received by Land Registry and Registry of Deeds from 2002 to date.

(7) A detailed list of all sources used in developing the land law proposals is contained in Appendix A.

(8) Data obtained from the Lands Tribunal in relation to applications for modification or extinguishment of impediments under the Property (Northern Ireland) Order 1978.

B.7 Is additional data required to facilitate screening? If so, give details of how and when it will be obtained.

No

(See Appendix 4 of the Equality Commission Practical Guidance on EQIA which provides a list of Sources of S75 data or speak to Central Statistics and Research)

Screening Analysis

B.8 Is there any indication or evidence of higher or lower participation or uptake by the following Section 75 groups? (see Annex A)

(1) Religious belief - No

(2) Political opinion - No

(3) Racial group - No

(4) Age - No

(5) Marital status - No

(6) Sexual orientation - No

(7) Gender - No

(8) Disability - No

(9) Dependants - No

Please give details: Not applicable.

B.9 Is there any indication or evidence that any of the following Section 75 groups have different needs, experiences, issues and priorities in relation to this policy issue?

(1) Religious belief - No

(2) Political opinion - No

(3) Racial group - No

(4) Age - No

(5) Marital status - No

(6) Sexual orientation - No

(7) Gender - No

(8) Disability - No

(9) Dependants - No

Please give details: Not applicable.

B.10 Have consultations with the relevant groups, organisations or individuals within any of the Section 75 categories, indicated that policies of this type create problems specific to them?

(1) Religious belief - No

(2) Political opinion - No

(3) Racial group - No

(4) Age - No

(5) Marital status - No

(6) Sexual orientation - No

(7) Gender - No

(8) Disability - No

(9) Dependants - No

Please give details: Pre-publication consultation with key stakeholders has taken place. These stakeholders were not consulted on the basis of their affiliation to the s. 75 groups; there was no indication that the policy would create problems specific to the s. 75 groups.

B.11 Is there an opportunity to better promote **equality of opportunity or good relations** by altering the policy, or by working with others, in Government, or in the larger community in the context of this policy?

Yes / No

Please give details: Not applicable.

B.12 It may be that a policy has a differential impact on a certain s. 75 group, as the policy has been developed to address an existing or historical inequality or disadvantage. If this is the case, please give details below:

No. The policy will apply to the general population (see B.3 above) regardless of circumstance.

B.13 Please consider if there is any way of adapting the policy to promote better equality of opportunity or good relations.

Not applicable

EQIA Recommendation

B.14 Full EQIA procedures should be carried out on policies considered to have **significant implications** for equality of opportunity. Please fill in the following grid in relation to the policy.

Prioritisation Factors	**Significant Impact**	**Moderate Impact**	**Low Impact**
Social Need			yes
Effect on people's daily lives			yes
Effect on economic, social and human rights			yes
Significance of the policy in terms of strategic importance			yes
Significance of the policy in terms of expenditure			yes

Please give details: Not applicable.

B.15 In view of the considerations above do you consider that this policy should be subject to a full EQIA? Please give reasons for your considerations. If you are unsure, please consult with affected groups and revisit the screening analysis accordingly.

We do not think that the proposals for the reform of the law of adverse possession and the law of ground rent redemption and related covenants in Northern Ireland should be subject to a full EQIA. There is no evidence to suggest that any one s. 75 group will be affected more than another and the policy will have a low impact on the prioritisation factors listed in B.14.

B.16 If an EQIA is considered necessary please comment on the priority and timing in light of the factors in the table at B.14.

Not applicable.

B.17 If an EQIA is considered necessary is any data required to carry it out/ensure effective monitoring?

Not applicable

ANNEX A

Main Groups Relevant to the Section 75 Categories

Category	Main Groups
Religious belief	Protestants; Catholics; people of non-Christian faiths; people of no religious belief
Political opinion	Unionists generally; Nationalist generally; members/supporters of any political party
Racial Group	White people; Chinese; Travellers; Indians; Pakistanis; Black people
Gender	Men (including boys); women (including girls), Trans-gendered people, Transsexual people
Martial status	Married people; unmarried people; divorced or separated people; widowed people
Age	Children under 16; people of working age (16/65); people over 65
“Persons with a disability”	Persons with a physical, sensory or learning disability as defined in sections 1 and 2 and Schedules 1 and 2 of the Disability Discrimination Act 1995
“Persons with dependants”	Persons with personal responsibility for the care of a child; persons with personal responsibility for the care of a person with an incapacitating disability; persons with personal responsibility for the care of a dependant elderly person
Sexual orientation	Heterosexual people; homosexual people; bisexual people

APPENDIX C

REGULATORY IMPACT ASSESSMENT (RIA) SCREENING ANALYSIS FORM

Policy to be screened

C.1 Title

Proposals for reform of the law of adverse possession and the law of ground rent redemption and related covenants in Northern Ireland (contained in the Supplementary Consultation Paper: Land Law).

Aims of the policy to be screened

Aims: To reform, modernise and clarify existing land law in Northern Ireland

Objectives: To make recommendations to DFP to reform, modernise and simplify existing common law principles and statutes that relate to the law of adverse possession and the law of ground rent redemption and related covenants.

Context: This policy is one of the policies/projects contained within the Northern Ireland Law Commission's (NILC) First programme of reform (2009 – 2011). The policy is being taken forward by the Land Law Project team, within the Northern Ireland Law Commission. The policy relating to ground rent redemption and related covenants comes from a reference dated May 2008 by the then Minister for Finance and Personnel, the Rt. Hon Peter Robinson MP MLA.

There are no EU obligations specifically relating to land law (see Treaty of Amsterdam 1997, Article 295 - "This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.")

Desired outcomes: To create a legal framework of land law for the 21st century that is responsive to legal obligations and yet accommodates personal and commercial

requirements, needs and circumstances. This reform of land law relating to adverse possession, ground rents and related covenants will provide a firm foundation for the streamlining and efficiency of the whole conveyancing process, potentially benefiting all who deal with property including the business, voluntary/community sector. The proposed clarification and simplification of the law should also result in significant economic benefits. This will render the law much more accessible to those who want to understand it and those who need to use it. The more complicated the law, the more time it takes professional advisers to carry out transactions and to explain to clients what is being done. That complexity also means that client understanding and satisfaction tends to be low. This policy will result in a system which would be much speedier and cheaper than the current system. It would bring substantial benefits to land owners, professional advisers, registration authorities and the general public, which encompasses the business, voluntary and community sector. Where the policy relates to ground rents and related covenants it will confer ownership on the rent payer subject to just, fair and reasonable restrictions.

Clarification and simplification should also result in significant social benefits. It should render the law more understandable by landowners and transactions more easily explainable by professional advisers. Reform of the law will also cure defects in the current law which prevent or inhibit landowners from legitimate exploitation of the land. It would also remove aspects of the law which operate in an inefficient and uneconomic way.

C.3 On whom will the policy impact? Please specify

The policy will impact on the general population i.e. anyone who holds or deals with land and also on service providers (e.g. Solicitors; Land and Property Services; other property professionals e.g. surveyors, estate agents; mortgage lenders; academics, barristers and the judiciary).

C.4 Who is responsible for (a) devising and (b) delivering the policy? What is the relationship and have they considered this issue and any equality issues?

(a) NILC is responsible for devising the policy, although, as stated above, the policy relating to ground rent redemption and related covenants comes from a reference dated May 2008 by the then Minister for Finance and Personnel, the Rt. Hon Peter Robinson MP MLA.

(b) The Northern Ireland Executive and DFP are responsible for the implementation of the policy.

DFP is a joint sponsoring body of NILC with the Northern Ireland Office (NIO). DFP will be presented with recommendations emanating from the policy and will consider taking these forward through the legislative process.

C.5 What linkages are there to other NI Departments/NDPBs in relation to this policy?

NIO (as sponsoring body), DFP (as sponsoring body, author of reference in relation to ground rent redemption and related covenants and leading department), Land Registers (Northern Ireland) within the Land and Property Services (key stakeholder involved in the registration of land and the conveyancing process).

C.6 What data is available to facilitate the screening of this policy?

(1) Report of the Committee on the Registration of Title to Land (1967).

(2) Survey of the Land Law of Northern Ireland (1971).

(3) Final Report of the Land Law Working Group (1990).

(4) The Reform and Modernisation of Land Law and Conveyancing Law, Law Reform Commission, Republic of Ireland, Consultation Paper 34 – 2004.

(5) Reform and Modernisation of Land Law and Conveyancing Law, Law Reform Commission, Republic of Ireland, Report 74 – 2005.

(6) Information and data on relevant transactions which relate to the policy from the Land Registers of Northern Ireland i.e. the number of applications received by Land Registry and Registry of Deeds from 2002 to date.

(7) A detailed list of all sources used in developing the land law proposals is contained in Appendix A.

(8) Data obtained from the Lands Tribunal in relation to applications for modification or extinguishment of impediments under the Property (Northern Ireland) Order 1978.

C.7 Is additional data required to facilitate screening? If so, give details of how and when it will be obtained.

No.

Screening Analysis

C.8 Is the policy or amendment to the policy likely to have a direct or indirect impact on businesses, voluntary / community sector (this includes charities and the social economy sector)?

The Commission has examined all the proposals contained in the Supplementary Consultation Paper (SCP) but have only included those which are considered to have relevance for the purposes of regulatory impact assessment.

Proposals:

CHAPTER 2: ADVERSE POSSESSION

Q2 *Fundamental features – conveyancing problems.* The proposal that the doctrine of adverse possession should apply to both registered and unregistered land in the same way (with technical adjustments only) will have a positive benefit on the conveyancing process, by promoting consistency and thus benefiting all users of the system.

Q9 *Technical rules – parliamentary conveyance.* The proposal that legislation should be implemented, stating that the dispossessed owner's title should pass to the squatter by way of a parliamentary conveyance in respect of unregistered land and a transfer of title in respect of registered land. This will have a positive benefit in that the law will be simplified, made more certain, and in the case of registered land, will confirm the long established practice of the Land Registry. It will also ensure that the law relating to unregistered land accords with the practice in registered land.

Q16 *Technical rules – purchasers in possession.* It is proposed that in the case of purchasers in possession under an uncompleted contract there should be clarification of the position, in that adverse possession can be claimed and time runs when permission to occupy ends or the full purchase price is paid, whichever is the earlier. This will have a positive benefit in that it clarifies the position and simplifies the conveyancing process, thus benefitting all users of the system.

CHAPTER 3: GROUND RENTS

Q17 *Proposals for reform – a new scheme.* It is proposed that the present scheme for the redemption of ground rents should end when new proposals are implemented and that there should be appropriate transitional arrangements for applications already involved in the process. This new scheme should accelerate the simplification of titles and actively encourage the move towards unencumbered statutory ownership equivalent to a fee simple absolute. This will have a positive benefit on all users of the system.

Q18 & 20 *Proposals for reform – applicability of the scheme.* It is proposed that a new more straightforward scheme for the redemption of ground rents should be devised which should accelerate the simplification of titles and actively encourage the move towards unencumbered statutory ownership. The scheme is to operate in respect of dwelling houses (either under a free farm grant or a long lease subject to a ground rent) and will have the same exceptions as under the Ground Rents Act (Northern Ireland) 2001. This will have a positive benefit in that the proposals should meet the expectations of the parties and produce an outcome that is satisfactory to the rent payer and the rent owner.

Q19 *Proposals for reform – applicability of the scheme.* It is proposed that the 1971 Act be repealed and replaced by a new statutory provision conferring similar powers on the lessees who were able to take advantage of it and where the rent owners under leases which have less than 50 years to run would be entitled to compensation based on 1% of the capital value of the property multiplied by nine. The processes involved will be more efficient and the method of calculating the compensation will be more easily understood by both parties; this proposal therefore constitutes a positive benefit.

Q22 *Proposals for reform – right of re-entry.* It is proposed that s. 44 of the Conveyancing Act 1881 be repealed and replaced. In the context of a new redemption scheme which balances the rights of rent owners and rent payers, this proposal will have a positive benefit in that the 1881 Act will no longer serve any useful purpose.

Q23 *Proposals for reform – ground rent as a contract debt.* It is proposed that ground rent should cease to be secured on the land. It should become a contract debt and would be a personal matter between the rent payer and the rent owner. This will have a positive benefit in that non-payment of ground rent will not involve loss of possession of the property. Some rent owners may see this as having an impact on them due to the loss of control over the property, but the existing rights can be considered to be

disproportionate to the interest held and the amount of rent paid. Therefore, the benefits outlined will outweigh any impact on owners.

Q24 *Proposals for reform – smaller ground rents.* It is proposed that there should be a distinction between smaller ground rents and larger ones and that any ground rents of £10 or £20, or less, would come within a scheme for small ground rents. This could have a positive benefit for the rent payer in that the rent will be extinguished and the property will be made more marketable.

Q26 *Proposals for reform – automatic extinguishment.* It is proposed that on an appointed day all ground rents of £10 or £20, or less, per annum should be extinguished and compensation would be due. It is proposed that there should be a lead in period of three years to enable the parties to arrange between themselves for payment of the compensation. This will have a positive benefit, in that the process will be taken out of the Land Registry, it will be simpler, involving no bureaucratic procedures or Land Registry costs. It will also make the property more marketable. However, a minority of rent owners may perceive this as having an impact on them, due to the loss of income, as compensation provisions may not be seen as adequate and recovery of compensation may be disproportionate to the amount sought. There is some qualitative evidence from rent owners holding large portfolios to suggest that small ground rents are uneconomic and difficult to recover. Therefore, any impact will be balanced by the considerable benefits of having fair compensation and the decreased costs of collecting ground rents.

Q27 *Proposals for reform – automatic extinguishment.* Following on from Q24, on extinguishment, the rent payer would acquire ownership of the land equivalent to the fee simple absolute and the estate of the rent owner would be discharged; any other superior interest would also be extinguished. The estate of the rent payer would be converted automatically into statutory ownership. This will have a major positive benefit in that the rent payer will

become unequivocally the owner occupier and no one else will have any estate in the land. The importance of this perception should not be under estimated. This proposal will endeavour to bring the law into line with both economic reality and popular perception. It will also assist in simplifying the conveyancing process and the property will become more marketable. There will be no Land Registry costs in this process.

Q28 *Proposals for reform – raising amount of automatic extinguishment.* It is proposed that the scheme for the redemption of small rents might be extended or rolled out further in due course to include those above £10 or £20. This proposal will have a positive benefit in that the process will taken out of the Land Registry, it will be simpler, involving no bureaucratic procedures or Land Registry costs. It will also make the property more marketable. The estate of the rent payer would be converted automatically into a statutory ownership. This will have a major positive benefit in that the rent payer will become unequivocally the owner occupier and no one else will have any estate in the land.

Q29 & 30 *Proposals for reform – compensation.* It is proposed that the responsibility for requesting and obtaining compensation should lie with the rent owner and if not sought by the appointed day the right to payment of the compensation would be lost. This may have a positive benefit on the rent payer if the rent owner does not pursue recovery, either because it is not seen as viable, or because the right is lost. However, some rent owners may see this as having an impact on them due to the fact that after the appointed day the right to compensation may be lost as the debt would become statute barred, but this process is only being proposed where the ground rent is very small and the maximum potential capital sum that would be lost would therefore be only £90 or £120.

Although this proposal may be perceived as an impact on rent owners, a proportionate response may indicate that no full or partial RIA is required as it is envisaged that any change in the law will be adequately advertised and that appropriate notification procedures will be in place. These should be utilised by rent owners, especially those from the business, voluntary and community sectors who have the benefit of professional advice.

Q31(a)&(b) *Proposals for reform – smaller ground rents – amount of compensation.* It is proposed that the amount of compensation that should be paid should be based on a simple multiplier of nine or twelve times the ground rent. This proposal has already been the subject of much discussion and has previously been put out to consultation by Government who concluded, in an analysis of responses to a discussion paper on the Ground Rents Act (Northern Ireland) 2001, that a multiplier of nine was appropriate and provided reasonable compensation. Previous debates suggested that the market value of ground rents was three to four times the purchaser price and therefore a multiplier of nine was considered to be generous by contrast. A multiplier of nine is a figure already familiar from the provisions of the Ground Rents Act (Northern Ireland) 2001. This constitutes a positive benefit. However, a minority may see this compensation provision as inadequate (i.e. the multiplier is not large enough) and recovery of compensation may be disproportionate to the amount sought.

Although this proposal may be perceived as having an impact on rent owners, Government considered (as stated above) a multiplier of nine to be appropriate and reasonable. Therefore, this indicates that no full or partial RIA is required. If a multiplier of twelve is chosen, rent owners will obtain more compensation and this will lessen any impact on them.

Q31(d) *Proposals for reform – smaller ground rents – amount of compensation.* It is proposed that a formula based on investment of a capital sum in government stock should be used for calculating compensation for smaller ground rents due to the rent owner. This approach will result in a more tailored mechanism for the calculation of compensation for smaller ground rents and will exactly equate to the income produced by the ground rents. Any perceived impact on the rent owner will be nullified by this proposal to reproduce the ground rent by investment of the compensation in Government stock. This has already worked very successfully in both Scotland and the Republic of Ireland.

Q32 *Proposals for reform – compensation – outstanding arrears.* It is proposed that arrears of ground rent should be paid and possibly interest charged as well. This would obviously have a *positive benefit* on rent owners in that they could recover full arrears, but this would be no more than they could recover under the Limitation (Northern Ireland) Order 1989. This proposal may be perceived as having an impact on rent payers, in that they would have to pay arrears and possibly interest. But this proposal is better than under the present system where arrears can be sought but also statutory rights of re-entry can be exercised which could result in the rent payer losing their property. Therefore, the benefits flowing from this proposal will negate any perceived impact.

Q33 *Proposals for reform – larger ground rents - amount of compensation.* One proposal is that a formula based on investment on fixed interest government stock should be used for calculating compensation for larger ground rents due to the rent owner. This approach will result in a more tailored mechanism for the calculation of compensation for larger ground rents and will exactly equate to the income produced by the ground rents. Any perceived impact on the rent owner will be nullified by this proposal to reproduce the ground rent by investment of the compensation in Government stock. This has already worked very successfully in both Scotland and the Republic of Ireland.

Another proposal is that the amount of compensation that should be paid should be based on a simple multiplier of nine or twelve times the ground rent. This proposal has already been the subject of much discussion and has previously been put out to consultation by Government who concluded, in an analysis of responses to a discussion paper on the Ground Rents Act (Northern Ireland) 2001, that a multiplier of nine was appropriate and provided reasonable compensation. Previous debates suggested that the market value of ground rents was three to four times the purchaser price and therefore a multiplier of nine was considered to be generous by contrast. A multiplier of nine is a figure already familiar from the provisions of the Ground Rents Act (Northern Ireland) 2001. This constitutes a positive benefit. However, a minority may see this compensation provision as inadequate (i.e. the multiplier is not large enough) and recovery of compensation may be disproportionate to the amount sought.

Although this latter proposal may be perceived as having an impact on rent owners, Government considered (as stated above) a multiplier of nine to be appropriate and reasonable. Therefore, this indicates that no full or partial RIA is required. If a multiplier of twelve is chosen, rent owners will obtain more compensation and this will lessen any impact on them.

Q34(a) – (e) *Proposals for reform – trigger points for redemption of smaller rents.* For small rents, it is proposed that there should be trigger points within the three year lead in period on the occurrence of which the ground rent would be extinguished. This could have a positive benefit as it would facilitate ground rent redemption, leading to administrative efficiencies and increased marketability of property, which would in turn contribute to the simplification of the conveyancing process. This would thus benefit all the users of the conveyancing system. There may be a perceived impact on rent owners in that they may not be aware of the occurrence for some of these triggers until they seek professional advice (e.g. transmission on death). However, for other triggers there are currently mechanisms in place to inform rent owners, so this should dissipate any such impact (e.g. sale/transfer).

Q34(f) *Proposals for reform – trigger points for redemption of small rents – responsibility for paying the compensation.* It is proposed that the responsibility for the payment of the compensation to the rent owner on the happening of a triggering event lies either with the previous rent payer or the new rent payer. In the event of compensation being paid by the new rent payer, this will represent a positive benefit in that they will obtain the statutory ownership of the property. If the previous rent payer is to be responsible, this may have an impact on them in that they will not obtain the benefit of statutory ownership. However, they should be able to factor this into the purchase price of the property. This proposal will have obvious positive benefits for the rent owners regardless of who pays the compensation.

Q35(a) – (b) *Proposals for reform – trigger points for redemption of large rents.* For larger rents, it is proposed that there should be specific triggering events, upon occurrence of which, ground rent redemption would be compulsory. It is proposed that these events should be the sale of the land and any other change of ownership, including voluntary transfers, transmission on death and mortgage/re-mortgage/charge of the land. This could have a positive benefit as it would facilitate ground rent redemption, leading to administrative efficiencies and increased marketability of property, which would in turn contribute to the simplification of the conveyancing process. This would thus benefit all the users of the conveyancing system. There may be a perceived impact on rent owners in that they may not be aware of the occurrence for some of these triggers until they seek professional advice (e.g. transmission on death). However, for other triggers there are currently mechanisms in place to inform rent owners, so this should dissipate any such impact (e.g. sale/transfer).

Q35(c) *Proposals for reform – trigger points for redemption of larger rents – responsibility for paying the compensation.* It is proposed that the responsibility for the payment of the compensation to the rent owner on the happening of a triggering event lies either with the previous rent payer or the new rent payer. In the event of compensation being paid by the new rent payer, this will represent a positive benefit

in that they will obtain the statutory ownership of the property. If the previous rent payer is to be responsible, this may have an impact on them in that they will not obtain the benefit of statutory ownership. However, they should be able to factor this into the purchaser price of the property. This proposal will have obvious positive benefits for the rent owners regardless of who pays the compensation.

Q36 *Proposals for reform – trigger points for redemption of both small and large rents – six month lead-in period.* It is proposed that there should be a lead-in period for introduction of the triggering events which should be six months. This may be a positive benefit in that it would speed up ground rent redemption and lead to general administrative efficiencies, with a knock on effect on the simplification of the conveyancing process. This could be perceived as having an impact on a minority of rent owners as the six month lead-in period may not be considered long enough to adjust to the prospect of ground rent redemption on the triggering events. On the other hand, discussions with rent owners would indicate that this period is adequate.

Q37 *Proposals for reform – trigger points for redemption of both small and large rents – responsibility on rent owner to obtain compensation from rent payer.* It is proposed that on the occurrence of a triggering event that the ground rent would be extinguished automatically and it would become the responsibility of the rent owner to obtain compensation from the rent payer. In the context of the new redemption scheme this proposal represents a positive benefit for both rent owners and rent payers.

Q38 *Proposals for reform – larger ground rents - amount of compensation – option to pay compensation by instalments.* It is proposed that the rent payer should be given the option to pay the amount of compensation by instalments. This represents a positive benefit for the rent payers as they have the opportunity to pay the compensation over a longer period of time. It also represents a positive benefit for the rent owner in that it is more likely to receive compensation if the rent payer is offered favourable terms.

Q39 *Proposals for reform – intermediate interest - option 1 - automatic extinguishment.* It is proposed that on redemption of smaller ground rents in possession automatic extinguishment should extend to intermediate rents. If any occupational ground rents in this category are redeemed, the intermediate landlord will obtain compensation which is a positive benefit and which this will supply him with sufficient funds to discharge his own obligations to his superior landlord. This will remove the pyramid title governing the property and put statutory ownership in the hands of those in possession.

Proposals for reform – intermediate interest - option 2 - no automatic extinguishment. It is proposed that on redemption of smaller ground rents in possession no automatic extinguishment will extend to intermediate rents. As this proposal does not affect the current position there will be no impact on the owners of the intermediate interest.

Q40(a) *Proposals for reform – intermediate interest – calculation of compensation - option to pay compensation by instalments.* It is proposed that compensation due to intermediate interests should be calculated on the basis of the simple multiplier used for smaller ground rents. However, there is also an open ended proposal as to how compensation would be calculated. See Q31 above in relation to the potential impact of this proposal.

It is also proposed that if a multiplier used produces a larger capital sum there should be an option to pay by instalments. This represents a positive benefit for the intermediate rent payer as they have the opportunity to pay the compensation over a longer period of time. It also represents a positive benefit for the rent owner in that the superior owner is more likely to receive compensation if the intermediate rent payer is offered favourable terms.

Q41 *Proposals for reform – non-payment of ground rent – extinguished if not demanded after six years.* It is proposed that where the rent has not been demanded or paid for six years, both the right to demand the rent and the title of the rent owner should be extinguished. It is also proposed that

this provision would apply to all ground rents regardless of size and whether the rent was reserved by a lease or a fee farm grant. In the context of the new redemption scheme this proposal represents a positive benefit in that it would facilitate the elimination of ground rents. A very small minority of rent owners may perceive this as an impact due to the loss of title as well as the loss of income. However, after a period of six years failure to collect the rent, the rent owner would be in a weaker position and would have no grounds for complaint. Any such impact would be therefore outweighed by the benefits of the proposal.

Q42 *Proposals for reform – non-payment of ground rent – enlargement of rent payer's estate by statutory declaration.* Following on from Q36, it is proposed that where the rent has not been demanded or paid for at least six years that the estate of the rent payer could be enlarged into statutory ownership equivalent to a fee simple absolute by a statutory declaration. It is also proposed that this provision should apply to rents of more than £10 or £20 but less that £50 per annum. In the context of the new redemption scheme this proposal represents a positive benefit in that it would facilitate the elimination of ground rents and provide the rent payer with a marketable title. A very small minority of rent owners may perceive this as having an impact on them due to the loss of title as well as the loss of income. However after a period of six years failure to collect the rent the rent owner would be in a weaker position and has no grounds for complaint and any impact would be therefore outweighed by the benefits of the proposal.

CHAPTER 4: COVENANTS AFTER REDEMPTION

Q44 *Types of covenant – "practical benefit", "protect the amenity" or "protect amenity land".* It is proposed that some covenants should remain after redemption of the ground rent. This proposal suggests the covenants which remain should either be of "practical benefit", "protect the amenity" of the land or "protect amenity land" e.g. those relating to the maintenance, repair or renewal of boundary walls or fences and works on the land and those relating to the protection of amenities. In the context of the new redemption scheme this proposal represents a positive

benefit in that it would substantially reduce the number of surviving covenants; it would also clarify the position in relation to them and would provide the rent payer with a marketable title. However, there could be an impact on rent owners, as if it is decided that covenants have to be registered by the owners in the Land Registry, this would involve administration costs and fees. However, covenants were never intended to have a high financial value and this will restore them to the status to which they were intended. There could also be a positive benefit for the rent owner as any remaining covenants will preserve the character and amenity of the locality for the mutual benefit of the inhabitants and their landlord (see SCP para. 4.81).

Although this proposal may be perceived as having an impact on rent owners, a proportionate response may indicate that no full or partial RIA is required.

Q45 *Types of covenant – definition – "practical benefit", "protect the amenity" or "protect amenity land".* It is proposed that only one of the above tests i.e. *"practical benefit", "protect the amenity" or "protect amenity land"* should be preferred. In the context of the new redemption scheme this proposal represents a positive benefit in that it would clarify the position in relation to surviving covenants and provide the rent payer with a marketable title. Whatever test is agreed upon, there could be an impact on rent owners, as if it is decided that covenants have to be registered by the owners in the Land Registry, this would involve administration costs and fees. However, there could also be a positive benefit for the rent owner as any remaining covenants will preserve the character and amenity of the locality for the mutual benefit of the inhabitants and their landlord (see SCP para. 4.81).

Although this proposal may be perceived as having an impact on rent owners, a proportionate response may indicate that no full or partial RIA is required.

Q46(a) *Types of covenant – financial obligations.* It is suggested that there could be types of covenants other than those mentioned in section 16(2) of Ground Rents Act

(Northern Ireland) 2001 which should survive redemption of the ground rent, notwithstanding that they may not be of practical benefit, protect or enhance amenity e.g. those relating to financial obligations. This may be a positive benefit in that it will define and clarify the final category of retained covenants. There could be a positive benefit on rent payers in that their statutory ownership (equivalent to a fee simple absolute) will be subject to fewer covenants, making it more marketable. Also there may be an impact on rent owners, in that the covenants that remain would have to be registered, thus increasing costs. However, it would be clear what covenants survive and are enforceable.

Q46(b) *Types of covenant – covenants not retained to be automatically extinguished.* It is suggested that those covenants which will not be within the chosen general definition and not retained should be automatically extinguished e.g. covenants for indemnities, covenants in relation to a body corporate formed for the management of land and covenants for title. This will be a positive benefit in that it would clarify the position in relation to surviving covenants and provide the rent payer with a marketable title. There would be a negligible impact on rent owners in that those extinguished covenants would have had little effect upon their control of the land.

Q47 *Covenants – land benefitted – covenants enforceable by neighbours.* It is proposed that some types of covenants should continue to be enforceable by neighbours for the benefit of adjoining land e.g. covenants which were reciprocally enforceable between the rent payer and other participants in a relevant building scheme. In the context of the new redemption scheme this proposal represents an extremely positive benefit for both rent payers and rent owners in that it releases the rent owner from any liability and will provide mutual benefit for both the rent payer and neighbours in relation to their property. It potentially enables neighbours to enforce covenants against each other as long as they meet the required criteria.

Q48 *Covenants – land benefitted - neighbours – definition of "proximity".* It is proposed that it is important to define the proximity of the benefitted land in relation to the burdened land. In the context of the new redemption scheme this proposal represents a positive benefit in that it contributes to the practicalities in dealing with surviving covenants in relation to neighbouring land.

Q49 *Covenants – land benefitted - neighbours – measurement of "proximity".* It is proposed that the measurement of the physical proximity to the burdened land be 100 metres, 500 metres or another measurement. In the context of the new redemption scheme this proposal represents a positive benefit in that it contributes to the practicalities in dealing with surviving covenants in relation to neighbouring land.

Q50(a) *Covenants – land benefitted - neighbours – criteria for "building or development scheme" statutorily defined.* It is proposed that there should be criteria for qualification as a building or development scheme. In the context of the new redemption scheme this proposal represents a positive benefit in that it contributes to the practicalities of dealing with surviving covenants in relation to building or development schemes.

Q50(b) *Covenants – land benefitted - neighbours – criteria for "building or development scheme" statutorily defined.* Following on from Q44 if it is decided that there should be criteria then should it be statutorily defined by adopting various existing definitions e.g. title is derived from a common vendor in "substantially similar terms" In the context of the new redemption scheme this proposal represents a positive benefit in that it provides clarity, contributes to the practicalities in dealing with surviving covenants in relation to building or development schemes and will provide mutual benefit for both the rent payer and neighbours in a building or development scheme.

Q51 *Covenants– land benefitted - neighbours – permanent building attached.* It is proposed that the land to which the benefit of the covenant is attached should have on it a

permanent building which is in use as a place of human habitation or resort and that the neighbour should actually (or mainly?) live there. This is a positive benefit for rent payers in that the rent owner might not have any remaining enforceability. A minority of rent owners may perceive this as a loss of a right, even though they have no longer any interest or estate in the burdened land and do not live in the vicinity, but the Commission takes the view that they should not have any such entitlement.

Q52 *Covenants – land benefitted - neighbours – registration of neighbour covenants.* It is proposed that when a ground rent is redeemed, the former rent owner should be required to register the neighbour covenants in the Land Registry. This will have a positive benefit as they are for the mutual benefit of neighbouring properties. However, there could be an impact on rent owners, as they would be required to register covenants and this would involve administration costs and fees.

However, any such impact would be counter-balanced by the positive benefits of the proposals as a whole and a proportionate response indicates that a full RIA would not be required.

Q53 *Covenants – land benefitted - former freeholder.* It is proposed that a former ground landlord or superior owner should continue to enjoy the benefit of a covenant and to have rights of enforcement of that benefit. If the rent owner already has rights, this proposal does not confer any benefit or burden that is not already in existence.

Q54 *Covenants – land benefitted - former freeholder lives near to burdened land.* If the proposal in Q53 is adopted should these rights depend on whether that person continues to actually (or mainly?) live near to the burdened land? This would have a positive benefit on the rent payer in that the rent owner should not live far from the burdened land and there is the possibility that fewer covenants may be registered.

Q55 *Covenants – land benefitted – neighbour lives near to burdened land.* If the proposal in Q53 is adopted the former freeholder has to live in a permanent building which is in use as a place of human habitation or resort and that they should actually (or mainly?) live there (as with neighbours at Q51). This would be a positive benefit on the rent payer in that the rent owner would have to live in proximity; therefore there would be more limitation on the potential of the rent owner to enforce registered covenants. However, there could also be a positive benefit for the rent owner, as any remaining covenants will preserve the character and amenity of the locality for the mutual benefit of the inhabitants and their landlord (see SCP para. 4.81).

Q56 *Covenants – land benefitted - former freeholder – definition of "proximity".* If the proposal at Q53 is adopted it is proposed that the definition of proximity, as put forward in Q48 and Q49, would be appropriate. In the context of the new redemption scheme this proposal represents a positive benefit in that it contributes to the practicalities in dealing with surviving covenants in relation to neighbouring land.

Q58 *Covenants – land benefitted - former freeholder – onus on former freeholder to register the benefit of surviving covenants.* If the proposal at Q52 is adopted it is proposed that the onus be placed on the former superior owner to register the benefit of the surviving covenants in a register of covenants in the Land Registry. This proposal could have an impact on the former rent owner, who will incur administration and registration costs.

However, any such impact would be counter-balanced by the positive benefits of the proposals as a whole and a proportionate response indicates that a full RIA would not be required.

Q59 *Covenants – general – redemption of ground rent being a triggering event for compulsory first registration (CFR).* This proposal will have a positive benefit on rent payers, in that it will simplify title and registration in the Land Registry will make the property more marketable. There will also be an impact on rent payers, in that they would have to pay the costs of CFR, but these would have to be paid at

some point anyway. Moreover, any such impact would be counter-balanced by the positive benefits of the proposals as a whole and a proportionate response indicates that a full RIA would not be required.

Q60 *Covenants – general — benefit of covenant to be enforceable by both the neighbour and former freeholder if registered separately by both.* This proposal would have an impact on the rent payer, as there would be two parties with the right to enforce covenants in relation to the property, but a positive benefit on the former rent owner and the neighbour, in that they would both enjoy the benefit of the covenants and be able to enforce them. However, the former rent owner and the neighbour would incur some administration and registration costs which might constitute an impact on them. However, any such impact would be counter-balanced by the positive benefits of the proposals as a whole and a proportionate response indicates that a full RIA would not be required.

Q61 *Covenants – general – surviving covenants classified according to type under different headings.* In the context of the new redemption scheme, this proposal represents a positive benefit, in that it contributes to the practicalities of dealing with surviving covenants in relation to neighbouring land and clarifies the position on the register. The proposal will add to the simplicity and accessibility of the new scheme.

Q63 *Covenants – enforcement – procedure for enforcing covenants through the Lands Tribunal.* In the context of the new redemption scheme, this proposal represents a major positive benefit, in that it contributes to the practicalities of dealing with surviving covenants in relation to land and avoids court with all the attendant delays and costs. However, there may be a remote possibility of this impacting on the rent owner or the rent payer, who may have to pay some enforcement costs. The impact on the Lands Tribunal of an increase in applications is likely to be low as procedures are already in place. Currently application can be made to the Lands Tribunal to have covenants modified or extinguished.

Q64(a) – (b) *Covenants – enforcement – existing remedies - possible extension of Lands Tribunal jurisdiction.* This would represent a positive benefit for the rent owner as they would be entitled to a remedy but would represent an impact on the rent payer as they would have to comply with the remedy. The rent payer should be aware of the consequences of breach and be able to access professional advice in relation to same. There could be positive benefits as well as some perceived impacts on both the rent payer (as a neighbour in a building development scheme with reciprocal rights) and the rent owner, as any registered covenants could impact on either party. In relation to the proposed extension of the Lands Tribunal jurisdiction this would represent a positive benefit for both parties as the procedures are quicker and subject to efficient case management.

RIA Recommendation

C.9 Full RIA procedures should be carried out on policies considered to have **significant costs or savings on business, charities and the social economy sector.** Please fill in the following grid in relation to the policy.

Prioritisation Factors	**Significant Impact**	**Moderate Impact**	**Low Impact**
Social Need			yes
Effect on people's daily lives			yes
Effect on economic, social and human rights			yes
Strategic Significance			yes
Financial Significance			yes

Please give details: not applicable

C.10 In view of the considerations above do you consider that this policy should be subject to a full RIA? Please give reasons for your considerations. If you are unsure, please consult with affected groups and revisit the screening analysis accordingly.

We do not think that the proposals in relation to adverse possession, ground rents and related covenants should be subject to an RIA. When viewed as a whole, the proposals will have a major positive benefit for the conveyancing process and will contribute greatly to its clarity, efficiency and modernisation and will outweigh any perceived negative impacts on business, charities and community bodies. The policy will have a low impact on the prioritisation factors

listed in at C.9 above. It is not possible to provide an analysis of costs and/or savings at this stage as consultee responses are awaited and therefore the proposals have not been fully settled.

C.11 If an RIA is considered necessary please comment on the priority and timing in light of the factors in the table at C.9

Not applicable

C.12 If an RIA is considered necessary is any data required to carry it out/ensure effective monitoring?

Not applicable

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