The Law Commission

(LAW COM. No. 151)

RIGHTS OF ACCESS
TO NEIGHBOURING LAND

REPORT ON A REFERENCE UNDER SECTION 3(1)(e)
OF THE LAW COMMISSIONS ACT 1965

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

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*Succeeded The Honourable Mr. Justice Ralph Gibson (now The Right Honourable Lord Justice Ralph Gibson) on 1 October 1985.

RIGHTS OF ACCESS TO NEIGHBOURING LAND

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THE LAW COMMISSION

RIGHTS OF ACCESS TO NEIGHBOURING LAND

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

PART I

INTRODUCTION

1.1 In this report we consider the law relating to the rights of persons to gain access to neighbouring land for the purpose of carrying out work to their own land and we make recommendations for its reform.

1.2 The present law does not provide any general means whereby a person, who is unable to carry out necessary work to his own land without access to his neighbour's land, can lawfully enter that land without the neighbour's permission.

1.3 A simple example of this would be afforded by the case of two adjoining landowners, X and Y. X's house is built close to the boundary with Y's land. One of X's gutters on the boundary side is in urgent need of repair to prevent damp penetrating his sitting room. The repair can be carried out only from Y's land, but X has no legal right to enter Y's land for this purpose. Accordingly, if Y refuses him access, X cannot carry out the repair—with the result that his house may eventually become uninhabitable. X has no legal remedy against Y, however unreasonable Y's refusal might be.

1.4 This topic was referred to us primarily because of the steady trickle of cases in which members of the public or their Members of Parliament have approached the Lord Chancellor's Department or us about actual difficulties caused by lack of access rights. On 3 August 1978 the Lord Chancellor asked us:

"To consider the legal difficulties of those who, lacking the legal right to do so, need to enter upon another's land in order to inspect or do work upon their own, to consider whether these difficulties can be remedied by legislation and to make recommendations."

The working paper and consultation

1.5 We published a working paper[1] on this topic in 1980, expressing the provisional view that the law should be altered so as to enable landowners to have some general means of obtaining access to neighbouring land to do work on their own property. We provisionally favoured giving landowners a right of access that would arise at the discretion of a tribunal and on such conditions as the tribunal considered just. We invited comments on these matters.

1.6 We are extremely grateful to all those who wrote to us with their

[1] Rights of Access to Neighbouring Land (1980), Working Paper No. 78.

comments. We also wish to record our particular indebtedness to Sir Wilfrid Bourne, K.C.B., Q.C., for the extensive help which he has given us in analysing the consultation and the issues of policy on which the recommendations in this report are based.

1.7 The working paper attracted a considerable response. We received comments from many members of the public as well as from lawyers, surveyors, professional bodies, government departments, statutory undertakers and others. The large volume of comments was probably due in part to the fact that, in addition to publishing the working paper, we distributed free copies of a pamphlet summarising the main issues discussed in the working paper. But the working paper itself received extensive coverage, not only in the Press, but also on radio and television, since the topic was one of general public interest. The size of the response indicates that the absence of any general right of access over neighbouring land gives rise to problems in practice and results, in some cases, in serious deterioration of property and danger to health and safety.

1.8 We discuss the tenor of the consultation later in this report; it is enough for us to record that a clear majority of those who responded to our working paper favoured a change in the law which would give a landowner, subject to safeguards and conditions, a right of access to neighbouring land for the purpose of repairing or maintaining his own property, a right which, in this report, we shall call a "right of access". And, while there were considerable divergences of view as to how this might be achieved, most of those who wrote to us agreed with the working paper's provisional view that a right of access should arise only by order of a county court. That approach forms the basis of the scheme proposed in the later parts of this report.

The arrangement of this report

1.9 In Part II, we summarise the current state of the law in this area. In Part III, we describe the defects of the present law, discuss possible reforms and give an outline of our proposals. Part IV contains the details of our recommended scheme; and Part V is a summary of our recommendations. A draft Bill to implement them is to be found in Appendix A. Appendix B contains an example of a prescribed form for a statutory notice procedure. Appendix C contains a list of those who commented in detail on our working paper.

PART II

THE PRESENT LAW

Introduction

2.1 Part 2 of the working paper contained a full statement of our understanding of the present law. None of those who commented on the working paper suggested that that statement was either incomplete or inaccurate, and we therefore see no need to go over the same ground in detail in this report. It may, however, be helpful for us to give here a short summary of the statement in the working paper.

No general right of access

2.2 As we have already said, the law does not provide any general right enabling a person to gain access to neighbouring land in order to carry out work to his own land. A person who enters neighbouring land without any authority does so as a trespasser[2] and renders himself liable to civil proceedings at the suit of the occupier.[3] It is no defence to show that the need for access was compelling or that the loss arising to the plaintiff from access was negligible.[4]

A right of access in particular cases

2.3 While there is no *general* right of access to neighbouring land, a right of access may exist or arise in *particular* cases:[5]

(a) Rights created expressly

(i) *Easements*

2.4 An owner of land (the "servient" land) may grant to the owner of adjacent land (the "dominant" land) an express right of entry for the purpose of doing work on the dominant land in such a form that, without any further grant, the burden and benefit will, respectively, pass to the successors in title of the servient and dominant owners. Such a right is known to the law as an easement and is said to "run with the land".

(ii) *Other express rights*

2.5 An express right of access to neighbouring land may arise in other ways, e.g. by convenant, contract or licence. Since such a right arises from an

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[2] *Hewlitt* v. *Bickerton* (1947) C.L.C. 10504; 150 E.G. 421. Trespass to land is an unjustifiable interference with the possession of land. So entry on a person's land is not trespass if it is justifiable on the basis that the entrant has a right to enter, however that right may have arisen.

[3] The neighbour may bring an action for damages and for an injunction restraining continuance or repetition. An injunction is, however, a remedy in the discretion of the court: see *Tollemache & Cobbold Breweries Ltd.* v. *Reynolds* (1983) 268 E.G. 52 (C.A.).

[4] The law in this area operates irrespective of the use for which the land is occupied. So access problems can arise for business as well as for residential accommodation.

[5] In one sense, a right of access will arise on the neighbour's simply consenting (perhaps orally) to the access. But, while such rights of access may often arise in practice, they are wholly dependent upon the neighbours' co-operation in granting them in the first place: the recommendations contained in this report are based on the fact that such co-operation is not always available. Accordingly, the rights with which we are concerned in this part of the report are pre-existing rights entitling the applicant to enter the neighbour's land when the need arises.

essentially personal arrangement between the parties concerned, it does not "run with the land", so as to affect successors in title. Thus, one landowner may covenant with another that he will permit the other to enter his land. Equally he may grant him a licence to do so; but that will not necessarily impose any obligation, or confer any right, on their respective successors.

(b) Rights not created expressly

2.6 Rights of access may exist or arise otherwise than by express creation by the parties:

(i) *Implied easements*

2.7 An implied easement comes into being when, and only when, on a transfer of land the circumstances are such that the law treats an easement as having arisen, notwithstanding the absence of any express reference to it. Implied easements may take the form either of easements of necessity or of quasi-easements.

Easements of necessity

2.8 An easement of necessity arises when, on a transfer of land, the land transferred cannot be used at all without the easement, or when it is a corollary to another right expressly granted, or is otherwise necessary to give effect to the common intention of the parties. Such an easement is unlikely to amount to a right of access for our purposes.

Quasi-easements

2.9 A right in the nature or an easement will arise when the owner of land transfers a part of that land which has enjoyed "rights" (quasi-easements[6]) over the part not transferred. On the transfer, such "rights" may become, in effect, easements either at common law under the rule known as "the rule in *Wheeldon* v. *Burrows*"[7] or, in somewhat less restrictive circumstances, under s.62 of the Law of Property Act 1925. Although a quasi-easement arising in these circumstances can, particularly under s.62, confer a right of access for our purposes, for the reasons explained in the working paper, the occasions on which it will do so are very limited.

(ii) *Easements acquired by long usage*

2.10 If a facility has actually been enjoyed for a considerable period of years, the law will in certain circumstances accord it the status of an easement. However, for the reasons explained in the working paper, long usage is unlikely to bring about a right of access for our purposes.

(iii) *Estoppel rights*

2.11 A landowner who "stands by" after encouraging his neighbour to believe that access will be granted, while the neighbour incurs expense on the strength of that belief, may thereafter be "estopped" from denying a right of

[6] They are so known since they would count as proper easements were it not for the fact that the land they benefit and the land they burden are in common ownership.
[7] (1879) 12 Ch. D. 31 (C.A.).

access. But, as we explained in the working paper, it is only exceptionally that estoppel can afford an answer to the problem with which we are concerned.

(iv) *Access under the London Building Acts*

2.12 An owner to whose property the provisions of the London Building Acts (Amendment) Act 1939[8] apply, may, in some circumstances, have a right of access to his neighbour's land to do necessary work to structures on his boundary which he does not own, or owns only in part, or to deal with a dangerous structure. We examine this legislation in more detail below.[9]

(v) *Access to protect land*

2.13 An occupier of land has, at common law, the right to enter adjoining land to "abate" a nuisance arising on, or to protect an easement enjoyed over, that land. As we said in the working paper, exercise of this right is hazardous and would not help resolve our problem. We mention it only for the sake of completeness.

Summary

2.14 The law in this area can be summarised as follows: there exists no general right of access. Such a right can exist only in particular cases and then only if created expressly or if arising in certain other ways. The express creation of such a right between individual landowners is comparatively rare[10] for reasons explained below.[11] And the other means whereby a right may arise are likely in practice to produce it in very few cases only.

[8] The operation of this Act is confined to inner London areas.
[9] Paras. 3.37–3.39 below.
[10] Such rights are far more usual in modern estate developments.
[11] Paras. 3.9 and 3.10 below.

PART III

DEFECTS IN THE PRESENT LAW; POSSIBLE REFORMS; AND AN OUTLINE OF OUR RECOMMENDATIONS

The problem

3.1 As we have shown in our summary of the present law, there exists no general right enabling a landowner to enter neighbouring land to carry out work to his own land. Accordingly, unless he has a specific right,[12] he will not lawfully be able to enter without his neighbour's permission. And, since it may be impracticable or impossible to do the work from his own land, he may have to accept the risk of deterioration inherent in the non-repair of his property. It will be convenient, for the purposes of this report, to refer to the person requiring access as "A" and to the person whose consent he needs as "B". For the reasons explained in Part IV below, neither A nor B need have any title to the land in question, though in practice A will normally be the owner or occupier of the property to be repaired and B the occupier of the land to which access is required. But this will not always be the case.

The extent of the problem

3.2 In inviting comments on the provisional conclusions reached in our working paper, we were particularly concerned to assess the extent of the problem. We wanted to find out whether many persons had experienced difficulties in getting access to neighbouring land where they had no right to such access and whether the consequences of refusal had been serious.

3.3 It seems clear from the comments that we received that the absence of any general right of access can cause difficulty in practice; though there is no clear indication of how often such difficulty occurs. The majority of those who commented were aware of cases where access to carry out necessary repair work had been refused. Many had been involved directly, either as A or as B. In most cases, the sort of work for which access was required was relatively minor, such as the repair of gutters, the replacement of tiles, the re-pointing of walls and the painting of window frames.

3.4 Although the consultation makes it clear that the problem has arisen in practice and has created difficulties, it is not so easy to tell whether those difficulties could easily have been settled by negotiation and, if not, how serious the consequences were likely to be. Many of those who commented thought that disputes could be resolved by negotiation, perhaps with the assistance of professional advisers. On the other hand, the evidence we received from members of the public suggests that negotiation is sometimes unlikely to be successful (or even to be attempted) because of some bad feeling between neighbours which existed before there was any request for access. And, while many of those commenting had no direct experience of refusal of access resulting in serious problems, it is clear that such refusal can involve financial loss to A, deterioration to his property and a risk of its becoming a danger to the health and safety of himself and others. In one case

[12] As to which see paras. 2.3–2.13 above.

we were told about, the physical damage to a building resulting from a refusal of access was said to have led to its eventual collapse.

3.5 The conclusion that we draw from the consultation and from cases that have come to our attention in other ways is that the occasions when the problem causes actual practical difficulties are not so rare as to be insignificant; that, where such difficulties do arise, they may sometimes be capable of resolution by negotiation, which may involve the payment of money;[13] and that, where agreement is not reached, A's property is likely to deteriorate with consequential financial loss to him.

Should there be some general right of access?

3.6 Having established that the lack of a general right of access can give rise to difficulties which are potentially serious, we have had to consider whether the law should be changed so as to provide some such right.

3.7 In our working paper we expressed the provisional view that the law should be changed so as to enable an occupier of land to have some means of obtaining access to neighbouring land to enable him to do work to his own property. A clear majority of those who wrote to us in response agreed with this view though a substantial minority disagreed. While we remain of the view that the law should be changed in the way mentioned above, we must now set out the case for, and the case against, such a change in the light of the arguments that have emerged from the comments we have received on the working paper.

(a) The case in favour of reform

3.8 The case in favour of reform is based on the argument that the absence of any general right of access to neighbouring land means that properties throughout the country are liable to deteriorate for want of repair and maintenance—with consequential financial loss to their owners and some detriment to the public, who have an interest in the maintenance in good repair of the country's stock of housing and other buildings. We now examine this statement more closely.

(i) *Why is there an "absence of any general right of access"?*

3.9 It may be argued that the better course would be, not for all landowners to be given a right of access by statute, but for future landowners and developers to adopt the practice of granting express rights of access whenever they sold off parts of their land or laid it out in individual plots. But this would do nothing to help existing cases, where access has been, and still is, refused; nor would it necessarily be a complete answer for the future since, while the current absence of express rights of access must sometimes be attributable to a lack of foresight on the part of earlier vendors and purchasers (or their advisers), it may also be attributable to other factors.

3.10 For example, those concerned may, while recognising the possible need for access, have assumed that good neighbourliness would in practice

[13] B may demand payment of a substantial sum of money by way of "entrance fee".

ensure that access would always be given. In other cases, the parties may have decided not to create rights of access because of the deleterious effect they might have on the land over which they would be exercised. In practice the rights, if granted in a form enabling them to run with the land, would have to be relatively inflexible and absolute. As a result, a strip of land to which access was given might at worst become "sterilised": no one would dare to build on it lest the building interfere with the access, or the access with the building. It is for this reason (among others) that the reform that we recommend in the next part of this report will involve a discretionary scheme which does not suffer to the same extent from these drawbacks.

(ii) *"Properties throughout the country": how widespread is the problem?*

3.11 We know from our consultation that a number of people are being denied access by their neighbours and that this happens in rural, suburban and urban areas. These are the cases of actual difficulty about which we have factual evidence; what we do not know about are the cases in which the difficulties, though they may become actual at any time, are at present only potential.

3.12 In assessing the need for reform, it must not be forgotten that there are cases in which the lack of a right of access is liable to cause difficulty, though it may not currently be doing so. In these days of intensive housing development, the potential need for rights of access must be common, but their existence is by no means universal.[14] To some extent the need may be reduced, at least in the case of detached buildings erected in comparatively recent years, by planning controls which can be exercised so as to prevent building close to a boundary;[15] but the problem remains substantial. It is also true that cases of potential need may never become cases of actual difficulty: for one thing, the work for which access would be required may in fact never become necessary; for another, access may be readily permitted, even though no *right* exists.[16] But, although these two factors may often serve to prevent the potential difficulty caused by the lack of rights of access from developing into an actual difficulty, they do not by any means dispel it. The situation in all such cases is necessarily precarious and therefore unsatisfactory, because it requires no more than a breakdown in good neighbourly relationships, or a change of ownership, for real difficulty to arise.

(iii) *"Are liable to deteriorate"*

3.13 As we have already said,[17] it is clear that the consequences of access to neighbouring land being refused may be serious. In many cases, the work for which access is required is comparatively trivial, such as replacing gutters

[14] Access rights are, however, commonly found in modern estate developments.

[15] The extent to which planning control will prevent the siting of buildings on or close to the boundary depends very much on the circumstances of individual cases, including the proximity of any buildings on the other side of the boundary. Accordingly, "boundary building" is still permitted in at least some cases.

[16] This latter point is of particular significance. It is probable that, unless the work involved real inconvenience or the risk of damage, most neighbours would allow access whether or not they were legally obliged to do so; or they would come to some other amicable arrangement—for example, that B himself should do the work, subject to reimbursement.

[17] Para. 3.4 above.

or tiles, painting window-frames, etc. But over a period of years the damp penetration and decay consequential on a minor disrepair are liable to result in a building becoming uninhabitable in whole or in part and a danger to the occupier and others.[18] It is true that the occupier often has at least a theoretical means of escape from his difficulties, in that he can demolish the building and replace it with a smaller one, for the erection of which no access is needed. But the cost of doing this is likely to be too great to make it a practical solution to the problem.

(iv) *"With consequential financial loss"*

3.14 Property that is deteriorating as a result of disrepair will, even if the deterioration is only beginning, command a lower price than a similar property properly repaired and maintained and with no continuing access difficulties. An owner who wishes to sell may have to accept a loss; indeed, if the signs of deterioration are marked, he may have great difficulty in finding a purchaser at all, particularly if there is a question of any potential buyer needing a mortgage. The most that the owner can hope for in such circumstances is that the neighbour himself moves as soon as possible and that his successor will be prepared to permit access so that the necessary repairs can, albeit belatedly, be executed.

(v) *"Detriment to the public"*

3.15 The arguments set out above are those that have been advanced on behalf of property owners with a need to maintain their properties. But, as we have already mentioned, there is also to be borne in mind the argument based on the public's interest in maintaining the country's stock of buildings in good repair. Inability to do this through denial of necessary access must result in the waste of resources. Although this argument was not stressed in our working paper, it has been advanced by some of those who have commented on our proposals; we see much force in it.

(b) The case against reform

3.16 The case against reforming the law so as to provide for a general right of access to neighbouring land is based primarily upon the principle that a landowner is entitled to exclude from his land any person[19] whose entry is unwelcome for whatever reason; and that the giving of a general right of access would constitute an unjustifiable erosion of this fundamental principle. Those who advance this argument often quote the old maxim "An Englishman's home is his castle" as exemplifying their stand on this issue.

3.17 Many of the those who disagreed with the working paper's provisional conclusions did so on this ground. They pointed out that people buy houses for privacy and security and that there is no reason why they should be disturbed or have their rights encroached upon simply to save other people trouble and money; that property rights have already been too much eroded

[18] Thus in *John Trenberth Ltd.* v. *National Westminster Bank Ltd.* (1979) 39 P. & C.R. 104 (Ch. D.), the building affected adjoined the public highway and the disrepair was such that the front stonework was liable to collapse.

[19] Except any person who already has a right of entry.

and should not be diminished further; and that the absence of a right of access in any particular case is indicative of the neighbour's wish to withhold it.

3.18 There is certainly some force in these objections. Any proposal that detracts from an occupier's right to exclude unwelcome entrants needs careful examination and should be treated with caution, though that is not to say that such a proposal should be rejected out of hand. Yet some of those who responded to the working paper took the view that the principle of exclusion was not "negotiable" in any circumstances; that no matter how grave the hardship to A, no matter how serious the danger presented by a crumbling property, B's right to refuse access for repairs must remain inviolable.

3.19 This is a view shared neither by us nor by most of those writing to us. Indeed, it is not a view taken by the law as its stands, since there are already exceptions to the general rule: for example, many public authorities have statutory rights to enter premises in order to carry out their functions.[20] It can be argued that these exceptions are justifiable only because they are in the interests of the public at large, and that a right of access which operated in favour of private landowners (of which there is no general instance[21]) would be both different in kind and liable to set an unfortunate precedent for the future erosion of the principle. But our purpose in mentioning these existing exceptions is not to argue, by analogy, that the rights of access with which this report is concerned should necessarily constitute a further exception: the only point that we seek to make here is that the right to exclude, protecting as it does the private interest of landowners, does on occasion have to give way to other interests. For the purposes of this report, we have had to ask ourselves whether the fact that the principle of exclusion renders houses and other buildings liable to deteriorate through lack of repair can amount to an occasion that can justify a further "erosion" of the principle. We have no doubt that sometimes it can.

3.20 There is, in our view, no simple "yes" or "no" answer to the question "Should a person be able to go onto neighbouring land without the neighbour's consent in order to execute essential works to his own land?" The answer that we would give would be that it depends on the circumstances of the case. Such an answer to the question acknowledges that the principle of exclusion is not inviolable; but, by itself, it would be of little help unless we were able to state precisely what circumstances we had in mind.

3.21 If, however, the question were "Should a court have power to grant a right of access over neighbouring land in certain circumstances?", then we have no doubt that such power should exist. This proposal, as we have already said, forms the basis of the scheme which we recommend later in this report. In making that recommendation, we recognise that the structure and terms of the scheme itself must be such as fairly to balance the interests of A and

[20] For example, under the Public Health Act 1936, s. 287; Rights of Entry (Gas and Electricity Boards) Act 1954, ss. 1 and 2; Criminal Law Act 1967, s. 2; Land Commission Act 1967, s. 88; Control of Pollution Act 1974, ss. 91 and 92; Refuse Disposal (Amenity) Act 1978, s. 8 and Highways Act 1980, ss. 289–291.

[21] The rights contained in Parts VI and VII of the London Building Acts (Amendment) Act 1939 (paras. 3.37–3.39 below) are restricted to London.

B;[22] and that, in its working, the scheme must be able to take account fairly of any conflict of interest in a particular case. In many cases of refusal of access, there will be some merit on each side and we see serious defects in a law which is (as is the present law) unable to take account of those merits.

3.22 While those who disagreed with the working paper's provisional conclusion would probably agree that there was a conflict between the interests of As and Bs, they might nevertheless argue that a major erosion of the principle of exclusion was too high a price to pay for enabling the law to resolve the conflict by balancing one set of interests against the other and that it would be better to leave the law in its present state, even if that state were unsatisfactory from A's point of view.

3.23 We doubt whether this "major erosion" view is borne out by reality. *First,* there is the public interest factor ensuring that the nation's stock of housing and other accommodation can be maintained and kept available for use, an interest which the law already recognises insofar as it confers on public authorities a limited right of access for the purpose of executing works on neighbouring land.[23]

3.24 *Secondly,* reasonable neighbours do not in practice object to access for repairs on the grounds that such access would be a major erosion of their rights. The fact that most people do not object to temporary incursions by their neighbours at times of need shows that such incursions are not generally considered to be objectionable. It is one thing for a neighbour to give access of his own volition and another for it to be forced on him. But the proposed scheme would enable any good objective reason that B might have for refusing access to be considered by the court when hearing A's application; and if B had no such reason, we think he should be required to allow the access. It appeared from the consultation that when access was refused, the immediate cause of the refusal was often some existing ill-feeling between neighbours, the origins of which lay in some incident unconnected with the request for access. In these cases, the purpose of the refusal was to spite A rather than to protect B's rights.

3.25 *Thirdly,* even in cases where strong views about access are genuinely held as a point of principle, they are, arguably, so held only so long as they suit the proponent. Thus, the person who needs access thinks it right in principle that the law should be changed so as to allow it—until his own asparagus bed is threatened by his neighbour's ladder; the person who does not need access thinks the law is fine as it stands—until a tile falls off his own roof.

3.26 *Fourthly,* under our proposals the purposes for which B could be

[22] Another interest to be considered is the public and environmental interest in maintaining buildings in a proper state of repair.

[23] For example, under the Public Health Act 1936, s. 287, mentioned in n. 9 to para 3.19 above. A counter-argument to this is that, if the public interest has to be served, it should be public authorities that are given the necessary powers rather than private individuals. However, the consultation suggests that local authorities, at least, would not welcome such additional powers. And it is difficult to see how exercise of access powers by private individuals could constitute a greater erosion than their exercise by public authorities.

required to give access would be strictly limited. We discuss this in detail in the next part of this report; but, broadly, access would be limited to the carrying out of necessary works of preservation. Access would not, for example, be available to enable A to build an extension to his house or office. And enforceable conditions could be imposed regulating the manner in which the works were carried out, the making good afterwards, payment of compensation for damage, and so on.

Conclusion: a limited reform

3.27 In our view, reform of the law in this area is necessary. It is unsatisfactory that properties should be deteriorating through the lack of rights of access to carry out repair work. Most of those responding to our working paper agreed that a right of access to neighbouring land for this purpose was desirable and we recommend that the law be changed so as to make available such a right.

3.28 The reform should be limited both in its nature and scope. Any reform of the law involving the property rights of individuals is liable to be controversial. It is clear from our consultation that even a limited measure of reform in this area will not be welcomed by everyone, and the first creation of a new right of this nature is, in our view, better made with caution.

The form of the right of access

3.29 Having recommended that the law should be changed so as to make available a right of access, we now need to consider what form that right should take.

3.30 In our working paper, we reached the provisional conclusion that the right of access should be available only at the discretion of a tribunal, our preference being for the county court. This provisional view was endorsed by those who wrote to us in response, including those who did not favour the creation of a right of access. The working paper did, however, canvass an alternative means of providing for this right which attracted some support. We think it would be helpful for us to set out at this stage the various possibilities we have examined in the light of the consultation.

(a) An "automatic" right

3.31 The (apparently) simplest solution would be to provide that a legal right of access to neighbouring land should in future exist automatically in all those cases in which it was required and be exercisable without more ado whenever access was needed. The main argument used in support of an automatic right has been its alleged simplicity. It was also argued that such a right would have the advantage of certainty: there would be no need to litigate to establish the existence of the right as there would be if the right were to arise only on the making of an order by a court vested with discretionary powers.

3.32 However, formidable difficulties stand in the way of this solution. To begin with, it would be necessary to define the circumstances in which, and the methods by which, the automatic right could lawfully be exercised

in any given case. The legislation would, for example, have to define the scope of the work in respect of which the right existed and, although the formulation of such a definition need not present great difficulty (it is also an essential element in a discretionary scheme), the question whether a particular operation fell within that definition would often not be readily answered without resort to litigation. It must remain doubtful whether, in practice, any great degree of certainty would be achievable.

3.33 We also think that the argument based on simplicity is far from established, since the scope, incidence and extent of an automatic right would have to be spelled out. There would have to be many exceptions and qualifications. For example, unless unacceptable damage, disruption and inconvenience were to be allowed, an automatic right would have to be confined to entry on such land as had on it no building in continuous use. There would also have to be exceptions covering land (such as that occupied by British Rail) where entry by strangers could cause danger to others. We do not think that a right so qualified would be either simple or useful. A discretionary scheme, on the other hand, would not be confined in this way, since the court would be able to take into account the particular circumstances of each case. An automatic right approach could also result in additional conveyancing complexities and expense since prospective purchasers would wish to know the extent to which the land they were buying was, or might be, adversely affected by a neighbour's automatic right of entry.

3.34 It will be apparent that the main difficulties inherent in the automatic right approach derive from the need to define the right so that it does not go further than is necessary. In the event, the right would probably fall short of what is required: an automatic right to go on to one's neighbour's land could hardly extend to the demolition of any building on that land which obstructed the necessary access; yet it might be impracticable to exercise the right effectively without demolishing, or at least damaging, the neighbour's building. In any event, there is the risk referred to in paragraph 3.10 above that land near the boundary would become "sterilised" to avoid interference with the neighbour's automatic access right. By contrast, a discretionary scheme could, by use of suitably protective conditions, permit a measure of interference with neighbouring land that would be unacceptable as an automatic right.

3.35 In short, the concept of a comprehensive automatic right founders on its inflexibility. It is not, in our view, possible to devise a scheme based on an automatic right which is, on the one hand, extensive enough to provide a complete solution to the problem but is not, on the other, so extensive as to be oppressive to the neighbouring landowner. In practice, any such scheme adequate to cater for every likely situation would involve an unacceptable risk of damage to the neighbouring property and would have therefore to be made subject to complex qualifications and conditions to an extent which would nullify much of the advantage claimed for such a solution to the problem.

(i) *A limited automatic right*

3.36 Although, for the reasons stated above, we do not think it would be practicable to create a comprehensive automatic right of access appurtenant to the ownership (or occupation) of land, we did see some merit in introducing a *limited* automatic right, with a view to minimising costs in those cases where the repair work required by A was minor and involved no serious interference with B's land. Such a right might, for example, be exercisable only on notice and only for a short time (e.g. two days) on any one occasion, a limitation which would exclude major building operations—these could still be covered by a discretionary scheme. Exercise of the right could be complemented by a statutory duty to make good, clear up and pay compensation for any damage done. Although we were attracted by this idea (some elements of which feature in other possible schemes, discussed below), in the end we came to the conclusion that it would not be as satisfactory as a discretionary scheme. Not only would a limited automatic right have, as would a comprehensive automatic right, to be subject to many qualifications and exceptions; in addition, it would take no account of B's position or of any objections to entry that he may have.

(ii) *The London Building Acts*

3.37 Another form of automatic right of access is that provided by the London Building Acts (Amendment) Act 1939. Part VI of that Act contains provisions enabling a person to obtain access to neighbouring land to repair walls and other structures that are not owned (or wholly owned) by him. A number of those responding to the working paper suggested that a right of access should be made available by extending the scope of the Act, first, so that it would cover access for all purposes (and not just for doing work on boundaries) and, secondly, so that it would cover the whole country and not just London.

3.38 The approach of Part VI of the 1939 Act is to give any landowner certain rights to deal with structures built on the boundary line separating his land from that of his neighbours. For example, a landowner is given a right to make good, underpin, thicken, repair or demolish and rebuild a party wall if such work is necessary.[24] He also has a right to enter neighbouring premises in order to execute the work. But, before a landowner can exercise these rights, he must serve on the adjoining owner a notice stating the nature and particulars of the proposed work and saying when it is to begin. He must serve the notice at least one month before starting the work. The adjoining owner then has the right to serve a counter-notice requiring the building work to incorporate certain features for his benefit. If the adjoining owner does not give written consent to the notice (or if the landowner does not give written consent to the counter-notice) within fourteen days, a difference is deemed to have arisen between them. That difference is resolved in the first instance by a single surveyor (if the parties can agree upon one), or (if they cannot) by three surveyors, one appointed by each party and the third appointed by the first two. The surveyor or surveyors then settle the details of the work to be done and the conditions upon which it is to be carried out. Both parties have

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[24] Section 46(1)(a). The other provisions referred to in this paragraph are contained in ss. 47–55.

a right to appeal to a county court or, in certain circumstances, to the High Court.

3.39 Plainly, an automatic right of access along the lines of this Act would be possible. A landowner would be given a statutory right to enter neighbouring land to carry out certain works to his own property. Equally plainly, however, the existing provisions of the 1939 Act would not suffice, since those provisions are designed for party structures and would not give access to repair non-party structures or non-structural items. And, while those provisions could be amended, or entirely new legislation could be drafted, to provide an automatic right of access for whatever purposes were felt appropriate, we are not convinced that the 1939 Act offers a model which could satisfactorily be adopted to meet the access requirements with which this report is concerned. To start with, the automatic right which a 1939 Act type regime would produce would raise the difficulties that we have already mentioned in relation to other forms of automatic rights. The circumstances in which the right could be exercised would need defining, as would the exceptions and qualifications to its exercise. The right that resulted would be something of a misnomer, because it would not exist at all in some cases and in others it would not be exercisable by A until the arbitration process had run its course, should B still resist access despite the service of a statutory notice. But, more importantly, it is not clear to us how far a system of serving notices and counter-notices followed by arbitration would be likely to achieve settlement between the parties more quickly or more cheaply than could have been achieved anyway by the parties either agreeing terms relatively informally or by taking the matter straight to court.[25]

(b) A discretionary scheme

3.40 The great advantage of a discretionary scheme, as compared with an automatic right, is that the scheme can first be devised so as to apply only on the terms and in the limited class of case, in which reasonable people would normally think it right to permit access; and in addition, the making of any order for access can be fitted to the individual circumstances of any special or unusual case. Access would be refused where, because of the hardship it would cause, it is unreasonable for it to be ordered; or it would be granted only on conditions, including a condition for paying compensation and for giving security for that purpose. Under such a scheme, there is no need to draw a clear line between the incidents of access which can and those which cannot be included, a need which exists with an automatic right, but is difficult to satisfy. Furthermore, the flexibility of a discretionary scheme would tend to go some way towards meeting the objections of those who oppose any general right of access. Thus, B would be able to resist an application for access if he could show that, because of the hardship it would cause him, it would be unreasonable for A to have access; he would not be so able if A had an automatic right of access.

3.41 At first sight, a disadvantage in a discretionary scheme lies in the fact that, in theory, the right of access would in no case be clear until the

[25] It may be noted that the procedure involved under the 1939 Act is sometimes criticised as being obstructive and expensive: see (1983) 4 Property Law Bulletin 34.

court exercising the discretion had reached a decision. A person wishing to exercise the right would have, in theory, to argue his case before the court with consequential expense and uncertainty, before he could know whether he was to have access or, if so, subject to what conditions. In practice, however, we believe that the scheme would not work in that way. We expect that, in clear cases, the existence of a right to apply to a court would be enough to secure the necessary access. If B had no good reason for refusing, his choice would lie between giving way on the best terms he could obtain and fighting a case, which would end, not only with an adverse decision, but also with an award of costs against him. Moreover, if B is financially eligible for legal aid, but he has no reasonable ground for refusing access on the terms offered, he would not obtain the grant of legal aid.

An outline of our recommendations

3.42 Our provisional view was that a general right of access should arise only at the discretion of a county court. That view has been endorsed overwhelmingly by those responding to the working paper and forms the starting point of our recommendations. We therefore propose that any person needing access to neighbouring land for carrying out necessary preservation work to his own land should have a right to apply to a county court for an order giving him the necessary right of access. If made, the order would impose certain obligations on the applicant and would be subject to such conditions as the court might think reasonably necessary. This we call "the discretionary scheme."[26]

3.43 Before setting out (as we do in Part IV of this report) the details of the scheme and our proposals for legislation, we wish to discuss the question of costs and explain certain variations on the discretionary scheme, based on a statutory notice, which we have considered as a possible means of reducing the expense—both public and private—necessarily involved in a scheme

[26] A discretionary scheme already operates in Michigan following a recommendation made in the Michigan Law Revision Commission's Third Annual Report (1968). This provides that where:—

(a) a landowner seeks to make improvements or repairs to land so situated that they cannot reasonably be carried out without access to neighbouring land; and
(b) the owner of that neighbouring land refuses access; and
(c) the landowner seeking access applies to the court stating the facts making the entry necessary, the date on which entry is sought, the duration and method proposed for protecting the neighbouring landowner against damage,

the court may grant a limited licence for entry upon such terms as justice and equity require. The landowner seeking access is liable for damage occurring as a result of the entry and has to file such bond or liability insurance (or both) as the court requires. The appeal of a scheme along these lines lies in its simplicity. It is short and contains very little in the way of detail or innovation. The drawback, however, is that the simplicity is more apparent than real. The scheme surmounts problems by ignoring them and thus leaving them to be resolved by the court. Indeed, nearly everything is left to the court—including definition of the work for which access is to be permitted and the property to which access is to be given, the conditions to be imposed and the factors which the court should bear in mind in deciding what "justice and equity" require. Such a scheme might be made to work in this country but it would not assist A or B (or their respective advisers) who would want to know, before deciding what course to take, how the court was likely to deal with the application. Moreover, the result might be a wide divergence of practice as between different county courts before experience of the legislation produced a settled practice. We think it better that these rules be laid down from the start, as is done in the scheme we recommend in this report.

which provides for the making of applications to a court where access has been refused.

Costs: variations on a discretionary scheme

3.44 The cost of the working of the discretionary scheme would be both private, in the expense of legal and other fees incurred by the parties, and public, in the increased demands upon courts[27] and in legal aid—if and to the extent that legal aid is made available. As to private costs, A, who needs access to carry out repairs, may be deterred from seeking a court order by the burden of his own costs and the risks of having to pay some or all of the costs of B. B, who (upon introduction of the scheme) would lose the right of simple, absolute refusal, would face the risk in costs of opposing a claim to access and, on occasion, the expense of obtaining legal or other expert advice. Legal aid is currently available for proceedings in the county court and we can see no good reason for denying it to either party in these proceedings should their means make them eligible. We assume in the discussion which follows that legal aid would be available to both sides, within the existing financial limits, for proceedings under the discretionary scheme.

3.45 As to public cost, court proceedings make demands on public resources since they occupy the time of court staff, registrar or judge. We have been told that the public cost of proceedings in a county court before a judge is £75 per hour and for proceedings before a registrar £70.[28] Further, if the court has to try some additional cases under a new discretionary scheme, there must be some delay to other cases which are pending in that court. If a significant number of cases should require trial with the assistance of legal aid to the parties, the impact might be considerable: limitations on the size of the legal aid fund have already prevented or delayed some extensions of the legal aid scheme which otherwise would have been welcomed.

3.46 The balance of social gain and cost can be described in concept but it is, we think, impossible to calculate the amount of either in advance. The public interest would be served by enabling necessary repairs to be done to that part of the existing stock of buildings in respect of which refusal of access would, in the absence of the scheme, prevent the doing of those repairs. If introduction of the scheme would cause private and public costs to be incurred only in those cases in which, without the scheme, refusal of access would be maintained, then, in our view, the balance of social gain would be clearly in favour of implementing the scheme. If, however, introduction of the discretionary scheme would cause costs to be incurred, including the costs of disputed applications to the courts, in a significant number of cases in which, as things now are without any right to ask for a court order, consent would be given, then the balance of social gain would be doubtful if not adverse. The purpose of the scheme is to provide a means of overcoming unreasonable refusal: it is not to make complicated, expensive and formal that which is now done simply and at no expense.

[27] See paras. 4.88–4.93 below where we conclude that the county court is the most suitable tribunal for access proceedings. It should be borne in mind that a less formal tribunal specialising in access proceedings at public expense may reduce the private cost of the scheme but is likely to increase the public cost.

[28] These figures have been supplied to us by the Lord Chancellor's Department.

3.47 The bringing into existence of the discretionary scheme, with power in a court to overrule unreasonable refusal, should not by itself increase the number of those who will refuse reasonable requests. Indeed, we think it is probable that, having regard to the pressure of the ordinary rule as to costs, knowledge of the existence of the proposed discretionary scheme would promote agreements for access on fair terms on the part of many who would otherwise not be prepared to consent. There might, however, be some effect from enactment of the discretionary scheme in one particular respect. The legislation would announce, in effect, the decision of Parliament that an occupier may only be required to consent to access for the purpose of carrying out necessary repairs of his neighbour's property upon stated terms: i.e. the "automatic" conditions of responsibility for making good all damage, and for compensation, and other discretionary conditions in cases when they are shown to be necessary. Some occupiers (who otherwise would give prompt informal consent) might decline to give prompt informal consent to access on request and would seek—sometimes at public expense—advice as to what they can properly require, and might then insist upon provision of undertakings and/or indemnity in appropriate documents. Some applicants—or their builders or surveyors—might think it advisable to get similar advice in order to discover what they should or must offer in the way of undertakings, indemnities, or restrictions as to working hours, etc., with a view to securing consent, or to avoiding the costs of an application to court, in cases in which, without the scheme, they would have asked for and got prompt informal consent.

3.48 The extent to which enactment of the scheme would cause simple cases to be complicated, or to be taken to court, must depend upon the clarity of the rules of the scheme itself and upon whether in simple cases it is clear on the facts whether A is or is not entitled to an order for access. If the rules are clear, and if it is possible in simple cases for the parties, or their advisers, to know in advance whether or not an order will be made, then, in our view, the scheme should do what it is intended to do, namely to overcome unreasonable refusals without unnecessary complication or costs. Those who want access would be advised not to seek an order under the scheme if the facts do not justify the making of an order. Those who are asked to allow access would not refuse, and thereby risk having to pay costs, if they can see, or are advised, that the work is within the scheme and that they are being offered the protection which the scheme provides. The details of our recommended scheme (which, so far as possible, should enable parties to predict whether or not an order will be made) must be assessed in the light of this discussion of the factor of costs. Further, since it may appear to those who must consider these questions that the probable cost of the scheme as recommended may be substantial, there follows an examination in some detail of possible alternatives to the scheme which, though in our view less satisfactory, are nevertheless worthy of consideration.

(a) A statutory notice procedure

3.49 One possible addition to a discretionary scheme would be a statutory notice procedure. This would be designed to enable A to get B's consent to entry without A having to get a court order against B. A would give B a notice

(in a form prescribed by statute) explaining that he needed access and setting out the terms and conditions of that access. A statutory notice procedure would be complementary to the discretionary scheme and might, by increasing the chances of disputes over access being settled without recourse to the courts, eliminate the need for incurring major expense. We are particularly concerned with those situations (which the evidence shows are not infrequent) in which the work to be done is not extensive and does not need the involvement of surveyors, architects or lawyers. The minor works which we have mentioned as examples of those cited to us (repairing gutters, replacing tiles, etc.) should not have to become the subject of litigation if it can be avoided; resort to the court could only cause delay and make the work disproportionately expensive. The statutory notice is unlikely to help in cases involving major building operations where professional advice and assistance would anyhow be necessary. A statutory notice procedure would be particularly useful in inducing consent where B's refusal had been occasioned by his fear that A would abuse any licence granted informally. A could be required, if he were to take advantage of the procedure, to state clearly *in the form of a prescribed notice*: what he wanted to do; the nature and extent of the access he required; how he proposed to go about the work; his readiness to "make good" B's land and to pay compensation for any damage caused; and his acceptance of an obligation to "clear up". B's fears might be allayed by such a statement and he might thereby be induced to consent to A's request. Consent given (whether immediately or after negotiation over details) in pursuance of a statutory notice could be made to create mutual rights and obligations in the nature of those arising under a contractual licence, compliance with the terms of which would be enforceable by either party.

3.50 The possible usefulness of any statutory notice procedure has to be considered against the background revealed by the reponse to the working paper. From the evidence the Commission has received, it is plain that, in most cases, there is *no* dispute: a combination of good-neighbourliness and enlightened self-interest leads to B's granting access and to A's taking care to minimise any damage or inconvenience and undertaking to "make good", clear-up and pay compensation, etc. Where there *is* a dispute, it can usually, though not always, be resolved—sometimes only with the help of professional advice and intervention. Where, in a residue of cases, resolution of a dispute proves impracticable, the evidence shows that the reason is likely to be that:

(a) *B has an objection in principle* to any "stranger" coming on to his land; or

(b) *there is some measure of personal hostility* between A and B; or

(c) *B does not trust A:* if A is granted access, B fears that A will abuse his licence, by, e.g.:—

  (i) extending an allegedly minor "repair job" to a major building operation; or

  (ii) damaging B's property without either repairing it or paying compensation; or

  (iii) making a mess of B's property and not clearing it up.

3.51 The introduction of the proposed discretionary scheme might, in

itself, provide a further reason for B to refuse access to A, even in a simple case. An access order would be granted only on terms that A agreed certain safeguards for B. Once it became known that a statutory procedure offered greater protection to B than he would normally have if he merely gave A informal permission to enter to do the work, B could justifiably be deterred from agreeing a simple request by A. Naturally, it would be open to B, when faced with an informal request for access by A, to stipulate for the same conditions to protect his interests; and A could agree. That would make the conditions contractually binding. However, without professional advice or the help of some easily available standard procedure, like a statutory notice procedure, B would probably not know for what conditions to ask. Professional advice is open to the same objections as the unnecessary use of the discretionary scheme—apparent unneighbourliness and cost—and therefore a statutory notice procedure could have advantages.

3.52 It would be vain to suppose that any statutory notice procedure could always, or even often, affect B's objection in principle or his personal hostility towards A. However, one of the primary purposes of a statutory notice procedure should be seen as a simple and direct method of informing parties about their rights. We think it probable, although we have no evidence in support, that some refusals on the ground of personal hostility, or principle, stem from ignorance of the legal possibilities of placing strict limits on the rights of entry and obtaining safeguards. There are probably cases in which B, fully informed by a statutory notice and given a simple means of granting a strictly limited right of access, would accede to A's reasonable request when he would not otherwise have done so. In many other cases where B's refusal to accede to a reasonable request for access (and, for our present purposes, we assume that the request *is* reasonable) stems either from an objection founded on principle or from personal hostility, the most that any such procedure could achieve would be to bring it home to B that persistence in unreasonable refusal, followed by an application by A to the court under the discretionary scheme, might put B at risk over costs. To this extent, the purpose served would be analogous to that of a solicitor's "letter before action".

(i) *The effect of refusal*

3.53 It appeared to us clear that express refusal (including insistence on unacceptable conditions) on the part of B in response to a statutory notice must leave A with no recourse other than applying to the court under the discretionary scheme. In theory, the legislation could place on B the burden of applying to the court if, notwithstanding the service by A of a statutory notice, he wished to continue to refuse access. But such a provision would seem to us not only inconsistent with our recommendations (since we are not proposing anything in the nature of an appurtenant right of access) but also undesirable in practice, since it would put into the hands of a "pushing" and unscrupulous A a weapon he could use to intimidate B into allowing him access for purposes extending beyond the doing of genuinely "preservation" work. It therefore seemed to us inevitable that the statutory notice procedure we were contemplating must involve A's being thrown back on the discretionary scheme should his statutory notice evoke an express refusal from B.

(ii) *Deemed consent*

3.54 Express consent and express refusal on the part of B would cause no significant difficulties. Failure by B to make any response to a statutory notice might give rise to some difficulty. Such failure *could* be treated as tantamount to express refusal, a course which would avoid further complications. It would, however, destroy most of such effectiveness as the procedure might otherwise have, since (apart from the possible effect on costs should litigation ensue) there would be no inducement for B to pay any attention to the notice. We therefore concluded that, if a statutory notice procedure were to have any chance of achieving our object, and provided that it contained a clear statement of the consequences of any lack of response, it would be necessary to treat B's silence as his consent to access on the terms of the notice, with the same legal results as his express consent would have.

3.55 "Deemed" consent does, however, raise questions which would have to be answered. Among these are:—

(a) The work specified in the notice might extend beyond "preservation" work: would B be deemed to have consented to access for the purpose of the excess? The risk of this happening, and disputes arising about it, would be minimised by confining the procedure to items of work taking a very short time. Our example in the next paragraph suggests that access authorised under this procedure should be limited to works taking no more than two days.

(b) Would service of the notice have to be personal so that there could be certainty that it had come to B's attention? While provisions in statutes relating to property which provide that a notice served by post is to be effective without positive proof that the notice has reached the intended recipient are commonplace[29] and have been accepted for many years in cases of considerably greater economic significance to the landowner than would be the case here, we nevertheless feel that such provisions would unnecessarily complicate a statutory notice scheme, the main justification for which would be its informality and simplicity, and provoke arguments (and possibly litigation) as to whether a notice had or had not been properly served. Furthermore, such provisions might be regarded as unacceptable in principle because they could operate unfairly: for example, if, because A's notice is lost in—or delayed by—the post, B were to lose his right to object to A's entry. Accordingly, we answer our question by saying that notices would have to be served personally.[30]

(c) Would it be necessary to cover the possibility that the proposed work could not be completed in the time specified in the notice: would B's "consent" be deemed to include a reasonable extension of time? Or would A have to serve a fresh notice? The danger of underestimating the time needed for a particular job, and therefore the period of access required, will be common to both a discretionary scheme and a statutory notice procedure.

[29] For example, Law of Property Act 1925, s.196; Landlord and Tenant Act 1927, s.23.
[30] In the case of a company, however, it should be possible for a notice to be sent to the registered office by post (as an alternative to handing it there personally).

3.56 It has to be accepted that any deemed consent arrangements would occasionally result in B finding that he must permit access when he would have wanted to oppose it. This could happen as a result of failure in the authorised means of service, or of misunderstanding of the prescribed form. Such cases could give rise to disputes and bitterness which could have been avoided had there been no deemed consent rule. However, the seriousness of such a risk would be considerably reduced by confining the procedure to work which would take no longer than two days to complete. Whether that risk is acceptable is a matter of judgment: in reaching a conclusion, the public interest in the work being done[31] must be taken into account.

(iii) *A possible statutory notice procedure*

3.57 It will be helpful in judging whether there should be a statutory notice procedure to consider the possible form that one might take. We consider that one on the following lines would be practicable:—

(1) *Service of notice in a prescribed form*

A would start by serving on B a statutory notice which would—

(a) specify the work to be done and the access required for doing it, including dates and times; the nature of the equipment (e.g., ladders or scaffolding) to be brought on to B's land; the name of any builder to be employed;

(b) incorporate notes for B's information, e.g. stating A's obligation to make good, clear up and pay compensation for any damage caused by the access, and making clear the limitations on the work for which A could request access under the procedure;

(c) inform B that failure to respond would result in his being deemed to have consented to the entry.

(2) *Response by B*

(a) *Consent in writing*: with the effect that A would obtain an irrevocable licence to enter as proposed in the notice and incur an enforceable obligation to make good, etc. (It need make no difference to A's rights or obligations that the notice had specified work going beyond "preservation" as defined in the discretionary scheme);

(b) *Refusal in writing*: A would obtain no right and would be thrown back on the discretionary scheme;

(c) *Counter-proposals in writing*: these would constitute a refusal; but, if they led to an eventual agreement, would be the basis of a contractual licence governed by the general law, but incorporating the obligations on A which are the safeguards to B;

(d) *No written response within the time limit*: B would be deemed to have consented to access in the terms of the notice.

(3) *Limitations on the statutory notice procedure*

(a) *Minor repairs*. The procedure would not be suitable for other than minor works of repair. Since there can be no suitable definition, for

[31] Para. 3.15 above.

this purpose, of "minor" works, the desired result could best be achieved by imposing a maximum period (perhaps two days) for which a right of access by virtue of a notice would last.

(b) *Restrictions on access.* Any right of access by virtue of service of a statutory notice could be restricted to land not built over. Such a restriction would go far to safeguard the interests of B if, for any reason, he had failed to respond to the notice in time. This limit also makes clear that the procedure could never be used for such cases as a flat owner requiring access to a neighbouring flat, however minor and quick the work in question.

Appendix B contains an example of a statutory notice under such a procedure. The form would be divided into four parts: notes for A, the notice itself, notes for B, and a reply form which B could, but need not, use.

(iv) *Relationship with discretionary scheme*

3.58 A statutory notice procedure would not be a substitute for the discretionary scheme we propose. Nor would it add to the costs of, or time taken by, an application under the discretionary scheme, because the statutory notice procedure would not be a necessary preliminary to it. If A chose to use the notice procedure and was met by a refusal from B or a counter-proposal suggesting unacceptable conditions, he would have no alternative, if he still wished to do the work, but to use the discretionary scheme. In such a case, the time taken by, and the expense of, his use of the notice scheme would have been wasted, except perhaps in establishing that B had not acted reasonably. B would have been caused minimal additional trouble in sending a written refusal or counter-proposal. If A carefully considered in each case whether the use of the statutory notice procedure was appropriate, it seems likely that the wasted time and money would not be significant.

(v) *Conclusions*

3.59 We think a statutory procedure on these lines could be devised to "catch" most of the cases we are concerned with, namely minor, almost "Do It Yourself" repairs—though we recognise that many minor repairs are beyond the capability of an inexperienced amateur. We have, however, found it impossible to estimate the extent to which the addition of such a procedure to the discretionary scheme would achieve our object of keeping a significant number of small cases out of court. There are two related, though distinct, questions the answers to which we are unable to give:—

(i) what is likely to be the reaction of an "average B" to the receipt of a statutory notice; and

(ii) what would the resulting cost amount to?

3.60 The circumstances in which a statutory notice procedure might be used have to be borne in mind. If, rather than becoming routine in the vast majority of cases in which A required access, the present practice of informally approaching B for consent were to continue, the statutory notice procedure would only be used when A's informal approach had failed, B having refused any reasonable offer to make good, etc. The only advantage from B's point

of view would be that consent would fix A with an inescapable obligation to do what he had offered informally to do; but that obligation would, if A defaulted, be enforceable only by an action for breach of contract, the cost of which would be likely to exceed the amount involved. Whether any great number of Bs would be induced to grant (or acquiesce in) what they had previously refused must be doubtful. We have also borne in mind the possibility that a statutory notice procedure could, in some cases, lead to expenditure which would not otherwise have been incurred. For example, instead of acceding to a reasonable request for access B may, upon receipt of a statutory notice, seek professional legal advice, possibly at the public expense under the "Green Form Scheme". How many Bs would in practice do so, we cannot say; but the possibility has to be borne in mind.

3.61 After much consideration, we have reached the conclusion that the benefits of a statutory notice procedure are not sufficiently obvious to justify the expenditure of further time and resources in drafting legislation to provide for it. Nevertheless, we see no objection in principle to the introduction of a statutory notice procedure. And, if such a procedure's likely benefits in terms of enabling neighbours to reach agreement informally and thereby reducing the cost of the discretionary scheme are judged to be greater than we have concluded, we should welcome the introduction of such a procedure alongside the discretionary scheme.

(b) *A modified "notice" procedure*

3.62 An alternative and less complicated version of a statutory notice procedure would make no provision for "deemed" consent: if A did not receive actual consent he would have to apply to the court for an order. Service of the statutory notice would have no greater effect than that of an offer by A, containing the protective terms in favour of B which the scheme requires, with an official statement to B as to what sorts of work fall within the scheme, and a warning to B that failure to allow the access, where it is clearly reasonable for it to be ordered, would put him at risk as to costs. There could be provision in the legislation giving power to the Lord Chancellor to prescribe a form of notice and directing the court to have regard to the terms of any such notice served, and to the response of B to that notice, in exercising its discretion as to costs. It appears to us that the availability of suitable forms would be useful, and some of us hold the view that it would be better to make provision for them in the legislation, but, as we are not agreed upon this, the Bill does not contain such provision.

(c) *Conclusion*

3.63 Accordingly the draft Bill annexed to this report does not include any provisions for procedures to complement the discretionary scheme. It is likely that, if the scheme is put into operation, those experienced in these matters will devise simple and straightforward *pro forma* letters. Anyone contemplating application to the court under the scheme could, without having to seek professional assistance, use a suitable form letter as the basis of an effective "letter before action" in simple cases. The availability of such form letters would be a useful development.

PART IV

OUR RECOMMENDATIONS IN DETAIL

4.1 In this part of the report we discuss details of the discretionary scheme outlined in Part III. We shall consider in turn each element of the scheme, starting with the types of work to which the scheme is to extend. In the interests of brevity, we shall continue to refer to the person requiring access and the person whose permission he needs as, respectively, "A" and "B".

The work

4.2 We recommend that the types of work for which A should be entitled to seek a right of access under the scheme should be limited to "preservation work", that is to say, work intended to preserve A's property.[32] The work should be specified in every access order.

4.3 We accept that there is a case for widening the scope of the scheme so that access could be made available, not only for preservation work, but also for work involving no element of preserving existing property, such as improvements and alterations done for their own sake or land development generally. Since the right of access would not be automatic, but would arise only by order of a court, there is arguably less need to exclude any kind of work, so that, if A were a developer, he would benefit by being able to make full use of the land at his disposal; B, it can be argued, would be protected by the power of the court to refuse the application or to grant it subject to conditions, including conditions as to compensation.[33]

4.4 In our working paper[34] we gave our reasons for preferring that the scheme be restricted to preservation work. Our main reason was that the complaints that had given rise to our remit related solely to preservation work. To extend the scheme further would be to propose a remedy that was wider than the ill which it was designed to cure. We also pointed out that preservation work could be distinguished from other work in a number of respects. First, the spirit of good neighbourliness would normally allow access for preservation work more readily than for other work, such as extension building. Secondly, the access scheme that we proposed depended on the relevant work being reasonably necessary. While many categories of works may be described as "reasonably necessary", the necessity in the case of preservation work relates to protecting and maintaining existing property, whereas in other cases the only "necessity" is one for making changes to, and thereby enhancing the value of, that property.

4.5 Most of those responding to our working paper agreed that the right of access should extend only to preservation work. They pointed out that, since any right of access afforded to A tends to derogate from B's rights of

[32] We talk in terms of "A's" property for convenience only. It is not necessary for him to own any interest in the property which he seeks to preserve: see paras, 4.65–4.67 below. Nor, for that matter, need B own any interest in the property to which access is sought: see para. 4.73 below.
[33] Paras. 4.48–4.59 below.
[34] Para. 5.3.

ownership and to be burdensome to him, it should be restricted to the purpose of enabling A to do that which is necessary to avoid his suffering disproportionate harm. And, while some favoured an extension of the scheme to include building works generally,[35] these views were very much in a minority.

4.6 We accordingly remain of the view that access under the scheme should extend only to the carrying out of preservation work and we recommend later in this report[36] that the carrying out of the preservation work in question must be reasonably necessary if a right of access is to be made available under the scheme.

4.7 We think that "preservation work" should include any work that is reasonably required to preserve A's property.[37] In relation to structures,[38] it should include the inspection,[39] decoration, cleaning, care, maintenance and repair of any building, fence, wall or other thing constructed on or under the land, including the strengthening of foundations, damp-proofing and the making good of lost support or shelter. This would cover the type of work for which access is, in practice, most often required.[40] But preservation work may, on occasions, fairly include some work of improvement and alteration, and even of demolition and rebuilding. It is to these matters that we now turn.

(a) Improvements and alterations

4.8 We do not think that the access scheme should extend to improvements and alterations done for their own sake, since they would not be reasonably necessary for the preservation of land, whereas access under the scheme would be limited to cases where the works were so necessary. On the other hand, we see no reason why the scheme should exclude improvements and alterations which are merely incidental to necessary preservation work. For example, if a window has to be replaced, it should be permissible to replace it with a better one: apart from anything else, an improvement of this sort may reduce the need for access in the future. We suggested in our working paper[41] that such improvements and alterations should be treated as "preservation work" and this was generally accepted by those who wrote to us.

[35] One reason given for this was that property development is in the public interest, and that control over its nature and extent is a matter for planning authorities.
[36] Para. 4.104 below.
[37] By "preserve", we intend its ordinary meaning of keeping safe (from harm, decay, etc.); keeping alive; maintaining a state of things; retaining a quality or condition, etc. And by "property" we mean any type of property (whether real or personal) capable of benefiting from preservation work. Thus it includes the land itself, any building or structure on or under it, growing things, etc.
[38] In relation to other property, see para. 4.12 below.
[39] This is necessary to provide for the case where B not only refuses access for the execution of the work, but also will not afford A access for the purpose of ascertaining whether there is any work that needs executing and, if so, the extent of the work necessary to put things right. Access would also be available for the making of plans in connection with preservation work.
[40] This could even include the case where access was required by an A who had purchased the property knowing it to be in a state of disrepair.
[41] Para. 5.5.

(b) Demolition and rebuilding

4.9 Another matter raised in our working paper[42] was whether the work for which access under our scheme should be available might include demolition and rebuilding. An example might occur where a building had become altogether unsafe or had deteriorated (perhaps because access had not previously been available) to a point at which rebuilding was the only course practicable. Such access would not be required in order to *preserve* the particular building that was to be demolished. It would, however, facilitate the doing of the next best thing—putting the structure in at least the state of repair that could have been achieved had it been practicable to use the right of access to preserve the old building.

4.10 Most of those who wrote to us about this point agreed that access for demolition should be covered by our scheme; the point was made that demolition is often an essential element of repair. There was less argument as to the rebuilding of a structure following its demolition. Some people were concerned that a right to rebuild could amount to a "developers' charter", or to a means whereby A could secure the construction of a building that would permanently damage B's enjoyment of his own property. The point was also made that, once a building had been demolished under a right of access given by the scheme, no further right of access should be available to assist in its rebuilding, since the new building should be designed without the need for access.

4.11 In the result we recommend that the works for which access should be available under our scheme should include the total or partial demolition of a structure. This is justifiable, not merely in the interests of removing unsafe buildings, but also because preservation work must at times involve an element of demolition, perhaps no more than removing a rusted gutter.[43] Although we are conscious of the arguments against using the scheme for rebuilding structures following their demolition, it is clear that it must cover some rebuilding following demolition because, in the same way as preservation work must sometimes involve demolition of gutters, roofs, etc., it must equally involve their repair or replacement. We therefore recommend that the scheme should permit access for rebuilding or replacement work following demolition, but only if the work involved would amount to preservation work. Accordingly, access under the scheme for the rebuilding of a house or other building following its total demolition would not normally be authorised, since it would be unlikely to amount to preservation work. The purpose of making this distinction is to prevent the scheme being used for major building works that are to be carried out, not in the interests of preservation, but merely in order to develop a site.

(c) Non-structures

4.12 Preservation work is normally related to structures. But it is clear from comments of those who responded to the working paper that access

[42] Para. 5.5.

[43] If the work for which access is required involves demolition, planning consent for the demolition itself may sometimes be necessary: *North Norfolk District Council* v. *Long* (1982) 267 E.G. 251 (C.A.).

rights are also needed in connection with other property. The example most often mentioned in these comments is the dangerous tree which, while growing on A's land, cannot be lopped or removed without access to B's land. Other examples are the hedge that needs clipping and the ditch, drain or sewer that needs unblocking. The sort of preservation work for which access to non-structures would be available would be similar to that applicable to structures, so that access could, for example, be made available for the removal of a hedge and the planting of a replacement.[44] Since any of these operations may be required to preserve A's land, we recommend that the scheme should apply to non-structures as well as to structures.

(d) Ancillary

4.13 We suggested in our working paper[45] that the right of access, if granted by the court, should be capable of extending to anyone reasonably assisting A in connection with the work. It would, for example, enable his contractors to enter B's land. We also suggested that the right of access should include a right, while the work was going on, to place on B's land any materials and equipment needed in the course of the work, as well as anything emanating from the work—for example, rubble from a wall which is demolished or branches from a tree which is felled. Our suggestions were confirmed by the consultation; we therefore recommend that a right of access should, unless the court directs otherwise, include these ancillary rights.

The property to be entered

4.14 We recommend that our scheme should in general permit entry to any neighbouring land whether it is to the side of, or above, or below, the land of A. By "land" we mean anything within the general meaning of land,[46] including structures which in law form part of the land and the airspace above the ground.[47] It would make no difference whether or not the land was residential. And by "neighbouring" we mean any land access to which is required by A in order to carry out the work. It need not be contiguous with any part of A's land: for example, there may be a strip of land adjoining his land which is so narrow that it is insufficient to enable him to put up scaffolding, with the result that he requires access not only to that strip but to the adjoining land as well.

4.15 This recommendation broadly follows the provisional conclusion that we reached in the working paper,[48] which was generally supported by those writing to us in response. Most accepted that, if the scheme was to achieve its object, it must permit access to land of all descriptions including gardens, yards and buildings occupied for residential or other purposes.

[44] So far as growing things are concerned, the preservation work we have in mind would include the inspection, pruning (including root pruning), lopping, cutting back, care and treatment of those things; and their removal, felling, grubbing-up and replacement.
[45] Para. 5.7.
[46] Interpretation Act 1978, Sched. 1.
[47] Thus, so long as preservation work was involved, the scheme could enable the jib of A's crane to swing through B's airspace. Such an action would otherwise be a trespass unless B consented: *Woollerton and Wilson Ltd.* v. *Richard Costain Ltd.* [1970] 1 W.L.R. 411 (Ch. D.).
[48] Para. 5.9.

4.16 The provisional view expressed in the working paper[49] was that there should be no exceptions excluding from the scheme land of *any* description. The argument was that, because the scheme would be discretionary, there would be no need for any such exclusion: the court would consider each case on its merits and would refuse an order in those cases in which refusal was justified. This view was challenged during the course of the consultation. Some, while accepting the principle that the scheme should apply to land generally, thought that there should nevertheless be exceptions. This was usually either because of the nature of the land (or the use to which it was put), or because it would be unjust for the scheme to apply in particular circumstances. In the result, we accept that limited exceptions from the scheme are justified in some of the cases discussed below.

(a) The Crown

4.17 We are not recommending that our scheme should bind the Crown as a respondent. We have two main reasons. The first is the absence of need. At no point in the consultation, or in the cases referred to us, has there been evidence of the Crown, in its capacity as occupier of land, unreasonably refusing access. The second reason is the position of the Crown in its capacity as occupier. Examples of land occupied by the Crown include the offices of government departments, defence establishments, research stations and prisons. It is admittedly unlikely that the court would, even if it had the power to do so, authorise access to such places against the wishes of the Crown; but the Crown might not always be free to explain fully its reason for objecting and we think it better for the Crown not to be put under any pressure to do so. Accordingly, whilst we would prefer to make no exceptions, we nevertheless recommend that our access scheme should not authorise the making of an access order against the Crown. We doubt whether this exclusion will detract from the working of the scheme in any way. However, this exclusion should be reviewed if, in the light of experience, this proves desirable.[50]

(b) The highway

4.18 We recommend that our scheme should not afford access to any neighbouring land that is the highway.[51] We say this, not because of any policy reasons for excluding the highway, but simply because the existing law already provides adequate means whereby owners of property abutting on the highway can gain access to it for the purpose of repairing or maintaining

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[49] Para. 5.9.

[50] The exclusion should be as limited as possible. Thus it should only apply in cases where the Crown would otherwise be the respondent in an access application. For example, the Crown in its capacity as applicant would be bound by the terms and conditions of an access order. And there would in principle be no exclusion in a case where the land, although owned by the Crown, was not occupied by or on behalf of the Crown. It may be noted that the London Building Acts (Amendment) Act 1939 to which we referred in paras. 3.37–3.39 above do not bind the Crown either: s.151 of the 1939 Act. Whether the exclusion should apply equally to the Crown acting in the right of the Duchies of Lancaster and Cornwall is a matter upon which consultation may appropriately be carried out after the submission of this report.

[51] The highway is any way over which there exists a public right of passage; that is to say, a right for all Her Majesty's subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance: *ex parte Lewis* (1888) 21 Q.B.D. 191. It includes all public roads, pavements and footpaths. See also Highways Act 1980, s.328(1).

that property.[52] It is true that a case can be made out for including the highway in our scheme. For example, the scheme is specifically geared to access requirements, whereas the existing law deals with public rights over the highway in a more general manner. On the other hand, the existing law appears to work satisfactorily in practice. People needing access to the highway to carry out works to their own property are, so far as the evidence shows, able to get it. And it would be difficult to include the highway in our scheme without duplicating, or creating conflict with, the existing law. So we recommend that the highway be excluded from our scheme.

(c) Agricultural land

4.19 A number of those responding to the working paper suggested that our scheme should not afford access to land that was used for agricultural purposes. Their argument was partly that there was no need for the scheme to apply to agricultural land, because no need for access would in practice arise. They also mentioned the risks inherent in applicants being given access; these included the risk of their spreading diseases like foot and mouth and of their sustaining personal injury while carrying out the work.

4.20 Our recommendation, however, is that no exception should be made for agricultural land. Apart from the difficulty of defining such land, there seems to us no reason for affording it special treatment. To the extent that most agricultural land is isolated from other property, there can be no harm in the scheme applying to it; and to the extent that agricultural land is not isolated, it will be positively desirable that the scheme should apply. Agricultural land has to stop somewhere and we have seen from our consultation that there may be a need for access to repair property built near the edge of a farmer's field.[53] As for the risks of disease and personal injury, these are matters which can properly be left to the court's discretion: they may constitute a reason for refusing access altogether, or for allowing it subject to conditions. Similar considerations apply to land of other descriptions.

(d) Boundary building

4.21 Many of those responding to the working paper argued that there should be no right of access to repair a building which A had deliberately—often against B's wishes—erected close to his boundary. In such a case, A had only himself to blame for his predicament and it would be adding insult to injury to allow him to extricate himself by entering B's land against his will. Accordingly, many people felt that, in a case of what may conveniently be called "boundary building", the proposed right of access should be wholly excluded or, at least, severely restricted.

4.22 Not surprisingly, the comments we received on this issue tended to come, not from As, but from Bs. Nevertheless, there are some powerful arguments on A's side. In the first place, boundary building is as lawful as

[52] See *Harper* v. *Haden & Sons Ltd.* [1933] Ch. 298 (CA). The common law rights of frontagers are to some extent now subject to the provisions of the Highways Act 1980, Part IX, so that, for example, the consent of a highway authority will be necessary before scaffolding can be erected on the highway: s.169.

[53] We were told of a case involving a barn which, built on the boundary of a farmer's field, collapsed because its owner had been unable to gain access to repair it.

building anywhere else, provided that all necessary planning consents are obtained,[54] and, in some areas where land is in short supply, planning policy may positively encourage boundary building. Secondly, A may not have been personally responsible for the boundary building, which is likely to have been erected by a predecessor. Thirdly, the proximity of the building to the boundary may have arisen, not through the building having been constructed close to the boundary, but through the boundary being positioned next to a building that was already in existence. So B (or *his* predecessor) may be at least partly to blame for the boundary building problem, if he as original owner of the building in question sold it to A (or *his* predecessor) with a boundary close by. Fourthly, the passage of time may have led to difficulties which before either did not exist or were not apparent. This can be true, not only of the case where good neighbourliness ceases to exist,[55] but also where a tree or hedge, originally planted well inside the boundary, grows up to the boundary and spreads over into B's land.

4.23 We do not think that there is any way that this issue can be resolved to everyone's satisfaction. Plainly, the scheme cannot altogether exclude access for repairing and maintaining boundary buildings, since the principal need for the scheme relates to buildings that are in want of repair precisely because they are on, or very close to, the boundary. It might be possible for the scheme to strike some sort of compromise whereby access was allowed only in respect of boundary buildings erected before the scheme came into effect; or whereby no access would be available until a given period after the erection. But such compromises, based as they would be on a concept of blameworthiness, would serve to complicate the scheme without providing any comprehensive solution to the problem with which this report is concerned. Unless the defects inherent in the present law are to be perpetuated, either rights of access must be available to repair boundary buildings, or else landowners must be prevented from building too close to boundaries. Each of these alternatives is liable to be controversial. The former option is the subject of the present criticism: the latter option would be the subject of future criticism, involving as it does no solution for existing buildings and being impracticable[56] for future buildings in densely populated areas. In any event, boundary building is often necessary in the interests of proper land use. Whether or not a particular boundary building should be permitted is a question to be governed by planning law.

4.24 Our conclusion is that there is no justification for the scheme containing any special provisions restricting A's right to obtain an access order merely because the access was needed to repair or maintain a boundary building. Whether access is authorised under our scheme should be a matter to be resolved by factors such as A showing that he needs the access to preserve his land and B showing that such access will cause him hardship. Whether B considers that a building should or should not have been

[54] Indeed Part VI of the London Building Acts (Amendment) Act 1939 contains provisions expressly designed to enable one landowner to build up to, or on, the boundary line between his land and that of his neighbour: paras. 3.37–3.39 above.

[55] Perhaps through a change of neighbours.

[56] Some buildings by their very nature involve boundary building—for example, flats and terraced accommodation.

constructed on a particular part of A's land is not, in our view, a reason for denying A access to maintain it.

(e) Sterilisation of land

4.25 A number of those responding to the working paper were worried that, by making available a right of access over B's land, our scheme would tend to have the effect of "sterilising" that land, or at least the part of it closest to the boundary: if there is a right to enter B's land, B may be unwise to use that land for any purpose inconsistent with the exercise of the right. As adding to their cause for concern, a number of people referred to the provisional conclusion reached in our working paper[57] that the court should have power to authorise the demolition or removal of anything on B's land that stood in the way of access. It would be particularly galling for B if access ordered by the court for the purpose of repairing a boundary building involved A's being authorised to demolish a structure on B's land, notwithstanding full provision of compensation and reinstatement. On these grounds it was argued by some that access under the scheme should not extend to any neighbouring land where the access would be impeded or blocked by something already on that land.

4.26 The possibility of sterilisation is, in the eyes of those who have advanced this argument, a serious defect in the proposal. The fears expressed appear to us, in the main, to be unjustified. Although the possibility of an access order being made at a future date might inhibit some particular user of land near the boundary, under the proposed scheme B could ask the court to refuse to make the access order or only to make it subject to conditions. We accordingly think that there is no risk of any serious "sterilisation" of land.

Conditions of access

4.27 We now turn to the important matter of the conditions on which the court may order access. It is the possibility of tailoring these conditions to meet the circumstances of each case that provides one of the main advantages of a discretionary scheme. And, since the conditions are primarily designed to protect B's interests and, so far as possible, to meet any reasonable objections that he may have, the court's power to impose them should reassure those who expressed misgivings over the creation of any general right of access.

General power to make conditions

4.28 In our working paper we provisionally concluded[58] that the court should have a general power to impose conditions on the making of any access order, with a view to minimising B's inconvenience and loss of privacy; to reducing security risks and the risks of financial loss or of physical damage or personal injury; to ensuring that the work was done properly and quickly; and to awarding compensation if appropriate. There was general agreement among those who wrote to us that the court should have such a power and

[57] Para. 5.10.
[58] Para. 5.14.

we so recommend, though we propose that the generality of the power should be so expressed as to restrict its exercise to the objectives mentioned above; and the power should be exercisable only in so far as the need to achieve those objectives arises from the exercise of the entry made possible by the access order. The "conditions" we have in mind fall into three categories:—

(a) those which, unless expressly excluded by the terms of the order, impose certain obligations on the party concerned;

(b) those which are essential features of any access order, but which must nevertheless be expressly stated because their precise terms will vary from case to case; and

(c) those which will attach only if expressly imposed by the court at the request of a party.

4.29 We gave examples in our working paper[59] of conditions that the court should be able to impose in the exercise of its general power. They were generally supported by the consultation and we discuss them in the following paragraphs. Subject to some changes that we have thought desirable in the light of the consultation and in the interests of simplicity, we recommend that most of these conditions should be specifically referred to in the legislation implementing the scheme. It is to be noted that, while the purpose of our scheme is to authorise access and not the doing of the work itself, it is impossible to draw for all purposes a firm line between the work and the access, because the court, in deciding whether to grant the access, must consider the nature and extent of the work. Accordingly, the proposed conditions relate to the work as well as to the access.

(a) Making good

4.30 This condition is that the property entered should, so far as is reasonably practicable, be fully reinstated and any damage made good, before the expiry of A's right to enter the property.

4.31 In our working paper[60] we suggested that this should be an automatic condition which would attach in every case unless expressly excluded. Although there may be occasions on which "making good", in the sense of restoring the land to its previous state, will be either undesirable or impracticable, we are satisfied that our provisional conclusion was right, though it would, perhaps, be more accurate to describe what is envisaged as an obligation imposed on A by virtue of an access order, unless expressly excluded by that order. We recommend that there should be such an obligation.

(b) Commencement, duration, hours of work, etc.

4.32 This condition would relate to the timing of the entry and the work. For example, it could state the date of entry or dates between which entry was permitted, or that the work should be completed within a specified period, or that it should take place only during specified hours of the day, or on specified days of the week.

[59] Paras. 5.12–5.15.
[60] Para. 5.12.

4.33 This condition was referred to in the working paper.[61] A number of those responding made the point that while the court should have power to make it a condition that the work should be completed within a specified period, that power should be exercised carefully, since the duration of building work tends to be difficult to forecast and it would be undesirable for unrealistic time limits to be set. No doubt, the court can be expected to take this point into account when fixing a time limit.

4.34 This "condition" so far as it relates to the date of entry or the dates between which entry is permitted will evidently form an essential feature of any access order, though the precise terms will have to be spelled out in each order. Less essential is the timing of the work itself, so a condition as to the days on which or the hours between which, the work is to be carried out would be imposed only at the request of a party.

(c) Method of work

4.35 This condition relates to the possibility of the work being carried out in more ways than one. In such a case, it should be possible for a condition to be imposed that the work be done in a particular way.

4.36 This condition was proposed in the working paper[62] and was generally accepted, though there should rarely be any need for it to be imposed. It could be argued that how the *work* is done is no business of B and that his only concern is how the *access* is exercised. But the two cannot be treated as entirely independent of each other. Not only may one method of work involve more interference than would another with B's use of his land, but also the likelihood of access being needed at a future date may depend in part on how the work is done in the first place. But we do not think that, in this context, the method of work should include "aesthetics", such as the colour of paint to be used. B may dislike A's choice; but that choice should not affect the reasonableness of access.

4.37 The point was made in consultation that only an "expert" tribunal (comprised perhaps of surveyors) is capable of judging between alternative methods of working. It seems to us, however, that where such an issue arises, the court would, when necessary, have the benefit of expert evidence in arriving at its decision.

(d) Limits of access

4.38 This condition would be that access is to be allowed only to a limited and specified area of B's property and that no one engaged on the work should go beyond this area (except, perhaps, for specified and limited purposes).

4.39 This again is as proposed in the working paper,[63] general support having been expressed for it in the consultation. It is clearly an essential element in any access order.

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[61] Para. 5.14 (a).
[62] Para. 5.14 (b).
[63] Para. 5.14 (c).

(e) Precautions and safeguards

4.40 This condition relates to the prescribing of precautions and safeguards designed to eliminate or reduce the risk of damage[64] or injury, or to take account of security risks. It could provide for the taking out of insurance cover, including cover against third party claims.

4.41 In the working paper we did not refer specifically under this heading[65] to insurance cover. A number of those responding, however, stressed the need on occasions for A to take out, or pay for, insurance to cover injury or other damage suffered as a result of any act or omission on his part or that of his workmen, whether by B himself of by a third party (including any injury for which B might be liable as an occupier of the land). We accordingly propose that the power to impose conditions should include the taking out of insurance for those purposes.

(f) Neighbour's supervision of work

4.42 This condition would be that the work (or certain aspects of it) should be done under the supervision, and perhaps to the reasonable satisfaction, of B or of his surveyor or architect. The choice of contractor to carry out the work could also be subject to the approval of B (or such other person).

4.43 The working paper[66] elicited little comment on this condition. It is probably only in cases involving major building works that it would be thought necessary or reasonable to impose such a condition since, in the case of a minor repair, B is not likely to have a sufficient interest to justify its imposition. There could, however, be exceptional circumstances in which he had good reason for wishing to exercise a measure of supervision and we think the court's powers should be wide enough for that purpose. We had, for example, put to us in the consultation the case where the use to which B's land was put was such that it would be impracticable, or unsafe, for any right of access to be exercised, or any work done otherwise than under his supervision.[67]

(g) Reimbursement of fees and expenses

4.44 This condition as set out in the working paper[68] would be that A should pay the fees of any surveyor, architect, solicitor or other adviser reasonably employed by B in connection with the access application.

4.45 The working paper again attracted little comment on this condition. We see no reason why, in simple cases, B should incur such costs, or it be thought reasonable for him to have done so; but the condition should be available and should cover reimbursement not only of professional fees but also of any other expenses reasonably incurred by B. The question of costs generally is discussed later.[69]

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[64] Such a condition could be used to cover the risk that entry of strangers on agricultural land might spread disease: see paras. 4.19 and 4.20 above.

[65] Para. 5.14 (d).

[66] Para. 5.14 (e).

[67] See paras. 4.60 and 4.61 below.

[68] Para. 5.14 (f).

[69] Paras. 4.113–4.118 below.

(h) Giving security

4.46 This condition would require A to give security, before the work began, for any moneys that might become payable by him in connection with the access. Such moneys would include the likely cost of making good, compensation, fees and costs (in so far as any of these were not payable beforehand). A might alternatively be required to pay such moneys into court. This condition could also be used to require A to insure against loss sustained by B in consequence of the access;[70] and security could be required in an appropriate case to cover the possibility of A's abusing the right of access.

4.47 Our provisional conclusions reached in the working paper[71] on this issue were generally agreed. The suggestions as to payment into court and as to insurance were raised on the consultation; we agree that they should be covered by the court's general power to impose conditions.

(j) Compensation

4.48 This condition, as proposed in the working paper,[72] would require A to pay compensation (to be assessed in the same way as damages for tort) for any physical damage, financial loss, or actual nuisance or inconvenience suffered as a result of the access. No compensation would, however, be available for mere access.

4.49 This condition was generally approved by those who wrote to us in response. Indeed, the need for adequate compensation was emphasised by many people; the importance and complexity of this topic requires separate discussion of the various possible heads of compensation.

(i) *Compensation for physical damage*

4.50 Nobody who responded to the working paper disagreed with the proposition that compensation should be payable for physical damage to B's property (as distinct from consequential financial loss) caused by the exercise of a right of access under an order. We find it difficult to envisage any circumstances in which it would be right for such compensation not to be payable, and we therefore recommend that the making of an order should carry with it an obligation to pay compensation for physical damage unless such an obligation is expressly excluded.

(ii) *Compensation for financial damage*

4.51 The provisional view expressed in the working paper was that there should be compensation for financial damage caused not only by the *access* but also by the *work* (eg, loss of trade that could not be carried on while it was in progress or any resulting fall in the value of B's property). Although those who expressed views on the point were in general in agreement with this recommendation, on reflection we think it goes too far. That compensation should be payable for financial loss caused by the exercise of the *right of*

[70] See paras. 4.40 and 4.41 above where, under a different heading, we recommend the use of insurance to protect B's position.

[71] Para. 5.14 (h).

[72] Para. 5.14 (g) and 5.15.

access seems to us plainly right, since it stems directly from an act of interference with B's free use of his own land. But loss stemming from work done on A's land is in a different category. There is no right to claim compensation for loss caused by building work being done on adjacent land unless the doing of that work amounts to a common-law nuisance. We do not see why, in principle, it should make any difference that the work is done in pursuance of an access order. Equally, if a change to X's house, which X is entitled to make, causes Y's house to depreciate in value, Y has no remedy at common law; again, we see no reason why it should make any difference that the alteration has been made in pursuance of an access order. Our conclusion on this issue is that financial loss caused by *exercise of the right of access* should be a possible subject of compensation. We do not, however, think that A should have to pay compensation under this head unless the order contains an express condition to that effect; to make it an "automatic" condition, which would attach unless expressly excluded, would in our view raise in A's path an obstacle which would, more often than not, be unrealistic and which might, since the financial loss could be "open-ended", deter him from pursuing an entirely reasonable application. However, compensation for financial damage stemming from the *doing of the work* should not be recoverable in the access proceedings: any claim for such compensation should be enforceable, if at all, under the general law.

(iii) *Compensation for nuisance and inconvenience*

4.52 In the working paper we expressed our provisional view that the court should be able to make it a condition that compensation would be payable for actual, not merely trivial, nuisance or inconvenience. Although general agreement with this view was expressed in the consultation, it requires re-consideration partly, though not entirely, in the light of the major modifications to our original proposals that we now recommend. In its popular sense, "nuisance" means much the same as "inconvenience" and connotes that which is tiresome, though not intolerable. Used in that sense, we treat "nuisance" as being neither more nor less than "inconvenience". But "nuisance" also has a technical meaning, being an actionable tort which consists in the doing on one's land of something which interferes substantially with the enjoyment by a neighbour of his land.

4.53 In the context of our original proposals, it was logical that any "nuisance" (in this tortious sense) caused by the doing of the work should be capable of being made the subject of a condition for compensation, because, under that proposal, the parties' (and others') rights at common law would have been to some extent superseded by an access order. For the reasons explained below, we do not now recommend that an access order should have so wide an effect. It is, therefore, not necessary for it to affect (with one technical exception, mentioned below) any right to claim damages for a tortious "nuisance". It may be that, in practice, the execution of any work in accordance with conditions imposed by a court would be unlikely to cause such a "nuisance"; but it is not impossible, and we see no reason why B, or anyone else, should not be able to rely on his rights at common law—though he might well find that an application to vary the terms of the order would be more effective. We do not, therefore, recommend that the court's power

to impose conditions should include a power to award compensation for a tortious "nuisance".

4.54 Inconvenience (including "nuisance" in the popular sense) raises a different issue. There is no general right to claim compensation for inconvenience caused by the act of another person and our conclusion is that the scheme should *not* permit compensation to be recovered for inconvenience, whether that inconvenience stems from the exercise of a right of access granted by the court or from the doing of the relevant work. We have two reasons: inconvenience is usually difficult, and sometimes impossible, to measure in terms of money. We do not think that it would be to the advantage of anyone if the scheme were to encourage arguments on questions of *quantum*. Secondly, and more importantly, a scheme that is over-solicitous towards B will fail to achieve our object, because it will encourage B to ask for more than he reasonably needs. A measure of inconvenience is something which must simply be endured. Should the likely inconvenience appear intolerable, that would be a ground on which the order might be refused. We appreciate that it may, at times, be difficult to draw a clear line between the mitigation of inconvenience and financial loss; but that is a line which can and, we think, should be drawn. Accordingly, we do not recommend that payment of compensation for inconvenience should be a permissible condition for the making of an access order.

(iv) *No compensation for mere access*

4.55 We provisionally concluded in the working paper[73] that no compensation should be payable merely because access has been granted.

4.56 The consultation revealed a marked difference of opinion on this issue. Those in favour of compensation being paid for mere access argued that the grant of access must constitute some derogation from B's rights for which he ought to get some payment. Furthermore, since A would be getting from B something of value to A which B did not want to part with, why should A not pay for it? Those against compensation for mere access (who were in the majority) argued that compensation should be designed to recompense B for actual loss. So, if there was no actual loss, why should compensation be paid? They also made the point that expectation of an award from the court for mere access would encourage B to be obstinate, so that more requests for access would be refused as a matter of course.

4.57 Our recommendation is that compensation for mere access should not be payable. First, if such compensation were to be payable, there would arise the question of how it should be assessed. We do not see how the court could be assisted in in reaching a figure, unless, perhaps it were to be a fixed amount for every day the work was in progress. We think that resolution of such issues would serve only to complicate the scheme, to no great benefit. Secondly, we find convincing the argument that compensation should reflect only loss and damage suffered as a result of the access. Moreover, a right to compensation for mere access could encourage "holding out" in the hope of

[73] Para. 5.15 (i).

getting more from the court than A was prepared to offer. On both grounds, we think that no such compensation should be payable.

(v) *Compensation based on benefit to applicant?*

4.58 A number of those responding to the working paper argued that the court should, when considering questions of compensation, take account of the enhanced value of A's property arising from the access. This argument is based on the proposition that, but for the access scheme which we are proposing, any A who wanted access badly enough would be prepared to pay for it and the amount he would offer would depend, in part at least, upon what the access was worth to him in terms of increasing the value of his property.

4.59 We do not recommend the payment of compensation on this basis. For one thing, it might be difficult to assess the increase in value that was attributable to the access. For another, compensation payable under our scheme is designed to prevent B sustaining loss caused by the exercise of any right of access, not to reduce the benefit to A of being able to repair his property. In no sense could B's loss be measured by A's gain.

(k) Access involves danger of special difficulties

4.60 In some circumstances, B will be unwilling to allow free access to his land because the land is used for some purpose or operation such that the access would expose A to a substantial risk of injury or cause substantial interference with that purpose or operation. An example is access to land used by British Rail. Free access to such land could involve risks both for A and for railway equipment and could result in loss and inconvenience if train services had to be delayed or suspended while the work was being carried out.

4.61 We anticipate that most such cases will be resolved, without the need for access proceedings, by agreement that the work will be carried out either by B himself at A's expense or by A under B's supervision. If, however, an agreement of this sort cannot be reached and access proceedings are brought, the court will be able to attach to the access order (if it decides to make one) any conditions it considers reasonably necessary to reduce the risk of injury and of loss resulting from any interference with B's operations. For example, access might be allowed only on condition that the work is carried out under B's supervision; or that B is compensated for loss incurred by reason of operations being suspended during the period of access.

The nature of the right of access

4.62 Having discussed the type of work to be covered by the proposed scheme, the property to which, and the conditions on which, access is to be permitted, we have covered its essential ingredients. The remainder of this report is concerned with the obtaining and enforcement of a right of access. First, we need to analyse the nature of the right of access to be granted by the court.

A "one-off" right

4.63 In our working paper we considered[74] whether the right of access should be a permanent right or one which arose merely for the purpose of carrying out one particular project, the details of which had been settled in advance. Our provisional conclusion was that it should be the latter—that is, a "one-off" right—so that A, who at a later date needed access to the same neighbouring land, would have to apply again, even if the work for which access was required was on both occasions similar. We accepted that it might in some cases be convenient for the right to be more permanent so that, for example, it might enable A to have access to redecorate the exterior of his house, on certain conditions, every third year. We noted, however, that a permanent right such as this would amount in effect to something in the nature of an easement[75] and would be inconsistent with the discretionary scheme that we are proposing, in that it would take no account of changes in circumstances.

4.64 Our provisional conclusion that the right of access should be "one-off" rather than permanent was strongly supported on consultation. Much of the support that our working paper received was on the basis that the right of access would not be permanent or automatic, but would arise only by order of a court and be subject to such conditions as were necessary to protect B's interests. Anything going beyond that (as would a permanent right) would be strongly opposed; nor, in our view, is it required. If an access order has been made in the past, and circumstances have not changed, B will realise that an application for access made to the court in the future for the same purpose and on the same terms is likely to succeed. In such a situation, he is likely to grant access voluntarily without being subjected to a further access order. We accordingly recommend that the right of access should be on a "one-off" basis.

The applicant

4.65 In the working paper we provisionally concluded[76] that the class of persons entitled to apply for access under the scheme should comprise anyone in occupation of the land and anyone else with a legal estate in the land. We deliberately made this class wide because the class of persons capable of benefiting from a right of access was wide. It included people who occupied without having any legal interest and people who had a legal interest but did not occupy,[77] as well as those who were occupiers with such an interest. Anyone in the class might reasonably be concerned to ensure that even trivial works, such as repairing gutters, were attended to without undue delay.

4.66 There was general agreement with this approach amongst those who wrote to us. It was felt that the class of potential applicants should be as wide as possible. Indeed it was suggested by some people that the class as originally drawn was not wide enough and a number of additional categories were

[74] Paras. 5.17–5.19.
[75] And questions of a technical nature might arise. For example, would the permanent right bind all those with interests in the neighbouring land, and their successors?
[76] Para. 5.20.
[77] Principally landlords.

suggested: these included the beneficiary under a continuing trust, the purchaser of A's land pending completion, and A's agent,[78] receiver[79] and trustee in bankruptcy. The need to add to the class led one of those who commented[80] to question the need to place any limit on the category of potential applicants.

4.67 While we think that some of these additional categories suggested were already covered by our provisional proposals, we are persuaded that the class of applicant should be unrestricted and we think that anyone who wants to should be able to apply for a right of access. We have two main reasons for reaching this conclusion. The first is that an open class of applicant will help simplify the access scheme as a whole. The class proposed in the working paper was, it is true, reasonably simply drawn,[81] but it would not have remained simple had it been necessary to add the categories suggested. With an unrestricted class of applicant, the scheme achieves greater simplicity for anyone minded to apply, with no loss of protection for his neighbour. Secondly, an open class would be unlikely to do any harm. The only persons who are likely to apply for a right of access are those who are entitled to carry out the necessary work and have not only a sufficient interest in the property to want that work done, but who also are prepared to spend the time and money involved in going to the court. A "harassing" application is unlikely to be made.

The neighbour

(a) Introduction

4.68 The next question is who should count as a neighbour under our scheme. In other words, when A wishes to apply for access to neighbouring land, which persons having an interest in, or a connection with, that land should be involved in the proceedings? We discussed this and related topics at some length in the working paper[82] and we provisionally concluded that there should be a "respondent class" comprising all those whom A might have to involve. In the result we have decided not to recommend such a class. Before making our positive recommendation, it is necessary for us to explain one of the main problems raised by our proposal.

4.69 A person going onto neighbouring land without any authority does so as a trespasser and renders himself liable to an action in trespass,[83] which may result in an award of damages or the issue of an injunction forbidding his continued presence on the land.[84] Since the right of access we propose will be effective only against those persons who are parties to the proceedings and therefore bound by the order, A could still be sued in trespass by a non-party. Accordingly, it would be in A's interest to take steps to identify

[78] Including the holder of a power of attorney.
[79] Under the Mental Health Act 1983.
[80] Messrs Jones Blakeway & Pepper of Gloucester.
[81] Although the problem as to whether A was or was not "in occupation" might occasionally have given rise to dispute.
[82] Paras. 5.24–5.41.
[83] Para. 2.2 above.
[84] As happened in *John Trenberth Ltd.* v. *National Westminster Bank Ltd.* (1979) 39 P. & C.R. 104; 253 E.G. 151 (Ch.D.).

all persons who might be able and likely to sue him in trespass, with a view to making them respondents to his application.

(b) Respondent class suggestion

4.70 We recognised, in the working paper,[85] that it is not always easy to determine who can, and who cannot, sue for trespass. Since it seemed to us that A might find it difficult to ascertain who was able to sue him for trespass, we suggested[86] that the legislation should provide for a "respondent class", comprising persons whose interests in the land gave them an evident right to sue in trespass for any unauthorised entry, and that a successful applicant should be immune from action at the suit of anyone not in that class, or anyone in that class whom he had made respondent to his application. Thus, if he made the whole class respondent, he would to totally protected. We suggested that the respondent class should comprise, *first* those persons occupying[87] the neighbouring land by virtue of some estate or interest in that land (or by virtue of a contract or a statutory right), who would be entitled to sue for trespass in respect of the access sought; and *secondly,* any other person so entitled being the owner of any estate or interest in that land,[88] where the work for which access was sought was such that there was a real risk of damage which (if not made good) would substantially reduce the value of that estate or interest.

4.71 In suggesting this respondent class procedure, we recognised the impossibility of devising a simple and inexpensive scheme that could both keep intact the rights of every person entitled to oppose A's access and at the same time enable A to enter and execute the works without any risk of being sued. The compromise reached by the respondent class procedure achieved the result that most of those people who ought to be involved as respondents would be so involved and that A would generally be able to protect himself against actions in trespass.

4.72 We are, however, now satisfed that our object (which received considerable support on consultation) can be achieved without resort to a respondent class procedure. It has become clear from the comments received that most of the work for which access is needed is of a simple nature. Few examples were given to us of work that would have affected the interests of anyone other than the occupier of the neighbouring land. Only rarely might the work have affected the value of the land so as to justify, for example, the occupier's landlord being made a respondent in addition to the occupier. Viewed in this light, the respondent class procedure seemed unnecessarily complicated in the lengths to which it went to provide A with immunity against actions in trespass. Admittedly, it would have enabled him to achieve a comprehensive immunity; that immunity would, in many cases, have been immunity from being sued by people who would have had no intention of suing and who would have been unaware of the request for access but for being included as respondents. Since a satisfactory measure of immunity can

[85] Para. 5.26.
[86] Paras. 5.27–5.38.
[87] The test of "occupation" is much easier to apply than that of "possession".
[88] Such as the reversionary interest of a landlord.

be attained without resort to a respondent class procedure, we have come to the conclusion that the additional complications (and expense) involved in such a procedure are not justified.

(c) Our recommendations

4.73 We recommend there should be no "respondent class" and that it should be left to A to decide whom to make a respondent to his application. To safeguard himself completely, A would have to include as respondents all those who would, on the particular facts, be entitled to sue in trespass; but he would normally protect his position adequately if he chose to concern himself only with those who were in occupation of the land. Only a person who was a party to the order would be bound by it; and the effect of a person being bound by the order would be that no action in trespass in respect of A's entry on the neighbouring land in accordance with the order would lie at the suit of such a person.[89] The order (and conditions) would thus operate only between the parties and A would enjoy no immunity against trespass proceedings instituted by a non-party.[90]

(i) *New respondents*

4.74 A is unlikely, in practice, to have difficulty in ascertaining who is the right person to make respondent to his proceedings. Attempts to obtain an informal agreement for access will normally have revealed who is likely to object and only rarely will A need to look beyond the occupier although, if major building work is involved, A will, if prudent, enquire more closely to ascertain whether there is anyone other than B who could require him to stop. However, despite his enquiries, A may, having obtained his access order, discover that there is such a person. To meet this contingency, we recommend that A should be able to apply to the court, at any time before completion of the work, for such a person to be joined as respondent and thus be bound by the order.

4.75 It is, however, very much in A's interests to identify all possible objectors at the outset so that they can all be bound by the order. For, whilst A can apply after the order has been made, for a "newcomer" to be joined as respondent, there is no guarantee that the court will either extend the order to bind the newcomer or, if the newcomer in the meantime starts proceedings against A in trespass, order that those proceedings be stayed pending the joinder application. Further, the newcomer may choose to end A's trespass by exercising his right of self-help: in other words, provided that he uses no more force than is reasonably necessary, he may eject both A and his equipment.[91] This would, to say no more, be inconvenient for A especially if he had already assembled men and equipment. One solution to this problem would be to suspend the newcomer's right of self-help pending a court application. However, this would be difficult to enforce (especially if the newcomer were unaware of the existence of the access order) and would be inconsistent with our policy of not binding non-parties. A is really in no

[89] The scheme achieves this result by treating such entry as being with that person's consent.

[90] Nor would he enjoy any general immunity against proceedings in nuisance: see paras. 4.80–4.83 below.

[91] *Hemmings* v. *The Stoke Poges Golf Club Ltd.* [1920] 1 K.B. 720 (C.A.).

different position from that of a contractual licensee who has failed to ensure that everyone entitled to keep him off the land has been made a party to the licence. A should therefore be circumspect at the outset. If, despite his efforts, a newcomer does appear and threatens to eject him and his equipment, A would no doubt be well advised in practice to cease using the access until the newcomer had been joined as a respondent. This would at least reduce the risk of physical confrontation.

(ii) *Variation, etc.*

4.76 We recommend that the court should have power, on the application of any party to access proceedings, to vary, suspend or discharge an access order (or any term or condition of an access order) in the light of any change in circumstances.

(iii) *No known respondent*

4.77 Our recommendations have so far been made on the basis that, while it should be left to A to choose his respondent, there would nevertheless be someone whom he could choose. We have to consider also the case where the neighbouring land is unoccupied and A knows of no one[92] who could sensibly be made respondent to his application. We discussed this problem in the working paper.[93] We noted the possibility that A should, in such circumstances, be entitled simply to enter the neighbouring land and carry out the work. We also noted, however, that it might be thought wrong to give A what would amount to a licence to enter at will without either consent from anyone or an order from the court. An acceptable alternative might, we suggested, be for A to apply *(ex parte)* to the court for an order; alternatively, a representative respondent (such as a local authority) could be chosen.

4.78 The consultation indicated strong opposition to any proposal that A should acquire any right of access without first getting an order from the court.[94] Most of those who wrote to us on the point felt that he should take reasonable steps[95] to find out who had any interest in the neighbouring land with a view to tracing someone who could be made respondent; if those steps failed, he should apply *ex parte* to the court for an access order, the order to be made only if the court were satisfied that A had taken all reasonable steps to trace such a person.

4.79 Our recommendations echo the views of the consultees. Thus, we recommend that no right of access should arise under our scheme without an order from the court; that it should be open to A to apply for an access order *ex parte*, on satisfying the court that he had taken reasonable, but

[92] That is to say, someone like a non-occupying owner of a legal interest in the neighbouring land who might be able to sue A in trespass.

[93] Para. 5.36.

[94] The suggestion of a representative respondent attracted no support either.

[95] Consultees suggested that such steps might include the placing of notices (specifying the work to be done) on the neighbouring land and the insertion of appropriate advertisements in the local press. If the Land Register were open to public inspection, this would be one way of identifying the legal owner of neighbouring registered land: see Second Report on Land Registration: Inspection of the Register (1985), Law Com. No. 148 for our recommendation to this effect.

unsuccessful, steps to identify an appropriate respondent;[96] and that the court should have power to direct A to take such steps in this behalf as it may think fit. We are satisfied that these matters can be covered by rules of court under existing powers.

(iv) *Liability in nuisance*

4.80 In discussing A's need to make the right persons respondents to his application, we have so far been concerned only with his need to protect himself against actions in trespass. This is because the scheme is primarily designed to make it possible for A to obtain a right of entry to neighbouring land, the penalty for such entry without any right being liability to an action in trespass. But it is possible that A may sometimes be liable in nuisance for the way in which he carries out the work.

4.81 In discussing the power of the court to make payment of compensation a condition of an access order we have referred to the provisional conclusion, expressed in the working paper,[97] that A should enjoy immunity in respect of actions brought against him in nuisance as well as in trespass. We suggested in the working paper that, provided the work was covered by the access order and was executed in accordance with any conditions imposed, A's liability to those interested in the neighbouring land for a nuisance arising out of the doing of the work, should be limited to actions brought by members of the respondent class not bound by the order.

4.82 As we have explained above, our provisional conclusion was dependent on the proposal for a "respondent class". The abandonment of that proposal makes it unnecessary for the scheme to afford any immunity (with one technical exception, to which we refer below) to actions in nuisance. In any event, we are satisfied that it would have been difficult for any such immunity to operate satisfactorily without the court having to prescribe in great detail how the work was to be done: the effect of building work "on the ground" can be very different from what was expected at the "drawing-board" stage. Accordingly, we do not recommend any immunity from liability for nuisance, subject to the technical exception of an action brought by the owner of an easement.

4.83 The owner of an easement[98] whose rights are obstructed, has a claim in nuisance, not in trespass.[99] For example, A's scaffolding erected on B's land pursuant to an access order may block a right of way enjoyed by a third party, whose right to require the removal of the obstruction would be enforceable by an action for nuisance. A's entry on B's land will not, provided

[96] One advantage for A in troubling to get an access order in this way is that he will thereby avoid any risk of having exemplary damages for trespass being awarded against him.

[97] Para. 5.40.

[98] Such as a right of way or right of light. In a recent case, injunctions were granted to restrain a landlord from building in such a way as to interfere substantially with the reasonable use of a right of way enjoyed by the plaintiff: *Celsteel Ltd.* v. *Alton House Holdings Ltd.* [1985] 1 W.L.R. 204.

[99] *Paine & Co. Ltd.* v. *St. Neots Gas & Coke Co.* [1939] 3 All E.R. 812 (C.A.). This is in contrast with the owner of a profit a prendre who is able to sue in trespass as well as in nuisance. An alternative for the easement owner would be for him to abate the nuisance: para. 2.13 above.

B has been made a respondent, be actionable at the suit of B, irrespective of its effect on a third party's enjoyment of an easement; nor ought it to be actionable at the suit of that third party if he, too, had been made a respondent. We are satisfied that the desired result will be achieved by our proposal that anything done by A in pursuance of an access order should be treated as being done with the consent of any respondent.

(v) *Criminal liability*

4.84 We did not discuss in the working paper the possibility that an access order might relate to land entry on which could constitute a criminal offence; nor was this point raised in the consultation. It does, however, need to be considered. There are a number of statutory provisions (some contained in public Acts, such as the Official Secrets Acts 1911 and 1920 and the Railway Regulation Act 1840 and others in private and local Acts, such as the British Transport Commission Act 1949) which make it an offence to trespass on land occupied for certain purposes or by certain authorities. The relevant provisions may be so framed as to make it an offence to "trespass" on the land in question, or the offence may be defined in terms of entering without the permission of the occupying authority.

4.85 The situation is not likely to arise often. The exclusion of land occupied by the Crown will prevent any order being made in respect of defence installations and the evidence we have received shows that public authorities, though they may respond slowly to a request for access, rarely refuse such a request if it is reasonable.[100]

4.86 Although, for the reasons given above, we do not think there will often be orders made which could raise the problem we have been considering, we think the legislation ought not to leave it open whether it would be a defence to a criminal charge that the entry was made in pursuance of an access order. One possible solution would be to provide expressly that an access order was not to affect the operation of any statutory provision prohibiting or restricting entry on land of any description. But we do not think this would be satisfactory: it would effectively exclude from the scheme any land occupied for one of the relevant purposes and could constitute something of a trap for an applicant who was unaware of a private Act imposing the ban.

4.87 Our conclusion is that the better course is for entry in pursuance of an access order to be treated, for this purpose, as being not a trespass against, or as being unauthorised by, the relevant occupying body, provided that that body had been made a respondent to the application. Our proposal that such entry should be deemed to be entry with the consent of any respondent will, we think, achieve the desired result.

[100] It is an offence under the Game Act 1831 to trespass on any land in search or in pursuit of game. However, this is unlikely to be relevant: it is theoretically possible that a successful applicant might take the opportunity to shoot his neighbour's pheasant and then set up a technical defence to a charge of poaching; we think that the possibility is so remote that it can be ignored.

Jurisdiction

4.88 We now consider the question of which court or tribunal should have jurisdiction in access proceedings.

4.89 In the working paper[101] we explained that many of the access cases likely to arise would involve simple (but perhaps urgent) questions about work of no great cost arising between ordinary householders of modest means. Accordingly, the tribunal should be local and accessible and its procedure speedy and economical. We also pointed out that some of the cases would be of greater complexity. We suggested that the choice of tribunal lay between the courts and the Lands Tribunal.

4.90 So far as the courts were concerned, we thought[102] that the most appropriate would be the county court and the High Court. The county court seemed particularly suitable as regards speed, cost and accessibility. As regards the Lands Tribunal, we noted[103] its expertise in determining a wide range of questions relating to valuation, compensation and the discharge or modification of restrictive covenants. But we pointed out the drawback that the Tribunal had no local offices where informal advice could be obtained, proceedings instituted and interlocutory work handled; also, it was less well-known than the county court. On balance we thought that the county court was probably the best available forum for deciding access cases. But we invited comments on the point.

4.91 Those who wrote to us with their comments expressed a clear preference for the county court over the Lands Tribunal. There was plainly a greater familiarity with county court (as opposed to Lands Tribunal) practice and procedure. We have also considered the possibility of arbitration. But we, like many of those who commented, think that the conclusive argument in favour of the county courts and the High Court is that they have at their disposal comprehensive machinery for enforcing their orders.[104] We accordingly recommend that the county court should have primary jurisdiction in respect of access applications.[105] We are much fortified in this conclusion by the knowledge that the Council on Tribunals, whose views must carry much weight, agree.

4.92 On the assumption that the county court should have jurisdiction over access proceedings, we sought views as to the extent of that jurisdiction. It might be desirable for some cases—perhaps the largest and most complicated—to be considered by the High Court. But it was difficult to see what criterion could be used to limit the county court's jurisdiction in such cases. A criterion based on the likely cost of the proposed work, or on the rateable value of either of the properties involved, would create anomalies and would

[101] Para. 5.43.
[102] Para. 5.44.
[103] Para. 5.45.
[104] Including injunction and contempt proceedings.
[105] Alternative suggestions for the tribunal raised by a number of consultees included the Rent Assessment Committee, magistrates' courts, local authorities and arbitration by surveyors. In the event of a housing court being created at some time in the future, parts of the county court jurisdiction (including that of the access scheme) might be transferred to that court.

be difficult to operate in practice.[106] So we suggested that it might be better to give the county court an unlimited and exclusive jurisdiction, coupled with a power to transfer cases to the High Court.[107]

4.93 Those who wrote to us were in general agreement that the county court should have an initial unlimited and exclusive jurisdiction in access proceedings, with power for the proceedings to be transferred to the High Court. We agree and so recommend. We did consider the possibility of giving the High Court an initial jurisdiction in cases where all the parties agreed to it. They might do this to avoid expense if, because of the complexity of the case, it seemed inevitable that the case would have, if started in a county court, to be transferred to the High Court. There would be some merit in this; however, prior agreement of the parties as a basis of jurisdiction presents problems and the additional expense of an agreed transfer to the High Court is not great. Accordingly, we recommend that all access proceedings should be started in the county court, subject to a power of transfer to the High Court if some important question of law or fact is likely to arise.

A preliminary procedure?

4.94 In the working paper[108] we asked for views as to whether there should be some sort of compulsory preliminary procedure designed to avoid the need for a hearing by the court, on the lines of the procedure laid down for similar purposes in Part VI of the London Building Acts (Amendment) Act 1939; we suggested that this procedure, suitably modified, might be of advantage in access cases.

4.95 Most of those who wrote to us on the point favoured the idea of there being a preliminary procedure which might help to clarify the issues and prevent cases reaching the court. A minority disagreed; they argued that it would be preferable to leave the parties to conduct their negotiations in whatever way they thought best. There was also some doubt as to whether such a procedure could, in the more complex cases at least, be effectively invoked without professional assistance.[109]

4.96 In the event we have decided not to recommend any sort of compulsory preliminary procedure for very much the same reasons as have led us not to recommend the "statutory notice procedure"referred to in Part III above. The main object of a preliminary procedure—that of clarifying the issues for the parties—can be achieved by rules of court requiring the parties to state their respective positions fully in writing in advance of any hearing. Thus, A's notice of application could be required to include particulars of the

[106] For example, the work might be just to repair a gutter. So, on a "cost of work" basis, the county court should have jurisdiction. But if the gutter were attached to a property in a fashionable area the county court, on a rateable value basis, might not have jurisdiction. Furthermore, it might sometimes be impossible to estimate the likely cost of the work.

[107] Or, possibly, to the Lands Tribunal.

[108] Paras. 5.47–5.53.

[109] In other words, little might be gained by having prescribed forms of notice and counter-notice if the parties could not understand how to go about using them; and, in any event, the preliminary procedure would achieve nothing which could not be achieved by correspondence between the parties' respective professional advisers.

work for which access was required and the conditions of access that he was prepared to accept; and B's answer could be required to include his grounds of objection and the conditions that he would want imposed if the court granted access. The respective positions of A and B would be made as clear by this approach as would be possible under any sort of compulsory preliminary procedure.

Getting the access order

(a) The application

4.97 It will plainly be necessary for A to state in his notice of application the names of the person or persons he wants bound by the order, and to specify the work for which he requires access and the property over which the access is sought. He will also, if well advised, state any conditions of access which he has either already agreed with B or is prepared to accept. B's answer will have to set out his reasons for opposing the application and to specify any conditions he would wish to have imposed should an order be made.

(b) The discretion

4.98 The access scheme which we recommend in this report is a discretionary scheme. That is to say, rights of access do not arise automatically just because applicants want or need them: they arise only by order of the court and on such terms and conditions as the court decides to impose. The question arises as to the extent to which the court should be given some guidance in the exercise of its powers.

4.99 Our view expressed in the working paper[110] that it would not be practicable to lay down detailed *guidelines* in accordance with which the court should reach its decision[111] was broadly shared by those who commented on the point. Guidelines would not only have the effect of complicating the legislation, but would also tend to make any hearing before the court more protracted and, therefore, more expensive. Those who commented shared our doubts as to the usefulness of such guidelines; we adhere to our provisional view that they should not be included in the legislation.

4.100 We did, however, specify[112] certain *principles* (as distinct from guidelines) on which the court's powers might be based. These were: *first*, that A must show that the work was reasonably necessary and that it could not be done (or would be substantially more difficult or costly) without the access applied for; *secondly*, that the court should, if satisfied on this point, grant access to A in the absence of any substantial objection that could not be met by the imposition of conditions; and, *thirdly*, that, if a substantial objection could not be met in this way, the court should not grant access unless it considered that the need for access was exceptionally great and that an order was, in all the circumstances, justified.

[110] Para. 5.54.
[111] There might, for example, be a guideline to the effect that the discretion should be exercised in a special way in "boundary building" cases: paras. 4.21–4.24 above.
[112] Para. 5.54.

4.101 The basis of this provisional recommendation was to indicate that A should get his access order if he showed he needed it and if any objections to his access could be overcome. It objections could not be overcome, they would have to be weighted against the need for access (the importance and necessity of the work, for example) before an access order would be made.

4.102 Those who wrote to us on the point expressed a variety of views about these principles. Some considered them too favourable to A; that access should be authorised only if A showed that the work he wanted to do was, not merely *reasonably* necessary, but in fact *strictly* necessary; and that he should have to show that it was physically impossible to do the work from his own land. Others felt that access should be authorised if A had shown that he "needed" it. Most agreed generally with the "principles": that there should be access only if A had shown that the preservation work was reasonably necessary; and that the principles achieved the right balance between the respective interests of A and B. Our recommendations reflect this balance, but we have found it desirable to make some modifications to the formulation of the principles as set out in the working paper.

4.103 In particular, we have been concerned to achieve one objective which we referred to in Part III when discussing costs. In simple cases at least, it should be possible for the parties (or their advisers) to know in advance whether or not an order will be made upon a given set of facts. Thus, unreasonable refusals of access will be overcome without the matter ever reaching the court, since the unreasonable B will otherwise risk having to pay the costs.

4.104 Accordingly, we recommend that the power of the court to make an access order should arise only on the court's being satisfied that:—

(a) the work for which access is sought is reasonably necessary for the preservation of the land to which the work is to be carried out; and
(b) the work cannot be done (or would be substantially more difficult or expensive) without the access applied for.

The power should then be exercised in favour of A unless B satisfies the court that, despite any terms and conditions that the court may be prepared to attach to the order, entry by A would cause such hardship that it would be unreasonable to make an order. If, but only if, B is able to satisfy the court on this point, the order should be refused.

4.105 This information is designed to achieve the objective of overcoming unreasonable refusals by making it clear that an order will be made unless B can satisfy the court that actual hardship will be suffered. While B's personal circumstances may well be a relevant matter that should be taken into account, the court should not be over-solicitous and give any weight to unreasonable and wholly subjective objections or anxieties.

The effect of the order

4.106 An access order will have the effect of giving A, as against B, a right to enter B's land (and to bring on to it any necessary equipment, etc.). It

would not bind anyone other than a respondent.[113] Since the entry would be deemed to be with B's consent, A would therefore be immune from any proceedings based only on entry in accordance with the order brought by B[114] but would enjoy no additional immunity (save immunity from an action in nuisance at the suit of an easement owner who had been made a respondent).[115] B would be required to permit A to enjoy the access specified in the order together with any other rights attached to the order. The right of access given by the order would be subject to any terms or conditions included in it as well as to any undertakings given to the court by or on behalf of any party. The order would cease to have effect on the date specified in it. A respondent's right to enforce any terms and conditions subject to which the order was granted would not be prejudiced by its ceasing to have effect.

Enforcement of the order

4.107 Enforcement of an access order raises two issues: enforcement of the right of access itself and enforcement of any conditions, terms or undertakings subject to which the right was granted.

4.108 The analogy which we have made above of a right of access, by virtue of an order, to a contractual licence to enter is not complete. It would not be satisfactory for a successful A, to whom entry was refused in spite of the order, to have to start fresh proceedings claiming damages or an injunction, as he would have to do in the case of a breach of a contractual licence. The access order should itself be directly enforeceable by committal proceedings as well as by a claim for damages, without the need for the institution of fresh proceedings. We so recommend.

4.109 Enforcement of "conditions" raises different issues. Some will be expressed as "conditions precedent", so that failure to comply will prevent the access order becoming effective. Others will not be so expressed, and the party aggrieved by failure to comply will, on the analogy with a contractual licence, be able to claim compensation and an injunction.[116] In order to avoid unnecessary complexity and expense, the scheme must give such a party a "cause of action" sufficient to enable him to make such a claim in the access proceedings, without prejudice to his right to apply in those proceedings for the terms of the order to be varied or the order itself suspended or discharged. It is, therefore, necessary for the legislation to empower the county court to make any order for the payment of money, irrespective of the amount involved.

4.110 There are two further points on enforcement.

[113] Thus we do not recommend that any right created by an access order should be capable of registration in any register relating to interests in, or incumbrances on, land.

[114] Para. 4.73 above.

[115] Para. 4.83 above.

[116] An undertaking given to the court, on the faith of which the court sanctions a particular course of action (or inaction) has exactly the same force as an order made by the court. Accordingly, a breach of an undertaking amounts to contempt of court in the same way as would a breach of an injunction: see *Gandolfo* v. *Gandolfo* [1980] 2 W.L.R. 680 (C.A.).

(a) Trespass ab initio

4.111 In the working paper[117] we referred to the rule stated in the *Six Carpenters' Case*[118] to the effect that:

> where a person having entered upon land under an authority given by law subsequently abuses that authority he becomes a trespasser *ab initio,* his misconduct relating back so as to make his original entry tortious.[119]

We suggested that this rule might be expressly negatived for the purposes of the access scheme, since it seemed inappropriate in the context of a scheme designed specifically to ensure that A's entry on B's land was lawful. We thought that there might be a risk that this rule, while operating only in cases of positive misfeasance, might have effect so as retrospectively to render unlawful A's entry pursuant to an access order if he exceeded the authority given him by the order or acted in breach of a condition which it imposed. In the event, however, it has proved unnecessary for us to recommend that the rule be negatived. This is because the rule operates only in cases where the defendant enters land under an authority given by law, and not in any case where he enters with the authority or consent of the plaintiff:[120] under the access scheme which we recommend, A's entry upon neighbouring land is deemed to be with B's consent. So the *trespass ab initio* rule will not apply to A's access pursuant to an access order.

(b) Third parties

4.112 We have recommended that the rights created by an access order should be enforceable only by those persons who are parties to the proceedings. This is a different approach from that suggested in the working paper.[121] There we reached the provisional conclusion that any conditions attached to an access order should be enforceable, not only by those for whose benefit they were imposed, but also by anyone interested in B's land who could show that he would be prejudiced by their non-enforcement. Since we are no longer recommending the creation of a "respondent class", the rights of any such person can be left to the general law.

Costs

4.113 In our working paper we suggested[122] that the court should have a wide discretion as to costs, which would not automatically follow the event: depending upon the circumstances, the court might exercise its discretion so as not to make any order as to costs, or make a successful applicant pay both sides' costs.[123]

4.114 Most of those responding to the working paper agreed that the question of costs should be in the discretion of the court. There was, however,

[117] Para. 5.71.
[118] (1610) 8 Co. Rep. 146a.
[119] *Clerk & Lindsell on Torts* 15th ed., (1982), para. 22–29.
[120] (1610) 8 Co. Rep. 146b.
[121] Paras. 5.67 and 5.68.
[122] Para. 5.56.
[123] The principal costs would be legal costs and surveyors' fees.

a view expressed by many that this discretion should normally be exercised in favour of B, so that, whether or not he had been successful in resisting the application, he should be able to look to A for payment of his costs, so long as he had acted reasonably in incurring them. The argument was that B, whose rights A was seeking to diminish, should not have to bear the cost of defending them.[124]

4.115 We do not accept this argument. If, in the public interest, a right is created by statute for A to apply, within a limited scheme, to a court for an order for access, A is not seeking to diminish B's rights if A applies within the scheme for such an order and offers such terms and conditions as are required. B has then, in our view, if and where the facts are clear, no right to put A to needless expense by opposing that which the general law says that A may have. The question of costs should be left to the court for decision according to ordinary principles. It is our hope that applications to the court will be made only as a last resort, when the parties have been unable to reach a mutually satisfactory agreement as to access: agreement will be made easier if B knows, or is advised, that he will probably incur an order for costs against him if he unreasonably refuses access in a case clearly within the scheme.

4.116 Secondly, the ordinary discretion as to costs will enable the court to make its decision on the basis of what is fair and reasonable in the circumstances of the case having regard to matters such as the outcome of the case and the terms offered before litigation. We make this point because a number of those who wrote to us appear to have based their opposition to our proposals (and, indeed, to the access scheme generally) on the hypothesis that most applicants will be unscrupulous persons in a much stronger financial position than their neighbours. This may happen; but there was little evidence of it in the many letters we received from people writing in response to the working paper. It is true that many Bs who wrote to us appeared to have limited resources, but it is also true that many As were in the same position. It would be wrong for the rule to be that A, win or lose, should generally pay B's costs.

4.117 Our third reason for leaving the question of costs to the court's discretion, rather than having any sort of presumption that B should never be out of pocket, is that such a presumption would be inconsistent with provisions in the Legal Aid Act 1974, which restrict the liability of a legally assisted person to contribute towards the costs of a successful opponent.[125] Many of the potential As and Bs who wrote to us appeared to have limited resources; and, on the assumption that legal aid would be available to bring or defend access proceedings, it seems likely that many would apply for legal aid. Since an assisted person's liability to contribute towards his successful opponent's costs is limited (and since costs of an unassisted party can be

[124] It should be noted, however, that this argument is not one which has found favour in the analogous situation arising under the London Building Acts (Amendment) Act 1939: see s.56 of that Act.

[125] The liability of an assisted person to contribute towards his successful opponent's costs (or to give security for those costs) is limited to what he can reasonably afford to pay, account being taken of the means of the parties and their conduct: s.8(1)(e).

awarded against the legal aid fund only in limited circumstances),[126] a presumption that B should never be out of pocket would cause difficulties if A were an assisted person. Win or lose, B would be unable to recover his full costs from anyone.[127] We cannot see that there is any satisfactory solution to this problem. In theory, the legal aid scheme could be amended so that the receipt of legal aid by A should not affect his liability to pay (or give security for) costs. But we cannot recommend such an amendment which would be inconsistent with the basis of the legal aid scheme. If A is too poor to pay his own costs, he is unlikely to be in a position to pay (or give security for) someone else's.[128] We therefore take the view that no special rules as to costs would be justified where a party was legally assisted.

4.118 We accordingly recommend that the court should have its normal discretion as to costs (including the ordering of security for costs) and should exercise that discretion in accordance with existing principles, including those applicable to cases where any party is legally assisted.

Contracting out

4.119 In our working paper we considered[129] how far it should be possible to contract out of the right to apply for access under our scheme. Our provisional view was that an agreement, whenever made, which would have the effect of preventing an application under the scheme should be unenforceable, but that a grant of rights of access more extensive than those obtainable under this scheme should remain, *pro tanto,* effective.

4.120 Most of those who commented on this proposal agreed with our provisional view that contracting out should not be permitted, on the grounds set out in the working paper; it was generally accepted that to allow contracting out might undermine the scheme. We accordingly recommend that it should not be possible for a right to apply for access under our scheme to be excluded by agreement, irrespective of the date or form of the purported exclusion.

Procedure

4.121 We make no special recommendations as to procedural matters, since we intend procedure on an application for access to be governed by existing rules of court, with the addition of such new rules as may be required.

[126] In general, an unassisted party who "wins" can have his costs paid out of the legal aid fund only if the case was brought by the assisted party and only if the court is satisfied both that the unassisted party will suffer severe financial hardship unless the order is made and that it would be just and equitable in all the circumstances: Legal Aid Act 1974, s.13.

[127] If B himself were also receiving legal aid, he would be concerned with recovering only such part (if any) of his costs as were not being met by the legal aid fund.

[128] Such an amendment would, moreover, tend to run contrary to the legal aid philosophy that a person of limited means should not be deterred from claiming or defending his rights either because he cannot afford professional representation or because he is too poor to be able to give security or accept the risk of paying his opponent's costs.

[129] Paras. 5.72–5.75.

PART V

SUMMARY OF RECOMMENDATIONS

5.1 In this part of the report we summarise the recommendations for reform which we have made earlier. Where appropriate, we identify the relevant provisions of the draft Access to Neighbouring Land Bill (contained in Appendix A to this report) which are intended to give effect to these recommendations.

Our principal recommendation

(1) The law should be changed so as to enable a person to obtain a right of access to neighbouring land for the purpose of carrying out work to his own land. This right of access should arise only by virtue of an order made on application to a court.

(paragraph 3.42)

The work for which access should be available

(2) The types of work for which access should be available under the scheme should be limited to *preservation work.* Other types of work should fall outside the scheme.

(paragraphs 4.2–4.6)

(3) "Preservation work" should include any work that is intended to preserve an applicant's property. It should thus include the inspection, decoration, cleaning, care, maintenance and repair of any building, fence, wall or other thing constructed on or under the land, including the strengthening of foundations, damp-proofing and the making good of lost support or shelter.

(paragraph 4.7)

(4) Improvements and alterations done for their own sake should not count as preservation work. However, improvements and alterations that were merely incidental to the carrying out of work that did count as preservation work should be covered.

(paragraph 4.8)

(5) Demolition of a structure (or any part of one) and its rebuilding or replacement should be capable of being treated as preservation work; but an access order should be available for rebuilding or replacement work following demoliton only if the work amounted to preservation work.

(paragraphs 4.9–4.11)

(6) The scheme should also apply to non-structures. So it would cover preservation work to trees, hedges and other natural growths.

(paragraph 4.12)

(7) The right of access should, if granted, also permit access to anyone reasonably assisting the applicant in connection with the work; it should also permit the placing on the neighbouring land of materials, plant and equipment needed in the course of the work and any waste arising from the work.

(paragraph 4.13)

The property to be entered

(8) The scheme should, in general, permit entry to any neighbouring land of any description.

(paragraphs 4.14–4.16)

(9) The scheme should not authorise the making of an order against the Crown.

(paragraph 4.17)

(10) The scheme should not apply so as to afford access to the highway.

(paragraph 4.18)

(11) No exception should be made for agricultural land.

(paragraphs 4.19–4.20)

(12) The scheme should not contain any provisions restricting or excluding its application in cases where the access required was either to repair a structure built by the applicant on or close to the boundary or else would be impeded or blocked by something already on the neighbouring land.

(paragraphs 4.21–4.26)

Automatic provisions

(13) The following provisions should be contained in every access order:—

(a) *The work:* this provision will describe the work for which access is authorised;

(b) *The land:* this provision will describe the land access to which is authorised;

(c) *Timing:* this provision will include the dates on or between which access is to be allowed.

(paragraphs 4.2, 4.34 and 4.39)

Automatic obligations

(14) The following obligations should attach to every access order:—

(a) *Access:* the neighbour to be required to permit the applicant to have the access (and any other facilities) provided in the order;

(b) *Making good:* the applicant to be required to reinstate fully the property entered and make good any damage so far as reasonably practicable;

(c) *Indemnity:* the applicant to be required to indemnify the neighbour against any loss or damage to the land resulting from the entry.

(paragraphs 4.31, 4.50 and 4.106)

Conditions of access

(15) The court should have power to impose conditions on any access order, with a view to minimising the neighbour's inconvenience and loss of privacy; to reducing security risks and the risks of financial loss, physical damage or personal injury; to ensuring that the work is done properly and quickly; and to awarding compensation if appropriate.

(paragraph 4.28)

(16) This power should specifically enable the imposition of conditions dealing with the following matters:—

(a) *Method of work:* this condition would be that work should be done in a particular way.

(b) *Precautions and safeguards:* this condition relates to the prescribing of precautions and safeguards to eliminate or reduce the risk of damage or injury, or to take account of security risks. It is to be wide enough to provide for the taking out of insurance cover.

(c) *Neighbour's supervision of work:* this condition would be that the work should be done under the neighbour's supervision.

(d) *Reimbursement of fees and expenses:* this condition would be that the applicant should pay any fees and expenses reasonably incurred by the neighbour in connection with the access.

(e) *Giving security:* this condition would be that the applicant should be given security for any payment that might become due from him in connection with the access.

(f) *Compensation:* this condition would be that the applicant should pay compensation for any loss, damage or injury which the neighbour suffers as a result of the access. But no compensation should be payable for nuisance or inconvenience or for the access itself; nor should the enhanced value of the applicant's property (or any consequential reduction of the value of the neighbouring property) arising from the access be relevant for the purposes of assessing compensation.

(paragraphs 4.29–4.61)

The nature of the right of access

(17) A right of access granted under the scheme should not be a permanent right, but should subsist only for the purpose of carrying out the particular project of work for which the right of access was sought. It would thus be a "one-off" right.

(paragraphs 4.62–4.64)

The applicant

(18) There should be no restrictions on the categories of person entitled to apply for access under the scheme.

(paragraphs 4.65–4.67)

The neighbour

(19) There should be no restrictions on the categories of person capable of being treated as neighbours under the scheme: the applicant would be free to make respondent to his application anyone whose interest in the neighbouring land appeared to him to be such as to make it necessary that he be bound by an order.

(paragraph 4.73)

(20) Only a person who was a party to an access order would be bound by it. The effect of a neighbour's being so bound would be to prevent him bringing any action in trespass in respect of the applicant's entry on the neighbouring land in accordance with the order.
(paragraph 4.73)

(21) A person who was not a party to the order would not be bound by it and should be able, for example, to sue the applicant in trespass even though the applicant had entered the neighbouring land in accordance with the access order.
(paragraph 4.73)

(22) An applicant should, however, be entitled to apply to the court, at any time before completion of the work, for any person to be joined as a party to the access proceedings.
(paragraph 4.74)

(23) It should be possible for any party to the access proceedings to apply at any time for the access order or conditions to be varied, suspended or discharged.
(paragraph 4.76)

(24) In a case where, because the neighbouring land is unoccupied, the applicant does not know whom to make respondent to his application, he should be able to apply *ex parte* for an order on satisfying the court that he has taken such steps to identify respondents as are reasonable in the circumstances.
(paragraphs 4.77–4.79)

(25) An applicant should, in general, enjoy no special immunity against actions in nuisance. He should, however, be immune from an action in nuisance brought on the ground that the exercise of the right of access pursuant to an order would interfere with the respondent's easement over the neighbouring land.
(paragraphs 4.80–4.83)

(26) An applicant entering land pursuant to an access order should be immune from prosecution under any provision making it a criminal offence either to trespass, or to enter, or be, on that land without the respondent's consent.
(paragraphs 4.84–4.87)

Jurisdiction

(27) The county court should have an initial, unlimited and exclusive jurisdiction in access proceedings, with power for the proceedings to be transferred to the High Court.
(paragraphs 4.88–4.93)

(28) There should be no preliminary procedure (involving notices and counter-notices) operating prior to the access application.
(paragraphs 4.94–4.95)

Getting the access order

(29) The scheme should contain no detailed guidelines as to the court's exercise of its power to grant access. However, this power should arise on its being satisfied that the work for which access is sought:

(a) is reasonably necessary for the preservation of the land to which the work is to be carried out; and

(b) cannot be done (or would be substantially more difficult or expensive) without that access.

The power should then be exercised in favour of the applicant unless the respondent satisfies the court that, despite any terms and conditions that the court may be prepared to attach to the order, entry by the applicant would cause such hardship that it would be unreasonable to make an order. If, but only if, the respondent is able to satisfy the court on this point, the order should be refused.

(paragraphs 4.98–4.105)

Enforcement of the order

(30) The rights created by an access order should, in principle, be enforceable in the same way and to the same extent (but without the need for separate proceedings) as if they arose out of a contractual right of access expressly created between the parties.

(paragraphs 4.107–4.109)

Costs

(31) In deciding the question of costs, the court should have its normal discretion, which it should exercise in accordance with existing principles, including those applicable where any party is legally assisted.

(paragraphs 4.113–4.118)

Contracting out

(32) The power of the court to make an access order should not be capable of being excluded or restricted by any agreement, whether made before or after the legislation comes into force.

(paragraphs 4.119–4.120)

(Signed) RALPH GIBSON, *Chairman*
TREVOR M. ALDRIDGE
BRIAN DAVENPORT
JULIAN FARRAND
BRENDA HOGGETT

J. G. H. Gasson, *Secretary*
24 September 1985

APPENDIX A

DRAFT

OF A

BILL

TO

Make provision for obtaining access to neighbouring land for the purposes of carrying out works, and for connected purposes.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Access orders.

1.—(1) Where a person ("the applicant") for the purpose of carrying out works to land—

- (a) Requires entry to land (other than a highway) adjoining or adjacent to the land to which he wishes to carry out the works, and
- (b) does not have the agreement of a person ("the respondent") whose agreement to the entry he needs,

he may apply to the court for an order ("an access order").

(2) Subject to subsection (3) below, the court shall make an access order if (but only if) it is satisfied that—

- (a) the works for which the entry is sought are reasonably necessary for the preservation of the land to which the works are to be carried out, and
- (b) the works cannot be carried out or would be substantially more difficult or expensive to carry out without entry to the land to which entry is sought.

(3) The court shall refuse to make an access order if it is satisfied by the respondent that (notwithstanding any requirement of the Act or any term or condition which may be imposed under it) such hardship will be caused by the entry as to make it unreasonable to make the order.

(4) The works for which an access order may be made include—

- (a) carrying out works of repair, maintenance, improvement, decoration, alteration, adjustment, renewal or demolition of buildings and other structures,
- (b) inspection for the purpose of ascertaining whether such works as are mentioned in paragraph (a) above are required,

EXPLANATORY NOTES

Clause 1

1. Clause 1 enables an application to be made to a county court for an access order and defines the circumstances in which, and the works for the purposes of which, such an order may be made.

Subsection (1)

2. Subsection (1) is the operative provision. It enables a person who, for the purpose of carrying out work on one piece of land, requires to enter neighbouring land but is unable to obtain the necessary agreement to such entry, to apply to "the court" for an order authorising his entry. This implements paragraph 3.27 of the report. Both paras. (a) and (b) refer simply to "entry". This word has to be read in conjunction with the definition in clause 8(2), where it is defined as including the doing of anything necessary for carrying out works. This extended definition is required because the applicant's difficulty in carrying out the work may, exceptionally, stem not from his neighbour's refusal of access, but from the refusal on the part of an easement-owner to allow him to obstruct the easement.

3. By virtue of the definition of "court" in clause 8(2), "the court" here means a county court. The phrase "adjoining or adjacent" land covers the possibility that the applicant may need to enter land divided by a narrow strip from the land on which the work is to be done. It thus caters for the situation referred to in paragraph 4.14 of the report.

4. As is recommended in paragraphs 4.68 and 4.74 of the report, subsection (1) does not define, or impose any limitation on, either the category of person who may apply for an access order or the category of person against whom such an order may be sought. Thus, any person (whether or not he has any legal or other interest in the land to which the work is to be done) may apply for an order and may make respondent to his application any person whose agreement to his entry on the adjoining land he thinks he needs, but cannot obtain.

5. There is in subsection (1) no definition of "land" as used in the Bill. It therefore has the meaning ascribed to it by the Interpretation Act 1978, Sched.1 and so includes buildings and other structures, which in law form part of the land, and the airspace above the ground. Access under the Bill does not, however, extend to the highway, and, since the Bill does not bind the Crown, no access order could (as is explained in the notes on clause 8) be made so as to require the Crown to permit entry. The relevant points of policy are explained in paragraphs 4.14–4.19 of the report.

Subsection (2)

6. Subsection (2) prescribes the circumstances in which (subject to subsection (3)) the power of the court to make an access order is to be exercised, namely on its being satisfied that access is necessary for the carrying out of preservation work. Subsection (2) implements paragraph 4.104 of the report.

(c) making plans in connection with such works,

(d) ascertaining the course of drains, sewers, pipes or cables and renewing, repairing or clearing the same,

(e) ascertaining whether any hedge, tree or shrub is dangerous, dead, diseased, damaged or insecurely rooted,

(f) replacing any hedge, tree or shrub,

(g) removing, felling, cutting back or treating any hedge, tree or shrub,

(h) clearing or filling in of ditches, and

(i) carrying out works requisite for, incidental to or consequential upon, any works falling within paragraphs (a) to (h) above.

(5) Rules of court may provide for the procedure to be followed where an applicant is unaware of and cannot reasonably ascertain the name of a person who should be the respondent and for enabling such a person to be made a party to the proceedings by description instead of by name.

Subsection (3)

7. Subsection (3) qualifies subsection (2), by requiring the court *not* to make an access order (notwithstanding that the work is necessary and the entry is required) if the respondent satisfies the court that, notwithstanding the obligations on the applicant arising under clause 3 or the imposition by the court of conditions under clause 2, entry by the applicant in pursuance of an order would cause such hardship that it would be unreasonable to make the order. In so providing, subsection (3) puts the burden on the respondent to satisfy the court that no order should be made, once the applicant has made out the case for access to do necessary preservation work. In so providing, subsection (3) implements the recommendation in paragraph 4.104 of the report.

Subsection (4)

8. Subsection (4) specifies, but not exhaustively, categories of work which fall within the meaning of "preservation" for the purposes of the scheme. They include, not only works of repair and maintenance, but also the carrying out of inspections and the making of plans; they also cover work done, not to buildings, but to things growing on the land such as trees and hedges.

9. Since, by virtue of subsection (2)(a) the court must, before making an order, be satisfied that the proposed work is reasonably necessary for the *preservation* of land, it follows that work designed merely to improve or alter that land cannot fall within subsection (4)—though improvements and alterations which are incidental to preservation work are *not* excluded. The effect is to implement paragraphs 4.2–4.12 of the report.

Subsection (5)

10. Subsection (5) enables rules of court (in this context, county court rules) to prescribe the procedure to be followed by an applicant who is unable to ascertain the name of the person whom he should make respondent. The report (paragraph 4.79) contemplates rules which will require the applicant to satisfy the court that he has taken all reasonable steps for that purpose before making an order on an *ex parte* application.

Power of court to impose terms and conditions.

2.—(1) An access order shall specify—

(a) the works which may be carried out,

(b) the date on or from which entry is authorised and the date on which entry ceases to be authorised, and

(c) the particulars of the land to which the entry is authorised.

(2) The court may impose such terms and conditions as appear to the court reasonably necessary for avoiding or minimising—

(a) loss, damage or injury to the respondent or to any other person or to the land or to any goods,

(b) inconvenience or loss of privacy to the respondent or to any other person,

caused by the entry to the land as authorised by the order.

(3) Without prejudice to the generality of subsection (2) above but subject to subsection (5) below, any such terms and conditions may include provision for any one or more of the matters mentioned in subsection (4) below.

(4) The matters referred to in subsection (3) above are—

(a) the manner in which the works are to be carried out;

(b) the days on which and the hours between which the works may be carried out;

(c) the precautions and safeguards (if any) as may be specified;

(d) taking out of insurance cover by the applicant against such risks (if any) as may be specified;

(e) compensation for loss, damage or injury to the respondent.

(5) No compensation shall be payable to a respondent by virtue of this section for any inconvenience he may suffer resulting from the entry as authorised by the order or by way of compensation for the mere making of the order.

(6) The court may make provision—

(a) for the reimbursement by the applicant of any expenses reasonably incurred by the respondent and not recoverable as costs;

(b) for the giving of security by the applicant for any sum that might become payable to the respondent by virtue of this section or section 3 of this Act.

EXPLANATORY NOTES

Clause 2

1. Clause 2 provides for the matters which are to be specified in, and the terms and conditions which may be attached to, an access order.

Subsection (1)

2. Subsection (1) provides for three matters which must be specified in every access order. These matters (relating to the extent of the work, the timing of the access and the particulars of the land to which access is to be given) are essential elements in any access order. In so providing, subsection (1) implements paragraphs 4.2, 4.32–4.34, 4.38 and 4.39 of the report.

Subsection (2)

3. Subsection (2) gives the court power to impose terms and conditions for the purpose of minimising any adverse consequences arising out of the entry authorised by the order. Subsection (2) thus imposes a limiting factor on the purposes for which conditions may be imposed and does *not* give the court a "blanket" power. In so providing, subsection (2) implements paragraphs 4.28 of the report.

Subsection (3)

4. Subsection (3) paves the way to subsection (4), which specifies a number of matters which may be included in terms and conditions imposed by the court. Subsection (3) makes it clear that the specifying of these matters does not detract from the generality of the power conferred by subsection (2), but equally does not detract from the prohibition imposed by subsection (5) on making inconvenience or "mere access" the subject of compensation.

Subsection (4)

5. Subsection (4) specifies a number of matters which the court may include in exercising its power to impose terms and conditions. These matters are referred to in paragraphs 4.32–4.53 of the report.

Subsection (5)

6. Subsection (5) ensures that the court's power to impose terms and conditions cannot be used to compensate a respondent merely because an access order has been made or merely because entry in pursuance of the order is inconvenient to him. The words ". . . entry as authorised by the order" make it clear that damages for breach of a condition imposed by the court to avoid or minimise inconvenience are *not* excluded: they would fall within clause 4. Subsection (5) implements paragraphs 4.54–4.59 of the report.

Subsection (6)

7. Subsection (6) enables the court to make provision for a respondent to be reimbursed expenses (such as professional fees) reasonably incurred by him, notwithstanding that those expenses could not (e.g., because they had been incurred before any proceedings were instituted) be part of the "costs" of the proceedings. The court may also require the applicant to give security for any money that may become payable to the respondent under this or the following clause. Subsection (6) implements paragraphs 4.46–4.49 of the report.

Effect of order.

3.—(1) An access order operates to—

(a) authorise the applicant to enter the land specified in the order for the purpose of carrying out the works specified in the order,

(b) authorise subject to subsection (2) below—

(i) bringing on and leaving on the land such materials, plant and equipment as are reasonably necessary for the carrying out of the works, and removing the same,

(ii) leaving on the land such waste as arises from carrying out the works and removing the same,

(iii) entry to the land by such number of servants, agents and other persons authorised by the applicant as are reasonably necessary for carrying out the works,

(c) require the applicant subject to subsection (2) below—

(i) before the date specified in the order as the date on which the entry ceases to be authorised, to make good the land so far as reasonably practicable,

(ii) to indemnify the respondent against damage to the land or goods resulting from the entry as authorised by the order,

(d) require the respondent to permit the applicant to do anything specified in the order or (subject to subsection (2) below), authorised by or by virtue of this section;

and any action taken in accordance with the order shall be deemed for all purposes to be taken with the consent of the respondent.

(2) Without prejudice to section 5 of this Act, the court may, on making an access order, dispense (wholly or in part) with or vary anything authorised or required by paragraph (b) or (c) of subsection (1) above.

Clause 3

1. Clause 3 provides for an access order to authorise entry on the land in question and to confer certain rights and impose certain obligations on the applicant and the respondent.

Subsection (1)

2. Paragraph (a) provides for the making of an access order to authorise the applicant to enter the neighbouring land to carry out the preservation work specified in the order. It implements the main recommendation in paragraph 4.106 of the report.

3. Paragraph (b) provides for the making of an access order to authorise the doing of a number of ancillary acts, including the bringing of materials and equipment onto the neighbouring land and the entry of the applicant's contractors, etc. The authority conferred under this provision is subject to the power of the court under subsection (2). Paragraph (b) implements paragraph 4.13 of the report.

4. Paragraph (c) provides for the making of an access order to impose on the applicant an obligation to make good the land before his authority to enter expires and to indemnify the respondent against any damage to the land (or goods on it) resulting from the entry. The obligations arising under paragraph (c) will apply unless expressely excluded or varied by the court in the exercise of its powers under subsection (2). The reason for giving an access order these "automatic" effects is that explained in paragraphs 4.30, 4.31 and 4.50 of the report, namely that they will be appropriate in all but the most exceptional cases.

5. Paragraph (d) provides for the making of an access order to impose on the respondent an obligation to permit the applicant to do anything provided for by the order. Enforcement of this obligation will be facilitated by the inclusion of this provision, since, if the respondent fails to comply with the order, the applicant will be able to apply directly to the court for committal proceedings rather than have to apply first for an injunction. Paragraph (d) implements the recommendation in paragraph 4.108 of the report.

6. The concluding words of subsection (1) provide for an access order to have the same effect as if the respondent had consented to the applicant acting in accordance with the terms of the order. The respondent will not, therefore, be able to sue the applicant in trespass (or, in the case of an easement-owner, in nuisance) for acting in accordance with those terms. Nor will an applicant entering land pursuant to an access order be liable to prosecution under any provision making it an offence either to trespass on that land or to enter or be on that land without the respondent's consent. This provision implements paragraphs 4.69, 4.83 and 4.87 of the report.

Subsection (2)

7. Subsection (2) enables the court to dispense with or vary the effects of an access order specified in paragraph (b) and (c) of subsection (1).

Enforcement.

4.—Without prejudice to any other remedy, the court may make an order for payment of damages by a party to the proceedings who fails to comply with anything specified in an order made under this Act or authorised or required by or by virtue of section 3 of this Act.

Clause 4

1. Clause 4 provides a remedy in damages in the event of a party to access proceedings failing to comply with any obligation imposed specifically by an access order or arising "automatically" under clause 3. It implements a recommendation in paragraphs 4.108 and 4.109 of the report.

2. Clause 4 does not (deliberately) provide expressly for the assessment of damages; this is left to the court. In some cases (e.g. where there has been physical damage to a party's property) it is to be expected that the court will adopt the principles applicable to the assessment of damages for tort. In others (e.g. where the applicant has defaulted on his obligation to "make good"), the court is likely to adopt the analogy of breach of contract. It would not be practicable, or necessary, for the legislation to cater specifically for every possibility.

Discharge and variation of access orders.

5.—(1) On the application by any party to the proceedings the court may make an order discharging or varying an access order or any order previously made under this section or any term or condition of such an order or suspending any term or condition temporarily or reviving any term or condition so suspended.

(2) Unless previously discharged, an access order and any order made by virtue of subsection (1) above shall cease to have effect on the date specified in the order as the date on which entry ceases to be authorised, but without prejudice to the enforcement by the respondent of any terms and conditions specified in the order or anything required by section 3(1)(c) of this Act.

(3) The discharge or cessation of an access order or any order made under subsection (1) above shall not affect the previous operation of the order.

EXPLANATORY NOTES

Clause 5

1. Clause 5 provides for the variation, discharge, suspension and cessation of access and other orders made by the court.

Subsection (1)

2. Subsection (1) enables any party to apply to the court for an access order to be varied, suspended or discharged and extends to any previous order for variation, suspension or discharge of an access order, as well as to any terms or conditions imposed by such an order. It also enables such a term or condition to be temporarily suspended or to be revived. In so providing, subsection (1) implements paragraph 4.76 of the report.

Subsection (2)

3. Subsection (2) provides for an access order to cease to have effect on the date specified in the order for the cessation of the authority to enter. If the work is completed before that date, the respondent will be able, if he so wishes, to apply for the order to be varied accordingly. Equally, if the applicant needs more time, he will be able to apply for an extension. Cessation is without prejudice to the respondent's right to enforce, after that date, any term or condition of the order or any obligation imposed on the applicant by clause 3(1)(c). Subsection (2) implements a recommendation in paragraph 4.106 of the report.

Subsection (3)

4. Subscription (3) makes it clear that the cessation of an access order does not affect its previous operation. It implements a recommendation in paragraph 4.106 of the report.

Jurisdiction and transfer of proceedings.

6.—(1) A county court has jurisdiction to entertain any proceedings and any claim (for whatever amount) brought under this Act and whatever the net annual value for rating of any land concerned is to be taken to be for the purposes of the County Courts Act 1984.

(2) At any stage in any proceedings under this Act the county court may either of its own motion, or on the application of any party to the proceedings, order the transfer of the whole or any part of the proceedings to the High Court if the court considers that some important question of law or fact is likely to arise.

(3) At any stage in any proceedings transferred to the High Court under subsection (2) above, the High Court may, either of its own motion or on the application of any party to the proceedings, order the transfer of the whole or any part of the proceedings to such county court as the High Court considers to be convenient to the parties.

The transfer shall not affect any right of appeal from the order directing the transfer or right to enforce in the High Court any judgment signed or order made in that Court before the transfer.

EXPLANATORY NOTES

Clause 6

1. Clause 6 provides for the unlimited jurisdiction of county courts in access proceedings and for the transfer of those proceedings to and from the High Court. It implements recommendations in paragraph 4.93 of the report.

Subsection (1)

2. Subsection (1) gives county courts jurisdiction in all access proceedings regardless of the value of any claim under those proceedings or of any affected land. Thus, no "county court limit" will be applicable to access proceedings. This provision is required because of the financial limitations imposed by sections 15, 21 and 23 of the County Courts Act 1984.

Subsection (2)

3. Subsection (2) provides for the transfer of access proceedings to the High Court if the county court considers that some important question of law or fact is likely to arise. It follows the precedent set by section 42 of the County Courts Act 1984.

Subsection (3)

4. Subsection (3) provides for the transfer back to a "convenient" county court of proceedings transferred to the High Court under subsection (2) above, and for related matters. It follows the precedent set by section 40 of the County Courts Act 1984.

Supplementary provisions.

7.—(1) An access order shall not bind any person other than a party to the proceedings.

(2) Any agreement whenever made (whether before or after the passing of this Act) which would have the effect of preventing or restricting a person applying for an access order shall be void to the extent that it would have that effect.

Clause 7

1. Clause 7 contains supplementary provisions relating to the effect of an access order and invalidates any "contracting-out".

Subsection (1)

2. Subsection (1) provides for an access order to bind no one other than a party to the access proceedings. It implements recommendations in paragraphs 4.74 and 4.106 of the report.

Subsection (2)

3. Subsection (2) readers ineffective any agreement (whenever made) which would (but for this provision) have the effect of preventing or restricting a person applying for an access order. In so providing, subsection (2) implements paragraph 4.120 of the report.

Short title, interpretation, commencement and extent.

8.—(1) This Act may be cited as the Access to Neighbouring Land Act 1985.

(2) In this Act—

"court" means a county court except in relation to cases transferred from a county court under section 6 of this Act, when it means the High Court;

"entry" includes the doing of anything necessary for the carrying out of works, and "enter" shall be contrued accordingly.

(3) This Act shall come into force on 1 January 1986.

(4) This Act extends to England and Wales only.

EXPLANATORY NOTES

Clause 8

1. Clause 8 provides for the short title, interpretation, commencement and extent of the Bill.

Subsection (1)

2. Subsection (1) gives the short title of the Bill.

Subsection (2)

3. Subsection (2) contains two important definitions:—

(a) by defining "the court", it confers on the county courts an exclusive jurisdiction in access proceeding (apart from those transferred to the High Court under clause 6(2)) and thus implements the recommendation in paragraph 4.93 of the report;

(b) by defining "entry" as including the doing of anything necessary for carrying out works, it ensures that the Bill, particularly clause 1, caters for the exceptional case in which the objection comes, not from the occupier, but from the owner of an easement over the land to which access is sought.

Subsection (3)

4. Subsection (3) provides for the Bill to come into force on 1 January 1986. This date will, however, need to be amended because of the need to make rules of court (both county court rules and Rules of the Supreme Court) regulating the procedure, including that to be followed under clause 1(5).

Subsection (4)

5. Subsection (4) provides expressly that the Bill is to apply only to England and Wales.

Application to the Crown

6. Paragraph 4.17 of the report recommends that the legislation should not bind the Crown as a respondent. There is no need for any express provision to that effect, since the general rule is that legislation binds the Crown only if expressed to do so, or if doing so by necessary implication. The absence of any provision binding the Crown does not mean that no order can be made for access to land *owned* by the Crown: if such land has been let, an access order can be made against the tenant and, in most cases, such an order will give the applicant all that he needs, since the Crown, as lessor, would not normally be a necessary respondent to the application.

APPENDIX B

AN EXAMPLE OF A PRESCRIBED FORM (WITH NOTES) FOR A STATUTORY NOTICE SCHEME

Access to Neighbouring Land Act 1985

APPLICATION FOR TEMPORARY RIGHT OF ACCESS TO NEIGHBOURING LAND

If you cannot do repairs without entering the next door property

1. Even if essential maintenance or repair work needs to be done to your property, and the best or only way to do it is by entering your neighbour's* property, you have no automatic right to go in.

2. You may enter in any one of the following cases:—
   (a) your neighbour agrees;
   (b) you have a contract which allows you to go in, or the conditions governing the ownership of your neighbour's land allow you to;
   (c) the local county court makes an order giving you permission. (For details of how to apply, see ● (official explanatory booklet));
   (d) you have given your neighbour notice in the form on page ●, and he or she has not objected. In this case, you are entitled to go in only if the conditions and procedure set out below have been strictly observed.

3. The temporary right to enter given by the notice procedure is strictly limited. It will entitle you to enter:—
   (a) only the land which you describe on the form;
   (b) for no longer than two consecutive days;
   (c) only during the hours of daylight which you specify on the form;
   (d) only to do the work which you state on the form.

4. The notice you give must be on the attached printed form. You must address it to the person who would be entitled to give you permission to enter. You must then hand it to that person. If it is a company which can give you permission to enter, you must either leave the notice at its registered office or else send it there by post.

5. There must be at least seven clear days between the date on which the person to whom the notice is addressed receives it, and the date you state for the work to start.

6. If the person to whom you give the notice agrees, or does not reply before the date you state for work to start, you may enter on that day and the day after to do the work you described on the form.

---

* "Your neighbour" means the person who is entitled to give you permission to enter. That may not be the person occupying the neighbouring property.

7. If that person tells you in writing that he or she does not consent, you may not go in. If you still wish to do so, you will have to apply to the county court (see paragraph 2(c) above).

8. If the written reply you receive says you may go in on certain conditions, you may accept that position and enter, observing the conditions. If the conditions are not acceptable, you should try to agree a variation of them. If you cannot agree but still need access, you will have to apply to the county court.

9. If you enter under a consent given, or taken to have been given, by the person to whom your notice was addressed, the following terms automatically apply:—

(a) you are responsible for repairing all damage done by you or your employee or contractor whom you employ;

(b) if any such damage cannot be repaired, you are responsible for paying compensation;

(c) you must leave the neighbouring land at least as clean and tidy as it was when you entered;

(d) you are not entitled to go into or upon any building;

(e) you are not entitled to do anything which interferes with any business for which the neighbouring property is used.

If you do not think you can accept any one or more of these conditions, you should not serve notice on the attached form; you should apply to the county court.

Access to Neighbouring Land Act 1985

APPLICATION FOR TEMPORARY RIGHT OF ACCESS
TO NEIGHBOURING LAND

TO: (Name and address of person entitled to give permission to enter)

I, (Your name and address)

need access to (Describe land you will need to go on)

so as to carry out the following work on the adjoining property (Describe work to be done)

The work will be done on 198 (Give starting date and time)

and on the next day, during the following daylight hours:

The Access to Neighbouring Land Act 1985 gives you certain rights if you agree to my entering the land described above for this purpose. Your rights are explained on the back of this notice.

If you object to my entering you *must* inform me in writing *before* the date given for the work to start. If you do not, you will be unable to object. If you do agree, but state in writing before that date that you wish to lay down conditions, then I may accept those conditions and enter to do the work.

What receiving this notice means to you

1. No one is entitled to go on someone else's land without their consent, even to do essential maintenance and repair work which can only, or only conveniently, be done by going onto neighbouring land.

2. With this notice, your neighbour is applying for your consent temporarily to go on the land described to carry out the specified work on his own property. Because it is in the general interest that buildings and property should be properly maintained, the Access to Neighbouring Land Act 1985 lays down that anyone who gives consent after receiving a notice in this form shall enjoy certain safeguards.

3. If you agree to this work being done:—

(a) it will only last for the two stated days;

(b) no one will be entitled to come onto your property except during the hours of daylight;

(c) no one will be entitled to enter any building on your property;

(d) no one will be entitled to do anything to interfere with any business for which your property is used;

(e) your neighbour must leave your land clean and tidy;

(f) your neighbour is responsible for repairing all damage done by him or her, or any employee or contractor he or she employs;

(g) if there is any damage which cannot be repaired, your neighbour is responsible for paying you compensation.

4. What to do:—

(a) *If you agree to the work being done*

You can either return the copy form, saying you agree on the reply form. Or, you can simply do nothing. If you do nothing, you will be taken to have agreed.

(b) *If you do not agree to the work being done*

You must tell your neighbour *in writing* that you object *before* the date given for starting the work. You can use the reply form.

(c) *If you agree to the work being done, provided certain conditions are observed*

You must tell your neighbour *in writing*, specifying the conditions, *before* the date given for starting the work. You can use the reply form.

5. You can give your written reply to your neighbour personally. Or, you can deliver it or send it by post to his or her address on the notice form. In that case, you must allow sufficient time for your reply to come to your neighbour's attention before the date of starting the work.

6. If you do not agree to the work being done, and notify your neighbour in writing, he can apply to the local county court for an order which will allow him to do it. If he does, you will have the chance to oppose his application, or to argue for acceptable conditions. The county court has power to order either party to pay the costs of the application, and in taking its decision will consider how far you on the one hand and your neighbour on the other have acted reasonably.

You can tear off the attached copy of this notice and use the slip at the foot of it for your reply.

Signed (sign your name here)

Date (insert date you send or deliver the notice)

....

REPLY FORM

* I AGREE to your entering to do the work as above

* I DO NOT AGREE to your entering to do the work as above

* I AGREE to your entering to do the work as above, but only on the following conditions:

* Delete 2 alternatives.

APPENDIX C

List of persons and organisations who made detailed comments on Working Paper No. 78[1]

Association of County Councils
Association of Local Authority Valuers and Estate Surveyors
Bristol Law Society
British Legal Association
British Property Federation
British Railways Board
British Telecom
Building Societies Association
Cambridgeshire and District Law Society
Chancery Bar Association
Chartered Institute of Building
City of Bristol (City Clerk's Department)
J.M. Collins
John Colyer, Q.C.
A. Cotton
Council of Her Majesty's Circuit Judges
Council on Tribunals
County Landowners Association
Crown Estate Office
The Hon. Mr. Justice Dillon
Department of the Environment
The Rt. Hon. Lord Justice Gibson (N. Ireland)
H.M. Land Registry
House Owners Conveyancers Ltd.
Hunter & Partners
Incorporated Society of Valuers and Auctioneers
Institute of Conveyancers
Institute of Legal Executives
Institution of Civil Engineers
Institution of Municipal Engineers
Jones Blakeway & Pepper
Kingsley, Napley & Co.
The Law Society
Linklaters & Paines
London Transport Executive
Lord Chancellor's Office
P.B. Matthews (University College, London)
J.P. McBrien
National Federation of Building Trades Employers
North Middlesex Law Society
N.E. Osborn
Plymouth Law Society
Post Office
Professor A.M. Prichard

[1] This list refers to the positions held by persons when their comments were made.

Property Services Agency
Royal Institute of British Architects
Royal Institute of Chartered Surveyors
Senate of the Inns of Court and the Bar
Professor L.A. Sheridan
The Society of Conservative Lawyers
P.A.E. Stone
R.W. Suddards
Treasury Solicitor
The Hon. Mr. Justice Walton

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