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Conservation Covenants

The Law Commission's report on easements, covenants and *profits à prendre*¹ concluded that enduring restrictions on land should be acceptable only when they operate for the benefit of neighbouring land. Their *Eleventh Programme of Law Reform*,² however, includes the study of a possible exception to this rule in the form of conservation covenants. Such covenants might prescribe the maintenance and protection of a monument or historic building or site, the conservation of wildlife habitat or public access to land or buildings.³ The aim of this article is to examine some of the issues that this development might raise, drawing on the experience of conservation easements⁴ in the USA and of the conservation burdens introduced as part of the recent land law reforms in Scotland.

In this context, a number of issues inter-connect in various ways, in that decisions on some aspects of any scheme may avoid, resolve or exacerbate problems with others. Central concerns, though, are the balance between permanence and flexibility and the ways in which the public interest can be protected when this private law mechanism is used to further conservation goals in which the public legitimately has a stake (especially if public bodies or funds are involved). It is this tension between private law mechanisms and public goals which lies at the heart of the discussion here. The use of private law mechanisms opens up the enterprise of conserving our natural and cultural heritage to the initiative and participation of a wide range of parties, rather than relying exclusively on the intervention of public authorities,⁵ but at the same time it is the very nature of such mechanisms that they focus on the rights and interests of the direct parties alone, without regard for wider "stakeholders".

¹ *Making Land Work: Easements, Covenants and Profits à Prendre* (LAW COM 327, 2011), para.2.24.

² LAW COM 330 (2011), paras 2.7-2.12.

³ These examples are given in the Law Commission's introduction to this project at <http://lawcommission.justice.gov.uk/areas/conservation-covenants.htm>

⁴ The choice of terminology (covenant or easement) can be important, making a difference to how this mechanism is viewed (see note 25, below), but it seems less confusing to use the terms most widely used in each jurisdiction rather than adopting a potentially more neutral term such as "servitudes" or "land obligations". Whatever the term, the restrictions on land are a statutory creation and do not automatically and necessarily take on all the features of the mechanism whose name they may share.

⁵ C.T. Reid, "The Privatisation of Biodiversity? Possible new approaches to nature conservation law in the UK" (2011) 23 JEL 203.

Background and Experience

English law has not been willing to recognise easements or covenants “in gross”, concerned about the proliferation of enduring restrictions on land and their impact on land as an asset which can be freely used and transferred by the current holder. There has also been concern, especially in the past, pre-registration, over the difficulties of being able to keep track of what rights exist and who can enforce them. Only those restrictions which benefit neighbouring land can exist in a form which “runs with the land” and binds successive owners. Nevertheless a handful of statutory exceptions have already been recognised where bodies can benefit from and enforce such restrictions even though they do not own nearby land, including the National Trust,⁶ the Forestry Commission,⁷ the statutory conservation bodies,⁸ planning authorities⁹ and Ministers.¹⁰ Such exceptions exist to further public policy goals that require land to be looked after in certain ways over prolonged periods. The introduction of conservation covenants would potentially extend these exceptions in three ways, making this mechanism available to a wider range of bodies, broadening the purposes for which the mechanism can be used and allowing for permanent, or at least open-ended, restrictions to be imposed as opposed to the fixed-term nature of many of the statutory restrictions.¹¹

In Scotland this step has already been taken with the creation of “conservation burdens” as part of the reform of the feudal system in the first few years of this century. The rights of the feudal superior enabled the creation and enforcement of enduring restrictions and conditions on the use of land, regardless of whether neighbouring land was held. When the future of such feudal burdens was considered by the Scottish Law Commission, its initial

⁶ National Trust Act 1937, s.8.

⁷ Forestry Act 1967, s. 5.

⁸ E.g., Natural Environment and Rural Communities Act 2006, s.7 (Natural England); National Parks and Access to the Countryside Act 1949, s.16 (Countryside Council for Wales); Conservation of Habitats and Species Regulations 2010 (SI 2010 No 490), reg.16(4) (both).

⁹ Town and Country Planning Act 1990, s.106.

¹⁰ E.g. Ancient Monuments and Archaeological Areas Act 1979, s.17.

¹¹ The existing statutory provisions do not prevent open-ended restrictions, but in practice many are entered into for a fixed-term, especially where the public body is making a financial contribution in exchange for certain management activities by the landowner, as is the case with most management agreements for habitat conservation.

view was that there should be no special provision for charities, religious bodies and others to be able to enforce burdens imposed for reasons other than the amenity or service of other land.¹² The result of the consultation process, however, was to persuade the Commission that such burdens should be recognised. The prime examples given and the weight of representations related to burdens affecting the future alteration and maintenance of historic buildings, without which local authorities and trusts might be unwilling to provide financial support for restoration work, but the potential for this mechanism to be used for wider environmental purposes was also recognised.¹³ Accordingly, the legislation that followed permitted existing feudal burdens of this type to be converted into burdens that could be enforced under the new law¹⁴ and enables certain new burdens to be created.¹⁵

These burdens have not been widely used in Scotland, but in the USA conservation easements have become a major feature of endeavours to conserve landscapes and habitat, with large areas of land subject to such restrictions.¹⁶ Coming from the same legal tradition as England, land law in the USA was similarly unwilling to accept easements or other restrictions in gross, but legislative intervention across almost every state has allowed for the creation of such easements.¹⁷ Their use has grown rapidly,¹⁸ greatly assisted by generous tax

¹² Scottish Law Commission, *Property Law and the Abolition of the Feudal System* (Scot Law Com DP No 93, 1991) paras 3.30-3.32.

¹³ Scottish Law Commission, *Report on Abolition of the Feudal System* (Scot Law Com No 168, 1999) paras 4.52-4.61 and *Report on Real Burdens* (Scot Law Com No 181 (2000) paras 9.1-9.25.

¹⁴ Abolition of Feudal Tenure etc (Scotland) Act 2000, ss. 26-32.

¹⁵ Title Conditions (Scotland) Act 2003, ss. 38-48.

¹⁶ Estimates vary, but articles in a special issue of a journal devoted to this subject reported that in the mid-2000s 10% of the area of Maine was covered, and across the nation approximately 10 million acres by easements held by land trusts alone and 37 million acres in total; (2011) 74 *Law and Contemporary Problems* issue 1, at pp. 5, 54 and 84.

¹⁷ R.H. Levin, *A Guided Tour to the Conservation Easement Statutes* (2010, Land Trust Alliance). In many cases the legislation follows the Uniform Conservation Easements Act produced by the National Conference of Commissioners on Uniform State Laws; available at

http://www.uniformlaws.org/shared/docs/conservation_easement/ucea_final_81%20with%2007amends.pdf

¹⁸ Z. Bray, "Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements" (2010) 34 *Harv Envl Law Rev* 119, pp.126-130.

breaks (the landowner's creation of a conservation easement counts as a charitable gift)¹⁹ and the comparative absence of direct regulatory intervention on privately held land.²⁰ It is worth noting, therefore, that the prevalence of such easements in the USA is largely attributable to the wider legal, regulatory and fiscal context there, so that the role of conservation covenants here might well differ, as will the motivation and incentives for adopting this approach to conserving property. The proliferation of conservation easements has, however, given rise to concerns, and although some have arisen specifically as a consequence of the tax rules,²¹ the issues raised in the USA are worthy of exploration when contemplating the introduction of similar mechanisms here. The rest of this paper concentrates on two of these, namely the duration and flexibility of the covenant and ways of ensuring that the public interest is protected.

Duration and Flexibility

A fundamental feature of conservation covenants is that they are enduring and bind successors in title to the landowner who initially agrees to the restrictions they impose, as opposed to falling away as soon as the land is transferred. Permanence is also at the heart of many of the conservation purposes for which such covenants might be used, such as preserving historic monuments or conserving or establishing habitat.²² Yet perpetual and unchangeable restrictions may not be desirable. Not only do they offend against the standard

¹⁹ D. Halperin, "Incentives for Conservation Easements: The charitable deduction or a better way?" (2011) 74 *Law and Contemporary Problems* 29. One estimate is of claimed relief of over \$20 billion in 2001-03 alone: Z. Bray (note 18, above) pp.145-146.

²⁰ J.D. Echeverria, "Regulating Versus Paying Land Owners to Protect the Environment" (2006) 26 *J. Land Res. & Envtl. L.* 1.

²¹ Notably the requirement for agreements in perpetuity and debates over whether, given their nature as charitable gifts, any amendments are permissible only through the operation of the *cy pres* doctrine; D. Halperin, (note 19, above), N.A. McLaughlin, "Conservation Easements: Perpetuity and Beyond" (2007) 34 *Ecology L.Q.* 673.

²² This is especially so if covenants are used as a means of delivering biodiversity offsets whereby the loss of habitat in one location is accepted in return for habitat gains elsewhere, a trade-off that makes sense only if long-term measures are in place, especially since many habitats such as woodland take many years to mature and thus deliver biodiversity value equivalent to that which has been lost; for details of the DEFRA pilot on biodiversity offsetting see <http://www.defra.gov.uk/environment/natural/biodiversity/uk/offsetting/>, and more generally C.T. Reid, "The Privatisation of Biodiversity? Possible new approaches to nature conservation law in the UK" (2011) 23 *JEL* 203, pp.214-219.

objections to allowing the “dead hand” of the past to dictate how the current generation can deal with the land, but they may not serve the conservation purpose for which the covenant was created, e.g. if unforeseen threats to a historic site emerge, if scientific developments show that the prescribed management is no longer optimal or if climate change means that particular sites can no longer provide suitable habitat for the species they were intended to benefit. Indeed the terms of the covenant may become impossible to comply with, or operate against the goal for which they were created. A balance between permanence and flexibility is therefore desirable.²³

This balance can be achieved to some extent in the specification of the purposes and terms of the covenant, since appropriate drafting can avoid some difficulties by building in a degree of flexibility.²⁴ For example, it may be possible to specify the outcome to be achieved rather than prescribing the specific steps to be taken in managing the property, but such an approach may well come at a price of some uncertainty and possible disputes when it comes to enforcement, especially since some outcomes, e.g. the state of habitat, are not readily susceptible to simple “pass/fail” assessment. The risk of uncertainty may be reduced by referring to professional or other standards by which the methods used or results achieved can be judged, standards which are reviewed and restated from time to time, but there is no guarantee that such standards will continue to be updated into the future to provide a permanent solution.

In relation to amendments to or termination of the covenant, the fundamental starting point is, of course, that since covenants are a matter of agreement between the parties, operating in private law, the same parties (or their successors) should be free to agree to amend or terminate them as they wish. Nevertheless, leaving the issue wholly in the hands of the parties gives rise to two contrasting concerns. On the one hand there are the difficulties presented if an unreasonably obstinate party blocks the amendment or release of a

²³ This has become an issue of particular debate in the USA where the requirement for restrictions to operate in perpetuity as a condition of tax relief has made this a standard feature of conservation easements; as examples of the literature see J.D. Mahoney, “Perpetual Restrictions on Land and the Problem of the Future” (2002) 88 Va. L. Rev. 739, J. Owley, “Conservation Easements at the Climate Change Crossroads” (2011) 74 Law and Contemporary Problems 199.

²⁴ A. Rissman, “Evaluating Conservation Effectiveness and Adaptation in Dynamic Landscapes” (2011) 74 Law and Contemporary Problems 145; Owley (note 23, above) pp.219-225.

restriction which is obstructing some beneficial change and as a result harming other interests, whether those of the other party to the covenant or the public. To resolve this, a procedure exists to allow a restrictive covenant to be discharged or modified in the absence of consensus, by means of an application to the Upper Tribunal; the grounds for intervention include that the restriction is obsolete or is impeding the reasonable user of the land for public or private purposes.²⁵ Recent legislative practice has been to make similar provision for other forms of enduring restrictions. Thus the Scottish legislation allows for conservation burdens to be varied by the Lands Tribunal for Scotland if such a step is considered to be reasonable, taking account of a number of factors, including changed circumstances, the benefit to the public and the practicability and cost of compliance.²⁶ Similarly, planning law allows for the alteration of planning obligations, with the ultimate decision taken by the Secretary of State in the absence of agreement.²⁷

In passing it can be noted that in the USA, the preference for perpetual agreements which preclude the modification or termination of an easement by the parties and the absence of mechanisms for seeking the modification or discharge of an easement have led to an examination of how far standard property law principles allow for changes to be made in the face of changed circumstances or impossibility.²⁸ At the same time, the fact that the donation of a perpetual conservation easement counts as a charitable gift has brought into play the doctrine of *cy pres* as both limiting the scope of but providing a procedure for future changes.²⁹ Making express provision for amendment and discharge is clearly desirable.

The provision for reference to a tribunal to override a refusal to agree changes would thus resolve any fears of land being “locked-in” forever to what has become a pointless or even harmful stipulation, although the costs involved might still render this an onerous

²⁵ Law of Property Act 1925, s.84. Although the detailed statutory provisions will have the final say, this is one area where terminology can affect expectations; if one refers to “conservation covenants” the existence of such an overriding powers seems a natural concomitant of what is envisaged, whereas this is not the case if the term “conservation easements” is used.

²⁶ Title Conditions (Scotland) Act 2003, ss.98, 100.

²⁷ Town and Country Planning Act 1990, ss.106A-106B.

²⁸ Owley (note 23, above), pp.209-218.

²⁹ N.A. McLaughlin, “Rethinking the Perpetual Nature of Conservation Easements” (2005) 29 Harv. Envtl. L. Rev. 421, C.T. Lindstrom, “Conservation Easements, Common Sense and the Charitable Trust Doctrine” (2009) 9 Wyo. L. Rev. 397.

process. Yet there is a contrasting problem from a different perspective. Where covenants are used to serve a public purpose, or attract the expenditure of public funds, others may be concerned, as discussed in the next section, if the obligations that have been accepted on the basis of being an enduring settlement can be easily overcome at a future date, by simple agreement between the current representatives of the parties.³⁰ Protections can and should be created in various ways to offer some reassurance that the public interest will continue to be served.

Other matters may also have to be considered in relation to the possible termination of conservation covenants. The general law states that a restrictive covenant ceases when there is unity of ownership and occupation of the dominant and servient tenements,³¹ but it may be asked whether this is appropriate in relation to restrictions intended to serve the public interest into the indefinite future. The courts have already recognised that this rule requires special application in dealing with land held by public authorities for different purposes,³² which may cover some situations where a covenant is entered with a government department or local authority, but would leave open the position where the covenant is with a charity or even a narrowly focussed statutory body where the covenant was entered and then the land acquired for the same purpose.³³ Similar issues over the survival of a covenant may also arise in relation to compulsory purchase. Again, an express provision to cover these situations may be desirable.

Serving the Public Interest

³⁰ Cf. the provision in planning law that it is only where “satisfied that the change is not material” that a planning authority can simply change a planning permission that has already been granted through the formal, public process; Town and Country Planning Act 1990, s.96A.

³¹ *Texaco Antilles Ltd. v Kernochan* [1973] AC 609, pp.624-626.

³² *University of East London Higher Education Corporation v London Borough of Barking and Dagenham* [2004] EWHC 2710 (Ch), [2005] Ch 354, paras 52-60. In the USA, the charitable nature of a donated easement has led to the argument that when the land comes into the hands of the easement holder the easement still survives since it is held in a different capacity, as charitable trustee, from that in which the land itself is held; N.A. McLaughlin, “Conservation Easements and the Doctrine of Merger” (2011) 74 *Law and Contemporary Problems* 279.

³³ E.g. if a statutory conservation body acquires land over which it has formerly held a management agreement.

Although conservation covenants are a property law mechanism and part of a private law, the reason for contemplating their recognition as an exception from the standard rules of property is the public interest that they serve. As the Law Commission itself says in introducing the project:

“The benefits of this reform would be felt by the bodies who would be able to take advantage of a more efficient and flexible system than is available under the existing law. This would, in turn, benefit the public – the individuals who make use of the sites protected by conservation covenants and, more generally, communities and society at large by protecting, while facilitating the use of, cultural, ecological and environmentally important resources.”³⁴

It is therefore appropriate to consider ways in which one can be satisfied that the exception is justified in the particular case and that the public interest continues to be served even though the mechanism used takes the form of a private agreement which would normally be no concern of anyone other than the direct parties.

These issues become especially important if the covenants have further consequences. Most conservation purposes require the active management of the land or buildings affected if their goals are to be achieved,³⁵ so that effective conservation covenants may well provide for payments to the landowner in exchange for the covenant and their continuing care for the property. Indeed the potential for covenants to provide long-term obligations ensuring the future conservation of a property is one of their attractions, offering the reassurance of future care which can act as an incentive to individuals and organisations providing financial support for restoration, maintenance or continuing management.³⁶ There may also be indirect benefits for the landowner, with land subject to a covenant being eligible for further grants or tax relief.³⁷ Further financial consequences may arise depending on how the existence of a covenant is regarded as affecting the value of a property, a more important issue in the US experience of conservation easements because of the role of state land taxes as well as the

³⁴ <http://lawcommission.justice.gov.uk/areas/conservation-covenants.htm>

³⁵ The “natural” countryside is the product of centuries of human intervention and many valuable habitats would rapidly be lost if simply abandoned, e.g. the grasslands of the Downs that would be invaded by scrub, whilst ancient monuments and historic buildings may require major and frequent interventions if they are to be conserved.

³⁶ Scottish Law Commission, *Abolition of the Feudal System* (Scot Law Com No.168, 1999) pp.58-59

³⁷ Cf. the relief from inheritance tax for some national heritage assets; Inheritance Tax Act 1984, ss.30-31.

relief for donating an easement,³⁸ but still potentially significant here for stamp duty land tax and inheritance tax when land is transferred for any reason.

The public interest therefore calls for measures which ensure that the benefits of this special mechanism are available only where justified and that a covenant does indeed deliver the results it is designed to provide. This call can be answered at several stages, each having an effect on the need for and nature of controls at others. The stages include: the scope of the purposes recognised as eligible for conservation covenants, the range of bodies able to hold such covenants, the need for any official approval of covenants, arrangements for the enforcement of covenants and the procedures for amending, terminating or transferring a covenant. A further stage, which is problematic in the USA but should not prove so here,³⁹ involves the public registration of any covenant which is entered, important both so that anyone dealing with the land can identify the restrictions on it and for transparency and public accountability in relation to such agreements. It is surely unthinkable nowadays that any enduring restriction on land would be allowed to take effect without the requirement for registration.⁴⁰ In any event, freedom of information legislation⁴¹ should ensure that at least the existence of covenants can be known.

In relation to purposes, the Scottish legislation provides a fairly broad scope, stating that a conservation burden must be:

“for the purpose of preserving, or protecting, for the benefit of the public—
(a) the architectural or historical characteristics of any land; or

³⁸ R.H.Levin, *A Guided Tour to the Conservation Easement Statutes* (2010, Land Trust Alliance) pp.39-40.

<http://www.landtrustalliance.org/policy/emerging-issues/conservation-easement-enabling-statutes>

American experience on valuation may be of limited use given the extent to which much stronger direct regulation of land use in the UK makes it more likely that protected land is not in fact susceptible to development, regardless of the owner's wishes, so that the restrictions in a covenant may not by themselves be the cause of any loss of development value; cf. *MWH Associates Ltd v Wrexham CBC* [2011] UKUT 269 (LC); [2011] R.V.R. 263.

³⁹ J.L. Olmsted, “The Invisible Forest: Databases and the end of the clandestine conservation of natural lands” (2011) 74 *Law and Contemporary Problems* 51.

⁴⁰ This is an integral part of the Scottish legislation on conservation burdens (Title Conditions (Scotland) Act 2003, ss.4, 38) and indeed even for shorter-term management agreements (e.g. Countryside (Scotland) Act 1967, s.49A), but not always in England (e.g. Natural Environment and Rural Communities Act 2006, s.7).

⁴¹ In this case usually the Environmental Information Regulations 2004, SI 2004 No.3391.

(b) any other special characteristics of any land (including, without prejudice to the generality of this paragraph, a special characteristic derived from the flora, fauna or general appearance of the land).⁴²

This by itself, therefore, does not impose a narrow restriction, although the requirement that the burden is for the public benefit should preclude use of this mechanism for purely private gains,⁴³ although there may, of course, be some incidental private benefit from, say, ensuring that the land surrounding a country house remains undeveloped.

Where the Scottish legislation imposes a tighter control is by specifying a limited number of bodies that can hold the benefit of a conservation burden. A burden can be in favour only of the Scottish Ministers or one of the conservation bodies designated for this purpose by the Ministers.⁴⁴ The burden is extinguished if the holder of it ceases to be a conservation body⁴⁵ and burdens can be assigned only to another conservation body or the Scottish Ministers.⁴⁶ Moreover, if a burden is created by someone else (for example by a private landowner as opposed to by a conservation body over land it is disposing of), it can take effect only with the consent of the conservation body concerned or the Ministers.⁴⁷ The bodies designated include all Scottish local authorities, the National Trust for Scotland, a number of heritage and building preservation trusts and, in relation to the natural environment, Scottish Natural Heritage, Plantlife, the John Muir Trust, the Royal Society for the Protection of Birds, the Scottish Wildlife Trust and the Woodland Trust.⁴⁸

Thus, this exceptional mechanism is available only to a limited range of parties, a feature which serves several purposes. It limits the proliferation of such burdens, it

⁴² Title Conditions (Scotland) Act 2003, s 38(2). Similar burdens can also be created for the purpose of reducing greenhouse gas emissions: Title Conditions (Scotland) Act 2003, s 46A, added by Climate Change (Scotland) Act 2009, s 68.

⁴³ Cf. the public benefit test in charity law: Charities and Trustee Investment (Scotland) Act 2005, ss.7-9; Charities Act 2011, ss.2-4.

⁴⁴ Title Conditions (Scotland) Act 2003, s 38.

⁴⁵ *ibid*, s 42.

⁴⁶ *ibid*, s 39.

⁴⁷ *ibid*, s 38(2).

⁴⁸ Title Conditions (Scotland) Act 2003 (Conservation Bodies) Order 2003, SSI 2003/453 (as amended). Only bodies whose objects or functions are or include the purposes noted above can be designated; Title Conditions (Scotland) Act 2003, s 38(5) .

constrains their scope to those within the *vires* of the bodies listed, and should be a protection against inappropriate burdens since the listed bodies and Ministers are hardly likely to accept terms which are thought unworkable or to place inappropriate obligations on either party. Moreover, such bodies can be expected to maintain adequate records and to take their responsibilities seriously in terms of enforcement, not least because of the extent to which they can be called to account, legally (and politically in some cases), by the public and/or their members and beneficiaries. In other words, by limiting those who can hold the burden, some aspects which might otherwise have to be regulated are essentially taken on trust, but in a way that does open up the process to a degree of scrutiny by at least a portion of the public. Any system that depends on maintaining a list can, however, become administratively burdensome and risks becoming out-of-date and can be seen as limiting the flexibility being sought by moving away from the current position where enduring restrictions can be agreed only under specific schemes involving a few specific public bodies. Yet this may be a simpler and less onerous approach than allowing greater freedom to enter and deal with covenants but having to impose more direct regulation.

Such regulation is, of course, equally possible. In Massachusetts, for example, conservation easements have to be approved by the relevant state body⁴⁹ before they can take effect.⁵⁰ The greater flexibility allowed by making use of covenants widely available, not just to a limited list of bodies, would be balanced by the approval mechanism securing the public interest. Such an approach, perhaps with approval as a pre-condition of registration and thus enduring effectiveness, would secure transparency, offer a clear opportunity for public participation,⁵¹ increase the availability of this mechanism and ensure that only appropriate covenants made with appropriate bodies were recognised, but at the cost of greater administrative burdens and delays. Approval might also be required for any amendment, transfer or discharge of a covenant, and could consider the long-term viability of any

⁴⁹ In the English context the neatest approach might be to make this a function of the Secretary of State, operating in consultation with specialist bodies such as Natural England and English Heritage.

⁵⁰ Z. Bray, "Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements" (2010) 34 Harv Envl Law Rev 119, pp.153-156.

⁵¹ Although public participation is an established feature of the town and country planning system, its role in other areas is less settled (e.g. the different opportunities for public involvement in the designation of sites of Special Scientific Interest in England and Wales and in Scotland: Wildlife and Countryside Act 1981, s.28; Nature Conservation (Scotland) Act 2004, ss.3(1), 48(2)).

financial arrangements in place, ensuring that that the relationship envisaged in the covenant can indeed endure. The insertion of formal regulatory approval would, however, rather go against the current tide of regulatory relaxation in favour of private law mechanisms. Whether this is necessary will in part depend on how far other features of the scheme serve to ensure that the public interest is protected.

A conservation covenant which is not enforced will obviously fail to serve its purpose and to deliver the benefits expected by the public.⁵² In part, enforcement depends on ensuring that the beneficiary of the covenant has the tools available for effective action, in terms both of discovering non-compliance and of having adequate sanctions available. Without powers of entry it may be difficult for the beneficiary of a covenant to discover whether or not it is being complied with, so that providing these should be considered, either expressly as a matter of drafting in the covenant or as a something inserted by statutory implication.⁵³ In relation to sanctions, since the whole point of a covenant will be to conserve some feature of the land, it is likely that financial compensation by itself will usually be inadequate so that the injunctive powers of the court are likely to be relied on and again some consideration might be given to whether there is need for some statutory clarification of the position rather than relying on more general legal principles.⁵⁴

Given the public interest involved, there is also the question of whether there should be some provision to intervene if the beneficiary of a covenant does not act when its terms are broken. This is likely to be less of a problem if the beneficiaries are restricted to a class of well-established and accountable bodies, but if the mechanism is open to a wider range of smaller and less-organised bodies these may lack the resources, or desire, to respond effectively when terms of the covenant are broken. Again the US experience illustrates possible approaches. The law on conservation easements in Maine was amended in 2007 to introduce, among other reforms, a legal obligation on easement holders to monitor and report on the state of the land affected every three years and a power for the Attorney-General to intervene where the holder has not taken action to respond to a breach of an easement's

⁵² None of the possible provisions discussed below is part of the Scottish scheme.

⁵³ Cf. the gradual recognition and closing of this gap in the nature conservation legislation; C.T. Reid, *Nature Conservation Law* (3rd ed., 2009, W. Green), pp.45, 109-110.

⁵⁴ E.g. Senior Courts Act 1981, s.50.

terms.⁵⁵ This is not an unlimited power but relies on the easement holder being no longer in existence, insolvent or uncontactable or failing to take reasonable steps to ensure compliance after being served notice by the Attorney-General. There is thus a way to make up for default without going so far as to enabling any person to intervene whenever they consider a breach to be occurring,⁵⁶ whilst the monitoring requirement should serve to avoid the problem of obligations falling dormant. In the US context there is some discussion of whether in any event, given the charitable nature of most easements, the Attorney-General has a residual power to intervene if conservation easements are not being enforced,⁵⁷ but clearly express consideration of this issue is to be preferred.

A further issue affecting the public interest may be the relationship between conservation covenants and other statutory regimes and policies. For example, if the owner of a Site of Special Scientific Interest agrees a covenant with a wildlife organisation, there may in future be a clash between the management scheme determined by the statutory conservation body⁵⁸ and some aspects of the terms of the covenant agreed decades earlier.⁵⁹ In such circumstances, should the statutory body be able simply to override the covenant or should any modification of the covenant depend on agreement or the standard process of applying to the tribunal for approval of changes that cannot be agreed? The more widespread the use of covenants, the greater the potential for them to conflict and potentially be an obstruction to evolving public plans and policies, and the stronger the argument for creating some override mechanism so that public plans and programmes approved after due process

⁵⁵ J. Pidot, "Conservation Easement Reform: As Maine goes should the nation follow?" (2011) 74 Law and Contemporary Problems 1, pp.11-16.

⁵⁶ This broad approach is taken in some Australian contexts such as in New South Wales where any person can take court action to enforce a "biobanking" agreement, "whether or not any right of the person has been or may be infringed by or as a consequence of the breach"; Threatened Species Conservation Act 1995, s.127L.

⁵⁷ Pidot (note 55, above). This argument is based on essentially the same principle as the Attorney-General's powers in relation to charities in England as *parens patriae* (*Attorney General v Bishop of Worcester* (1851) 9 Hare 328 at p.361).

⁵⁸ Wildlife and Countryside Act 1981, s.28J.

⁵⁹ This could be because of changes in our scientific understanding or physical changes such as climate change, the migration of species, the arrival of invasive non-native species or the effect of disease.

can take priority without the need for every covenant to be individually altered by agreement or tribunal proceedings.⁶⁰

Conclusion

The introduction of conservation covenants would allow for more flexibility in the arrangements securing the long-term care of properties. As existing statutory examples show, this innovation can be kept within limits that do avoid the danger of an unknowable dead hand unduly restricting the use and transfer of land, but the tighter the limits the less far-reaching the benefits that can be achieved. More difficult is accommodating the public interest which lies behind this exception to the rules of property law, requiring attention to the risks both from the creation of inappropriate burdens and from the failure of covenants to fulfil their purpose.

The scale and nature of any safeguards depend on the scheme adopted and the role it is going to play. If conservation covenants are to be a marginal adjunct to the statutory regimes already in place for planning control and to conserve our natural and cultural heritage, then a light touch may be permissible. If, on the other hand, substantial areas of land come to be subject to such restrictions,⁶¹ then greater care may be needed. Especially if such covenants are to play a major part in the trade-offs between conflicting pressures on sensitive sites, then tight control may be necessary. Determining the role of covenants within conservation policy for our natural and cultural heritage is thus vital in determining the details of any new legal framework to be introduced. Experience in other jurisdictions provides models of what can be done, and the debates in the USA reveal some of the issues to be considered, although the very different context there must always be kept in mind. It is the wider implications of the use of covenants as much as the technical matters of property

⁶⁰ Cf. current debates over whether the preservation of the “Green Belt” has outlived its usefulness; A. Morton, *Cities for Growth: Solutions to Our Planning Problems* (Policy Exchange, 2011), esp. pp.60-64, 81, 100-102. The Green Belt is the very sort of policy that might have been embodied in and supported by conservation covenants had these been available, creating restrictions which might stand in the way of the decision of later generations that the terms written into the covenants are no longer desirable.

⁶¹ Given the contrasting Scottish and US experience, substantial tax relief or other incentives may lie at the heart of the wide adoption of this mechanism, raising questions over whether this is the best way to spend public funds to further conservation goals; D. Halperin (note 19, above).

law that should form part of the Law Commission's consideration⁶² and above all the response to it.

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⁶² The Law Commission expects to produce a consultation paper in early 2013.