



Neutral Citation Number: [2025] UKUT 209 (LC)

Case No: LC-2024-592

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

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

**Nottingham Civil Justice Centre,
Carrington Street, Nottingham, NG2 1EE
4 July 2025**

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – discharge or modification – covenant preventing alterations or additions – whether covenant secures practical benefits of substantial value or advantage to neighbouring owner - s.84(1) (aa), Law of Property Act 1925 – application allowed

BETWEEN:

MR AND MRS CHRISTOPHER AND LUCY ANTHONY

Applicants

and-

MR AND MRS CHRISTOPHER AND PATRICIA HARDY

Objectors

**Welbeck House, Bigsby Road,
Retford, Nottinghamshire DN22 6SB**

Mr Mark Higgin FRICS FIRRV

8 May 2025

*Mr Sam Healy, instructed by Wake Smith Solicitors, for the applicants
Mr Christopher Hardy represented himself and Mrs Hardy*

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The following cases are referred to in this decision:

Alexander Devine Children's Cancer Trust v Housing Solutions Ltd [2020] 1 WLR 4783

Cresswell v Proctor [1968] 1 W.L.R. 906 CA

Hodgson v Cook [2023] UKUT 41 (LC)

Martin v Lipton [2020] UKUT 0008 (LC)

Re Bass Ltd's Application (1973) 26 P&CR 156

Introduction

1. Mr and Mrs Anthony own and live in Welbeck House, a modern detached home in Retford. This decision concerns an application by them to discharge or modify a covenant that prevents them from completing the construction of a conservatory attached to the rear of their house. They would also like to install a large door or doors in the rear wall of their garage in order that they can bring large items such as garden furniture into their garden. At the moment there is only limited means to do so.
2. Mr and Mrs Hardy live next door in Roche House and have the benefit of the covenant which prevents alterations and additions to Welbeck House. They object to both the conservatory and the works to widen the doorway.
3. I inspected Welbeck House on the morning of 30 April 2025 in the company of Mr and Mrs Anthony. Their counsel Mr Healy was also present. I viewed the partially completed conservatory and the rear wall of the garage which already contains a door and window. I noted the spatial relationship between the two houses and then visited Roche House. I saw the rooms closest to the conservatory and viewed Mr and Mrs Anthony's house from the garden. I was accompanied by Mr Healy.
4. At the hearing Mr and Mrs Anthony were represented by Mr Healy and Mr Hardy appeared on his own behalf and for his wife. He was assisted by his daughter, Lauren. I am grateful to both parties for their submissions.

The facts

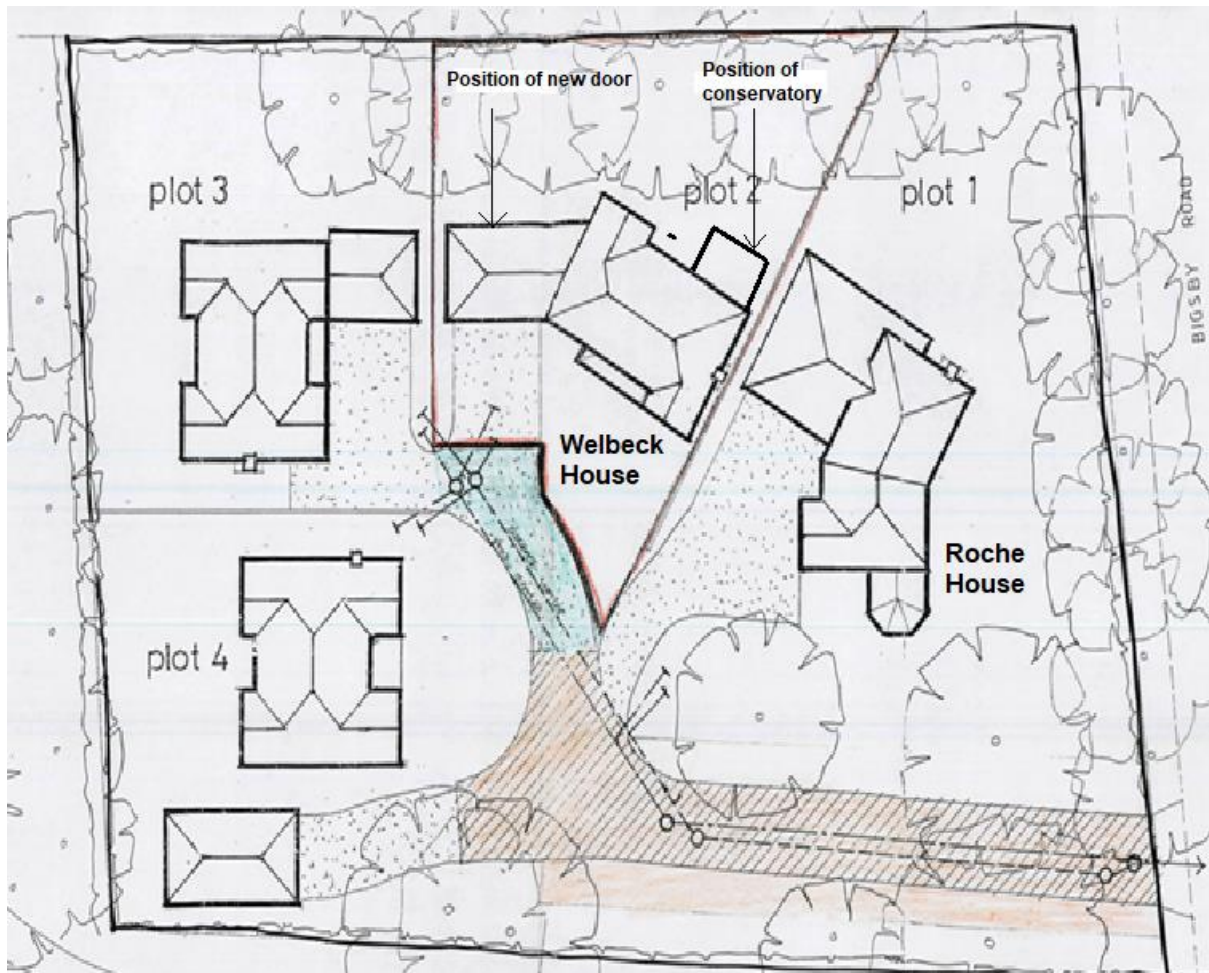
5. Retford is a small town in northern Nottinghamshire which lies about 15 miles south east of Doncaster. The A1 trunk road passes to the west of the town which is also served by the East Coast Mainline railway.
6. Welbeck House and Roche House are part of a small development of four detached houses occupying a rectangular site of about half a hectare (or 1.2 acres) located approximately a mile north east of Retford town centre.
7. The site was purchased and developed by a company owned by Mr Hardy in 2004. The plan that follows after paragraph 12 shows the arrangement of the houses; Welbeck House is annotated as 'plot 2' and Roche House as 'plot 1'. I have marked the position of the conservatory on the plan and indicated the approximate location of the proposed opening for the new doors.
8. Mr and Mrs Anthony moved to Welbeck House in 2008 and other than some internal changes have made no alterations to their home since that time. In June 2023 following the receipt of a redundancy payment, they decided to extend their property by constructing a conservatory next to their lounge. The position was adjacent to the boundary with Roche House which meant it was close to Mr and Mrs Hardy's garage and the utility room which is located behind it. The two houses are separated by a close boarded fence set between concrete posts. It is 1.75 metres in height. A pathway 0.95 metres in width separates the external wall garage/utility room of Roche House from the fence. On the

Welbeck House side of the fence there is a gap of 1.1 metres between the fence and the face of the brickwork forming the side wall of the conservatory. The part of Roche House that faces Welbeck House is of single storey construction and the wall adjoining the path contains two windows; one in the garage and the other in the utility room. The garage window has obscured glass, the utility room window is an opening casement with a single pane. The glass is approximately 400mm wide and 950mm high. The utility room also has a door to the back garden. The top half of this door is glazed with obscured glass.

9. Construction of the conservatory began on Monday 9 October 2023 and ceased just over a week later when Mr Hardy raised an objection on the basis that the conservatory breached a covenant in a transfer of Welbeck House to Mr and Mrs Anthony's predecessors in title. I could see when I visited that the footings had been dug, brickwork was completed to damp course level but no oversite concrete for the floor had yet been poured. A cavity wall approximately 3.095 metres wide and 1.650 metres high had also been built.
10. Mr and Mrs Anthony selected a local company, Solar Frame Direct, to undertake the project and plans supplied by them show the conservatory to be 4.0 metres in length and 5.0 metres wide. Initially the apex of the roof was said to be 'no more than 12 feet' but at the hearing new dimensions were submitted which confirmed the apex would be 10 feet 6 inches (3.2 metres) in height. The eaves height is specified as 2.1 metres. The following schematic shows the general arrangement.



11. The glazing frames are to be grey uPVC and the roof covering will be slate with two 'Velux' type windows in each roof slope. It was Mr and Mrs Anthony's understanding, having relied on the advice of Solar Frame Direct, was that neither planning permission nor Building Control approval were required for the project.
12. As far as the rear wall of the garage at Welbeck House is concerned this elevation already contains a single timber door and a two pane casement window which are separated by approximately 1.5 metres of brickwork. Mr and Mrs Anthony's intention is to create an opening of up to 3.5 metres in width but no higher than the height of the existing door. Both existing openings may be incorporated but no details were supplied with the application in relation to the door arrangements that would be required to fill such a void.



The legal background

13. Section 84 of the Law of Property Act 1925 gives the Tribunal jurisdiction to discharge or modify restrictive covenants affecting freehold and some leasehold land. So far as relevant to the application in this case it says this:

“(1) The Upper Tribunal shall ... 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 on being satisfied—

(a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Upper Tribunal may deem material, the restriction ought to be deemed obsolete; or

(aa) that in a case falling within subsection (1A) below the continued existence thereof would impede some reasonable user of the land for public or private purposes or, as the case may be, would unless modified so impede such user; or

...

(c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction:

and an order discharging or modifying a restriction under this subsection may direct the applicant to pay to any person entitled to the benefit of the restriction such sum by way of consideration as the Tribunal may think it just to award under one, but not both, of the following heads, that is to say, either—

- (i) a sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge or modification; or
- (ii) a sum to make up for any effect which the restriction had, at the time when it was imposed, in reducing the consideration then received for the land affected by it.

(1A) Subsection (1) (aa) above authorises the discharge or modification of a restriction by reference to its impeding some reasonable user of land in any case in which the Upper Tribunal is satisfied that the restriction, in impeding that user, either—

(a) does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; or

(b) is contrary to the public interest;

and that money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification.

(1B) In determining whether a case is one falling within subsection (1A) above, and in determining whether (in any such case or otherwise) a restriction ought to be discharged or modified, the Upper Tribunal shall 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.

(3A) On an application to the Upper Tribunal under this section the Upper Tribunal shall give any necessary directions as to the persons who are or are not to be admitted (as appearing to be entitled to the benefit of the restriction) to oppose the application, and no appeal shall lie against any such direction; ...

14. Importantly, section 84 confers a discretion on the Tribunal; if any of the various alternative conditions in sub-section (1) is satisfied, the Tribunal may discharge or modify the covenant but does not have to do so.

The covenant

15. The covenant is contained in a transfer dated 10 February 2004 between Christopher Michael Hardy and Patricia Jane Hardy and Hardy Rose Limited. It states that:

“9. One dwelling only to be constructed on the Plot in accordance with Local Authority Town and Country Planning requirements and no alteration or addition

to be made to the dwelling without the specific written consent of the Transferor. This is with the exception of the construction of a greenhouse and or garden shed of a reasonable size for domestic purposes only any such condition has not been complied with by the Transferee”

16. It is worth noting that of the four properties on the development only Welbeck House and York House (Plot 4) are bound by the restrictive covenant. This is not therefore a situation involving a ‘building scheme’ where a development is subject to covenants intended to be enforceable by the owners of all the houses against one another.

The application

17. In their application Mr and Mrs Anthony seek the discharge of the covenant or in the alternative, its modification to allow the completion of the conservatory and the creation of a large opening and door in the rear wall of the garage. They rely solely on ground (aa), namely that the continued existence of the covenant impedes some reasonable use of the land for public or private purposes, and it confers no practical benefit of substantial value or advantage, and any loss can be adequately compensated monetarily. In other words, Mr and Mrs Anthony say that their proposed alterations are modest in nature, objectively reasonable and will have no real impact on Mr and Mrs Hardy, or for that matter, any of their neighbours.
18. Mr and Mrs Hardy say that as originally built Welbeck House and Roche House were set against each other in a staggered configuration which is beneficial to both properties. Mr and Mrs Hardy say that if the covenant is modified the shape of Welbeck House will change and the staggered positioning will be altered in a way that will be detrimental to them. They dispute Mr and Mrs Anthony’s assessment of the impact on the proposed conservatory on Roche House and in particular say that the view from the window in their utility room will be harmed and the boundary between the two houses will become overly built up.
19. Mr and Mrs Pritchard who live in Rufford House (Plot 3) have no objection to the alterations.

The applicant’s submissions

20. Mr Healy based his submissions on the Tribunal’s decision in *Re Bass Ltd’s Application* (1973) 26 P&CR 156. In that case the Tribunal identified a series of questions which it found of assistance in coming to a conclusion on an application under ground (aa).
21. The first of these questions is ‘Is the proposed user reasonable?’ Mr Healy submitted that a conservatory is an unremarkable addition to any residential property and noted that Roche House has a sun room of its own. In terms of size the proposed conservatory was ‘not out of keeping’ with the overall size of Welbeck House and the apex of the roof will be no higher than 3.26 metres (10’6”). It would be set back from the boundary and the elevation facing Roche House had little glass.
22. The widened door in the garage was also a reasonable use and most householders would recognise the benefit of having an access to the rear garden for larger objects that did not involve dismantling a fence to facilitate such movements.

23. The second question is ‘Do the covenants impede that user?’ Mr Healy says that it is clearly the case that the covenant impedes what Mr and Mrs Anthony describe as the reasonable use of their land.
24. The next question is ‘Does impeding the proposed user secure practical benefits to the objectors?’ Mr Healy submitted that as far as the proposed works are concerned the covenant does not secure any practical benefits. Turning firstly to the conservatory the view from Roche House will not be affected and the amount of light entering any of the rooms will not be diminished to ‘any real extent’. Mr Healy made the following observations:
- (a) The existing fence between Roche House and Welbeck House substantially blocks the view from the utility room window in Roche House and affects the amount of light entering the utility room
 - (b) The fence will conceal most of the conservatory
 - (c) Users of the utility room are unlikely to use it to take in the view from the window.
 - (d) Views of the garden at Welbeck House and surrounding area are unlikely to be materially affected by the construction of the conservatory.
 - (e) Roche House has an extensive garden that wraps around the whole house and provides many spaces for sitting out.
25. As far as the garage works are concerned Mr Healy submitted that it was difficult to envisage how this would have any impact on Mr and Mrs Hardy as it would only be visible from a point in the garden of Roche House and would require that they peered over the hedge that separates the two properties. He noted that the occupants of Rufford House, which is adjacent to the garage, had not raised any objections.
26. Mr Healy further submitted that Mr and Mrs Hardy had not adduced any evidence in relation to the design ethos of the overall development and how it might be impacted. They did not raise the matter through expert evidence of their own or by questions to Mr and Mrs Anthony’s expert.
27. The fourth question asks – ‘If the answer to question three is affirmative, are those benefits of substantial value or advantage?’ Mr Healy said that should the Tribunal find that the ability to prevent the works is of value to Mr and Mrs Hardy, then that ability is not of substantial value or advantage because the works are so small, or putting it another way; these are alterations that will have next to no impact on the objectors.
28. At this point Mr Healy also dealt with the question of ‘the thin end of the wedge’, or in other words the notion that consent to the works in this case will create a precedent for approval of future applications for alterations. He noted that Mr and Mrs Anthony have no intention to carry out any other alterations and the scope to do so at Welbeck House, once the conservatory and garage works were completed, would be limited in any case. He also said that any future application would be considered on its merits and noted the Tribunal’s comments in *Martin v. Lipton* [2020] UKUT 0008 (LC) where at paragraph 72 Martin Rodger QC, Deputy Chamber President, and Mr Paul Francis FRICS said

“Applications of this type are fact sensitive, and it cannot be assumed that the outcome of one case will be mirrored in the outcome of a different application, even one seeking a very similar modification on the same Estate.”

29. The fifth of the *Re Bass* questions is ‘Is impeding the proposed user contrary to the public interest? This matter does not need consideration on the facts of this case.
30. The sixth question is concerned with compensation and asks ‘If the answer to question four is negative, would money be an adequate compensation? In other words, if the practical benefits are not of substantial value or advantage, can their loss be compensated for in money? Mr Healy submitted that were the answer to be negative it would logically follow (assuming there was evidence to support it) that money would be adequate compensation. He noted that Mr and Mrs Hardy have not claimed any compensation or adduced any evidence in support of it.
31. The last question deals with the matter of compensation if the answer to question five is affirmative. As there is no public interest aspect to this case we do not need to consider a response.
32. Mr Healy acknowledged that the covenant has only been in place for 21 years. He submitted that the modernity or otherwise of the covenant falls to be considered under s.84 (1B), meaning that it is a material consideration, but not one that he considered required any special weight to be attached to it. It needed to be weighed with all of the other factors.

The objectors’ submissions

33. In his submissions Mr Hardy said that he had previously developed a site with some other builders one of whom had altered and extended their house in breach of an agreement between the group. Unhappy with the outcome he had started again at the site on Bigsby Road. He resolved that he would avoid the same circumstances arising again and on the advice of his solicitor, included a covenant in the transfers of some of the properties to ensure that the consent of he and his wife was required before any alterations or additions.
34. Mr Hardy said that trees on the boundaries of the site were subject to Tree Preservation Orders, and he had worked closely with the architect for the development to arrive at a configuration for Welbeck house and Roche House which complied with the constraints imposed by the local authority, but also afforded openness at the boundary, light, privacy a sense of space and views. The positioning of the houses minimised the degree to which the flank walls faced one another and as Mr Hardy put it, ‘they would run against each other for as short a distance as possible’.
35. He explained that at the moment Welbeck House abuts the garage of Roche House rather than any of the living space. The conservatory would occupy space that he had deliberately left open in the interests of privacy and space. If permitted, the conservatory would create a dark and overly built up passageway at the side of the house and interfere with the views from the utility room window.
36. Mr Hardy also submitted that the construction of the conservatory is not, in his view, a reasonable use of land and that his enjoyment of his own land had already been impacted

by the work undertaken so far. He would be significantly affected by the completion of the conservatory and would ‘suffer an obstructed view from the window.... with a conservatory towering above the fence’.

37. Mr Hardy also objected to the modification of the rear wall of the garage, noting a lack of detail in the application. He regarded it as unnecessary as there was a passageway some 1.8 metres wide at the side of Welbeck House down which large items could be carried.
38. Mr Hardy also provided a lengthy submission concerning Mr Anthony's knowledge of the covenant and accusing him of purposely breaking it. It is not necessary to record the details of the various exchanges between the parties at this point in the decision, but I will return to them later.
39. Finally, Mr Hardy said that discharge of the covenant would result in more additions and alterations to Welbeck House to the detriment of Roche House.

Expert Evidence

40. Mr Healy called Mr John Francis FRICS to give expert evidence on behalf of Mr and Mrs Anthony. Mr Francis is a director of “Crapper & Haigh” and is based in Sheffield. He has over 45 years of experience of valuing and surveying residential and commercial properties in South Yorkshire, North East Derbyshire and North Nottinghamshire. He visited both Welbeck House and Roche House in February 2025 and took the measurements I referred to in paragraph 8.
41. Although the application is concerned solely with ground (aa) Mr Francis provided his opinion in relation to grounds (a), (b) and (c) as well. For the purposes of this decision I will concentrate on his opinion in relation to ground (aa).
42. Beginning with the conservatory, he noted that the only window in Roche House that overlooked the area where the conservatory is located is the utility room and that the view from that window is substantially blocked by the fence that separates the two properties. He questioned whether a utility room window was somewhere an owner would spend much time in front of or would stand at to take in a view. He considered that once completed the conservatory would be visible but the majority of it would be concealed by the fence.
43. Whilst acknowledging that he was not a rights of light surveyor, his long experience led him to conclude that the completed conservatory would not significantly hinder the amount of light entering the utility room at Roche House. He further noted that the covenant does not inhibit the placing of a shed adjacent to the fence and the consequences of doing so would be far more significant, in his view, than the current proposals for a conservatory.
44. Turning to the garage works, he commented that the intended opening in the rear wall would only be visible from the garden of Roche House and only then from a point near to the rear boundary.
45. Mr Francis suggested that the covenant provides no practical benefits in connection with the proposed works. After considering the desirability and value of Roche House both

before the works were undertaken and then in a hypothetical scenario where the works were complete, he concluded that there would be no effect. Putting it another way, Mr and Mrs Hardy would suffer no financial loss.

Discussion and determination

46. In order for the Tribunal to reach a judgment on whether it has the jurisdiction to modify or discharge the covenant it must decide whether ground (aa) is satisfied. In other words, does the covenant, in the circumstances of this application, provide Mr and Mrs Hardy with practical benefits of substantial value or advantage. They say that the covenant ensures that openness at the boundary, light, privacy, a sense of space and views are preserved. All of these were created by the original layout of the development. My assessment will therefore examine each aspect. My comments refer to the conservatory since the garage works cannot possibly have any impact on the attributes identified by Mr Hardy.

Openness at the boundary

47. At the moment the flank wall of Welbeck House and the garage/utility room external wall of Roche House are separated by a gap of 2.05 metres along their entire length. Were the conservatory to be completed that separation will not change, but the distance over which the buildings run beside each other will be extended by 4 metres to 13.2 metres. The conservatory has an eaves height (measured externally) of 2.1 metres which will be lower than the eaves height of the single storey part of Roche House which contains the garage and utility room. The conservatory has a roof which slopes away from the boundary. The houses are separated by a fence 1.75 metres in height which already creates a relatively narrow passageway down the side of each building. In my view there is sufficient spacing between the two buildings that the conservatory will not result in a material difference to the sense of openness at the boundary. This will be the case in the passageway and in the garden of Roche House when looking towards Welbeck House. The covenant permits a garden shed on the boundary and depending on its size and position could potentially create a worse effect than the conservatory. Mr Hardy rightly pointed out that no rational person would install a shed in the position occupied by the conservatory.

Light

48. Neither party adduced any evidence to demonstrate any loss of light although Mr Francis said that in his professional view the conservatory would not hinder the amount of light entering the utility room window at Roche House. I am inclined to agree with him. The utility room is lit by light from a glazed door into the garden, and by light from the adjacent breakfast room. From my inspection I could discern that the foremost part of the conservatory will be aligned with the rearmost part of the utility room window. In addition the side wall of the conservatory will only project 0.35 m (about 1 foot 2 inches) above the fence and at a distance of a metre beyond the fence. It seems to me that Mr and Mrs Hardy's fears of light loss are understandable but ultimately unfounded.

Privacy

49. No evidence was provided by either party in relation to any loss of privacy. I observe that the wall of the conservatory closest to Roche House is partially glazed and contains windows of about 400 mm in height which at their lowest point are some 1.65 metres

above ground level. There is also a full height glass panel in the same elevation. This is about 900 mm wide. Both can be seen in the representation in paragraph 10. I am mindful that the whole of the conservatory is situated behind the utility room window. This means that anyone standing in the conservatory, assuming that they were taller than 1.75 metres and could see over the fence, would have an oblique view into the utility room window. Bearing in mind that the utility room window is only about 400 mm wide and the top 20% of it is obscured by a roller blind, it is doubtful that the level of intrusion would be very great. Mr Francis observed in his report that a utility room is not a room in which most people chose to sit, although Mr Hardy said that his wife used it for decorating cakes and therefore spent more time in the room than would usually be the case. The prevention of such an inward view would in my judgement be a practical benefit but it would not be substantial.

50. The same could not be said of any views across the garden. The first floor windows of Welbeck House afford views into at least part of the garden of Roche House and the conservatory will not, in my view, contribute to a greater sense of overlooking.

A sense of space

51. From my inspection it was apparent that the conservatory would be a relatively minor addition to what is a large, detached house. Neither would it dominate the rear garden, which is also quite spacious. It will be noticeable from the garden of Roche House but only from the area adjacent to the boundary and when looking backwards towards the two houses. Mr Hardy said that the conservatory occupied space that he has deliberately left undeveloped. I accept that he thought carefully about the relationship between the two houses but the change which is now proposed is modest and in my judgment would result in only a minimal loss of amenity.

Views

52. The only room in Roche House affected by the conservatory is the utility room. It cannot be seen from any other window. The view from the window in the utility room is, at first glance, of the fence that separates the two houses. Above the fence the vista changes to some mature trees on the northern boundary of the garden of Welbeck House and above them of the sky. This is not a window from which a scene of rolling countryside or some other far reaching view might be enjoyed. As I have already mentioned part of the window is currently obscured by a scalloped roller blind. The other glazing in the utility room is in a door which provides access to the garden. That pane of glass is obscured or frosted. It seems to me that if the view from the utility room was important or worth enjoying either the door would have been installed with plain glass or the house would have been designed differently. The only part of the view that will alter is the scene looking backwards at Welbeck House and in my view its retention could never conceivably be a practical benefit of substantial value or advantage.
53. I conclude therefore that in relation to both the conservatory and the garage door works the covenant does not provide Mr and Mrs Hardy with practical benefits of substantial value or advantage. That means that I have jurisdiction to modify or discharge it. However, the question at this point is whether I should exercise the discretion conferred by statute.

54. I turn firstly to the question of whether to modify or discharge. It is easy in this case to envisage circumstances where the covenant might provide the protection Mr and Mrs Hardy sought; a much larger scale extension or a redevelopment which could seriously impinge on the amenity or value of the other houses in the scheme. I therefore have no doubt that the covenant should not be discharged and consequently the decision is whether or not to modify. Modification of the covenant for the works proposed by Mr and Mrs Anthony does not mean that the likelihood of any future application succeeding will be improved. In other words, this application will not be the ‘thin end of the wedge’. The Tribunal, in earlier decisions such as *Martin v Lipton*, has emphasised that each case is facts dependent.
55. That leads me to the consideration of whether there are any other factors which should form part of my exercise of discretion. Mr Hardy in his submissions argued that Mr and Mrs Anthony knew about the covenant before they formulated plans to extend their house, deliberately chose to ignore it and started work anyway. Mr Anthony, in response to a question from the Tribunal, said that he had no recollection of his solicitor drawing the matter to his attention at the time the house was purchased. Whether or not Mr and Mrs Anthony knew about the covenant, work on the project was stopped as soon as Mr Hardy raised the matter with them. It seems to me that this is not a situation where Mr and Mrs Anthony brazenly breached the covenant and presented the Tribunal with the completed project.
56. The second matter which falls to be considered as part of the Tribunal’s discretion is the age of the covenant. Imposed in 2004 the covenant in this case is not especially recent, but the objector is one of the original parties to the covenant. In *Cresswell v Proctor* [1968] 1 W.L.R. 906 CA the Court of Appeal (Harman and Danckwerts LLJ) took the view that the Tribunal’s discretionary powers ought not to be exercised in the case of a very recent covenant where the application was made by the original covenantor. In *Hodgson v Cook* [2023] UKUT 41 (LC) at [62] the Tribunal said that:

“Even if I had come to the opposite conclusion on whether the ground (aa) conditions were satisfied, I would have been very reluctant to lift a restriction which the applicants themselves freely accepted less than ten years ago. The more recently a restriction has been imposed the stronger the case for modification must be.”

The circumstances in this case are not wholly aligned with either *Cresswell* or *Hodgson* but the covenant has served the interests of Mr and Mrs Hardy for 21 years and its modification, however minor that change might be, is a factor which has a bearing on the Tribunal’s decision.

57. The final aspect which is worthy of consideration is the qualified nature of the covenant. The wording of the covenant does not create an absolute prohibition against any alterations or additions, since if that had been the parties’ intention there would be no reason to include a reference to the specific written consent of Mr and Mrs Hardy being required. It is not the job of the Tribunal to determine whether consent has been unreasonably withheld, such that the covenant could not be enforced, but when the Tribunal exercises its discretion, it seems to me that it is relevant to consider how likely the refusal of consent would be to survive a challenge that it was unreasonable. I have already concluded that for both alterations the effect on the amenity of Roche House will be very limited in the case of the conservatory and non-existent in the case of the wider

door; in those circumstances Mr and Mrs Hardy's refusal to consent to the modifications could very well be considered unreasonable.

58. In *Alexander Devine Children's Cancer Trust v Housing Solutions Ltd* [2020] 1 WLR 4783 Lord Burrows said at [52]:

.... I also accept that the Upper Tribunal in the Trustees of the Green Masjid case was correct to say, at paragraph 129, that once a jurisdictional ground had been established, the discretion to refuse the application should be "cautiously exercised".

59. In this case the main matters that require consideration in the application of discretion are finely balanced. On the one hand, the covenant was imposed by Mr Hardy himself to control changes to the property immediately next door to his own home. On the other hand, one of the proposed changes will have no effect, and the other will have only minimal effect, on his enjoyment of his own property, which it was the object of the covenant to protect. It is my judgement that the proper exercise of the Tribunal's discretion, taking all the relevant factors into account, is to allow the application to modify the covenant.
60. I now turn to compensation. Mr Hardy ticked the box on the objection form to indicate that he sought compensation but did not specify a figure and adduced no evidence. Mr Francis concluded that there would be no diminution in value at Roche House. In the circumstances I make no award.
61. There is one further aspect of this case that needs to be addressed. Mr Healy suggested that there might be some uncertainty about the scope of the restriction and, in particular, whether it applied only to external alterations and additions or also affected internal alterations. He referred to s.84(2) of the Law of Property Act 1925 which gives the Court power to make a declaration concerning the nature and extent of a restriction and invited me to resolve the suggested uncertainty. But section 84(2) confers jurisdiction on the Court, not on the Tribunal, and the Tribunal has no power to make declarations. Fortunately, the uncertainty which Mr Healy detected in the meaning of the restriction is not something which has caused difficulty between the parties.

Mr Mark Higgin FRICS FIRR V
4 July 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.