



Neutral Citation Number: [2025] UKUT 253 (LC)

Case No: LC-2024-518

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

AN APPLICATION UNDER SECTION 84 OF THE LAW OF PROPERTY
ACT 1925

13 August 2025

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

*RESTRICTIVE COVENANT – DISCHARGE OR MODIFICATION – planning consent for
erection of new dwelling - access, parking and garden on application land – restriction
preventing erection of buildings or structures and use other than as a private garden for
domestic recreation – easement for access limited to purposes in connection with use as a
private garden for domestic recreation – application refused*

BETWEEN:

LESLEY ANN GARTON

Applicant

-and-

WHEATCROFT LAND (THOROTON) LIMITED
AND SIX OTHERS

Objectors

Land to the rear of Manor House, Main Street,
Thoroton, Nottingham
NG13 9DS

Mrs D Martin TD MRICS FAAV
Nottingham Civil Justice Centre
4 June 2025

Mr Mark Diggle, instructed by direct access for the applicant
Mr Richard Power, instructed by Knights, for the objectors

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The following cases are referred to in this decision:

Hotchkin v McDonald [2004] 1 P&CR 7

Re O'Byrne's Application [2018] UKUT 395 (LC)

Shephard v Turner [2006] 2 P & CR 28

The Ridgeway (Oxshott) Management Ltd v McGuinness, unreported, 24/8/23, HHJ Monty KC

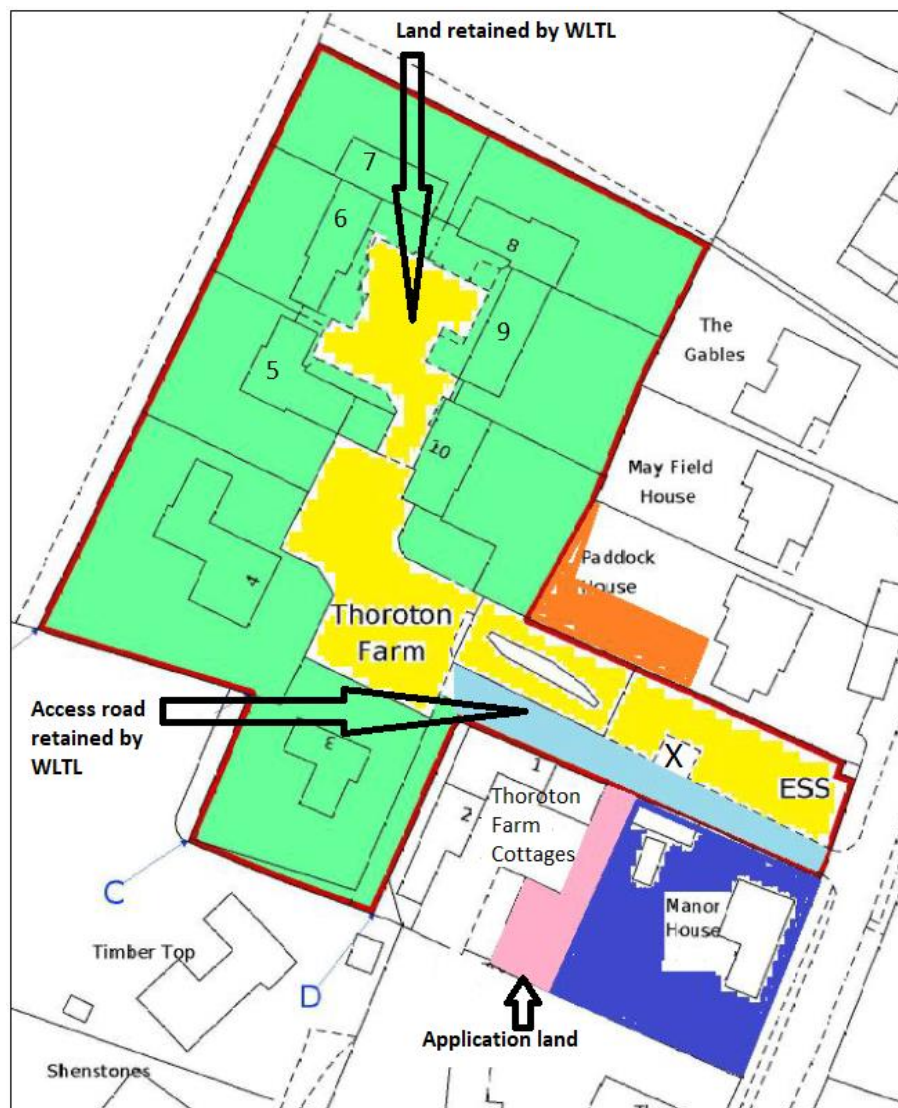
Introduction

1. This is an application for discharge or modification of restrictions which prevent the applicant from implementing a planning permission for the erection of a new dwelling in her garden at Manor House, Thoroton. The application land adjoins the end of the applicant's garden and would be used for access and parking associated with the new dwelling. However, it is burdened by a restriction which prevents the erection or construction of any building or structure on it and requires it to be used as a private garden for domestic recreation only ("the restriction"). The application land benefits from a right of way over an adjoining private access road to Thoroton Farm; that right is limited to purposes in connection with use of the application land as a private garden for domestic purposes ("the limited right of way").
2. An application was made on 18 July 2024 for discharge or modification of the restriction and modification of the limitation on the right of way, under grounds (a), (aa) or (c) of section 84(1) of the Law of Property Act 1925, to permit implementation of the planning permission. Whether the Tribunal has jurisdiction to discharge or modify a limitation on the use of a right of way is an issue on which I received submissions.
3. The full list of objectors to the application is provided at Appendix 1. The first objector is Wheatcroft Land (Thoroton) Limited ("WLTL"), a company which developed Thoroton Farm to provide eight new properties, numbered 3 to 10 Thoroton Farm. WLTL has retained ownership of the communal access road and adjoining areas until the titles of all the new properties are registered at the Land Registry. At that point, ownership will be transferred to the Thoroton Farm Management Company, and the owners of all the properties at Thoroton Farm will become members or directors of that company. Owners of six of the eight new properties at Thoroton Farm are objectors to this application ("the personal objectors").
4. I made a site inspection on 3 June 2025, accompanied by the applicant and her daughter, counsel for the objectors, and Mrs Deena Tomlinson, one of the personal objectors.
5. At the hearing the following day the applicant was represented by Mr Mark Diggle, who called the applicant to give evidence. The objectors were represented by Mr Richard Power, who called Ms Catherine Haward, a director of WLTL, Mrs Deena Tomlinson, Mrs Sonia Garratt, Mr Leonard Garratt, Mr Richard Saville and Mrs Jayne Saville. I am grateful to them all. Neither party adduced expert evidence.
6. I agreed that counsel for the parties could submit their closing arguments in writing.

Factual background and chronology

7. The plan below shows the application land, the applicant's adjoining land at Manor House, the land retained by WLTL and the properties Nos 3 – 10 Thoroton Farm which also benefit from the restriction. Nos 1 and 2 Thoroton Cottages were separately purchased, improved and sold on by WLTL and do not benefit from the restriction. The access road was originally the track giving access to the farm buildings. It now has a tarmac surface, just wide enough for two cars to pass each other. The strip of land to the north of the access road is laid to grass, with a pond, and the small area marked X is a fenced area of

tarmac where bins from the development can be left ready for collection. It is understood that refuse and recycling lorries reverse up to that area from Main Street.



8. Thoroton Farm, including all the parts described above and the surrounding farmland, was purchased by Mr Kenneth Beeby on 18 May 1979. The applicant's late husband worked from the early 1980s as Mr Beeby's farm manager and lived as Mr Beeby's tenant in Manor House ("the house"). The garden of the house at that time included the application land, which was open and unfenced through to the yard and farm buildings beyond.
9. In 1992 Mr Beeby sold the house to the applicant and her husband, with the requirement to erect a boundary between it and the application land, which he retained. In the same year Mr Beeby converted the closest farm buildings into two cottages, known as Nos 1 and 2 Thoroton Farm Cottages. The application land remained undeveloped.
10. In 2014 Mr Beeby discussed with the applicant (whose husband had died in 2007) his plans to develop the farm yard at Thoroton Farm. It was agreed between them that in consideration of the applicant agreeing not to object to Mr Beeby's proposed planning

applications he would transfer to her, free of charge, the application land and another small parcel which is not relevant to this application. The agreement was set out in a contract dated 9 December 2014, which included reference to “...rights of way only up the access road...” to the application land.

11. On 31 March 2016 Mr Beeby transferred Thoroton Farm into a pension trust. A planning application was made for development and permission was granted on 15 June 2017. This was subsequently varied on 7 May 2019.
12. On 22 May 2019 the application land was transferred to the applicant, subject to the restriction and the limited right of way which are the subject of this application.
13. In 2020 the development land was sold to WLTL. Construction of the development commenced on 28 September 2020 and was completed in August 2021. The eight properties were sold between June 2021 and June 2022. Refurbishment of Nos 1 and 2 Thoroton Farm Cottages took place between August 2022 and January 2023. Those two properties were sold in August and September 2023.
14. On 20 August 2021 the applicant submitted an application to Rushcliffe Borough Council (“the council”) for planning permission to build a new two-bedroom dwelling in her garden, including partial conversion of an existing outbuilding, with associated access and parking on the application land. Since the application included access over the access road in the ownership of WLTL, the applicant wrote on 11 August 2021 informing WLTL of her application. Ms Haward recalled making an objection to the application, on the basis of the restriction and limited right of way, but no objections are recorded on the council’s planning portal. Permission was granted on 27 May 2022.
15. A revised application was submitted on 4 April 2023 for a three-bedroom dwelling without conversion of the existing outbuilding. One objection was submitted by a resident of the new development. Consent was granted on 30 May 2023 (“the planning consent”).
16. The site plan below is extracted from the plans approved in the planning consent. I have added labels to show the access, parking and garden uses proposed for the application land. The applicant’s intention was that the proposed dwelling would be situated on adjoining land in the garden of Manor House, mindful of the restriction over the application land. The objectors do not accept that the approved site plan is sufficiently detailed to show that no part of the house would be built on the application land. However, I accept the evidence of the applicant that she was aware of the restriction preventing building on the application land (if not the extent of the impediment created by the limited right of way) and that her architect’s plans were produced with that in mind.



17. On 15 September 2023 the plot with planning consent, including the application site, was advertised for sale. Ms Haward was made aware of this and contacted the applicant's daughter to discuss the restriction and limited right of way. The applicant then took the plot off the market. Ms Haward confirmed that at that stage she anticipated being able to come to an arrangement with the applicant about access. However, when she notified the owners of properties at Thoroton Farm, as future owners of the access road, they made clear that they were unwilling to support that approach.
18. At the date of my inspection the application land was a rough grassy site with no boundary fence to the garden of Manor House. An ornamental hedge had been planted along the boundary fence to No 1 Thoroton Cottages. The application site is about 4.5m wide where it abuts the access road. There is currently a standard 3.6m timber field gate across the entrance with a short stretch of infill fencing beside it.

Legal background

Legislation

19. Section 84(1) of the Law of Property Act 1925 gives the Tribunal power to discharge or modify any restriction on the use of freehold land on being satisfied of certain conditions.
20. Ground (a) of section 84(1) is satisfied where it is shown that by reason of changes in the character of the property or neighbourhood or other circumstances of the case that the Tribunal may deem material, the restriction ought to be deemed obsolete.
21. Ground (aa) of section 84(1) is satisfied where it is shown that the continued existence of the restriction would impede some reasonable use of the land for public or private

purposes or that it would do so unless modified. By section 84(1A), in a case where condition (aa) is relied on, the Tribunal may discharge or modify the restriction if it is satisfied that, in impeding the suggested use, the restriction either secures “no practical benefits of substantial value or advantage” to the person with the benefit of the restriction, or that it is contrary to the public interest. The Tribunal must also be satisfied that money will provide adequate compensation for the loss or disadvantage (if any) which that person will suffer from the discharge or modification.

22. Ground (c) is satisfied where it is shown that discharge or modification would cause no injury to persons entitled to the benefit of the restriction.
23. In determining whether the requirements of sub-section (1A) are satisfied, and whether a restriction ought to be discharged or modified, the Tribunal is required by sub-section (1B) to take into account “the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas, as well as the period at which and context in which the restriction was created or imposed and any other material circumstances.”
24. If the applicant is able to establish that the Tribunal has jurisdiction to modify the covenant, the Tribunal must then decide whether to exercise its discretion to do so. If it does, the Tribunal may also direct the payment of compensation to any person entitled to the benefit of the restriction to make up for any loss or disadvantage suffered by that person as a result of the discharge or modification, or to make up for any effect which the restriction had, when it was imposed, in reducing the consideration then received for the land affected by it.
25. If the applicant agrees, on modifying a restriction the Tribunal may also impose some additional restriction over the land.

The restriction and limited right of way

26. The restriction was imposed by a deed of transfer dated 22 May 2019 (“the 2019 transfer”) between Richard John Beeby, Nicholas Nigel Beeby and Susan Wray Beeby (“the first transferor”), Rowanmoor Trustees Limited, Richard John Beeby and Amanda Jane Beeby as the Trustees of the Beeby Family Pension Trust, Nicholas Nigel Beeby and Susan Wray Beeby (“the second transferor”) and Lesley Ann Garton (“the transferee”). The parties relied on the HM Land Registry transfer form TP1 to provide details of the deed, and the relevant restriction and limited right of way are set out in part 12 of the form as “Additional provisions”.
27. Two parcels of land, Parcel A and Parcel B, were transferred by the deed, of which Parcel A was the application land, transferred by the first transferor. The transfer was not for money. Part 12.2 of TP1 concerns “Rights reserved for the benefit of the retained Property” and the limited right of way to Parcel A was included as an exception in part 12.2.2:

“12.2.2 There is reserved for the benefit of the Transferor and for the benefit of the Retained Property the benefit of the exceptions reservations rights covenants and easements and agreements and declarations contained or referred to in the Registers of Title to Title Number NT520576 and NT105884 to the intent that the

Transferee and her successors in title the owners and occupiers for the time being of the Property hereby transferred shall not be entitled to exercise or enforce the same and the same shall solely benefit the Retained Property and be exerciseable and enforceable by the Transferor to the exclusion of the Transferee and the owners and occupiers of the Property PROVIDED THAT the Transferee (and the persons deriving title under her) shall be entitled to exercise the right of way reserved at clause 12.3.1 of a Transfer dated 31st March 2016 made between (1) the Transferors and (2) the Transferors, Rowanmoor Trustees Limited and Amanda Jane Beeby subject as set out in that said reservation for the benefit of that part of the Property comprising parcel A only for all purposes in connection with the use of Parcel A as a private garden for domestic recreation but not for any other purpose.”

28. Part 12.3 of TP1 concerns “Restrictive covenants entered into by the Transferee for the benefit of the Retained Property” and includes one paragraph as follows:

“12.3.1 No building

The Transferee covenants with the Transferor for the benefit of the Retained Property and every part thereof capable of being benefitted thereby and so as to bind (so far as may be) the whole or the part or parts concerned (as the case may be) of Parcel A into whosoever hands the same may come not to erect or construct on Parcel A any building or structure (whether temporary or permanent) and to use Parcel A as a private garden for domestic recreation only PROVIDED THAT the erection of fencing in accordance with clause 12.4 below or a shed greenhouse or gazebo shall not be a breach of this covenant.”

Submissions on the Tribunal’s jurisdiction to modify the limited right of way

29. The introductory paragraph of section 84(1) states:

“(1) The Upper Tribunal shall (without prejudice to any concurrent jurisdiction of the court) have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction ...”

30. Mr Power submitted for the objectors that the limit on the right of way granted in part 12.2.2 was not a restriction within the scope of section 84(1) and the Tribunal had no jurisdiction to modify or discharge it. Moreover, since the applicant had no freehold interest in the access road, she was not entitled to make an application under section 84(1) to modify the terms of the easement granted to her over it.
31. Mr Diggle submitted that it is the applicant’s freehold interest in the application land which is affected by the restriction in 12.2.2 and that the words “or otherwise” in section 84(1) demonstrate that the jurisdiction is not limited to restrictions arising under covenants. He submitted that if section 84(1) is given the narrow meaning contended for by the objectors, that it relates only to covenants and not to easements, then the words “or otherwise” in the section are rendered otiose. He submitted that so long as an easement fulfils the remainder of the statutory definitions in section 84(1) then it is susceptible to the

power granted to the Tribunal by that provision. To decide otherwise would result in the frustration of the statutory power in circumstances where a covenant would be susceptible to modification but the existence of an easement that would prevent user in accordance with a modified or discharged covenant would in any event prevent the use of the land.

32. In *Shephard v Turner* [2006] 2 P & CR 2, at [58] Carnwath LJ had referred to the policy underpinning ground (aa), and said “...the general purpose is to facilitate development and use of land in the public interest, having regard to the development plan and the pattern of permissions in the area.” Mr Diggle submitted that to modify an easement in circumstances where it restricts the user of a piece of land would be to further the statutory purpose.
33. Both counsel referred me to *Hotchkin v McDonald* [2004] 1 P & CR, in which a decision of the Lands Tribunal to modify a restriction had been stayed pending an application to the court for a declaration on the construction of an express right of way, which was limited to the uses authorised in a schedule to the original conveyance of the manor house. HH Judge Rich QC, sitting as a Deputy High Court Judge, dismissed the claim for a declaration and held that the right of way could be used in connection with the use of the manor house if the use was not forbidden by the restrictive covenant. If the scope of the authorised uses was modified by the Lands Tribunal, then the right of way could be used in connection with the modified purposes.
34. HHJ Rich QC gave permission for his decision to be appealed and the case relied on by the parties is the decision of the Court of Appeal (Mummery LJ, with whom Thorpe LJ and Bennet J agreed) in which the appeal was dismissed.
35. Mr Diggle submitted that part 12.2.2 should be interpreted in the same way as the express grant in *Hotchkin*. In this case, as in that case, there was a clear link between the covenant and the easement. Both the covenant and the easement refer to the use of the application land as a private garden only. Mr Diggle relied in particular on the analysis of Mummery LJ at [12] to [16]:

“12 (3) The critical point is that the roadway is available as a right of way to and from the Manor House in connection with the lawful use of the Manor House. There is no dispute that the language of the grant must be construed in the light of the circumstances existing at the date when it was executed. The well known passage from the speech of Lord Hoffmann in *ICS Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896 at 912 F–913 D, was cited in Mr Rhys’s skeleton argument.

- 13 On that approach it is possible, in my view, to arrive at a construction of the grant which makes practical sense. The starting point is that the language of the grant of the right of way makes an express link between the use of the right of way in connection with the Manor House and the lawful use of the Manor House. Mr Hotchkin’s construction, however, rests not just on linking the use of the right of way to the use of the Manor House but to the use of the Manor House as fixed or frozen forever at one particular time—that is as specified in the 1965 conveyance, the date when the restrictive covenant was

imposed—regardless of whether the covenant is later validly modified or discharged by order of the Lands Tribunal to permit a different lawful use of the Manor House.

- 14 But, as I pointed out to Mr Rhys in argument, one of the circumstances existing at the date of the imposition of the user covenant was that it may not be legally possible to fix the use of the Manor House specified in the 1965 conveyance forever and ever. The lawful use of the Manor House may change from time to time. At the date of the grant of the right of way in connection with the use of the Manor House the restriction on user—although valid and effective as regards the property and the right of way—was subject always to possibility of judicial modification under the statutory authority of s.84 of the Law of Property Act 1925. Modifications can be obtained under s.84, if they are justified, in the judgment of the Lands Tribunal, by changes in the character of the property or by other material circumstances and the continued existence of the restriction would impede the reasonable use of the property without securing practical benefits to other persons.
- 15 The statutory jurisdiction under s.84 was not and, indeed, could not have been ousted by any agreement between the parties. The possibility of a non-consensual variation regarding the lawful use of the Manor House was, in my view, one of the relevant circumstances existing at the date of the 1965 conveyance, whether or not that was appreciated by the parties at the time.
- 16 If the user of the Manor House and the roadway giving access to it are so linked, as they are in the terms of this grant, it is unrealistic, to say the least, to suppose that the parties intended to create a situation in which the user of the Manor House could be lawfully changed without having a corresponding impact on the right of the way enjoyed in connection with it.”
36. Mr Diggle submitted that the parties to the original grant in this case cannot have been of the view that the use of the application land could be fixed and frozen forever. Given that the right of way is linked to the user of the application land, the interpretation of the grant would take account of a modified covenant. In considering all the circumstances of the case the Tribunal should pay particular attention to the initial agreement between the applicant and Mr Beeby, which made no references to the covenant or to the cutting down of the right of way.
37. In *Re O’Byrne’s Application* [2018] UKUT 395 (LC) planning permission had been granted for conversion of two barns in the grounds of a manor house into a dwelling, creating two dwellings at the property. Implementation of the permission was impeded by a restriction on use of the property imposed by the transfer in 2001. The permitted use was defined as “use as a single private dwellinghouse and for agricultural or forestry purposes”. A second impediment to implementation arose from the fact that the right of way to the property granted by the transfer was “for all purposes in connection with the use and enjoyment of the property for the permitted uses...”.

38. The Tribunal (HHJ Behrens and A J Trott FRICS) determined at [67] and [68]:

“67. In our view the purposive construction submitted by Mr Hutchings QC is to be preferred to that of Mr Rosenthal. In our view the reasoning of Mummery LJ is directly applicable to the 2001 Transfer and we do not repeat it. We agree with Mr Hutchings QC that it makes no difference that the parties have chosen to define the Permitted Uses in a definition section and then incorporated that definition into the two other clauses. If we were to distinguish the two cases on that basis it would not, in our view do any credit to the law.

68. Accordingly, we conclude that if we modify the restrictive covenant it will be lawful for Mr and Mrs O'Byrne to use the access road for the modified use.”

39. Mr Diggle submitted that this was further support for adopting the approach taken in *Hotchkin*.

40. For the objectors, Mr Power drew attention to paragraph [5] in *Hotchkin*, where Mummery LJ stated:

“...He [counsel for the appellant] pointed out, rightly, that the Lands Tribunal has no power to vary an easement as such.”

41. He also submitted that *Hotchkin* was clear authority to the effect that the extent of a right of way must be determined by reference to the language of the express grant. The difference in this case is that modification of the restriction in part 12.3.1 would leave part 12.2.2 unchanged.

42. Mr Power relied further on the case of *The Ridgeway (Oxshott) Management Ltd v McGuinness*, unreported in the County Court at Central London, 24/8/23, HHJ Monty KC. The case concerned a house on a residential estate where the estate roads were in the ownership of the claimant company. The defendants, along with the other owners of houses on the estate, had entered into a deed of easement by which rights were granted over the estate roads in connection with use of their land as a single dwelling. The defendants had been granted planning permission to demolish their existing house and build two new dwellings on the plot. The claimant was seeking a declaration that the rights would not accommodate the proposed development and an injunction preventing the defendants from implementing it.

43. In his decision HHJ Monty KC considered *Hotchkin* and *O'Byrne*, although not the paragraphs I have cited above since there was no associated restrictive covenant. He also considered the 2011 Law Commission publication Law Com No 327 “Making Land Work: Easements, Covenants and Profits a Prendre”. That publication had recommended that the jurisdiction of the Upper Tribunal (Lands Chamber) should be extended to cover modification and discharge of easements. He drew the inference that there was no current jurisdiction (there had been no subsequent reform) and concluded at [36] and [40]:

“36. I therefore proceed on the basis that it is not open to [the defendants] to make an application under section 84 in respect of the easements, at least not without

having an uphill battle, against the weight of judicial comment, to persuade the Tribunal that it does have jurisdiction.

...

40. I agree with Ms Seitler that an owner of land is freely entitled to determine the rights which are granted over that land even where that limits the use of the land by another; that there is nothing wrong with parties consensually agreeing the grant of a right which does not fall within section 84; that there are strong public policy reasons in favour of upholding contracts between freely consenting parties; and that there was no evidence in this case that ROML deliberately tried to avoid attracting the jurisdiction of the Tribunal by using an easement rather than imposing a restrictive covenant.”
44. The authorities cited support Mr Power’s submission that the Tribunal does not have jurisdiction under section 84(1) to discharge or modify an easement. The decisions in *Hotchkin* and *O’Byrne*, upon which Mr Diggles relies, both concerned situations where the Tribunal proposed to modify the authorised or permitted uses of an application property. The easements in each case were limited by reference in general terms, not specific terms, to the authorised or permitted uses, such that modification of those uses would make it lawful for the easement to include the modified uses.
45. In this case the right of way in part 12.2.2 is limited in specific terms to “...all purposes in connection with the use of Parcel A as a private garden for domestic recreation but not for any other purpose.” It is not linked to the restrictions in part 12.3.1 and any modification of the restriction would leave it unchanged.
46. I therefore determine that, even if I decided to modify the restriction on the application land, I have no jurisdiction to modify the limitation on the use of the right of way and it would remain as an impediment to implementation of the planning permission.

The application for discharge or modification of the restriction

47. Notwithstanding my determination that I have no jurisdiction to modify the limitation on the use of the right of way, it remains open to the parties to negotiate an appropriate modification to that right. On the assumption that the right of way could be modified by agreement, I now consider the application for discharge or modification of the restriction over the application land, under grounds (a), (aa) and (c) of section 84(1).
48. I note here that for the majority of the application process the applicant was unrepresented, which led to a less than straightforward progression from the application to the hearing, particularly once solicitors were instructed to represent the objectors as a group. The details of the various applications and directions are not relevant to this decision, but I am conscious that much of the criticism of the application on behalf of the objectors has focused on shortfalls in the nature and quality of the documentation. But the Tribunal is familiar with unrepresented parties and must always bear in mind its overriding objective to deal with cases fairly and justly. I do not, therefore, intend to dwell on those criticisms, but simply to focus on the matters to be considered under each ground of section 84(1).

Ground (a) - Obsolescence

49. Submissions for the applicant relied on the lack of clear evidence of the purpose for which the restriction was imposed, and the fact that since the imposition of it in May 2019 the benefitted land had been redeveloped leading to changes in the character of the neighbourhood. Mr Diggle submitted that if the purpose was to protect the retained land for the proposed development, then that purpose can no longer be achieved since the development has taken place and it ought to be deemed obsolete.
50. Ms Haward stated that when WLTL purchased Thoroton Farm in June 2020, with the benefit of the planning permission, it was in the knowledge and comfort of the restriction and limited right of way so that, once completed, the development would be an exclusive estate without traffic from other properties being able to use it. Mrs Tomlinson, who might be described as the lead objector, stated that she had a telephone conversation with Mr Beeby on 9 January 2025, to discuss the applicant's application to the Tribunal to have the restriction removed. She said that Mr Beeby was shocked and told her the restriction on the application land and on the right of way were imposed to prevent the applicant from developing it and her property. However, the subjective view of one party regarding the purpose of a covenant is not admissible evidence, and that purpose is to be inferred from the terms of the covenant and the objective circumstances, so I can give no weight to that assertion.
51. Regarding changes to the neighbourhood, Mr Power submitted that the applicant entered into the restriction in 2019 in the full knowledge of the proposed development at Thoroton Farm. She had entered into an agreement in 2014 not to object to planning applications for the development, the first planning consent had been granted in 2017 and the amended scheme was approved just before the transfer to her of the application land. The character of the neighbourhood now is exactly as it was envisaged to be when the restriction was imposed, and the restriction is therefore not obsolete.
52. From my site inspection I can understand why Mr Beeby would have decided, or been advised, to impose the restriction ahead of the sale of his retained land to a developer. As Ms Haward explained, this provided an assurance to the developer that they need have no concern about traffic from a third party utilising the private access road to their completed development - beyond that arising from limited use of the application land as a private garden for domestic recreation.
53. I conclude that the restriction, imposed only six years ago, has not become obsolete by reason of the development and, in fact, now fulfils its most likely anticipated purpose. I therefore decline to discharge or modify the restriction under ground (a).

Ground (aa) – Whether in impeding a reasonable use the restriction secures practical benefits of substantial value or advantage to the objectors and, if not substantial, whether money would be an adequate compensation for their loss

54. The restriction on the application land prevents the erection or construction of any building or structure and requires it to be used as a private garden for domestic recreation only. The drawings approved in the applicant's planning permission show that part of the application land would be used as a garden, and part as a driveway and parking area. It is not disputed by the objectors that the planning permission is persuasive that the use would be reasonable, and it is agreed by the parties that construction and use of the driveway and parking area is impeded by the restriction.

55. I received no submissions on whether practical benefits of value were secured by the restriction, nor on whether money would be an adequate compensation for loss or disadvantage suffered by discharge or modification.
56. The evidence from the personal objectors was that the restriction secured practical benefits of substantial advantage to them by preventing the use of their access road by additional traffic, and the potential for inconsiderate parking on the relatively narrow road which would impede access to the main development for wider delivery or emergency vehicles. It was notable that the witness statements for all the personal objectors other than Mrs Tomlinson referred to Mrs Tomlinson's statement and stated their agreement with her concerns and her statements set out in various numbered paragraphs. This was an unwise approach to the preparation of witness evidence, which led to objectors stating that they agreed with parts of Mrs Tomlinson's evidence, in particular her report of her telephone conversation with Mr Beeby, of which those who gave oral evidence admitted they had no personal knowledge.
57. No expert evidence was adduced by either party on the current and likely future traffic flows into and out of the development. Mr Diggle asked those personal objectors who gave evidence to comment on the number of cars currently using the access road, but they had no foundation on which provide empirical answers. Neither was any expert evidence adduced on the feasibility of parking two cars on the application land, as shown on the approved plans, nor on the feasibility of turning into the application land from the access road, both further aspects of concern to the personal objectors. However, during my site inspection my attention was drawn to the lighting bollards which are situated along the verge beside the access road and, in particular, the one immediately outside the application land which had been damaged a year or so ago. It is alleged (and not denied) that the damage was caused by a vehicle gaining access to the application land on behalf of the applicant. The objectors say that this illustrates the tightness of the access to the application land, and the difficulties for them all which would be caused by construction vehicles going in and out, and by vehicles delivering to a new dwelling turning in the access road or reversing up it from Main Street.
58. From my site inspection I agree that the narrowness of the access road and the limited width available for access to the application land would make entry to and exit from it difficult for vehicles larger than standard cars. An easy option for those vehicles would be to continue up into the generous open area within the Thoroton Farm development and turn there but, as Mr Power submitted, this would be a trespass. I accept Mr Diggle's submission that vehicles, of whatever size, associated with garden use of the application land currently have a right of access into it which cannot be prevented by the objectors. But that is a limited use, and unlikely to be more than occasional. However, since the approved plans make provision for only two cars to park on the application land, the question has to be asked - where would visiting cars park? There is an inevitability that they would park on the access road; even knowing that this was not allowed, visitors might take a chance for a few hours.
59. What became apparent from the objectors who gave evidence at the hearing was that parking in the access road is a particularly sensitive issue. Considerable friction has been created by vehicles connected with No 1 Thoroton Farm (one of the original cottages, which adjoins the access to the application land) being parked on the access road. This may be in part a temporary situation, whilst a garden project is undertaken, but I heard

evidence and saw photographs indicating that cars visiting the property are also frequently parked in the road. Ms Haward confirmed that all the residents at Thoroton Farm are subject to covenants, which include not parking on the access road or open communal area. She had recently sent an email to them all as a reminder of that. Mrs Tomlinson said that she had reminded the owner of No 1 several times of the covenant not to park on the access road and now, since the situation was ongoing, legal action would need to be taken. Another witness volunteered an opinion that the owner of No 1 was creating the parking problem in order to frustrate this application.

60. Mr Power pointed out that while the residents of Thoroton Farm all benefit from a scheme of covenants relating to the maintenance, cost, lighting and usage of the access road, this would not bind the applicant as an additional user. Although the applicant believed that her title deeds imposed on her a legal responsibility to contribute to the cost of maintenance of the access road, Mr Power submitted that it was a personal covenant which would not be transferred with the title of the application land. But no evidence was provided to confirm the nature of the assumed legal responsibility, so I cannot consider the point further.
61. However, I find no difficulty in concluding, from my site inspection and the evidence I heard, that the restriction on the application land does secure practical benefits which are of advantage to the objectors. As Ms Haward explained, the intention of the developer was to create an exclusive estate, which it has now done. The properties are subject to a scheme of covenants for mutual benefit and, once ownership of the common areas is transferred to the Thoroton Farm Management Company, the owners of the properties in the development will, through that company, be responsible for management of their common areas, including the access road. The access road is of limited width and the provision of a purpose built area for bin collection, close enough to Main Street that collection vehicles can reverse up to it, is indicative of the thought put into managing the use of that road by large vehicles. Modification of the restriction to allow implementation of the planning permission would give rise to unmanaged additional traffic, and potentially to cars parking in the access road, all beyond the control of WLTL and its successor management company.
62. What I must now consider is whether being able to prevent that situation provides practical benefits of substantial advantage to the objectors. Mr Power submitted that the avoidance of litigation arising from the likely trespass on the common areas, was in itself a practical benefit to the objectors. Moreover, he submitted, should the restriction be modified to permit the development, there would likely follow expensive and protracted litigation over the nature and extent of the right of way, which would remain the final obstacle to the applicant's intentions. In protecting the objectors from the prospect of litigation in general, Mr Power submitted that the restriction did provide practical benefits of substantial advantage.
63. Mr Diggle refuted that assertion and submitted that to place reliance on the likely actions of the future management company, of which the directors are as yet unknown, would be to descend into conjecture and supposition. The Court of Appeal had made clear at [58] in *Shephard v Turner* that a practical benefit relates to protection from the ultimate use of the land, not from the process of transition to such a use. He submitted that legal process would fall into the latter category. I accept that his submission has merit insofar as it

concerns prospective litigation over the right of way, which might follow modification of the restriction in order to achieve the intended use.

64. However, looking simply at the proposed use of the application land should the restriction be modified, I accept Mr Power's submission that any difficulties in exercising management and control over traffic arising from it would create an associated risk of litigation for WLTL and its successor company. Avoidance of that risk and uncertainty is part of the package of practical benefits secured by the restriction.
65. Overall, the restriction provides reassurance to the objectors that management and control of the access road to the Thoroton Farm development is subject only to the minor impact arising from use of the application land as a private garden for domestic recreation. I consider that the practical benefits of that reassurance, and the avoidance of risk and uncertainty, are of substantial advantage to the objectors.

Ground (c) – Discharge or modification would cause no injury to the persons entitled to the benefit of the restriction

66. This ground falls away now that I have found that the restriction secures practical benefits to the objectors.

Determination

67. I determine that I have no jurisdiction to modify the restriction under ground (a) that it ought to be deemed obsolete.
68. I determine further, based on my observations during inspection and the evidence I heard, that the practical benefits secured by the restriction are of substantial advantage to the objectors and I therefore have no jurisdiction to discharge or modify it under either ground (aa) or ground (c).
69. In any event, the Tribunal would be slow to exercise discretion to modify a restriction entered into so recently.

Mrs D Martin TD MRICS FAAV
XX August 2025

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.

APPENDIX 1 – LIST OF OBJECTORS

1. Wheatcroft Land (Thoroton) Limited
2. Mr Andrew Smith (4 Thoroton Farm)
3. Mr John and Mrs Katie Prestage (5 Thoroton Farm)
4. Mr Richard and Mrs Deena Tomlinson (7 Thoroton Farm)
5. Mr Richard and Mrs Jayne Saville (8 Thoroton Farm)
6. Mr Leonard and Mrs Sonia Garratt (9 Thoroton Farm)
7. Mr Adrian Page and Ms Pippa Gregory (10 Thoroton Farm)