Obsolete restrictive covenants: a socio-legal analysis of the problem and solutions.

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This thesis is submitted in partial fulfilment of the requirements for the award of the degree of Doctor of Philosophy of the University of Portsmouth.

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Abstract

Debates concerning the perceived problems regarding restrictive covenants have engaged the legal academic and reform community for almost fifty years. Law reform committees, in recent years the Law Commission, have consulted and reported many times yet significant reform has not been forthcoming. Whilst other jurisdictions have also considered the problem there has been little in the way of detailed comparative research between England and other countries and no research that could be considered to be empirical. This research aims to analyse the problem of obsolete restrictive covenants using a socio legal approach in order to assess the extent of the problem and to provide potential solutions.

As a philosophical position, utilitarianism judges law in terms of the extent to which it provides the greatest happiness to the greatest number. In this research utilitarianism provided a measure against which to assess the current law and procedure and from which to contemplate law reform. Quantitative analysis using inductive coding of a large data set of land registry titles produced a reliable measure of the types of covenant burdening land in England and Wales across time. This analysis provided the basis for consideration of the extent of problem of obsolete restrictive covenants. Thematic analysis of expert interviews and responses to the Law Commission’s most recent consultation in both England and Scotland produced themes relating to both the perceived problem and also the potential solutions.

The conclusions to this research are twofold. Firstly, that reform of restrictive covenants would be beneficial from a utilitarian perspective. To this end a number of reforms of the law and procedure, beyond those proposed by the Law Commission, are suggested. These include recommendations to remind land owners to check their titles for restrictions prior to commencement of development, a notice procedure to ‘flush out’ objections to proposed breaches of covenants, a ‘sunset rule’ to make old covenants which lack usefulness easier to remove and a more general reform of the legislative procedure for removal of restrictive covenants. Secondly, this research concludes that legal reformers could benefit from a more thorough use of social science methodology in analysis of legal problems and suggestions are made for further consideration in this regard.
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Declaration

Whilst registered as a candidate for the above degree, I have not been registered for any other research award. The results and conclusions embodied in this thesis are the work of the named candidate and have not been submitted for any other academic award.

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Glossary

Annexation: The permanent attachment of the benefit of a covenant to the land of the covenantee.

Assignment: The transfer of the benefit of a covenant to a particular person.

Benefited land: The land which enjoys the benefit of the covenant.

Burdened land: The land is restricted by the covenant.

Common law: Law that is not equity.

Covenantor: Individual who takes the burden of the covenant.

Equity: Law which traditionally supplemented the common law where operation of the common law was perceived as too harsh.

Estate: The length of time for which land has been granted to a tenant under the system of tenure.

In personam: A right enforceable against a particular person or class of persons.

In rem: A right enforceable against the ‘whole world’. A right in the property itself.

Injunction: An order of the court that requires someone to do something or refrain from doing something.

Specific performance: A remedy for breach of contract that requires the wrongdoer to meet the obligations under the contract.

Unity of seisen: The ownership of two plots of land by the same legal person.

Fungible: Items of property that are replaceable with another item.

Estoppel: A doctrine that prevents a party from asserting a fact or claim inconsistent with a previous position.

Praedial: Relating to the land.

Dominium utile: Equitable or beneficial ownership of property.

Dominium directum: Legal ownership of the land: the right of a superior or lord.
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<th>Contractual remedy which allows the innocent party to bring the contract to an end.</th>
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<td><strong>Unclean hands</strong></td>
<td>The equitable maxim which states that a claimant will not succeed where he/she has behaved in bad faith.</td>
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<td><strong>Acquiescence</strong></td>
<td>Agreement or consent which may be express or implied from silence or inactivity.</td>
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<td><strong>Abandonment</strong></td>
<td>Giving up use of a right.</td>
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<td><strong>Laches</strong></td>
<td>A defence to a proceeding in which the claimant seeks equitable relief based on delay.</td>
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<td><strong>Beanfeasters</strong></td>
<td>Those attending a social gathering or festival.</td>
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<td><strong>Bowking</strong></td>
<td>Bleaching.</td>
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<td><strong>Feuar</strong></td>
<td>One who hold a feu (form of Scottish land tenure).</td>
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<td><strong>Commonhold</strong></td>
<td>A system of freehold property ownership designed to allow for shared use of common facilities.</td>
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<td><strong>Ultra vires</strong></td>
<td>Beyond the powers of the corporation, Parliament etc.</td>
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Abbreviations and acronyms

IPA  Interpretative phenomenological analysis
LCLRA  The Land and Conveyancing Law Reform Act 2009
LPA 1925  Law of Property Act 1925
LTS  Lands Tribunal Scotland
NPO  Notice of Proposed Obstruction
PCPA  Planning and Compulsory Purchase Act 2004
SPSS  Statistical Package for the Social Sciences
TCPA  Town and Country Planning Act
TC(S)A  Title Conditions (Scotland) Act 2003
UT(LC)  Upper Tribunal Lands Chamber
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Dissemination

Journal Articles


Conference Papers

CHAPTER 1 - INTRODUCTION

There are few property issues that are more pivotal than the interrelated questions of whether landowners should be allowed to impose restrictions on the use of land that bind future owners in perpetuity and whether or to what extent courts should have the power to modify or terminate those land use restrictions if the passage of time appears to undermine their initial purpose and utility (Lovett, 2008, p. 4).

1.1 Introduction

This research arises out of a personal interest in restrictive covenants derived from working as a property solicitor. It is the daily work of a transactional property lawyer¹ to review title to land and to report the findings of this research to their client. The writer felt that very often this task was beset with titles peppered with numerous restrictive covenants, often lacking in clarity and with questionable relevance to the society in which the client now lived and worked. Often the covenants were old and appeared to pertain to a time when the concerns of society were rather different from today. This research considered only restrictive covenants registered on freehold titles. The decision to exclude unregistered land in the research was largely a practical one; registered titles are readily available whereas unregistered titles are not. Leasehold covenants were not considered as these have not been part of the law reform proposals that are considered within this research.

This introduction contains five sections. Section 1.2 provides a brief outline of what is meant by the term ‘restrictive covenant’, and it outlines the rules governing their creation, transmission and removal. Section 1.3 considers what is meant by utilitarianism which is the philosophical approach underpinning this research. Section 1.4 provides a summary of the aims of the study. Section 1.5 provides an outline of the methodology of the thesis, and finally, Section 1.6 provides an outline of the thesis.

1.2 Restrictive covenants

Restrictive covenants are a species of property right; more specifically, ‘a “covenant” is an undertaking contained in a deed by which one party, the “covenantor” promises another party, the “covenantee” that he will or will not engage in some specified activity in relation to a

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¹ The term lawyer here is used to include legal executives and licensed conveyancers and in this thesis as a whole also includes barristers.
defined area of land’ (Gray and Gray, 2009, p. 237). These undertakings are typically not to build or to carry out a particular kind of use. They differ from the rights in the law of contract which are subject to two important tenets, ‘freedom to contract’ and ‘privity of contract’; the former allowing parties to make such agreements as they wish (subject to only minor legal restrictions); the latter restricting the enforceability of such arrangements to the original parties to the contract. These two tenets are problematic where property rights are concerned; the restriction on development described above provides little benefit if it ends when the covenator sells his or her land. On the other hand, the longevity of proprietary interests means that it is undesirable that parties should be at liberty to add to the list of land rights to suit their own purposes as this could unduly restrict land use. It is necessary at this point to briefly discuss the rules, which enable restrictive covenants to attach to land, the remedies for breach and the mechanism for removal.

Covenants, both positive and restrictive, will bind the parties to them pursuant to the law of contract, but the benefit and burden of covenants can ‘run’ with the land when certain requirements of common law or equity have been fulfilled. The distinction between law and equity here is important as it impacts not only on the rules of how and when covenants run but also on the remedy available. Once the original parties have parted with possession of the land it is necessary to consider whether the burden and benefit have passed to their successors; in order for the covenant to still affect the land both the burden and the benefit must have passed. The burden of a restrictive covenant only passes in equity whereas the benefit may also pass in common law. It is more common for the equitable rules to be applied to both the passing of the burden and the benefit as those are the only rules applicable to the passing of

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2 However they can be extremely diverse. In the sample analysed there were covenants not to interfere with graves, not to keep reptiles, only to paint in quiet and conventional colours and not to erect an outside aerial except such type as is necessary to obtain reception on BBC 2.
3 Privity of contract has, to some extent, been modified by the Contracts (Rights of Third Parties) Act 1999.
4 In some circumstances a person who in not a party to the contract can be entitled to the benefit of a covenant by virtue of the Contracts (Rights of Third Parties) Act 1999 or the Law of Property Act 1925, s.56.
5 The limits on addition to the list of property rights is sometimes referred to as the ‘numerous clausus’ and is considered in Chapter Two.
the burden. These rules which are often referred to as the rules in Tulk v Moxhay⁶ are summarised below.⁷

With regard to the burden, the covenant must be restrictive in nature, for example ‘not to build’, rather than positive, for example ‘to build a fence’. Furthermore, it must touch and concern the land rather than being strictly personal in nature.⁸ In addition, the covenant must have been created to benefit the land of the original covenantee. This means that the covenantee must have retained some land at the time of imposing the covenant; this highlights the need for there to be benefitting as well as burdened land. Furthermore, the burden must be intended to run with the land. Since 1925 this has not been as difficult to establish as s79 of the Law of Property Act 1925 (LPA 1925) deems the burden attached to the land unless a contrary intention is shown.⁹ Section 79 is not retrospective, so lawyers must be aware of the old rules. The final condition is that the restrictive covenant must be registered; where the land is registered this will be in the charges register of the title, where it is unregistered this will be as a Class D(ii) Land Charge in the Land Charges Register.¹⁰

Having established the rules for the passing of the burden, it is necessary to consider the rules for the passing of the benefit. The equitable rules will be considered first. For the benefit to pass in equity the covenant must ‘touch and concern the land’¹¹ (it must not be purely personal). The claimant must also have a legal or equitable estate in the land of the original covenantee. Furthermore, the benefit of the covenant must have been transmitted to the claimant by; annexation, assignment or under a scheme of development. Annexation may be express¹² or implied by s78 of the LPA 1925.¹³ The land must be clearly identifiable, but if this is the case annexation should not now be too difficult to prove. Assignment may also be express

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⁶ Tulk v Moxhay (1848) 2 Ph 774.
⁷ In fact the rules were refined over time; see 2.2 for a more detailed discussion of the history of restrictive covenants and Harpum, Bridge and Dixon, 2012, Chapter 32 for a detailed consideration of the rules.
⁸ The three-part test frequently (although not rigidly) applied comes from Swift Investments v Combined English Stores [1989] AC 632. This test asks firstly, could the covenant impose a burden on any owner of an estate in the land as opposed to the particular original owner. Secondly, does the covenant affect the nature, quality, mode of user or value of the land? Thirdly, is the covenant expressed to be personal?
⁹ This contrary intention may be express or implied by the commercial context (Morrels of Oxford Ltd v Oxford United Football Club Ltd [2001] Ch. 459).
¹⁰ Land Charges Act 1972 s.2(5)(ii).
¹¹ Rogers v Hosegood [1900] 2 Ch. 388.
¹² By words such as ‘for the benefit of the Purchaser and his heirs and successors’.
¹³ As a result of Federated Homes Ltd v Mill Lodge Properties Ltd [1980] 1 All E.R. 371 unless a contrary intention is clearly shown the benefit of most covenants will now be annexed.
or implied, but it is important to note that where there is assignment this is only between the parties and does not attach the covenant to the land\textsuperscript{14}, and a chain of assignments will therefore be required to pass the benefit to subsequent purchasers. A further alternative is to establish that the benefit of the covenant has passed in equity under a ‘scheme of development’.\textsuperscript{15} This creates a kind of local land law that allows all the owners of a development to be both benefitted and burdened by restrictive covenants regardless of the order in which the plots were sold. The requirements are; that there is a common vendor, the vendor laid out his estate in lots and these are consistent with a scheme of development, that the restrictions are intended by the vendor to benefit all the lots to be sold, and that both parties, or their predecessors in title, purchased from the common vendor.\textsuperscript{16} The rules for the passing of the benefit of the covenant at common law are similar to those in equity, the most notable difference being that the claimant must have a legal estate in land; an equitable estate will not suffice.

As stated above, the distinction between law and equity is important not only with regard to the rules attaching restrictive covenants to land, but also with regard to the remedies available when there is a breach. Where a restrictive covenant has been breached a claimant will very often want an injunction to restrain the wrongdoing, or to reinstate the state of affairs that existed previously (Newsom, 2013, p. 276). The court has a discretion to award damages in lieu of an injunction\textsuperscript{17}, and until recently the ‘good working rule’ provided by A.L. Smith L.J. in the case of \textit{Shelfer v City of London Electric Lighting Co} [1895] 1 Ch. 287 at p. 322-323 stated that damages in lieu may be awarded:

\begin{enumerate}
  \item If the injury to the claimant’s legal right is small,
  \item And is one which is capable of being estimated in money,
  \item And is one which can adequately be compensated by a small money payment,
  \item And the case is one in which it would be oppressive to the defendant to grant an injunction…
\end{enumerate}

However, the recent Supreme Court decision of \textit{Coventry v Lawrence} [2014] UKSC 46 has widened the discretion of the court with regard to the granting of an injunction or awarding damages in lieu of injunction. In the Lawrence case Lord Neuberger preferred a more flexible approach, stating that a mechanical application of the four tests, leading to damages being

\textsuperscript{14} See \textit{Marten v Flight Refuelling} [1962] Ch. 115.
\textsuperscript{15} Also referred to as a ‘building scheme’.
\textsuperscript{16} \textit{Ellison v Reacher} [1908] 2 Ch 374, at p. 384.
\textsuperscript{17} s2 Chancery Amendment Act 1858 (‘Lord Cairns’s Act’) and now s50 of the Senior Courts Act 1981.
awarded only in very exceptional circumstances was wrong in principle. The prima facie position remains that an injunction (rather than damages) will usually be appropriate, and the legal burden continues to lie with the defendant to show why it should not. However, it would normally be right to refuse an injunction if the four Shefler tests were satisfied unless there were circumstances to contradict this position. Most significantly perhaps, he opined that the fact that those tests are not all satisfied did not mean that an injunction should be granted.

In any event where the claimant seeks an equitable remedy he must himself behave equitably, and therefore an injunction is unlikely to succeed where a claimant has stood by and allowed the defendant to build in breach of a restrictive covenant. This was the case in Jaggard v Sawyer [1995] 1 W.L.R 269 where the defendants built and used a house in past and continuing breach of covenant. Proceedings were issued when the works were in an advanced stage, and failure to act more quickly to secure an injunction was a factor in awarding damages in lieu.\textsuperscript{18}

The distinction between law and equity is also relevant to assessment of the quantum of damages. Where damages are assessed at common law, which will only apply in limited circumstances where the defendant is not a successor and the claimant can show transmission of the benefit at common law (see above), damages will be assessed for loss, injury and expense. The normal measure will be diminution in the value of the benefitted land. Exemplary damages and damages equal to profits are not generally considered to be applicable (Newsom, 2013, p.295). Assessment of damages in lieu of injunction is a somewhat contentious issue.\textsuperscript{19}

The court is not limited to any specific basis of assessment, and out of this position has grown a body of case law where damages are assessed on the basis of a sum which would have been agreed had the defendant successfully negotiated for the release of the covenant. The position is clearly summarised by Newsom (2013, p. 299):

\begin{quote}
The basic principle appears to be that damages should be calculated by reference to the proper value to the wrongdoer of the wrong use of land. Ordinarily it is assessed by reference to an estimate of the amount that, in prior negotiations, would have been paid by a reasonable person having regard to the profitability (if any) of the defendant’s project and the risk that the court would impose an injunction [in] the absence of a release.
\end{quote}

\textsuperscript{18} Loss of amenity was also small in this case and the Shefler working rule was considered.
\textsuperscript{19} See for example Wrotham Park Estate Co Ltd v Parkside Homes Ltd [1974] 1 W.L.R. 798 and Surrey CC and Mole DC v Bredero Homes Ltd [1993] 1 W.L.R. 1361.
Finally in this introduction to restrictive covenants, it is necessary to consider the law relating to their removal. Where an owner of land wishes to remove a restrictive covenant from the title to his land, usually because he wishes to develop on the land in a way that would result in a breach, he can apply to the Upper Tribunal (Lands Chamber) (UT(LC)) on one of the grounds contained within the LPA 1925 s84:

84 Power to discharge or modify restrictive covenants affecting land.

(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 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

(b) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed, have agreed, either expressly or by implication, by their acts or omissions, to the same being discharged or modified; 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.

The claimant may select one or more of the grounds set out in s84(1) on which to base his claim for either discharge or modification. The UT(LC) may allow the application in full or in part and may award compensation where it is deemed appropriate. A more detailed consideration of the workings of the UT(LC) can be found in Chapter Seven.

1.3 The utilitarian approach of this research

The philosophical underpinnings of this research are considered in Chapter Five, as clearly these impacted on the design of the primary research. However, it is helpful at the outset to provide a philosophical setting for the research. In order to assess the effectiveness of a current aspect of the law it is necessary to consider its purpose. The writer has chosen utilitarianism as a lens through which to view the current law of restrictive covenants and possible future changes in the law.

The founder of utilitarianism, Jeremy Bentham, was one of the most influential thinkers of his time and his legacy is evident in legal positivism, utilitarianism and law and economics. Of his published works the most canonical are, according to Schofield (2009), A Fragment of Government, An Introduction to the Principles of Morals and Legislation and Anarchical Fallacies.

The notions of utility and the greatest happiness are concepts that were fundamental to Bentham’s philosophy. On the very first page of his first published work he stated that, ‘it is the greatest happiness of the greatest number that is the measure of right and wrong’ (Bentham, 1776 cited in Burns and Hart, 1977, p. 393). In this early work Bentham equates happiness with ‘utility’, but in his later work decides that happiness rather than utility best expresses his philosophy (Harrison, 1983, p. 169). That said, Bentham is attributed not only with the principle of utility but with the creation of the term ‘utilitarians’ for those who had embraced the concept (Burns, 2005, p. 49). The phrase embodied Bentham’s notion of the basic principle to be applied to morals and legislation (Burns, 2005, p. 49). The greatest happiness principle

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20 Often where the application is for a discharge only modification will be granted.
21 Published anonymously in 1776.
22 Written in 1780 and published in 1789.
23 Which was published posthumously in England in 1834.
involves two elements, pleasure and absence from pain. Pain is the stronger sensation, and this
has to be taken into account when calculating the net happiness provided for by an act (Berry,
1995, p. 2). In addition, Bentham was aware that men look to the future and therefore
anticipation of pleasure and pain must also be considered (Berry, 1995, p. 2).

Bentham was a proponent of codification of the law, and his view of history was that it served
to explain the current state of the law (Sokol, 1994, p. 301). He believed that this codified law24
should be plain enough for the populace to understand and also available so that the people
could access and apply it to their daily lives (DiFilippo, 1972, p. 242). In order to make the
codified law accessible Bentham proposed posting of appropriate laws in market places
(DiFilippo, 1972, p. 244). He believed that in order to achieve reform of the substance of the
law it was necessary to completely reform the structure of the law (Hart, 1971, p. 32).

With regard to property, Bentham considered that property itself ‘is nothing but a basis of
expectation; the expectation of deriving certain advantages from a thing’ (Bentham, cited in
Berry, 1995, p. 3). Expectation and the prevention of disappointment are dependent upon
security. The utilitarian notions of greatest happiness, avoidance of pain and certainty of
expectation are therefore measures against which the current law, and proposed reforms will
be considered.

1.4 The hypothesis, aim and objectives of this study

This area of the law on covenants has been considered many times, and the concerns of the
writer have sometimes been echoed in the resultant reports.25 However, to date there has been
virtually no change in the law since 1925.26

The hypothesis of this research, derived from practical experience, is that many of the
restrictive covenants registered on titles in England and Wales27 are obsolete, and there should
be an easier and cheaper mechanism to de-clutter the titles of registered land so that they
better reflect the current position with regard to the land. The central aim is to assess the
extent of the problem of obsolete restrictive covenants and to make recommendations for

24 Or pannomion as he termed it (Schofield, 2009, p. 7).
25 See for example The Royal Commission on Legal Service, 1979, para. 3 Annex; and Law
26 Perhaps the only significant change was a modification to the Law of Property Act 1925 in 1969
adding a further ground to s84 to make it easier to succeed in an application for removal or
modification of a restrictive covenant.
27 Hereafter reference to ‘England’ should be deemed to include ‘Wales’.
reform and further research. In order to address this aim, the following four research questions have been designed and are answered in this research:

1. Where do restrictive covenants fit within the broader context of private land ownership and control?
2. To what extent is there a link between age and obsoleteness\(^{28}\) with regard to restrictive covenants?
3. To what extent does the continued registration of obsolete restrictive covenants conflict with the principles and practicalities of land registration?
4. Is there a mechanism that could reduce the quantity of obsolete restrictive covenants whilst maintaining the correct balance between the rights of landowners and the rights of third parties?

1.5 Methodology

This thesis aims to answer these questions in the ten chapters of which it is comprised. McConville and Chui distinguish two main traditions in legal research; black-letter or doctrinal research, and law in context research (2007, p. 10). As the title suggests, the overall approach of this research was socio-legal, and therefore the emphasis was on law in context. That said, in order to assess what the law is, how it works (or fails to work), and how it can be reformed, it was necessary to undertake a certain amount of doctrinal analysis. Doctrinal or ‘black-letter’ scholarship entails the detailed examination of primary sources, namely case and statute law, to extrapolate legal rules and their broader general legal principles. Part of the reason for the continuance of this type of work has been the relationship between law schools and the legal profession; textbooks are published because they are commercially viable and these are the ones which are aimed at the needs of law students and practitioners (Twinning, 1974, p. 152). Doctrinal legal scholarship has been perceived as being inward looking to the extent that it ignores issues of justice, utility, and morality, and fails to consider the effects of regulations (McCrudden, 2006, Vick, 2004). The doctrinal elements of this research are evidenced by the case and statute lists at the beginning of the thesis. Doctrinal elements are interspersed with analysis of the literature and theory in Chapter Two, in particular with regard to consideration

\(^{28}\) Obsoleteness is according to the ‘state of being obsolete’ and is selected in this thesis rather than the noun obsolescence with is ‘the process or fact of becoming obsolete’ (Oxford English Dictionary, n.d). In analysing the data the writer looks at the relationship between age and whether a covenant is obsolete rather than whether a covenant is in the process of becoming obsolete. It is accepted that the terms are widely used as synonyms and that obsolescence is more frequently chosen.
of the early case law pertaining to restrictive covenants. In Chapter Three there is further analysis of case law with regard to contractual interpretation generally, and more specifically how restrictive covenants have been interpreted. Chapter Four utilises comparative doctrinal analysis in comparing the legislative mechanisms for removal of restrictive covenants in other jurisdictions. Chapters Six, Seven, and Eight present empirical data, and therefore represent the socio-legal backbone of this research. However, this analysis also involves doctrinal elements. In Chapter Six, where Land Registry titles are analysed, the writer examines the case law with regard to nuisance covenants. In Chapter Seven, a socio-legal empirical analysis compares the cases heard in the Upper Tribunal (Lands Chamber) in England, and the Lands Tribunal Scotland. This involves elements of quantitative empirical research (see Figures 7.1-7.12) and qualitative empirical research (see analysis of the content of the decisions on pages 187-194). Interspersed with this empirical analysis are more traditional doctrinal elements in the form of a detailed analysis of the statutory provisions in both jurisdictions.

As well as doctrinal analysis of legal decisions from England and Wales this thesis makes comparisons with a number of other jurisdictions. The rationale for the comparative element of this research came from consideration of the Law Commission’s consultation in 2008. In this report, the Law Commission made reference to a number of foreign jurisdictions which have similar private land use restrictions. The writer selected a number of jurisdictions from which to draw comparisons. It was thought that in considering reform it would informative to draw not only from research and commentary in England and Wales, but also to consider whether lessons could be learnt from elsewhere. The following jurisdictions were selected for consideration: the USA, Australia, Northern Ireland, the Republic of Ireland, and Scotland. The USA was selected for consideration as there is a wealth of academic commentary from the USA, and it was thought important to understand the extent to which this literature could inform the debates in England and Wales. The Australian State of Victoria and the Northern Territory have, like England, contemplated reform. In order to consider whether lessons could be taken from these proposals, it was necessary to understand something of the law of restrictive covenants in Australia. The law in Northern Ireland and in the Republic or Ireland is discussed, as these jurisdictions have reformed the legislative mechanism for removal of restrictive covenants, and so in order to decide whether reforms such as these could be beneficial in England it was necessary to broadly compare the law with regard to restrictive covenants more generally. Scotland was chosen as the main comparative jurisdiction, not because it is closest in terms of law, as this is not the case, but rather because the practical concerns are similar.
Industrialisation took place in Scotland at a similar time to England and as a result both countries have many old restrictive covenants (Wortley, 2001). Scotland has a similar mechanism for law reform in the form of a Law Commission, and has recently undergone a significant programme of law reform, which is not replicated in any of the other comparative jurisdictions. Further, Scotland, like England, must ensure compliance with the European Convention on Human Rights.

As has been stated above, doctrinal scholarship has been criticised for the uncritical nature of its approach; ‘Black-letterism concentrates on the law as it is, not as it ought to be, nor why it came to be as it is’ (Adams and Brownsword, 2006, p. 34). These weaknesses led the writer to consider a socio-legal approach. There are a number of choices that have to be made in selecting a methodology. Chapter Five discusses the key debates in social science methodology, and considers how these impact on the socio-legal empirical research. In this chapter the writer explains the decisions made in selecting the design for this research, and the process by which the empirical data is collected and analysed.

### 1.6 Structure

This thesis aims to answer these questions in the ten chapters of which it is comprised. In the first three chapters following the introduction the literature is reviewed and the extent to which the objectives are answered by the previous research and analysis contained therein is assessed. More specifically, Chapter Two draws on the wealth of literature pertaining not only to restrictive covenants but also to the wider debate concerning private property, and the debate regarding the value of private versus public land control. These discussions are played out not only in England but also in other jurisdictions across the world. In order to assess whether obsolete restrictive covenants are problematic, it is first necessary to consider what is meant by property rights and to outline a theory from which further analysis can be undertaken. It is also necessary to consider the justification for the addition of restrictive to the list of property rights, and for this a historical perspective is adopted. Restrictive covenants do not exist in isolation and so the chapter goes on to consider where they sit within the system of land registration; a system which post-dates their creation and one that is located at the very heart of land law in England.

Chapter Three considers some of the problems related to restrictive covenants for those dealing with land. It then examines reports from the numerous official examinations of restrictive covenants, and the disparity in their conclusions is assessed. It goes on to focus on
what is meant by obsolete and the relationship between the concept of obsoleteness and that of utility to provide a working definition of obsoleteness for this thesis. Finally, it considers the extent to which the European Convention on Human Rights (ECHR) impacts on reform of the law in this area.

Chapter Four takes a comparative approach. For the reasons stated in 1.5 above, the United States, Australia, Northern Ireland, the Republic of Ireland and Scotland are selected for this comparison.

Chapter Five considers the complex questions regarding methodology and positions this research within the context both of research in law, and the wider arena of social sciences. It sets out the main philosophical options available and provides a rationale for the pragmatic approach selected for this research. Furthermore, Chapter Five explains how the empirical data is collected and analysed.

The next three chapters present the empirical findings of the study. Chapter Six presents the quantitative analysis of the qualitative data set of Land Registry titles and addresses the question of the relationship between age and obsoleteness with regard to restrictive covenants. Chapter Seven provides an analysis of data accessed from the UT(LC) in England and the Lands Tribunal in Scotland (LTS) to further consider the link between age and obsoleteness and to consider whether and to what extent the current systems of removal of restrictive covenants may be flawed. Chapter Eight presents the results of a thematic analysis of interviews carried out with Scottish and English experts, and considers whether the existence of obsolete restrictive covenants is problematic, and whether there is a mechanism which could reduce the quantity of restrictive covenants whilst maintaining the correct balance between the rights of landowners and the rights of third parties.

Chapter Nine provides a summary of the analysis carried out in Chapters Six to Eight, and places the finding in the context of the literature contained in Chapters Two to Four, and finally presents the recommendations for reform and further research. Chapter Ten draws the findings and recommendation together in the context of the research questions set out in this chapter.
CHAPTER 2 – THE HISTORY OF RESTRICTIVE COVENANTS AND THEIR PLACE IN LAW AND SOCIETY

2.1 Introduction

The aim of most literature reviews is to provide a context and justification for the research that follows (Cryer, 2006). This literature review is no different. In this thesis the literature is reviewed in Chapters Two, Three and Four; a brief summary of these chapters has already been provided in the introduction to this thesis. The introduction to this chapter seeks to expand on what was stated in Chapter One, and outline the aim of this part of the literature review. The overall aim of this chapter is to put the research that is to follow into the broader context of theoretical positions regarding property, and to answer objective one, ‘where do restrictive covenants fit within the broader context of private land ownership and control?’ In order to do this this chapter is divided into five sections. In 2.2 the key conflicting theoretical positions with regard to property are considered by asking; what is property? Where do restrictive covenants fit as property rights? And to what extent can and does the state interfere with these rights? In 2.3 the relationship between public and private land use controls is considered. In 2.4 the principles of land registration are discussed and applied to restrictive covenants. Finally, in 2.5 the theoretical position of this research is outlined.

2.2 Theoretical context

Answers to the questions ‘what is private property’, and ‘what rights are associated with ownership of property?’ are more than a thesis in themselves.

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right to property; or that sole and despotic dominion which one man claims and exercises over the external things of the world in total exclusion of the right of any other individual in the universe (Blackstone, cited by Rose, 1998, p. 601).

Where the relevant requirements have been complied with, restrictive covenants are a property right. They were once merely contractual but their status was elevated by the case of Tulk v Moxhay. Property rights enjoy a special status as ‘in rem’ rights which bind the whole world as opposed to ‘in personam’ rights that bind only individuals. The meaning of this special status must therefore be considered when law reform is contemplated. Depending, to some extent, upon the theoretical perspective of the reformer, the ‘in rem’ nature of property rights
restricts the extent to which the state can interfere. It is therefore necessary to consider theoretical perspectives, and to form at least a rudimentary theoretical basis upon which to proceed with the empirical research that is to follow. As Panesar (2000, p. 138) states:

Understanding the theoretical underpinning of property rights is important for a property lawyer. The perspectives offered by the various justificatory theories of private property continue to be reflected in the case law, they also influence policy makers and legislators.

Some important caveats must be employed at this stage. Firstly, the writer is a pragmatist and agrees with Margaret Radin when she states, ‘it has always seemed important to me to focus on the non-ideal nature of property practices and institutions, on the situated, and second-best, working out of liberal ideological commitments in practice’ (1993, p. 1). This leads to the second caveat; the writer is not a philosopher or a jurisprudential scholar, and the focus of this thesis is not intended to be a detailed review or analysis of the works of those who are. One would be extremely ill-advised to attempt to rewrite property theory on the basis of a detailed examination of one small area of property law.

What is property?

Perhaps the easiest answer is that property is a contested term, and that to try to define it is impossible, and to merely get on with the day to day business of transacting with property without concern as to definition. However a conception of private property arises in us all at a young age. We assert ownership over objects and express anger and distress when these are removed from us. Without a conception of private property what incentive is there to plough a field or build a castle? If the fruits of our labours could be taken or destroyed what motivation can there be to work and to create? Early theorists justified private property on the basis that it was a God-given right to all, which became privately owned by first occupation or labour. Their ideas of property influenced society for centuries to come. The well-known law and economics scholar, Richard Epstein, takes his heritage from the labour theory of property today and has argued in favour of absolute ownership of property. A position such as Epstein’s

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29 For a discussion on what is meant by the term pragmatist in the context of this research see Chapter Five.
30 Grotius’s principle idea was that all men had equal rights to the earth’s resources (Salter, 2001 p. 537).
31 The notion that man is entitled to property on the basis of an entitlement to the fruits of his labour is attributed to Locke.
allows for only the most minimal intervention of the state.\textsuperscript{33} These ‘natural law’ theories have not been without their detractors. One notable dissenter was Jeremy Bentham, who vigorously rejected the natural law theory of property. To Bentham, ‘property and law are born together, and die together. Before laws were made there was no property; take away laws and property ceases’ (Bentham, 1830, in MacPherson, 1978, p. 52). Bentham explained that before law man could secure very little for himself. He gives an example of a savage killing a deer, having a hope that he may keep this for himself if he can hide it away in his cave. He argued that an agreement between the hunters to respect each other’s acquisitions would be an example of law. Bentham contended that the greatest happiness in society in respect of resources would be attained by private ownership. Bentham is famous for his utilitarian notion of property, which regards property as ‘a positive right created instrumentally by law to achieve wider social and economic objectives’ (Panesar, 2000, p. 132). Calculating utility remains one of the challenges of utilitarian theory. Economists often substitute for utility some notion of welfare (Munzer, 1990, p. 196). Tools have been designed to try and assess utility or efficiency, the most important being Pareto optimality and Kaldor-Hicks efficiency. A detailed discussion of these tools will not progress this thesis.

Whilst this analysis of some natural law theory versus positivist utilitarian theory provides some conception of the justificatory debate that has engaged scholars, it sheds little light on the nature of property itself. Waldron explains that a layman might consider that a person could own a Porsche; that there is a ‘two-place relationship of ownership between a person and a thing’ (Waldron, 1985, p. 314).\textsuperscript{34} However, as Waldron states, a lawyer would argue that this conception is wrong because Porsches cannot have rights or duties or be bound by or recognise rules. The legal relations then are between the owner and others (the owner’s neighbours being one such example). The owner has certain liberties, to exclude others for example, but is also restricted by certain laws, for example nuisance, which prevent her using her car in certain ways.

This simple move away from the notion of the ‘thingness’ of property, to property as rights, obligations and duties is a rudimentary way of looking at Hohfeld’s conception of property. Hohfeld viewed property as a quadrumvirate of claim-rights, privileges (liberties), powers, and immunities (1923, p. 23 cited in Underkuffler, 2003, p. 11). Progressing from this point Honoré

\textsuperscript{33} See below for further consideration of state intervention.
\textsuperscript{34} See also Underkuffler (2003, p. 11) where she talks of the layman’s view of property as ‘things’. 

defined a list of ‘incidents’ of ownership common to western legal systems; the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuarity (Honoré, 1961, pp. 112-124). Honoré made no requirement that all of the individual incidents had to be in existence in order for ownership to arise. The notion of property as a bundle of rights or ‘bundle of sticks’ has gained considerable popularity, especially in the US where it is frequently cited by the courts;\(^{35}\) it is also recognised as an important concept in the UK.\(^{36}\) However, as a paradigm it has also been criticised.\(^{37}\)

One further significant component in the debate with regard to private property relates to the relationship between property and personhood. This theory originates with Hegel, who argued that the placing of will into an object takes the person from abstract to actual. There is insufficient space to do justice to the theory here, but in essence it focuses attention on the ways in which property contributes to the development of the self, or personality (Alexander and Peñalver, 2012, p. 57). His theory sees people as more than individuals, but as vehicles of a cultural and ethical movement (Salter, 1987, p. 247). Hegel rejected the individualist idea that property rights are God-given. He argued that in order to become a fully-fledged person an individual must go through a process of realisation of specific legal and other rights. Property enables self-awareness to arise in an individual.\(^{38}\) Unlike Locke’s theory of appropriation, in Hegel’s view initial occupancy did not give rise to a permanent validity. In Hegel’s theory continuous occupation would be required to maintain a property relationship (Radin, 1993, p. 46). In a modern interpretation of the law and personality theory, Margaret Radin argues that property should be divided into two types, personal and fungible. Personal property is of the type that evokes feelings of loss if taken, for example jewellery or a home. Fungible property, on the other hand, is more likely to be commercial property, the loss of which could be compensated with money. This distinction can be a helpful one, as it enables different


\(^{36}\) Lawson and Rudden (2002) refer to the law of property as providing a ‘bag of tools’ to an owner.

\(^{37}\) Penner (1996) argues that property as a bundle of rights is ‘little more than a slogan’ and Merrill and Smith (2001) submit that the notion dilutes the ‘in rem’ nature of property which has enabled increased state intervention.

\(^{38}\) For example, when we improve our home we see ourselves reflected back.
treatment of the two different types of property. Radin argues that this already occurs in the US legislature and judiciary where preferential treatment is afforded to ‘personal property’ (1993, p. 31). Personhood, Radin argues, depends upon the ability to plan for the future, which can only be achieved where there is expectation of future stability with regard to private property. Here the personhood theory links back to Bentham who stated ‘the idea of property consists in an established expectation’ (Bentham, 1802, p. 112 cited in Radin 1993, p. 43).

Where do restrictive covenants fit as property rights?

Restrictive covenants have not always been proprietary rights in fact in England and Wales. They are the most recent addition to the list of property rights. Restrictive covenants are a species of property that are incorporeal and equitable. They are considered incorporeal because they are intangible, and equitable as they were born out of a perceived defect in the common law and are subject to the equitable maxims. This section seeks to outline the fundamental distinction between property and contract, and explain why property has traditionally been far less flexible than contract. It will then summarise how restrictive covenants became part of the list of property rights, and how academics have tried to explain this change. Finally, it will discuss the position of restrictive covenants as equitable rights, and what this means for them as a species of ‘property’.

One of the fundamental differences between the law of contract and that of property is the adaptability or otherwise of legally enforceable interests in each of the two areas of the law. The law of contract is based on the tenet of freedom to contract, the notion that, subject to certain public policy limitations, parties are free to make such agreements as they wish. Property law rights on the other hand are limited under a principle which is conventionally described as the ‘numerus clausus’ principle which translates as the ‘closed list’ principle. Whilst some commentators question the applicability of the principle to common law systems, such as the English legal system (see Farran and Cabrelli, 2006, p. 430), others support the notion that it applies to both civil and common law systems, (see Merrill and Smith, 2001,. p. 4 and Edgeworth, 2006, p. 389). This principle states that landowners are not at liberty to add to

39 Whose utilitarian theory of property is discussed below.
40 The equitable maxims are as follows: equity will not suffer a wrong without a remedy; equity follows the law; where there is equal equity, the law shall prevail; where equities are equal, the first in time shall prevail; delay defeats equity; he who seeks equity must do equity; he who comes to equity must come with clean hands; equality is equity; equity looks to the intent rather than to the form; equity looks on as done that which ought to have been done; equity imputes an intention to fulfill an obligation; equity acts in personam (Hudson, 2012, p. 28).
the list of land rights to suit their own purposes. A clear example of this is the fact that a licence to occupy operates as a contractual rather than a property law right, and as a result of the contractual doctrine of privity of contract does not bind third parties. There are a number of arguments to be made in favour of the *numerus clausus* principle, not least that usefulness of land could be hampered for all time if parties were free to add whatever conditions or restrictions they wanted. A further argument is that an increase in the number of rights will tend to make the conveyancing process more time consuming and hazardous. Some theorists argue that in countries with developed systems of land registration increasing the number of property rights should not be problematic (Edgeworth, 2006). Merrill and Smith (2000) argue that the *numerus clausus* operates to create ‘optimal standardisation’ of property interests. The argument states that those interests most needed economically and socially are given the blessing of property law, whilst others are restrained by enforceability only in contract. This view is supported by Paisley in his discussion of real rights in Scotland (Paisley, 2005 p.281).

With regard to freehold covenants in England and Wales then, restrictive covenants are the most recent addition to the list of the property rights whilst the burden of positive covenants are presently only enforceable in contract law.

Restrictive covenants are often said to date from 1848 with the seminal case of *Tulk v Moxhay*. They were not born overnight of course; there had been a number of decisions prior to this which could be said to have paved the way for Lord Cottenham’s ‘watershed’ decision (Sabey & Everton, 1999 p. 1). Before considering the development of restrictive covenants through case law, it is worth providing a brief socio-economic context for this development in land law.

Prior to 1848 control of land depended largely on ownership of land. There was no public health legislation to protect occupants of squalid housing, and it was only the law of tort, in particular nuisance, which prevented a land owner from doing exactly what he pleased with his land without the slightest reference to the inconvenience of his neighbour. Change was already afoot by 1848, and it was in this year that the first Public Health Act was passed. Control of the use and organisation of land, however, simply did not exist; towns were developed in ‘a haphazard manner, without order or method’ (Jolly, 1931 p. 1), and as such there was a need to protect the residential character of neighbourhoods. Legislation to control development was not to arrive until 1909 when the first Town and Country Planning Act became law. The Housing, Town Planning etc. Act 1909 was concerned mainly with housing, giving the local authorities powers to build housing and demolish substandard housing (Moore, 2010). The
aims of this legislation are rather neatly put by John Burns, President of the Local Government Board, when he introduced the legislation:

The object of the bill is to provide a domestic condition for the people in which their physical health, their morals, their character and their whole social condition can be improved by what we hope to secure in this bill. The bill aims in broad outline at, and hopes to secure, the home healthy, the house beautiful, the town pleasant, the city dignified and the suburb salubrious. (cited in Cullingworth & Nadin, 2006, p. 16).

As is suggested above, whilst the case of Tulk v Moxhay was pivotal in changing the law with regard to restrictive covenants, it did not occur in isolation. It is worth mentioning that with regard to leaseholds, enforcement of restrictive covenants was not a problem, as the original parties were bound by all the covenants as a result of privity of contract and successors by virtue of privity of estate (Spencer’s Case (1583) 5 Co Rep 16a). Covenants could only be enforced to the extent that such covenants ‘touched and concerned’ the land, but this would include the majority of covenants contained within the lease. Since The Prior’s or Pakenham’s Case (1369) YB 42 Edw 3, the benefit of freehold covenants which ‘touched and concerned’ the land could run to successors in title of the covenantee, but the burden could not (Sabey & Everton, 1999).

Attempts to add freehold covenants to the list of property rights had been resisted by the judiciary. In 1834 in the case of Keppell v Bailey (1834) 2 My & K 517 Lord Brougham conducted a detailed review of the authorities and concluded that the covenant which the plaintiff sought to enforce was not on the list of rights over land recognised by common law and could therefore not be enforced by a third party:

[I]t must not therefore be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner [as] great detriment would arise and much confusion of rights if parties were allowed to invent new modes of holding and enjoying real property... (at p. 536).

Lord Brougham thus considered both the technical question of whether a restrictive covenant could run with the land and also with the matter on principle; the notion of numerus clausus discussed above.

This principle was affirmed in Hill v Tupper (1863) 2 H & C 121 where Pollock CB stated (pp. 27-28):

A new species of incorporeal hereditament cannot be created at the will and pleasure of the owner of property: but he must be content to accept the estate and a right to
dispose of it subject to the law as settled by decisions or controlled by act of Parliament.

How then was Lord Cottenham able to reject the *numerus clausus* principle and add freehold covenants to the list of property rights such a short time after such an emphatic decision by Lord Brougham? The theoretical justification is sketchy at best. However, the decision did not occur in a vacuum. The Real Property Commissioners were appointed in the early 1830s to investigate the law of Real Property in England. In 1832 in their Third Report they considered freehold and leasehold covenants and found the law in this area to be ‘defective, or imperfectly settled’ (Real Property Commission, 1832, cited in McFarlane, 2012, p. 210). In their report they suggested that restrictive covenants should be enforceable in equity where there was notice of the covenant (George, 1990, p. 183). What the Real Property Commission failed to do was to expound the conceptual basis for the enforcement of restrictive covenants in the court of equity. It further suggested that a register of covenants should be created to enable notice of restrictive covenants. It is therefore argued by some that *Tulk v Moxhay* follows the recommendations of the Real Property Commissioners rather than being a truly novel decision (see George 1990, p. 188). Indeed it is not only the Real Property Commissioners who got there before the decision in Tulk; several earlier cases also held that restrictive covenants could ‘run with land’. In *Whatman v Gibson* (1838) 9 Sim 196 Shadwell V-C makes no reference to authority but relies instead on the importance of the building scheme, which formed the subject matter of the case, in maintaining the character of the locality. In 1846 in the case of *Mann v Stephens* (1846) 15 Sim 377 an injunction was successfully obtained against a beer shop which had been opened in contravention of a covenant against building anything other than a private house or ornamental cottage. The defendant, a successor in title to the covenantor, was a purchaser with notice of the covenant, a factor which was significant in the later *Tulk v Moxhay* case. In *Mann v Stephens* the Vice-Chancellor relied on his previous decision in *Whatman v Gibson* to grant the injunction. When the defendant was committed for refusing to comply with the injunction Lord Cottenham held that it had been properly granted. Simpson (1986, p. 258) states that the only reason that the decision is *Mann v Stephens* is not the leading case on restrictive covenants is because the reasons of Lord Cottenham in this case are not fully reported.

So to the influential case of *Tulk v Moxhay*. The facts pertinent to this case begin in 1808 when the plaintiff conveyed a vacant piece of land in Leicester Square to Elms, who had entered into a covenant on behalf of himself, his heirs and assigns. The covenant stated that the land should
be maintained ‘in its present form and in sufficient and proper repair as a square garden or pleasure-ground, in an open state, uncovered with any buildings, in a neat and ornamental order’. After some time the land was conveyed to the defendant who devised a scheme to erect certain shops and buildings on the Square. The plaintiff objected on the ground that it was contrary to the covenant and would injure his (the plaintiff’s) houses in the Square. Contrary to the plaintiff’s objection the defendant proceeded to cut down trees and pull down the railings. The plaintiff successfully sought an injunction. This injunction was upheld on appeal by the Lord Chancellor, Lord Cottenham.

Lord Cottenham did not dispute the view of Lord Brougham in Keppell v Bailey that the burden of covenants did not run with the land at law. In fact his judgement was unrelated to the doctrine of the running of covenants with the land. Instead he relied on the equitable doctrine of notice.41 He held that allowing a purchaser who bought land with express notice of a covenant to act in breach of that covenant would be inequitable stating:

the party who takes the land takes it subject to the equity which the owner of the property has created: and if he takes it, subject to that equity, created by those through whom he has derived title to it, is it not the rule of this Court, that the party, who has taken the property with the knowledge of the equity, is liable to the equity? (Tulk v Moxhay (1848) 1 H & Tw 105, at 115).

Lord Cottenham’s dismissal of Lord Brougham’s earlier decision is brief. Indeed he states, ‘I say nothing of the doctrine supposed to be laid down by Lord Brougham (Keppell v Bailey, 2 My & K 517), because I have not had an opportunity of examining exactly how it stands; therefore, I may not very distinctly understand it’ (p. 116). Whilst Lord Broughman expressed concern at the detriment that would arise if parties were allowed to invent new modes of holding and enjoying real property, Lord Cottenham expressed no such concern, he relied on the principle of nemo dat quod non habet (no one gives what he does not have); if a landowner could convert his land from burdened to unburdened land he would transfer something he had never himself owned (Simpson, 1986 p. 259). The Lord Chancellor was not explicit in stating that his ruling specifically referred to restrictive covenants, and as a result of his brief judgement some commentators suggest that an unsatisfactory body of law developed (Simpson, 1986, p. 259). Others argue that as the covenants in Tulk v Moxhay were hybrid in nature, and that as Lord Langdale M.R. refused to order Moxhay to spend money restoring the square into a ‘neat and

41 Gray (1994) states that Lord Cottenham, ‘spoke not in terms of property at all, but rather in terms of obligation’ (p. 164).
ornamental order’, covenants which are positive in nature were distinguished from those which are negative (Bell, 1981; Griffith, 1983). It is hardly surprising that, as the boundaries of the decision were not considered in the judgement, the body of law which followed used *Tulk v Moxhay* widely. It was initially applied to the transmissibility of restrictive covenants to litigants who held no estate in the land benefitted by the covenants (for example, *Catt v Tourle* (1869) 4 Ch App 654); to positive covenants (for example, *Morland v Cook* (1868), L.R. 6. Eq. 252); and to property other than realty (for example *De Mattos v Gibson* (1868), 4 De G. and J. 276). These applications of the new doctrine were limited over time, so that it could no longer be applied to chattels or positive covenants and limiting its application to situations in which the covenantee retained benefitting land (McFarlane, 2012).

Lord Cottenham’s judgement has been criticised. Writing in 1885 Challis stated, ‘the whole principle of *Tulk v Moxhay* rests upon dubious grounds of equity’ (Challis, 1911 p. 185). Challis anticipated that once the principle was tested in the House of Lords it would have ‘its wings clipped’. However, by 1911 when the third edition of his book was posthumously published, a footnote had been added stating that the principle had been tacitly recognised. By 1925 the principle was institutionally accepted with restrictive covenants being included in the system of Land Charges registration.

In order to explain the juridical nature of the burden of restrictive covenants upon freehold land and the modification of the doctrine as set out in *Tulk v Moxhay*, a variety of different rationales have been expounded by academics. These include an extension in equity of the doctrine of Spencer’s case, an extension of negative easements, the conscience theory and the equitable charge theory.

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42 This view is founded on the judgement of Lord Jessel, M.R. in *L & S W Rly. Co v Gomm* (1882), 20 Ch.D 562 (Elphinstone, 1946, p. 72). The common law rule in Spencer’s case is, simply stated, that the benefit and burden of the covenants contained in a legal lease may extend beyond those parties who are bound together by contractual privity. For a criticism of this suggestion see Behan 1924, p.44.

43 This view is again founded on the judgement of Lord Jessel, M.R. in *L & S W Rly. Co v Gomm* (1882), 20 Ch.D 562 (Elphinstone, 1946, p. 72) There are similarities between the treatment of restrictive covenants and negative easements in that, like an easement, a restrictive covenant must be for the benefit of defined land, the dominant and servient tenements must be in different ownership and both restrict the use of enjoyment of land. However there differences notably the fact that at common law easements can be created only by express or implied grant or by prescription.

44 This would seem to be the real principle applied by Lord Cottenham in *Tulk v Moxhay*. Simply stated this principle is that if a party acquires property knowing that the seller is bound by a contract relating to the property, then equity would enforce the contract against the third party on the ground that his
Behan is remarkably plain in his condemnation of the juridical justification for the transmissibility of restrictive covenants:

The interest created by a restrictive covenant is in truth a singular juridical anomaly, amounting neither to a mere jus in personam nor to a full jus in rem, which has been received into our system because it serves a useful turn – without any question being raised as to the possibility of fitting it into some scientific scheme or legal classification (Behan, 1924, p. 42).

More gently put, Newsom states that restrictive covenant should be treated as ‘sui generis: that is, as a class of rights and obligations, originating in contract, but capable of having an operation between parties other than the contracting parties themselves, and bound by a special set of rules worked out for themselves alone by court with little legislative assistance’ (Newsom, 1998, p. 13). Does the end then justify the means? If the transmission of restrictive covenants from contract to property rights is a ‘juridical anomaly’ does it at least serve its social purpose of controlling development in such a way as to provide the optimal standardization of property rights propounded by Merrill and Smith? Whether justifiable or not, it may be argued that inception of restrictive covenants into the list of property rights was a political/ economic decision and that amendment to the law is also likely to be influenced in this way. In his consideration of the changing judicial treatment of the law of nuisance, Rotheram (1998, p. 43) argues that:

Property cannot be meaningfully conceived as some universal and immutable concept, but only in terms of historically contingent conceptions that are more or less prevalent in a particular culture at a specific point in time.

To what extent can and does the state interfere with these rights?

Whatever view one takes of the justification of restrictive covenants as a property right, the pragmatist scholar would argue that we must accept that they are property and move on. This conscience was affected. The main problem with this theory is that it is so wide that it gives free reign to the enforcement of positive covenants as well as personal covenants, and this indeed was the aftermath of Lord Cottenham’s judgement.

45 In Re Nisbet and Potts’ Contract [1905] 1 Ch. 391 Farwell J pointed to the fact that the burden created by a restrictive covenant is analogous to that of an equitable charge. The main distinction between the two is that a charge can exist in gross, in other words it can exist for the benefit of an individual rather than land.
section considers the importance of the label of property in determining the extent to which the state can interfere. In so doing, initial discussion will centre on theoretical debates with regard to state intervention in property generally, before moving to consider restrictive covenants more specifically. As has been stated at the outset, one of the central concerns of property law reform is the extent to which the state can interfere with property rights. Hart illustrates this issue well in his analysis of Nozick and Bentham. Bentham criticised the American Declaration of Independence on the, ‘absurdity of combining the assertion that there are unalienable rights with the assertion that government is necessary to protect them and legitimate when it does so’ (Hart, 1983 p. 149). He insisted that the rigidity of the doctrine of unalienable rights could have no place in the real world. Nozick, a libertarian American philosopher, raises the question, ‘How much room do individual rights leave for the state?’ (1974, p. ix) and answers similarly to Bentham. Nozick argues that that the ‘night-watchman state’ should only intervene to punish violations. Bentham appears to argue that you cannot have it both ways, have a natural law with inalienable rights and then modify them. This argument certainly has some force but equally it is difficult to reconcile the potential sacrifice of the individual in favour of the greater good in Bentham’s utilitarianism. This is one of the forms of ‘moral monstrousness’ described by Posner (1979, p. 116), the other being the refusal of utilitarianism to make moral distinctions between types of pleasure that most would find acceptable (for example, feeding pigeons) and those that society would find reprehensible (for example, pulling wings off flies). This second objection may be countered with the argument that legislation enacted on utilitarian principles of maximisation of happiness is unlikely to be morally abhorrent as this would go against the happiness of society.

It is difficult to envisage where the ‘bundle of sticks’ view of property fits within this picture. Merrill and Smith argue that this realist conception of property was political. They argued it aimed to allow state intervention in regulation and redistribution. They criticise the ‘bundle of sticks’ concept on the basis that it dilutes the ‘in rem’ characteristic of property. Their concept emphasises the certainty historical theorists from Blackstone to Bentham enjoyed in the ‘in rem’ nature of property rights; rights against the whole world. However, the state does intervene with property. Where the state requires land for a new motorway it can use its powers of compulsory purchase. There may also be judicial intervention where dependants

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46 The law relating to compulsory purchase is complicated but legislation such as the Highways Act 1980 provides a power of compulsory purchase. The procedure is set out in the Acquisition of Land Act 1981. The power to acquire title arises from the Compulsory Purchase Act 1965 and
have not been provided for in a will \(^{47}\), or in order to make provision for a spouse or civil partner on relationship breakdown.\(^{48}\) Gray (1991) acknowledges that property is both a dynamic and a relative concept, that ‘I may have “property” in a resource today, but not tomorrow’\(^{49}\).

Restrictive covenants are an interesting type of property right in that they relate to property belonging to another. Essentially they are a right in the land of a neighbour, which creates ownership of part of the utility of that neighbour’s land (Gray, 1994 p. 164). The effectiveness of restrictive covenants as a means of balancing the rights of owners has been disputed for many years. In the preface to the second edition to his book on restrictive covenants Jolly explains that:

Increased cost of living, high rates and taxes, and “servant trouble” have combined to render the spacious mansion of the Victorian Age an intolerable burden. Large houses are not marketable unless converted into flats or maisonettes while the vogue of the paying guest establishment or “guest house” has enormously increased (Jolly, 1931 p. iv).

He goes on to explain that for these reasons covenants previously tolerated are being regarded as oppressive. At the time Jolly was writing the new legislative scheme relating to land law popularly known as the 1925 legislation was in its infancy. This legislation made a number of key changes with regard to restrictive covenants. Firstly, the system of land registration under the Land Registration Act provided that restrictive covenants entered into after 1\(^{st}\) January 1926 should (in the case of registered land) be protected by the registration of a notice in the charges register of the burdened land. The Land Charges Act 1925 required restrictive covenants entered into after 1\(^{st}\) January 1926 to be registered as a class D(ii) Land Charge against the name of the owner of the burdened land. Discovery of restrictive covenants entered into before 1926 would still require a thorough review of the title deeds. Secondly, provision was made for the removal of restrictive covenants under s84 Law of Property Act 1925. This ability of the state to intervene to remove restrictive covenants on certain grounds\(^{50}\) is evidence that in England and compensation is assessed in accordance with the Land Compensation Acts 1961-1973. For a summary of the law in this area see Denyer-Green, 2014.

\(^{47}\) Inheritance (Provision for Family and Dependants) Act 1975.


\(^{49}\) He gives the example of ownership of clouds and rainfall and the often time limited nature of ownership of intellectual property.

\(^{50}\) These grounds are set out in the introduction and considered in more detail in Chapter Seven.
Wales (and other jurisdictions in which mechanisms exist for modification or removal). They are not perceived as ‘absolute’ property in the way natural law theorists would perceive property to be.

**What about rights of future property owners?**

The closed list of property rights restricts the number of different types of property right in order to prevent bargaining difficulties and excessive transaction costs (Merrill and Smith, 2000 p. 24). However, as Merrill and Smith argue, although the number of rights is limited, the law permits immense diversity in the attributes of the rights it does permit (p. 14). With regard to restrictive covenants now that they are one of the list of property rights, the parties are at liberty to create such restrictions as they see fit (as long as these are not illegal, for example racial restrictions would not be permitted). Libertarians argue that as long as there is notice, interests should take whatever form the parties chose; the argument being that parties will only negotiate to govern land use in a manner which is beneficial to them and to their successors in title (Epstein, 1982). In theory a developer will only apply such restrictive covenants as will protect his or her retained land (while such land is retained) and/or those that will enhance the value of each unit sold. This is most likely true; if a developer is overly restrictive, for example not allowing any pets to be kept, then the units will be difficult to sell. That said, some restrictions are likely to enhance marketability. For example, restrictions such as prohibition on the keeping of caravans or vans on driveways might be desirable to purchasers. However, it is arguable that these considerations could adversely affect the interests of future owners particularly where land is scarce. It may be in the interests of a developer to restrict the building of extensions to prevent unsightly modifications to the estate. However, the need for larger houses in a particular residential area may mean that future purchasers require houses of a size or specification not provided for. Libertarians would argue that the market will account for this; if there is a demand for five bedroom houses then these will be built. The extent to which the current generation must take into account the needs of future generations is not necessarily explicit in property theory. Wolf (1995, pp. 791-792) summarises the theorists on this point as follows:

> Some theorists imply that this is an easy question. Because rights have a special moral status, claims based on rights simply ‘trump’ claims of need, utility, or interest. And while it is arguable that future persons have some rights, it seems clear that they do

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51 For example Scotland under the Title Conditions (Scotland) Act 2003 s100.
not have current property rights, for they have no present opportunities to acquire special rights like the right to property.

It could be argued that a utilitarian view would permit modification of restrictive covenants to allow for adaptation of the needs of future generations if this equated to the ‘greater good’. Such a view might be unpopular with existing landowners if their view were to be marred by intensified development from which they believed themselves to be protected.

2.3 Public versus private land control

As previously stated, the introduction of restrictive covenants as a method of private land control arose at a time before a comprehensive system of public regulation of land use. There now exists considerable public intervention via a system of planning regulation, which leads to the question of whether this private system is needed at all. This section considers the relationship between public and private land use control. Firstly, public controls in the US and England are summarised. The US is included to widen the debate and to provide a context for some of the interesting academic commentary surrounding the public-private debate arising from America. Secondly, some of the arguments regarding public versus private land use controls in the US and England are assessed.

This thesis has expounded the Benthamite view that private property is a product of the law rather than a natural right and that it serves wider social and economic objectives. Planning law interacts with private property rights by on the one hand interfering with the peaceful enjoyment of property, and on the other protecting the utility of these rights. Planning law interferes by preventing an owner of property from doing what he or she pleases with the land. It protects utility by ensuring that the actions of neighbours do not infringe these private rights. In addition planning law ensures that public land such as highways and pavements are protected from excessive development and that other forms of infrastructure such as the water and sewage systems are able to cope. Whilst restrictive covenants are private land law rights enforced by individuals via the legal system, planning is a form of public law whereby the laws are not only made but also enforced by the state.

England is, of course, far from unique in controlling land use through a combination of public and private rights and restrictions. In the United States the centrality of private land ownership is clear. In the 1776 Declaration of Independence ‘life, liberty and the pursuit of happiness’ was promised to free white male Americans. Thomas Jefferson, the author of the Declaration, borrowed Locke’s phrase, ‘life, liberty and property’ (Jacobs, 2009, p. 55). In the United States,
as in England, industrialisation and urbanisation brought forth regulation seeking to protect public health. Between 1890 and 1920 the population of the United States rose by 42 million. Furthermore, whilst citizens of the United States embraced the freedom of private property they needed public land use control to protect their property from their neighbours. As Cullingworth puts it:

The battle — the word is appropriate — was between those who saw zoning as ‘a protection of the suburban American home against the encroachment of urban blight and danger’, and those who saw it as ‘the un-restrained caprice of village councils claiming unlimited control over private property in derogation of the Constitution’ (Brooks 1989:7) (Cullingworth, 1997, p. 59).

Drafters of the zoning ordinances were faced with the threat that they might be rejected by the courts as unconstitutional. The New York City zoning ordinance of 1916 is often regarded as the first comprehensive US zoning ordinance. It arose out of a dispute between competing uses, ‘If this was war of sorts, it was in truth a double war: garment manufacturers fighting retail merchants fighting wealthy residents’ (Toll, 1969, p.110). The result was the city was divided in terms of uses so that in future an area zoned for residential use could not be used for retail and so on. The ordinance did not have retrospective effect so it could do nothing to repair the damage already done. However as Scott puts it:

Zoning was the heaven-sent nostrum for sick cities, the wonder drug of the planners, the balm sought by lending institutions and householders alike. City after city worked itself into a state of acute apprehension until it could adopt a zoning ordinance’ (Scott, 1969 p. 192)

Other cities were quick to follow New York’s example and support from the federal government followed when the secretary of state, Herbert Hoover, set up the Advisory Committee on Building Codes and Zoning which in turn produced the Standard State Zoning Enabling Act. This provided a blue print for further zoning ordinances (Cullingworth, 1997, p. 61).

As with the US, the Industrial Revolution was a significant driver in creating a need for planning control. Increases in population and concentration of population in industrial towns led to appalling conditions. As has previously been stated, this resulted initially in public health legislation. Regulation of development prior to the Public Health Act of 1875 was unusual (Ashworth, 1954, p. 24). Early housing and planning policy was driven by fear of disease, and legislation was enacted with a view to clearing slums (Swenarton, 1981, p. 27). The first planning legislation was passed in 1909, The Housing, Town Planning Etc Act, by the Liberal
government. The legislation was a disappointment to the town planning movement, but it did make town planning a local government function (Ward, 2011, p29). Further legislation followed in 1919, 1923, 1924, 1930, 1932 and 1935.\footnote{Housing, Town Planning Etc Act 1919, Housing Etc Act 1923, Housing (Financial Provisions) Act 1924, Housing Act 1930, Town and Country Planning Act 1932, Housing Act 1935.} In the 1930s housing and planning began to be separated legislatively but it would be a mistake to imagine that local authorities had anything like the powers to control planning that they have at their disposal today. With regard to private schemes developers had the upper hand:

Development control, even for an approved scheme, was usually a formality since the scheme itself effectively permitted development to the extent of its proposals. Even in the occasional instances when permission was refused, enforcement powers were very limited (Ward, 2011, p.44).

Change came with the Town and Country Planning Act 1947 which gave planning authorities powers to refuse or impose conditions on detailed aspects of all development proposals and effective enforcement powers (Ward, 2011, p.101). Under the TCPA the local planning authority was charged with producing a development plan every five years. This plan was the result of a physical, social and economic survey of the area (Duxbury, 2012, p. 4). The plans involved elements of both positive and regulatory planning. Positive planning relates to land-use policies, such as compulsory purchase, the use of planning agreements, or powers to require the discontinuance of a use. Regulatory planning, on the other hand, is essentially development control whereby the developer puts forward proposals for approval (Duxbury, 2012, p.4). A number of pieces of legislation followed the TCPA 1947. The Acts of 1953 and 1954 altered the financial provisions and the Acts of 1959 and 1960 made some improvements in the system of planning control. The TCPA 1968 put into effect a system whereby there were to be broad structure plans requiring ministerial approval and local plans which would not require the approval of the Minister. The TCPA 1971 repealed and consolidated the 1960s legislation. Further Acts were passed in 1972 and 1986 until a further consolidation led to three Acts in 1990 which form the basis of the current system of planning law, the TCPA 1990 being the principal planning Act (Duxbury, 2012, p.9). The planning system is by no means straightforward, and the description which follows is necessarily simplistic. However, it is necessary to consider briefly how the planning system works in England as if restrictive covenants were curtailed land owners may rely more heavily on the planning system. The National Planning Policy Framework launched on 27\textsuperscript{th} March 2012 states that applications for
planning permission must be determined in accordance with the ‘development plan’. The ‘development plan’ includes the ‘local plan’ and neighbourhood plan. In turn the ‘local plan’ is defined as:

The plan for the future development of the local area, drawn up by the local planning authority in consultation with the community. In law this is described as the development plan documents adopted under the Planning and Compulsory Purchase Act 2004. Current core strategies or other planning policies, which under the regulations would be considered to be development plan documents, form part of the Local Plan. The term includes old policies which have been saved under the 2004 Act.

Progress in adoption of local plans has been extremely slow. Only 66% of Local Councils had a plan that had been found sound and adopted on 30th November 2015 (The Planning Inspectorate, 2015). The neighbourhood plan, introduced by the Localism Act 2011, is a plan prepared by a Parish Council or Neighbourhood Forum for a particular neighbourhood area.

Regulatory planning requires that where ‘development’ is carried out a planning permission must be obtained. Development is defined by the TCPA 1990 s55 and includes the carrying out of building, engineering, mining or other operations in, on, over or under the land, or the making of any material change in the use of any buildings or other land. Where development is desired the applicant must apply for planning permission. For certain minor building works, known as permitted development, a planning permission may not be required. Once the Local Planning Authority has received the planning application it will display public notices and/ or write to those near the proposed site asking for comments. Only such comments as are ‘material’ to planning are taken into account, and these do not generally include ‘matters that affect solely private interests’ (Department for Communities and Local Government, 2015, p. 14)

There are a number of arguments supporting the continuation of private land control. Firstly, there is a contractarian distinction to be made between choice and coercion where restrictive covenants form part of the realm of choice and planning regulation coercion (Alexander, 1999, p. 179). Put simply, the argument is that those affected by private land controls, in this instance restrictive covenants, have consented to these controls. They consent by purchasing with notice of the restriction. Ellickson (1982) makes this point in his comparison between public and private control in an examination of American legal rules regulating cities and homeowner associations. He argues that the voluntary nature of membership of homeowner associations
justifies more limited subjection to legal controls than the publically regulated city.\(^{53}\) Secondly, there is an argument that restrictive covenants protect against ‘disadvantageous development’ where the planning system fails to do so (Gray and Gray, 1999, p. 235). The extent to which this argument relates to environmental protection for the greater good, or whether it largely pertains to protection of private interests is unclear. Certainly Gray and Gray are of the view that private control serves in ‘taking over much of the social or community-directed function of public planning schemes’ (1999, p. 235). The recent proposals by the Law Commission to allow for a new species of ‘conservation covenant’\(^{54}\) (Law Commission, 2014) further supports the notion of the importance of private law rights protecting the public interest. It is not proposed that these new conservation covenants will be proprietary rights; instead they will operate as statutory rights. It is unclear as to why they will have a different status to restrictive covenants, and it matters not for the purposes of this research.\(^{55}\)

However, these two arguments are not without flaws. In the choice versus coercion argument it could be said that successors in title in practice may not be aware either of the restriction or its effects, or that a change in circumstances has made the restriction unfavourable.\(^{56}\) Furthermore, it could be argued that covenants created by developers do not correspond with the current requirements for land use control and that purchasers may have little influence on the historical choices of the developer. Moreover, it is likely that home owners do not consider the future uses they may wish to make of their home at the point of purchase, or they have forgotten by the time they wish to make changes. It may be that owners believe that obtaining planning permission is all that is required. It would be interesting to conduct some research on this question, but this was outside the parameters of this thesis. The ‘affordability crisis’ of property in England means that owners remain in properties they are more likely to want to extend than to move. The Office for National Statistics (2015) present the following trends in the housing market: rising house prices, declining number of first time buyers, decreasing number of younger homeowners, increasing deposits, fewer new homes being built. They

\(^{53}\) He also argues that zoning is sometimes unfair and ineffective as a way of eliminating ‘nuisance costs’. See also Ellickson, 1973.

\(^{54}\) In their report the Law Commission suggest a new type of obligation which can be either positive or restrictive and which will bind the land regardless of the fact that the covenantee may not own any benefitted land.

\(^{55}\) For a recent discussion proprietary analysis of conservation covenants see Pratt (2014).

\(^{56}\) Although restrictive covenants must be registered against the burdened land and therefore the purchaser has notice of the covenant, research carried out as part of the Scottish Law Commission’s report in 2000 found that only 62% of those interviewed were aware of the real burdens affecting their property (Scottish Law Commission, 2000, p. 470).
conclude that there is an increased demand and limited supply. Costs of moving, especially stamp duty land tax also provides a disincentive to homeowners (Hilber, 2015). Houses in the UK are among the smallest in the developed world; a new house in the UK is 38% smaller than densely populated Germany (Hilber and Vermeulen, p. 2) again this is likely to increase the desire to alter the house as built.

With regard to the argument that restrictive covenants serve as a useful protection of environmental amenity, one could argue that the public interest would be better served by a more comprehensive statutory scheme to protect the environment that could serve all areas of the country equally, not merely those where the original developers (often many years ago) sought to restrict development to protect their personal interests.

### 2.4 The impact of land registration on restrictive covenants

The rationale behind the system of land registration was straightforward, to make transfer of land simpler and cheaper and to protect purchasers against the dangers of secret transfers and charges which were a symptom of the system of the private conveyance. An eminent legal scholar, Frederick Pollock, commented that, ‘in all but the simplest cases the process is a long and costly one’ (1896, p. 171). Indeed, the Land Registry confirm that in the 1860s the legal costs of transferring a home were 2 to 3 per cent of the sale price compared to a combined legal and land registration cost of 0.5 per cent today (Land Registry, n.d.). The job of the conveyancer prior to registration of title was certainly a complicated one; title documents dating back at least 60 years had to be examined (Pottage, 1998, p. 139). The Law of Property Act 1925 s44(1) reduced the time period to 30 years. Since 1970 it is sufficient to examine only the last 15 years in order to establish good root of title (Law of Property Act 1969, s23). Proponents of land registration included Jeremy Bentham who was invited to contribute to the work of the Royal Commission which had been appointed in 1828. Bentham supported codification of the law based on utilitarian principles. This utilitarianism led to the aim to simplify transfer of land and to abolish any institution which stood in the way of this aim. According to Dicey, the Benthamite reformers wished, ‘that for the men of each generation land should be marketable, and that, as it is sometimes expressed, a field should be as easily saleable as a watch’ (Dicey, 1962/1914, p. 227). Reform was slow, not least because it was not in the interests of the legal profession who benefitted from the lengthy conveyancing processes of
the day and although the LRA 1925 paved the way for a comprehensive title register, it has only been since 1990 that the whole of the country has been the subject of compulsory registration. As well as making land transfer simpler and cheaper, there are three principles behind the land register identified by former Chief Land Registrar Theodore Ruoff: the curtain, mirror and indemnity principles (Ruoff, 1957, p. 8). The principle which is most pertinent to this thesis is the mirror principle, which was explained as follows, ‘the mirror principle involves the proposition that the register of title is a mirror which reflects accurately and completely and beyond all argument the current facts that are material to a man’s title’ (Ruoff, 1957, p. 8).

Whilst post 1925 restrictive covenants must be registered in order to be binding upon a purchaser, there are instances where they may be at odds with both the Benthamite notion of utility and Ruoff’s mirror principle. Whilst a purchaser will be aware of the restriction on his title by simply looking in the charges register, he may not be aware of whether this restriction remains binding on him. This is because a great many restrictive covenants were entered into in the Victorian era and may now be obsolete; the extent of the problem has not been researched. Typical examples of Victorian restrictive covenants are against immoral uses or old fashioned trades such as tanneries. Planning law would now prevent these uses, but the covenants remain on the title. Another major group of covenants relate to restrictions on development, the kinds of covenants referred to by Jolly (1931). These are more problematic because an owner may wish to develop in breach of covenant. Benefitting owners may well not be aware, and may not understand, that the land which they own has the benefit of a restrictive covenant as it is not reflected in the mirror of their title. This leads to the question of how much you can benefit from something you are unaware of. It is relatively straightforward to create and register a restrictive covenant, it is normally created in a transfer deed and then registered when that transfer is registered, and removal however is less simple and potentially very expensive.

2.5 Conclusion - the theoretical position of this research

It is not the aim of this research to devise an original and comprehensive theory of property; that is more than a thesis in itself and is both unhelpful and unrealistic when considering only

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58 Solicitors’ fees were determined by the length of the documents perused and drafted which led to lengthy abstracts of title and excessively wordy deeds (Offer, 1981, p. 24).
59 For a discussion on the relationship between restrictive covenants and the mirror principle of land registration see Walsh (2012).
60 The application fee alone currently stands at £800 UK Government, n.d.)
one property right. Rather it is the aim of this part of the research to describe a theoretical lens through which the problem and solutions relating to restrictive covenants may be viewed. This research then takes a broadly utilitarian approach to assessment of the ‘problem’ and ‘potential solutions’ of obsolete restrictive covenants. The underlying principle being that whilst restrictive covenants enjoy the special status of ‘in rem’ rights where they are problematic, they should be assessed on the basis of how well they serve the needs of the ‘greater good’ of society. It is submitted that this approach is consistent with the approach taken in the elevation of restrictive covenants to property rights and subsequent statutory provisions for amendment. Restrictive covenants became enforceable against successors in a historical context where there was a need for control of development. In Tulk v Moxhay the addition of restrictive covenants to the list of property rights was justified largely on the grounds of notice. The idea that someone should be bound by a restriction because they have notice of it is reflected in the link made by Munzer (1990, p. 221) between utility and expectations. An expectation is a feeling of being entitled to count on something. One of the arguments against removal of covenants is that the owner of the burdened land took with notice of the covenant, and equally it can be argued that the owner of the benefited land should be entitled to count on this benefit. The notion of expectation will be considered further in analysis of proposals for reform. The criticism of utilitarianism as putting the rights of society before the rights of individuals (as outlined above) is a concern that will be considered further in assessing reforms undertaken in Scotland and proposed in other comparative jurisdictions. The writer has already declared an affinity with the pragmatic approach; the theory is therefore utilitarian and the method pragmatic. This pragmatist methodology is discussed in detail in Chapter Five. William James stated that the pragmatic method enables the settling of interminable metaphysical disputes by tracing practical consequences (1975/1907, p. 28). According to James, pragmatism has no dogma of its own but represents the empiricist attitude (p. 31). The lack of doctrine enables pragmatists to take a range of philosophical positions.

In this research, in Chapter Six, these notions of utility, empirical data relating to ‘old’ and ‘new’ restrictive covenants is collected and their usefulness assessed. In Chapter Seven a similar exercise is undertaken with regard to decisions in the Lands Tribunal in England and Scotland. In Chapter Eight thematic analysis of interviews and written responses and part of this analysis considers the extent to which respondents reveal their own theoretical perspective and where

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61 One of the leading philosophers of the late nineteenth century and along with John Dewey and Charles Sanders Pierce one of the leaders of the pragmatic school of thought.
this agrees or conflicts with the approach taken in this research. In the final chapter in which conclusions are drawn and recommendations made these are set against a backdrop of the principles of this theory.
CHAPTER 3 - THE CASE FOR REFORM AND HUMAN RIGHTS

3.1 Introduction

Chapter Two established the history of restrictive covenants as proprietary rights and the theoretical basis for this research. This chapter moves forward to look at how the law with regard to restrictive covenants works in practice and how it has been criticised. This chapter is divided into five sections: 3.2 considers problems with interpretation, the impact of mortgage lenders on conveying land burdened by restrictive covenants and the pragmatic ‘solution’ of insurance; 3.3 summarises the numerous proposals to reform the law of restrictive covenants; 3.4 considers the meaning of obsolete; and 3.5 considers the human rights aspects of reform of the law.

3.2 Problems with interpretation of restrictive covenants and how restrictive covenants are dealt with in practice

The hypothesis of this research presupposes that there is a problem with regard to obsolete restrictive covenants which needs to be solved. Leaving aside obsoleteness in the first instance, this section considers more generally the challenges with the law and practice as it stands before considering in 3.3 how these have been raised in previous proposals for reform.

There are a number of issues to consider, the first relates to the issue of interpreting restrictive covenants. The perpetual nature of restrictive covenants is clear and resultantly those dealing with land, particularly conveyancing lawyers, have to interpret both old and new covenants in the context of an ever changing physical and legal landscape. In this section therefore it is necessary to consider these challenges particularly with regard to interpretation and removal of covenants.

General contractual interpretation

The starting point for a court in interpreting the meaning of a restrictive covenant is to apply the normal principles of contractual construction or interpretation. It has been traditionally stated that interpretation of written contracts involves ascertaining the common intention of the parties. However, recent case law suggests that the question is what a reasonable person having all the background knowledge would have understood the words to mean (Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896). The meaning should, in the first instance, be sought from the written contract alone as the parol evidence
rule excludes the insertion of extrinsic verbal and written material into a written contract. That said, the parol evidence rule does not prevent the admissibility of extrinsic evidence to interpret a written contract (Beale, 2008, pp. 112-117). As McMeel (2003, p. 277) states:

Modern judges are prepared to look beyond the four corners of a document, or the bare words of an utterance. They have regard to the relevant surrounding factual (and legal) circumstances which constitute the context in which the document was drafted or the utterance was made.

The extent to which judges are able to look to extrinsic evidence and whether the current approach is correct has been the subject of some controversy, with a number of commentators and members of the judiciary contributing to this debate. Modern law regarding contractual construction is set out in Lord Hoffmann’s judgement in *Investors Compensation Scheme v West Bromwich Building Society*, at p. 912E-913E (ICS). Lord Hoffmann lists five principles which are, briefly stated, as follows:

1. What the meaning would convey to the reasonable person having all the background knowledge.
2. The ‘matrix of fact’ including absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
3. The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification for reasons of practical policy.
4. The meaning of the document is not the literal meaning of the words, but the one the parties would reasonably have understood from the context.
5. Words should be given their ‘natural and ordinary meaning’ reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents.

It is accepted that the court does not look at what the parties actually intended but rather depersonalises the parties to create the popular legal construct of the ‘reasonable person’. The fundamental principle of freedom to contract states that parties of full capacity and operating without duress or undue influence should be entitled to insert whatever provisions into their dealing they see fit. With commercial agreements, such as conveyances of land, it is assumed

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62 For example, Hoffman, 1997; McMeel, 2003; Nicholls, 2005; McLauchlan, 2010 and Grabiner, 2012.
63 In *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827 Lord Diplock stated, ‘A basic principle of the common law of contract ... is that parties to a contract are free to determine for themselves what primary obligations they will accept.’ (p. 848).
that where the parties have written down the terms of their contract they may expect these words to be given full weight by the court should it be required to interpret the contract.\textsuperscript{64}

The controversial aspect of the discussion surrounding contractual interpretation relates to the circumstances in which, and the extent to which, the court may use evidence from outside the contract to interpret its words. It has long been accepted that the court may look to extrinsic evidence to make sense of ambiguity (\textit{Shore v Wilson} (1842) IX Cl. & F. 355). This principle has been reiterated more recently by the Court of Appeal in \textit{Co-operative Wholesale Society Ltd v National Westminster Bank plc} [1995] 1 EGLR 97 where Hoffman LJ stated:

This robust declaration does not, however, mean that one can rewrite the language which the parties have used in order to make the contract conform to business common sense. But language is a very flexible instrument and, if it is capable of more than one construction, one chooses that which seems most likely to give effect to the commercial purpose of the agreement (at p. 99, cited in Francis, 2013, p. 214).

In addition, there is now clear authority that the court may go further than this to correct obvious mistakes (Grabiner, 2012, p. 45). The point at which the court will draw the line is refusal to look to the pre-contract negotiations of the parties in interpreting the contract (\textit{Chartbrook Ltd v Persimmon Homes} [2009] UKHL 38). These may be used to bring a claim for rectification or estoppel but they may not be adduced in interpretation (see Lord Hoffmann in \textit{Chartbrook Ltd v Persimmon Homes}, para. 41). Whilst some commentators make a strong case for allowing evidence of pre-contract negotiations to be used in disputes relating to interpretation (Nicholls, 2005 and McLauchlan, 2010), Lord Hoffmann acknowledges but firmly dismisses these arguments (\textit{Chartbrook}, para. 32). In \textit{Chartbrook} Lord Hoffmann sets out his counter arguments, starting with the assertion that allowing evidence of pre-contractual negotiations would be contrary to a long line of authority, most notably: \textit{A & J Inglis v John Buttery & Co} (1878) 3 App Cas 55, \textit{Prenn v Simmonds} [1971] 1 WLR 1381, \textit{Bank of Scotland v Dunedin Property Investment Co Ltd} 1998 SC 657, and \textit{Alexiou v Campbell} [2007] UKPC 11 (paras. 28-34). He then argues that to adduce extrinsic evidence would be expensive and would lead to commercial uncertainty. Finally, he reiterates the point made by Justice Briggs in his first instance judgement that to amend contracts to account for pre-contractual negotiations could

\textsuperscript{64} As Lord Clarke stated in \textit{Rainy Sky SA v Kookmin Bank} [2011] 1 W.L.R. 2900 at p. 2908, ‘Where the parties have used unambiguous language, the court must apply it’.
prejudice third parties who had relied on the final contract and who had no access to the said negotiations (Chartbrook, para 40).

The perpetual nature of restrictive covenants may make extrinsic evidence even more problematic. It can be argued that when land is transferred many decades on from the date at which the covenant was drafted, extrinsic information relating to the drafting of that covenant should only be applied where the parties to the transfer may have become aware of such information upon reasonable enquiry (Newsom, 2013, p. 178). In a recent High Court judgement Mr Strauss QC stated,

In many cases, including this one, the issue of construction arises long after the contract was entered into, and as between parties who are not the original parties to the contract. It is then usually impossible to know what were all the facts known, or reasonably available, to the parties.... Some of the facts may be clear, but there is a real risk that the court is proceeding on the basis of incomplete evidence as to the relevant background, and that it may therefore misunderstand it (Churchill v Temple [2010] EWHC 3369 at para. 37(a)).

With regard to case law relating to restrictive covenants, extrinsic evidence is most frequently employed where there is an issue regarding the extent of the land to be benefitted. It is accepted that in order for a restrictive covenant to be enforceable, it must be clear which land it was intended to benefit. Ideally identification of the benefitting land will be achieved by specific reference to a plan in the deed which created the covenant. However, it is possible to utilize extrinsic evidence where the instrument of creation describes the land in such a way that it can be identified from other evidence (see Federated Homes v Mill Lodge Properties Ltd [1980] 1 WLR 594, Rogers v Hosegood [1900] 2 Ch 388 and Crest Nicholson Residential (South) Ltd v McAllister [2004] EWCA Civ 410).

A further key principle of contractual interpretation needs to be considered. The contra proferentem principle states that a deed or instrument shall be construed more strongly against the grantor. It is only applied in cases of doubt or ambiguity. The rationale behind the rule is that the party drafting the provision (usually the owner of the benefitting land) is likely to have put his interests first. As to the application of the ‘contra proferentem’ rule with regard to restrictive covenants both Francis (2013, p. 223) and Newsom (2013, p. 179) suggest that the principle is often used as a ‘last resort’. However Newsom adds that it may be more appropriate in take-it-or-leave it situations such as purchase from a developer of a building estate.
A number of specific issues arise when construing the meaning of restrictive covenants. The first of these is particularly pertinent to this research, that is the question of at what date should the meaning of the covenant be construed. According to Francis, ‘there is a rebuttable presumption in the case of contracts and deeds that they are to be interpreted in the accordance with the meaning and the understanding of the words used which were current when they were made’ (2013, p. 218). This means that research as to the historic meaning of words, and presumably phrases and concepts, will be needed. In the sample analysed there are a number of restrictions on use which may now be deemed archaic (see 6.4 below). However, it is clear that where the expression is old fashioned but the meaning easily translatable, that the covenant remains operable. For example in Texaco Antilles Ltd v Kernochan [1973] AC 609 the words ‘public garage’ as written in 1925 could include ‘service station’ (pp. 621-622).

The principle of judicial precedent is fundamental in common law jurisprudence. Essentially judges are bound to follow previous decisions of equal or higher courts. Decisions of the UT(LC) are not binding but may give an insight into how the Tribunal may make a decision. Even where decisions pertaining to restrictive covenants arise in the Court of Appeal, the wording of deeds and the background facts vary so widely that it is not always possible to regard previous decisions as precedents. Buxton LJ in Martin v David Wilson Homes Ltd [2004] EWCA Civ 1027 at para. 15 ruled that, ‘authority in this case did not bind us, and was not likely to bind a court in any construction matter unless it was authority directly on the very clause in question’.

Implication and restrictive covenants

The leading authority on implied contractual terms is the case BNP Paribas v Marks and Spencer [2015] UKSC 72. In this case Lord Neuberger considered the relationship between contractual interpretation and implication and stated that they are different processes with different rules. He explained that the question as to whether a term should be implied into a contract will only be considered after the express terms of the contract have been construed. The court held that

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65 This is, of course a simplification of matters. Only higher courts (from the High Court upwards) are bound and their decisions only bind courts at the same or lower level. Therefore the Supreme Court, as the highest court in the land, binds all lower courts. However, unlike the Court of Appeal and the High Court, the Supreme Court is not obliged to follow its own decisions, although it usually does.
a term will only be implied into a commercial contract if it was either necessary to give business
efficacy to the contract or where it was so obvious that it went without saying.

In the context of restrictive covenants these principles may be particularly important where a
covenant requires consent. For example many covenants may require consent for development
or alterations. This covenant will be an absolute prohibition on alteration or development
unless there are either express words that consent shall not be unreasonably withheld or such
words are implied. It is for the owner of the burdened land to prove that the words should be
implied.

**Mortgage lenders and restrictive covenants**

As land is such an expensive asset, most prospective buyers will require a mortgage in order to
purchase. In the Land Registry research carried out as part of this thesis, it was found that 49%
of the titles were subject to one or more mortgages. Of course some of the others may have
been mortgaged at the point of purchase with the mortgage having subsequently been paid off.
It is therefore necessary to consider the requirements of lenders with regard to restrictive
covenants. The Council for Mortgage Lenders (CML) is a trade association for the mortgage
lending industry whose members account for about 95% of UK residential mortgage lending
(Council for Mortgage Lenders, n.d.). The big six mortgage lenders; Lloyds Banking Group,
Nationwide, Santander, Barclays, HSBC and Royal Bank of Scotland (Williams, 2014) are all
members. The CML publish an online ‘Lender’s Handbook’ which provides instructions for
conveyancers acting on behalf of lenders in residential conveyancing transactions. Part 1 of the
Handbook, which relates to all lenders who are members of the CML, states as follows with
regard to restrictive covenants:

**Restrictive Covenants**

5.11.1 You must enquire whether the property has been built, altered or is currently
used in breach of a restrictive covenant. We rely on you to check that the covenant is
not enforceable. If you are unable to provide an unqualified certificate of title as a
result of the risk of enforceability you must ensure (subject to paragraph 5.11.2) that
indemnity insurance is in place at completion of our mortgage (see section 9).

5.11.2 We will not insist on indemnity insurance:

- if you are satisfied that there is no risk to our security; and
- the breach has continued for more than 20 years; and
there is nothing to suggest that any action is being taken or is threatened in respect of the breach.

In effect this means that where there is a subsisting or proposed breach of a restrictive covenant the conveyancer will need to form his/her own judgement that the covenant is unenforceable, take the risk that the covenant might be enforceable (essentially relying on their professional indemnity insurance if there is a claim), take the matter to the Upper Tribunal (Lands Chamber) or take out a policy. Where the breach is subsisting it is likely that an insurance policy is the cheapest option however, in reality the risk may be very small.

**Dealing with restrictive covenants**

The heading ‘dealing with restrictive covenants’, has been selected advisedly rather than ‘removing restrictive covenants’. This is because, as will be demonstrated later, removal of restrictive covenants is infrequent, bearing in mind how often they present a hurdle to land use. Where land is burdened by a restrictive covenant it is possible, if perhaps unadvisable, for the owner of the burdened land to approach the owner of the benefitting land and ask for a release. It is unadvisable because, although the owner of the benefitting land may simply acquiesce to the request, they will more likely either ask for money in return for the release, or to refuse. The refusal leads to a further problem, it makes obtaining restrictive covenant indemnity insurance impossible. This is the most popular method of dealing with restrictive covenants which are most likely obsolete. Insurers will only insure out a risk if they consider it to be relatively low and policies are often relatively inexpensive. However, the system of land registration aimed to reduce cost and therefore any additional costs are contrary to these aims.

**Restrictive covenant indemnity insurance**

It is unclear how long restrictive covenant indemnity policies have existed. Little seems to be written about ‘restrictive covenant insurance’ or indeed ‘conveyancing insurance’. It seems that the US counterpart ‘title insurance’ has been a feature of transactions in America since the latter part of the nineteenth century (Johnstone, 1957 p. 492). Writing in the 1950s, Johnstone states that the volume of ‘conveyancing insurance’ in England is ‘small’ (1957, p. 492). Certainly the industry is no longer ‘small’, although there appears to be no research into the size or extent of the sector.

Restrictive covenant indemnity insurance can be used in a variety of situations. It is commonly used to cover a situation where an owner has inadvertently breached a restrictive covenant.
The owner may be unaware that they have breached a restrictive covenant until such time as they attempt to sell the property. On investigation of title, the purchaser’s solicitor may notice a covenant requiring approval of plans and request a copy of the approval obtained when a conservatory or extension was built. Homeowners are likely to believe that when they apply for planning permission or instruct a contractor to build a conservatory, for example, they have covered all the necessary legal requirements. This is not the case, as there is no link between the planning system and investigation of title to the property. The purchaser’s solicitor will then ask for a restrictive covenant indemnity policy. It may be the case that the covenants are no longer enforceable because those with the benefit of the covenant have also breached, or those with the benefit have not acted quickly in objecting to the breach. However, if the purchase requires a mortgage an insurance policy will be required.

Restrictive covenant indemnity insurance is a common solution for dealing with obsolete restrictive covenants. The practice of ‘insuring out’ the risk of a potential claim pertaining to a breach of a restrictive covenant has been criticised. The practice is driven by a number of factors, most notably the requirements of mortgage lenders and the costs and delays associated with applications to the Upper Tribunal (Lands Chamber).

It was therefore decided that in order to comment on the practice of obtaining restrictive covenant indemnity cover it would be necessary to get an idea of what is involved and the likely costs. In order to obtain the necessary data, the author put the following search terms into a search engine: ‘restrictive covenant indemnity insurance’ and ‘title insurance’. There were a large number of results; some of which were the desired insurance companies and some were web pages produced by organisations keen to advise on the area of restrictive covenants and title issues in general. In the first instance eleven companies were selected on the basis of being the first to appear as a result of the search. All the companies now provide an online quotation system for firms of solicitors; only one allowed members of the public to obtain a quotation in this way. It was decided therefore that the companies be contacted by email and asked if they would be willing to provide a quotation (see Appendix 1). The author explained in this email that the information required was for research purposes so as not to obtain the

66 And ‘he who seeks equity must do equity’.
67 Delay defeats equity.
68 Indemnity insurance was endorsed by the Law Commission in 1984 as a relatively cheap solution to the problem posed by obsolete restrictive covenants (see 3.3 below).
69 See for example Lugger, 2010.
70 See Chapter Seven.
information under false pretences. It was thought likely that most companies would decline to provide the information on the basis that no sale would result.

A decision had to be made with regard to the nature of the quotation. It was decided that it would be appropriate to select a title with an ‘old covenant(s)’ and that the covenant should fall within one of the common categories. One of the most common types of covenant is the requirement for approval of plans. In the analysis of the land registry titles it was found that 22.5% of the titles contained this category of covenant. The author therefore used a statistical analysis tool, Statistical Package for the Social Sciences (SPSS), to create a spreadsheet to select a title number where this type of covenant was contained within an old deed. The title selected was WK118554, a residential property in Birmingham. The relevant covenant was contained within a deed dated 29 August 1928 and reads as follows:

3. Not to erect on the said piece of land any buildings other than private dwellinghouses of the minimum cost of £400 and that no house or other erection shall be erected or built upon the said piece of land the plans whereof have not been submitted to and approved and signed by the Vendors.

The insurance companies were asked to provide two quotations regarding the above covenant; one for a breach that had been subsisting for more than 12 months, and one for a proposed breach of covenant. The level of indemnity was set at £250,000. This figure was selected by looking at the average price of properties in the same street on Zoopla, which was £215,000, and rounding up.

In the event, five out of the ten companies approached provided a quotation for the subsisting breach. However, they did not wish to provide a quotation for a proposed breach of covenant even though the vendor was an individual who was unlikely to be alive to give consent. The inability to obtain insurance ahead of carrying out development works means that a covenantor must either breach the covenant and insure later or utilise the UT(LC) process (see Chapter Seven). No attempt was made to chase up the five companies who did not respond, as five quotations were considered sufficient to obtain an indicative figure. The range of the quotations was £110 to £250, and the mean quotation was £157. This is a reasonably small

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71 An ‘old covenant’ is one dated earlier than 1934 (see Chapter Six for the rationale behind this cut-off point).
72 See Chapter Six.
73 There was no price on Zoopla for the property itself.
amount of money,\textsuperscript{74} but as a percentage of the conveyancing cost of the sale of a property (as it is doubtless the seller who will be required to pay the cost of the premium), it is relatively high. In fact, using a price comparison website\textsuperscript{75} the ten cheapest quotations ranged from £378 - £578 (including VAT); so taking a mean price of £518, the mean insurance quotation raises the total cost of the transaction by approximately 30%.

### 3.3 Law reform

The notion that reform of the law in the area of servitudes is required pre-dates the doctrine in \textit{Tulk v Moxhay}. Indeed it has been argued that the decision in \textit{Tulk v Moxhay} reflected judicial approval of the recommendation of the Real Property Commissioners in 1832 (George, 1990 p. 188). During the 20\textsuperscript{th} Century the new proprietary right created has been frequently under review by The Law Commission, with reports on restrictive covenants in 1967, 1984, 1991 and most recently in 2011.\textsuperscript{76}

The 1967 report found, amongst other defects, that the procedure for discharge or modification of outdated covenants was inadequate. The mechanism provided by the Law of Property Act 1925 under s84 had proved to be, ‘of very limited value for the grounds on which modification or discharge can be ordered are extremely narrow’ (Law Commission, 1967 p. 11). The result of this criticism was the amendment of s84 to include a power for the Upper Tribunal to discharge or modify the covenant where it does not secure any practical benefits of substantial value, or it is contrary to the public interest. Concern was expressed by the Law Society and Conservative MPs that the shift went too far.\textsuperscript{77} The worry was that where planning permission for development was obtained, this would be interpreted as evidence of public benefit, and lead to loss of covenants which provided benefit to individuals. It appears that these fears were unfounded. Indeed Newsom advised, ‘it is to be hoped that applicants will in future be less ready than they have been sometimes in the past to invoke the public interest provision in quite ordinary cases; it is often a waste of time and money to do so’ (Newsom, 1982 p. 248).

\textsuperscript{74} As a percentage of the purchase price it is only 0.07%
\textsuperscript{75} The Conveyancing Network - http://www.theconveyancingnetwork.com/index.cfm/online-conveyancing-quote/
\textsuperscript{77} H.L Deb., Vol. 302, cols. 232-239.
Clearly the Law Commission did not consider the matter resolved by amendment of s84, as the matter of restrictive covenants was raised again in a major review of the law of covenants in 1984. Whilst the Royal Commission on Legal Services had complained that, ‘many thousands of words of restrictive covenants clutter the titles of house property and bedevil modern conveyancing’ (1979, para. 3 Annex), the Law Commission stated that this was an exaggeration arguing that, ‘the problem can often be cured in practice by a relatively inexpensive insurance policy’ (Law Commission, 1984, para. 2.4). The 1984 report made no recommendation to facilitate the removal of obsolete restrictive covenants. The main focus of the report is the creation of a new interest in the land, the ‘Land Obligation’. A detailed description of this proposed new legal interest in land is outside the scope of this thesis; the main change proposed was that land obligations would encompass both positive and negative obligations, and that the interest would be registered against both the dominant and the servient land. In 1998 the Lord Chancellor announced that the government was not going to implement the proposed legislation but asked the Commission to consider how the 1984 proposals would sit with other developments in property law (Law Commission, 2008, 7.8). According to the Law Commission, the other main development which the Lord Chancellor had in mind was the introduction of commonhold (see also Cooke, 2009, p. 449).

Only six years later the Law Commission was reporting again; this time specifically on the matter of obsolete restrictive covenants. In the interim, the Conveyancing Standing Committee had consulted on the matter of old restrictive covenants and having seen them as an impediment to conveyancing, referred the matter to the Law Commission. Theodore Ruoff, former Chief Land Registrar stated, ‘Today these millions of words of restrictive covenants serve no truly useful social public or private purpose’ (Law Commission, 1991, p. 121). The Law Commission then carried out a further specialist consultation prior to producing its report.

The 1991 report (p. 5) sets out the problems posed by old restrictive covenants: that there was no machinery to convert restrictive covenants into land obligations, that there was no way to deal with obsolete restrictive covenants, and that there would be covenants that would be binding indefinitely even though the details of them had been lost. Their proposal was, ‘that all restrictive covenants should lapse eighty years after they were first created. But anyone entitled to the benefit of a covenant which was not then obsolete would have the right to replace it

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78Conveyancing Standing Committee, What Should We Do About Old Restrictive Covenants? (1986)
with a land obligation to the like effect.\textsuperscript{79} The burden would be on the individual benefitting from the covenant to apply for it to be converted to a land obligation, as the Law Commission felt that if it were left to the owner of the burdened land to apply, applications would be rare.\textsuperscript{80} The Law Commission justified the eighty year period on the grounds that it was long enough for most covenants to be obsolete but short enough that restrictive covenants would start to fall away and the aim of cleaning up titles would be achieved. These proposals were rejected by the government on the grounds of cost, but it was stated that the, ‘the matter will be kept under review following implementation of the commission’s recommendations in ... [the 1984 Report] for a scheme of land obligations’ (Written Answer, Hansard, 17 October 1995, col 91).

In 2008 the Law Commission began a comprehensive consultation and review of the law relating to covenants, easements and profits à prendre. With regard to obsolete covenants it agreed with the findings of 1991 report that, ‘section 84 does not provide a wholly satisfactory answer to the problem of obsolete restrictive covenants’ (Law Commission, 2008, para. 13.12). The Law Commission further stated that this conclusion would not be affected by their proposals for the reform of section 84. They concluded that, ‘an alternative mechanism is required’ (para. 13.12). However, in the Law Commission’s recommendations there is no proposal to deal with obsolete restrictive covenants. The rationale for this decision would appear to be based on the responses from the consultees.\textsuperscript{81} However, it might in part also be that reform of the law with regard to obsolete restrictive covenants was never the main thrust of the consultation. The Property Law Commissioner herself stated that, ‘the most profound question that the Law Commission has to answer, whatever else it does or does not achieve in this project, is whether positive obligations should be able to run with the land’ (Cooke, 2011, p. 232).

3.4 Meaning of obsolete

The definition of ‘obsolete’ in the Oxford English Dictionary is, ‘no longer used or practised; outmoded, out of date’ (Oxford English Dictionary, 2015). The meaning given to obsolete when

\textsuperscript{79} Ibid. p. 5.
\textsuperscript{80} This is assertion is based on the fact that under the existing regime owners of the burdened land did not apply for removal of the covenants and were therefore unlikely to do so under a new simplified regime.
\textsuperscript{81} See Chapter Eight for analysis of the responses.
considering restrictive covenants comes from Romer LJ in the case of Re Truman Hanbury and Buxton & Co Ltd’s Application [1956] 1 QB 261 at p. 272:

It seems to me that the meaning of the term “obsolete” may very well vary according to the subject-matter to which it is applied. Many things have some value, even though they are out of date in kind or in form – for example, motor-cars or bicycles, or things of that kind – but here we are concerned with its application to restrictive covenants as to user, and these covenants are imposed when a building estate is laid out, as was the case here of this estate in 1898, for the purpose of preserving the character of the estate as residential area for the mutual benefit of all those who build houses on the estate or subsequently buy them.

It seems to me that if, as sometimes happens, the character of an estate as a whole or of a particular part of it gradually changes, a time may come when the purpose to which I have referred can no longer be achieved, for what was intended at first to be a residential area has become, either through express or tacit waiver of the covenants, substantially a commercial area. When that time does come, it may be said that the covenants have become obsolete, because their original purpose can no longer be served and, in my opinion, it is that sense that the word “obsolete” is used in section s84(1)(a).

The ‘original purpose’ was considered by the Law Commission in 2008 as a possible test for removal or modification of covenants (Law Commission, 2008, para 14.70(1)). The Law Commission recommended removing the ground of obsoleteness from the legislation as where a covenant was by definition ‘obsolete’ it was unlikely to need to be removed.

Another potential source of a definition is the 1991 Report, but in fact no such definition is provided:

2.7 Although for convenience we have entitled this Report Obsolete Restrictive Covenants’ and we use the term in our discussion, we do not propose to rely on it to define those covenants which should cease to have effect after eighty years. Rather, we suggest that the primary question should be whether, at the end of that period it secures ‘any practical benefits of substantial value or advantage’ to the owners of the dominant tenement. This wording is capable of wide interpretation.

This is rather wider than a covenant which no longer serves its original purpose. The ‘practical benefits’ part of the test is likely to be easy to prove, but it would be significantly tempered by the ‘substantial value or advantage’ part of the test (Law Commission, 1991, 3.43). In further consideration of the matter in this thesis, the concept of obsoleteness is viewed in two different ways; firstly whether the purpose for which the covenant was created can be served (which will pertain to archaic covenants), and secondly whether there is a ‘substantial value or advantage’ to be found in the covenant. For the purposes of this thesis then, a covenant is obsolete if it
either fails to serve its original purpose, or it is no longer of substantial value or utility to the covenantee. The second part of the definition of obsoleteness will necessitate a balance between the rights and views of the covenantor and covenantee.

Age and obsoleteness/ utility

The possible relationship between age and obsoleteness arises in both the 1991 report and in various other jurisdictions, which impose a time-bar on covenant duration. It was not anticipated that the relationship between age and value would be absolute. However, the Scottish Law Commission noted that, ‘all things being equal, an old burden is more likely to be obsolete than a new one’ (Scottish Law Commission, 2000, para. 5.2.1). In their consultation paper the English Law Commission was less certain, suggesting that ‘there may be a place for time limits in a scheme to phase out restrictive covenants’ (Law Commission, 2008, para. 13.20). In the analysis of restrictive covenants that follows at Chapter Six, the relationship between age and utility/value is considered in detail.

3.5 Restrictive covenants and human rights

Any reform of the law must now take into account the European Convention on Human Rights (The Convention). The Convention became incorporated into UK law with the passing of the Human Rights Act 1998 (HRA). The rationale behind the HRA 1998 was that the incorporation of the Convention into domestic law would mean that the rights would be, ‘more subtly and powerfully woven into our law’ (Secretary of State for the Home Department, 1997, para. 1.14). There are now two mechanisms by which the rights can be accessed. They can be relied upon in the national courts via the HRA 1998, and additionally in front of the European Court of Human Rights in Strasbourg.

Article 1, Protocol 1 protects the rights to peaceful enjoyment of possessions:

Every natural or legal person is entitled to the peaceful enjoyment of his possession. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such law as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.
It is notable that Article 1, Protocol 1 provides a balance between the private enjoyment and state interference. As was stated at the outset, the pragmatic method allows the writer to take the law as it now stands and to move forward. However, it is worth mentioning that on the one hand one might expound the Lockean notion of property as a natural right, and on the other one might consider the desire to protect the right as a tool to exert political control by preserving the *status quo* (Rook, 2001, p. 2). Whichever view is taken, the fact remains that reformers of property law will have to be mindful of the HRA 1998 implications of any change in the law.

Before considering the application of Article 1, Protocol 1 in general and then specifically with regard to restrictive covenants, it is necessary to ascertain the extent to which the Convention applies to disputes between private individuals. The purpose of Article 1, Protocol 1[^82] is to protect individuals from interference from the state (Goymour, 2011, p. 251). Goymour states that this check on the powers exercised by the state is primarily applicable to public property rules such as compulsory purchase and planning regulation, and that any impact on private property law is secondary (Goymour, 2011, p. 252). The extent to which the Convention and the HRA 1998 can be invoked to regulate the relationships between private individuals is not entirely clear. The general position would appear to be that the Convention does not apply to property disputes between private individuals (*H v United Kingdom* (1983) 33 DR). However, in some circumstances states may be accountable to individuals in private disputes for the condition of their law. Land law in England and Wales is a complicated web of statute and common law, and it is necessary to consider how the Convention overlays these two elements. With regard to common law, the question arises whether the state can be responsible for the common law’s enforcement of a private agreement relating to property (Goymour, 2011, p. 256).

The question as to the extent to which the HRA might apply to disputes between private individuals is referred to as the ‘horizontal effect’ (Wade, 2000, p. 34). It is clear that where there is a violation of an individual’s Convention rights by the government, then the individual can invoke the HRA 1998, the ‘vertical effect’ (Clayton, 2002, p. 181). What is more

[^82]: And Article 8, the other article which impacts on property, which provides ‘everyone has the right to respect for his private and family life, his home and correspondence’.
controversial is the horizontal effect, and this has led to a flurry of articles by commentators without any clear consensus.\textsuperscript{83}

HRA 1998, s3 provides that, ‘so far as it is possible to do so’, all primary and subordinate legislation must be read in a way which is compatible with the Convention rights. This is retrospective, so that not only must future legislation take into account the Convention, but all existing legislation must be interpreted through the Convention’s lens. This means that where one party seeks to rely on statutory provision to make his case, the other may challenge the statute’s compatibility under the HRA 1998. This was the case in Pye v United Kingdom (2008) 46 EHRR 45 where the state was held responsible for those provisions of the Limitation Act 1980 that allowed a squatter to acquire rights against a private owner of land. The law with regard to adverse possession was reformed by the Land Registration Act 2002, but this legislation does not have retrospective effect. Even more complicated is the question of the applicability of the Convention to the operation of the common law. HRA 1998 s6 provides that public authorities cannot act in a way that is incompatible with one or more of the Convention rights. Rook elucidates two possible issues here. The first is whether the grant of a court order pertaining to a common law matter satisfies the element of state responsibility. If so, she argues, all litigation between private individuals would become subject to the HRA 1998. This, Rook concludes, is unlikely. The second is whether the court, as a public authority, under s6 HRA 1998 has a duty to interpret the common law in such a way as to ensure Convention compatibility. During the passage of the HRA through parliament the issue arose as to whether courts should be included in s6(1). The Lord Chancellor stated:

\begin{quote}
We... believe that it is right as a matter of principle for the courts to have the duty of acting compatibly with the Convention not only in cases involving other public authorities but also in developing the common law in deciding cases between individuals. Why should they not? In preparing this Bill, we have taken the view that it is the other course, that of excluding Convention considerations altogether from cases between individuals which would have to be justified. We do not think that would be justifiable; nor indeed, do we think it would be practicable (Hansard, November 24 1997 col 783).
\end{quote}

Whilst this might clarify the position with regard to the underlying policy that courts are included within ‘public authority’, for the purpose of the Convention there remains scope for

debate as to the exact nature of the requirement for the courts to be consistent with the Convention (Hunt, 1998, p. 441).

In order to establish a violation of Article 1 Protocol 1 there are two stages. First, it is necessary to establish whether possessions have been affected and whether what has happened comprises an ‘interference’. Second, the interference must be unjustified (Gardner, and MacKenzie, 2012). The drafting of Article 1 Protocol 1 is seemingly inconsistent as it refers to ‘possession’ in the first and second sentences, and ‘property’ in the third. The word ‘possession’ is somewhat unsatisfactory in an English context as it not a concept the law considers; ‘property’ on the other hand is much more meaningful. However, the word possessions has an ‘autonomous meaning’ in the Convention. Essentially this means that, rather than the individual States applying their own individual meanings to the word according to national laws, the meaning is ascribed by the Court.84 Allen states that Article 1 Protocol 1 uses ‘possession’ as the general term for proprietary interests. In order to utilize Article 1 Protocol 1 the applicant would need to demonstrate a shift in proprietary entitlement. If we consider the ‘bundle of sticks’85 metaphor, Article 1 Protocol 1 can be engaged where one of the sticks is removed from the owner’s bundle. The benefit of a restrictive covenant is a proprietary right which would therefore come within the ambit of Article 1 Protocol 1.

Article 1 Protocol 1 protects against interferences, deprivations and controls of use (Goymour, 2011, p. 275). Modification or removal of a restrictive covenant would not be considered to be a deprivation, as this category requires the applicant to be deprived of ownership (Allen, 2005, p. 112). The distinction between deprivation and control of use may be significant as the former will almost certainly require compensation, ‘the taking of property in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances’ (James v UK (1986) 8 EHRR 123, para. 54). With regard to removal of obsolete restrictive covenants, the Commission has held that this constitutes control of use rather than deprivation of possessions.

Having established that removal of a restrictive covenant can be an interference with the control of use, the Commission then needs to consider whether or not it is justifiable as being in the general interest and proportionate to the aim being pursued. In James v UK (perhaps the most significant UK case) it was argued that transfer of property under the Leasehold Reform

84 For a detailed consideration see Allen, 2003 and Allen, 2005.
85 See 2.2.
Act 1967 was a deprivation under Article 1. The Leasehold Reform Act 1967 allowed tenants of houses on long leaseholds on low rents to acquire the freehold. A number of properties were so acquired by tenants of the Westminster family in Belgravia. The basis of valuation under the 1967 Act was significantly less than the market value, and the claimant therefore argued that the trust had been deprived of its possessions. The court held that there had been no violation of Article 1 Protocol 1. It mattered not that there was no benefit to the public at large if the compulsory transfer from one individual to another could be a legitimate means of promoting the public interest. Using leasehold reform to attempt to eliminate social injustice was a legitimate aim within the state’s margin of appreciation (Howell, 1999 p. 298). It has been argued that this wide margin of appreciation and low threshold of proportionality will make it, ‘hard to show that the Article would seriously inhibit government programmes involving interference with property aimed at a social democratic political agenda’ (Davis, 1996, p. 137).

The ability of the Lands Tribunal to free land from ‘unreasonable impediments’ was held in S v UK (App. No. 10741/84) to be a legitimate aim in the general interest. Although this is a Northern Irish case where the Commission considered different legislation, it is likely that the same would apply to LPA 1925 s84 applications. It is possible however that failure to compensate could result in a successful challenge (Rook, 2001, p. 211).

When considering the human rights implications of any potential reform, it is useful to consider comments by the Law Commission in their 2008 consultation and the consideration given to Article 1 Protocol 1 by the Scottish Law Commission in their Report on Real Burdens in 2000. The Scottish Law Commission acknowledged that their proposal for a sunset rule might impact on Article 1 Protocol 1 (Scottish Law Commission, 2000, p. 287). Interestingly, they suggested that this might be a deprivation of possession. The Scottish Law Commission then considered whether the sunset rule (and various other proposals made within the report) would be considered proportionate. Their conclusion was as follows:

The notice of termination procedure, while new, is closely related to an existing method of extinction, by application to the Lands Tribunal. A notice of extinction can be challenged before the Lands Tribunal. If the challenge is successful, the burden survives. If it is unsuccessful, compensation may be payable, under headings familiar from the existing law (Scottish Law Commission, 2000, para. 14.21).

86 See Lugger, 2014 for a recent consideration of this case and the potential HRA implications of s84.
87 This was not the view taken by the Law Commission; see Law Commission, 2008, para. 13.80.
The Law Commission in its 2008 report considered the impact of Article 1 Protocol 1 on its proposals, and it concluded that automatic extinguishment might be considered to be deprivation of possession. The Scottish style ‘extinguishment on application after a specified number of years’ was considered to be a control of use. The Law Commission stated that, ‘whichever category is at issue, we feel confident that all options for reform which are outlined above are potentially compatible with the jurisprudence on human rights’ (Law Commission, 2008, para. 13.81).

In conclusion, it seems likely that law reform in the area of restrictive covenants is possible without major human rights concerns, particularly where provision is made for the payment of compensation.

3.6 Conclusion

This chapter has explained the legal difficulties with regard to restrictive covenants and considered in what context a covenant might be ‘obsolete’. Taking guidance from case law and proposals for reform, it was decided that obsolete would refer to lacking in utility or usefulness. Previous attempts at reform were summarised, and it is unclear precisely why at certain times there seems to have been an appetite for reform and in others this has not been the case. The human rights implications of reform were considered in some detail, and it was decided that it would be possible to reform the law without breaching the Human Rights Act 1998. On this basis, Chapter Four, the final Chapter of the literature review will take a comparative position to consider what might be learnt from other jurisdictions.

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88 This was option (6) of the various options presented for dealing with obsolete covenants (see Law Commission, 2008, paras 13.64-13.71).
89 This was option (5) of the report (see Law Commission, 2008, paras 13.54-13.63).
CHAPTER 4 – COMPARATIVE JURISDICTIONS

4.1 Introduction

It is important to confirm from the beginning that this is not a comparative study; it is rather a study with a comparative element. When considering an area of law which has problems it seems logical to consider how other jurisdictions have attempted to find solutions to similar issues. That said comparing one jurisdiction to another can be risky:

Comparative law is always a dangerous endeavour. It can be especially treacherous when a scholar delves into property law, a subject whose traditions, rules and fundamental concepts are often deeply intertwined with a legal system’s unique history, culture and values. (Lovett, 2008, p. 2)

With these cautionary words in mind, the next section will take a comparative stance. England and Wales are not the only jurisdictions which have restrictive covenants. Other common law jurisdictions such as USA, Northern Ireland, the Republic of Ireland and Australia have comparable systems of land law. Hybrid systems such as that in Scotland, Quebec, Louisiana and South Africa also have restrictive covenant equivalents. In this study the following jurisdictions were selected for consideration: the USA, Australia, Northern Ireland, the Republic of Ireland and Scotland. The USA was selected for consideration as there is a wealth of academic commentary from the USA, and it was thought important to understand the extent to which this literature could inform the debates in England and Wales. The Australian State of Victoria and the Northern Territory have, like England, contemplated reform. In order to consider whether lessons could be taken from these proposals it was necessary to understand something of the law of restrictive covenants in Australia. The law in Northern Ireland and in the Republic or Ireland is discussed as these jurisdictions have reformed the legislative mechanism for removal of restrictive covenants, and so in order to decide whether reforms such as these could be beneficial in England it was necessary to broadly compare the law with regard to restrictive covenants more generally. Scotland was chosen as the main comparative jurisdiction not because it is closest in terms of law, as this is not the case, but rather because the practical concerns are similar. Industrialisation took place in Scotland at a similar time to England and as a result both countries have many old restrictive covenants (Wortley, 2001). Scotland has a similar mechanism for law reform in the form of a Law Commission, and it has recently undergone a significant programme of law reform which is not replicated in any of the

This chapter is therefore divided into six parts. In sections 4.1-4.5 the law with regard to restrictive covenants in the USA, Australia, Northern Ireland and Ireland are summarised and contrasted with that in England, with particular emphasis on reform. In section 4.6, a more detailed discussion is undertaken with regard to the law in Scotland. Finally, in section 4.7, a comparison of the legislative mechanism for removal of restrictive covenants in Northern Ireland, Ireland and Scotland is undertaken. There is no legislative mechanism for removal of restrictive covenants in the USA. The proposals of the Law Reform Commission of the Australian State of Victoria are also considered.

4.2 USA

Consideration of the law in the US is helpful for two main reasons. Firstly, the US law relating to private property restrictions finds its origins in English Law. Commentators often refer to an ‘Anglo-American’ tradition of land law. Secondly, the size of the US has meant that considerable research and academic commentary has arisen which cannot usefully be considered without an awareness of the extent to which it can be related to English law. In the United States property law comes from three sources: common law, statutes, and the Constitution. The primary source of property law is the common law which has developed from English common law. The law of property is a matter for individual states, because states’ courts develop the common law as courts of general jurisdiction (Johnston, 2007, p. 248). Johnston states that although the principles are broadly the same, as each state is sovereign, state courts vary their application of the law as to fact. Although no state law decision is binding on any other state, it is common practice for state courts to look to the decisions of other state courts as persuasive authority (Johnston, 2007, p. 248). States also have their own statutes which regulate property law. The third source of property law is the Constitution of the United States and the constitutional law of each individual state. A major source of influence on the development of the common law is the American Law Institute (ALI) which is an association of lawyers, judges and academics who are invited to membership and publish so-called Restatements of Law. The ALI has published restatements on property law as a whole and also on specific areas of property law including the Third Restatement Property (Servitudes) which it published in 2000.

The American rules with regard to restrictive covenants derive from the English cases of Spencer’s Case and Tulk v Moxhay, but the law has diverged much further than in Ireland and
Northern Ireland or indeed Australia. The position, as in England, is complicated, but a brief outline is attempted. As with English law, in the US covenants may be enforced in law or in equity. The legal principles derive from Spencer’s case and lead to a right referred to as a ‘real covenant’ (Woolf, 2000, 60-40). As with the law in England, the legal and equitable rules for ‘running’ of the covenants differ. Both require the covenant to ‘touch and concern’ the land and that the original covenantee parties intended the covenant to run. The legal rules also require some form of privity of estate whereas the equitable rules require the successor to have notice of the covenant. Some of these rules mirror those in England, but the application is rather different. It would seem in the US there is no clear consensus between states regarding the test, but one expert suggests that the requirement for a covenant to run with the land is that the covenant renders the covenantee’s land less valuable. The law in England does not allow a covenant to exist in gross. However, in the US ‘most courts’ have allowed the benefit to run even where the burden is personal (‘in gross’) to the grantor. As to intention, as with all aspects of the running of covenants, there is plenty of scope for dispute. However, it is put rather succinctly in Wolf (2000), ‘the intention of the covenanting parties as to the running of the covenant must be sought in the language of their transaction, read in the light of the circumstances of its formulation’ (60-51). The requirement of privity is very complicated indeed. The US law of real covenants identifies three types: mutual (the relationship between the original parties); horizontal (a requirement that the covenant and conveyance must be made at the same time) and vertical (relationship between the original contracting parties and their successors in title). Whilst vertical privity is easy to prove, mutual is more difficult. In fact it is the lack of mutual privity that prevents the burden of a restrictive covenant being enforceable in law against successors in title to the covenantee in English law. In Wolf (2000) it is stated that, ‘many modern cases still require some type of privity for covenants to run at law. Unfortunately, there is frequently no consistency as to the type of privity required even within a jurisdiction, and many courts just do not state which type of privity they require’ (60-65). Fortunately no US jurisdiction requires privity for enforcement of ‘equitable restrictions’. The final requirement for enforcement of equitable restrictions is that of notice. Unlike the English law, in which notice has been replaced with registration, in the US notice may be actual, constructive or inquiry. This is far less clear than the English position where a purchaser merely needs to look to the title.

90 Wolf is the author/ editor of Powell on Real Property which is a loose leaf treatise. The issue consulted included updates from 2007.
91 According to Woolf 2000 60-42, this test was created by Dean Bigelow and has been approved in various cases.
Remedies for breach in the US are, as in England, damages or injunction, with the preferred choice often being the latter. Whereas once the remedy might have depended upon whether the claimant was proceeding under the legal or the equitable rules, it seems that the courts now grant the relief they consider appropriate (Wolf, 2000, 60-106). There is no statutory mechanism for removal of covenants in the US. The mutual intent of the original parties governs duration except in a few jurisdictions where they are time limited. The conduct of the parties may also bring them to an end. The relevant types of conduct are:

- Merger
- Release
- Rescission
- Unclean hands
- Acquiescence
- Abandonment
- Laches
- Estoppel

Merger and release have clear counterparts in the English law. Rescission is similar to release but could, it would appear, be the result of a new oral agreement rescinding the original obligation created in writing (Wolf, 2000 para. 60-124). The remaining types of conduct appear to be analogous to equitable defences. These would not in England really bring the covenant to an end but rather make it difficult to enforce. In the US there is also a common law doctrine of ‘changed conditions’ which can lead to modification or termination. The doctrine of changed conditions is set out in the Restatement (Third) of Property, Servitudes (2000):

§7.10 Modification and Termination of Servitudes because of Changed Conditions

(1) When a change has taken place since the creation of a servitude that makes it impossible as a practical matter to accomplish the purpose for which the servitude was created, a court may modify the servitude to permit the purpose to be accomplished. If mediation is not practicable, or would not be effective, a court may terminate the servitude. Compensation for resulting harm to the beneficiaries may be awarded as a condition of modifying or terminating servitude.

(2) If the purpose of the servitude can be accomplished, but because of changed conditions the servient estate is no longer suitable for uses permitted by the servitude, a court may modify the servitude to permit other

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92 Iowa limits them to 15 years unless renewed (Iowa Code §614.24) and Massachusetts limits them to 30 years (Mass.Ann.Laws ch. 184 §23).

93 These are set out in the Restatement of the Law of Property (1944) 555-562 and the Restatement Third, Property (Servitudes) Chapter Seven and are listed in Wolf, 2000, pp. 60-120.
uses under conditions designed to preserve the benefits of the original servitude.

The extent to which the state should be allowed to intervene with regard to obsolete restrictive covenants in America is controversial. Reichman (1982) argues that the doctrine of changed conditions is necessary as the original parties cannot anticipate and therefore guard against change of circumstances, that the benefitted owners can use covenants to ‘blackmail’ others and that they generate excessive transaction costs. Epstein (1982) disagrees, arguing that parties to a transaction are themselves able to ‘shape their joint future’ (p. 1365). More recently Robinson (1991) looked at the doctrine, but rather than supporting or denying the usefulness of the doctrine, he considers from whence it arose, concluding that there is no clear basis in contract or property law.

4.3 Australia

Australia shares with England a history of restrictive covenants commencing with Tulk v Moxhay. There are therefore a number of similarities between the ways the two countries deal with private control of land. Like England, in most States and Territories in Australia restrictive covenants operate as equitable interests. In most States and Territories positive covenants do not run with land, and there is statutory power to modify or extinguish restrictive covenants. The main differences between England and Australia are that Australia has differences in law between its different States and Territories, whereas the law in England is unified; and Australia’s Torrens system of land registration is at odds with restrictive covenants. The first difference is clear from the discussion above: different States and Territories have different statutory regimes regarding restrictive covenants. The main historical problem with covenants in Australia is that Tulk v Moxhay had only recently been decided when Australia introduced its Torrens system of land registration. This conflict between Torrens and restrictive covenants is summarised by Bradbrook and McCallum as follows:

The law of restrictive covenants is a morass of technicalities, inconsistencies and uncertainties. In its complexity it resembles the medieval rules regulating the creation of future interests. In Australia this difficulty is compounded by the interaction

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94 In the Northern Territory covenants are now legal interests (Land Title Act (NT) ss106-117 and Law of Property Act (NT) ss167-181).
95 In the Northern Territory the burden of positive covenants run with the land (Law of Property Act (NT) ss168-171).
96 There is no such power in South Australia.
97 The first Torrens statute was enacted only ten years after the decision in Tulk v Moxhay.
between the law relating to restrictive covenants and the operation of the Torrens system. Because the law relating to restrictive covenants was in its infancy when the Torrens system was designed, and because restrictive covenants create equitable interests in land, no attempt was made in the original Torrens legislation to provide for the notification of covenants upon the certificate of title of the burdened land (2011, p. 283).

The purpose of the Torrens system was to allow a person searching the Register to discover the full nature and extent of the proprietary interests affecting the relevant lands. For such a person to undertake searches and enquiries outside the Register is against the spirit of the system. Despite the lack of reference to restrictive covenants in early Torrens legislation, the practice of notifying restrictive covenants as encumbrances upon the certificate of title for the burdened land began in Victoria towards the end of the last century (Bradbrook and MacCallum, 2011). Similar practices followed in New South Wales, Western Australia and South Australia. This practice was given legislative recognition in New South Wales in 1930, in Western Australia in 1950, in Victoria in 1954 and in Tasmania in 1962. Where restrictive covenants are notified they remain equitable rather than legal interests, and they are subject to the equitable rules regulating the running of the burden and benefit. A detailed explanation of how these rules operate is outside the scope of this thesis, but they are broadly analogous to the rules in England. In the Northern Territory it is now possible to register (rather than merely notify) restrictive and positive covenants on the titles of the benefitted and burdened land. In South Australia and the Australian Capital Territory there is no provision for the notification of restrictive covenants on the register, and in Queensland only certain covenants may be registered.

It has been argued that, ‘the true conception of Torrens is being corrupted by piecemeal judicial and legislative intervention by individual States and Territories’ (Christensen and Duncan, 2005, p. 106). Christensen and Duncan argue that the interests of covenantees are largely unprotected and are reliant on technical equitable rules, and they suggest that restrictive covenants could be recognised as legally registrable interests subject to existing safeguards and an administrative power of the Registrar of Titles to remove them.

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98 In Victoria and New South Wales the legislation operated retrospectively to enter notification the certificate of title.
99 A detailed account of all the relevant law is contained within Bradbrook, and MacCallum, (2011).
Further complications arise with regard to modification and extinguishment of restrictive covenants in Australia. As in England, they can be released by consent or may be extinguished by unity of seisen. It is unlikely that they can be abandoned. In all states and territories, apart from South Australia, the Supreme Court has jurisdiction to modify or wholly or partially extinguish restrictive covenants. The legislation in each of the states is similar, but in Queensland, Tasmania and the Northern Territory the grounds for extinguishment are broader than in Victoria, New South Wales and Western Australia. In Australia there are few reported cases in which applications for modification or extinguishment of restrictive covenants have been successful, and according to Bradbrook and MacCallum it may be easier for the owner of burdened land to find technical grounds for obtaining a declaration that a covenant is not binding than to have it discharged or modified (2011, p. 572).

Proposals for reform in two states in Australia were made in 1997 and 2010. Neither the proposals of the Law Reform Commission of Western Australia in 1997 or those of the Victorian Law Reform Commission have yet become law. They are however worthy of brief consideration.

The Law Reform Commission of Western Australia considered six main questions:

- Should all uses of restrictive covenants be abolished?
- Should any particular uses of restrictive covenants be abolished?
- Should limitations be placed on the use of restrictive covenants by developers or others involved in creating new blocks of land?
- How should inconsistencies between restrictive covenants and a town planning scheme or local law be resolved?
- How should restrictive covenants be enforced and should local governments have standing to enforce them?
- Do local governments require any additional powers to control the development or use of land?

(Law Reform Commission of Western Australia, 1997, para. 1.6)

They made relatively few recommendations for reform. Their most notable recommendations were that the power to modify or extinguish restrictive covenants should be transferred from the Supreme Court to the Town Planning Appeal Tribunal, and that the circumstances in which restrictive covenants can be extinguished or modified by the Town Planning Appeal Tribunal should be liberalised to make it easier for modification or extinguishment where the proposed

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100 These statutory provisions are based on the 1969 English amendment to the Law of Property Act 1925 s84.
101 For consideration of the options for removal of modification in Victoria see Bender, 2006.
use or development is in keeping with a town planning scheme. The Commission considered time limiting restrictive covenants but rejected this on a number of grounds:

- the owner of the benefitted block might not know about a still useful and valuable covenant;
- even if he knew of the covenant, he might be ignorant of the need to apply for re-registration;
- it would involve extra work for the Land Titles Division and there would be additional cost for the owner of the benefitted block; and
- in the case of estate schemes the value of the restrictive covenant would be reduced if the re-registration did not apply to all the blocks in the scheme. It would be necessary to decide whether all block owners in the scheme should be required to seek re-registration to protect their interest or whether re-registration by one of them should keep the covenants of all of them alive.

(Law Reform Commission of Western Australia, 1997, para.5.12)

The more recent Victorian Law Reform Commission’s report on Easements and Covenants in 2000 makes a more radical recommendation for reform in that in future restrictive covenants shall be for a defined period not exceeding 20 years. This proposal was widely supported by consultees, and the Law Commission makes a number of very interesting points in its summary of these comments most notably that there is a potential tension between enduring covenants and the principle of sustainable development. The Commission makes that point that the Brundtland Commission defines sustainable development as meaning, ‘the need of the present without compromising the ability of future generations to meet their own needs’ (Brundtland Commission, 1987 cited by Victorian Law Reform Commission, 2000, para. 6.145).

The other major reform proposal with regard to restrictive covenants was a recommendation to reformulate the statutory provisions allowing for variation or discharge of a restrictive covenant or easement. Currently the statutory provision is contained within s84 of the Property Law Act which is based on s84 of the English Law of Property Act 1925 (without the amendment made by the Law of Property Act 1969). The proposal involves replacing the ‘threshold tests’ contained within the current law with a ‘discretionary field’. This would appear a more flexible approach which allows the court to decide whether to vary or distinguish based on a list of relevant considerations rather than on a number of specific tests. This is more in line with the law in Northern Ireland and Scotland.  

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102 A full discussion is contained at para. 6.130-6.140.
103 Property (Northern Ireland) Order 1978 article 5(5) and s100 Title Conditions (Scotland) Act 2003.
4.4 Northern Ireland

According to Fox O’Mahony, ‘Northern Irish land law, like much in the jurisdiction, has always been a curious hybrid of Irish and English influences, along with a rich heritage that is all its own, and including a good measure of unique and often baffling problems’. (2011, p. 356). With regard to covenants, in Northern Ireland, the Property (NI) Order of 1997 codified the law by providing a list of what constituted an enforceable covenant. This list includes specific types of positive matters such as; repair of party walls and fences, contribution to costs of access, and reinstatement of damage. With regard to restrictive covenants the list includes; covenants restricting use, covenants against nuisance, covenants against interfering with facilities and covenants prohibiting, regulating or restricting building works or the erection of any structure, or the planting, cutting or removal of vegetation. This is a comprehensive list which would include most of the types of covenants identified in this research. It is not clear how widely these are interpreted, but it is possible that parking a caravan, for example, something not dealt with specifically in the list, could be prohibited under use. An earlier statutory provision, the Property (Northern Ireland) Order 1978, deals with power of the Lands Tribunal to modify or extinguish covenants. In order to have the covenant modified or extinguished the applicant must show that the impediment ‘unreasonably impedes the enjoyment of the land or if not modified or extinguished would do so’ (article 5(1)). Turner and Quinn suggest that ‘the test of “presently unreasonable” recognises that the covenant may at one time have played a useful function in relation to the land, but that the circumstances that gave rise to the covenant have changed and its purpose has now gone’ (2014, p. 216). Similar to the law in Scotland, in Northern Ireland there are a list of matters to be taken into account in considering the application. These are set out in article 5(5):

a. The period at, the circumstances in, and the purpose for which the impediment was created or imposed.
b. Any change in the character of the land or neighbourhood.
c. Any public interest in the land.
d. Any trend shown by planning permission (within the meaning of that Planning Order) granted for land in the vicinity of the land, or by refusals of applications for such planning permissions, which are brought to the notice of the Tribunal.
e. Whether the impediment secures any practical benefit to any person and, if it does so, the nature and extent of that benefit.

104 For a contemporary consideration of the Property (Northern Ireland) Order 1978 see Dawson, 1978.
Where the impediment consists of an obligation to execute any works or to do any thing, or to pay or contribute towards the cost of executing any works or doing anything, whether the obligation has become unduly onerous in comparison with the benefit to be derived from the works or the doing of that thing.

Whether the person entitled to the benefit of the impediment has agreed either expressly or by implication, by his acts or omission, to the impediment being modified or extinguished.

Any other material circumstances.


4.5 Ireland

As in Northern Ireland, the law in Ireland with regard to restrictive covenants derived from the English law under Tulk v Moxhay. Like in Northern Ireland, the common law and equitable rules have never been codified in statute. The Land and Conveyancing Law Reform Act 2009 (LCLRA) abolishes the previous rules replacing them with a straightforward proposition, ‘any freehold covenant which imposes in respect of servient land an obligation to do or refrain from doing any act or thing is enforceable’ (section 49(2)). This is rather different from the somewhat lengthy list of what constitutes an enforceable covenant in Northern Ireland. However, the two jurisdictions share a similar position with regard to removal of covenants. The test for modification or discharge of a covenant in Ireland is, ‘that continued compliance with it [the covenant] would constitute an unreasonable interference with the use and enjoyment of the servient land’ (LCLRA s50(1)). In determining whether, and on what terms, an order should be made the court shall have regard to the following factors set out in subsection 2:

(a) the circumstances in which, and the purposes for which, the covenant was originally entered into and the time which has elapsed since then,

(b) any change in the character of the dominant land and servient land or their neighbourhood,

(c) the development plan for the area under the Act of 2000,

(d) planning permissions granted under that Act in respect of land in the vicinity of the dominant land and servient land or refusals to grant such permissions,

(e) whether the covenant secures any practical benefit to the dominant owner and, if so, the nature and extent of that benefit,

(f) where the covenant creates an obligation on the servient owner to execute any works or to do any thing, or to pay or contribute towards the cost of executing any works or doing any thing, whether compliance with that obligation has become unduly onerous compared with the benefit derived from such compliance,
(g) whether the dominant owner has agreed, expressly or impliedly, to the covenant being discharged or varied,
(h) any representations made by any person interested in the performance of the covenant,
(i) any other matter which the court considers relevant.

These factors are very similar to those in Northern Ireland and also share some commonality with those in Scotland.

4.6 Scotland

England's nearest neighbour has a system of land law with both similarities and differences. This is to some extent a result of parallel development at certain times in history particularly in the early medieval times. According to Xu (2010), more reference to Scots law or the Scottish reform is made by the Law Commission in 2011 than to all other jurisdictions, such as Australia or the United States, put together. It was decided therefore that Scotland, having been through a recent period of land law reform, would provide the most useful comparator for this research. Scotland is also subject to the European Convention on Human Rights, and their application of the Articles and Protocols to reform is of considerable assistance.

Whilst some commentators stress the commonality of the two jurisdictions, others emphasise the differences. For example in the History of Scots and English Land Law Kolbert and Mackay (1977 xi) state:

An examination of the development of the land laws of these two realms within the United Kingdom sheds much light on the long history which we share and shows that what we have in common is probably more than that which divides us.

However, Gretton and Steven express the opposite view: ‘Though there has also been some English influence, Scots property law is based ultimately on Roman law and thus has much in common with continental systems’ (2009, p. 2). In order to compare the Scottish reforms regarding real burdens and to assess their success it is first necessary to outline how private land control works in Scotland. There follows, therefore, a brief consideration of the Scottish law of real burdens and servitudes including the recently historic feudal burdens.\(^\text{105}\)

In Scotland, as in England, there is a system of private control of land use. The tools utilised to privately control land in Scotland are real burdens and servitudes. The distinction between these two devices must be understood in order to consider how effective they are. A real

\(^{105}\) Feudal tenure was brought to an end by the Abolition of Feudal Tenure etc. (Scotland) Act 2000.
burden is an obligation on the owner of an area of land, either to do something in relation to that land, such as an obligation to erect a house, or not to do something, such as an obligation not to erect more than one house. Real burdens can be either ‘praedial’ or ‘personal’. Praedial real burdens are those enforceable by the owner of other land, while personal real burdens are those enforceable by certain bodies whose right to enforce does not depend on ownership of land. The system of real burdens has been in place for 200 years (Scottish Law Commission, 2000, para. 5.18). Real burdens roughly equate to English restrictive covenants and are divided into community burdens and neighbour burdens; with the former being analogous to building schemes and the latter to ordinary restrictive covenants. As is the case in England, these obligations require something to be done or not done, but unlike the English system both positive and restrictive obligations are treated in the same manner.\(^\text{106}\) The leading case on real burdens, *Tailors of Aberdeen v Coutts* (1840) 1 Rob 296, was reported in 1840 only a few years before *Tulk v Moxhay*. Unlike the English law of restrictive covenants, the Scottish courts have allowed real burdens the status of legal rights from the outset provided they comply with the requirements in *Coutts*. Real burdens involve a benefitted and a burdened property and are often imposed when land is divided (Gretton and Steven, 2009, p. 173). The modern law relating to real burdens can be found in the Title Conditions (Scotland) Act 2003 (TC(S)A 2003) which to a large extent codifies the existing common law (Gretton and Steven, 2009, p.173).

The rules set out in s4 of the TC(S)A are that a deed creating real burdens must:

- set out the terms of the real burden (s.4(2)(a))
- be granted by or on behalf of the owner of the land which is to be burdened (s.4(2)(b))
- use the term “real burden” or name one of the types of real burden set out in the Title Conditions Act (e.g., community burden) (ss.4(2)(a) and 4(3))
- nominate and identify the land to be burdened (s.4(2)(c)(i)) and (unless the burden is a personal real burden)
- nominate and identify the land which is to be the benefitted property (s.4(2)(c)(ii)) or, if the deed relates to the creation of a community burden,
- nominate and identify the community (s.4(4))
- be registered against both the burdened and the benefitted properties (s.4(5)) (unless the burden is a personal real burden)

Like restrictive covenants, real burdens are created by deed; unlike restrictive covenants however, since 2004 they are registered against the title of both the benefitting and the burdened land, as will be the case in England if the Law Commission’s proposals are adopted. The deed may specify a time limit for the burden but in most cases, as with restrictive

\(^{106}\) In Scotland positive and restrictive obligations run with the land.
covenants, the deed is silent and the burden perpetual (Gretton and Steven, 2009, p. 179). Real burdens are enforced by the owner of the benefitting land and the remedies are interdict, specific implement and damages.\textsuperscript{107} As with English law, there is a presumption of freedom to contract and ambiguous terms are construed \textit{contra proferentem} (against the benefitted party).

**Feudal Burdens**

Until very recently land in Scotland was held under a system of feudal tenure. This in Scotland was brought to an end on 28 November 2004 with the Abolition of Feudal Tenure etc. (Scotland) Act 2000. Feudal tenure is a system of landholding in which land is granted out in consideration of services rendered by the grantee to the grantor. In Western European feudal systems these services tended to be military (Gordon, 1999, p. 25). It is an oversimplification, but for the sake of brevity a necessary one, to state that the importance of feudalism began to decline in England in 1290 with the Statute Quia Emptores, and it was limited further with the Tenures Abolition Act in 1660. The Law of Property Acts in 1922 and 1925 introduced changes which meant that the theory of tenure in England is now, ‘a conception of merely academic interest’ (Burn and Cartwright, 2006, p. 27). This decline was not replicated in Scotland. A few words of terminology are required to facilitate the following discussion; the grantor was known as the ‘superior’ and the grantee the ‘vassal’, the vassal was not a complete owner of the land and was said to have ‘\textit{dominium utile}’, the interest retained by the superior was referred to as ‘\textit{dominium directum}’. With regard to burdens it was possible for the superior to impose burdens and restrictions on the vassal. These were enforceable between the superior and original vassal as a matter of contract (as covenants are in English land law). Enforceability between successors in title resulted from the theory that the investiture was renewed when the parties changed. This creates a relationship of privity of estate between the superior and the current vassal.\textsuperscript{108} Feudal tenure allowed the superior to retain a level of control over matters such as development where feuing conditions could make consent of the superior a prerequisite. The Abolition of Feudal Tenure etc (Scotland) Act 2000 (Commencements No.2) (Appointed Day) Order 2003 states that the appointed day for abolition of feudal tenure was 28 November 2004. On that day the feudal system of land tenure was abolished and real burdens

\textsuperscript{107} Interdict is broadly analogous to the English remedy of injunction and specific implement is analogous to specific performance.

\textsuperscript{108} Privity of estate is the relationship which exists between a landlord and a tenant in English land law and allows successors in title to the original parties to enforce the various obligations within the lease. Long residential leases are not permitted in Scottish law.
enforceable only by former superiors were extinguished unless preserved by an appropriate savings notice under the Abolition of Feudal Tenure etc. (Scotland) Act. Two important points arise: firstly a number of former feudal burdens will remain enforceable as they benefit not only the former superior but also others within the community: secondly the feudal superior could register a notice to save enforcement rights if the burden benefits their land. Around 2,000 such notices were registered (Steven and Wortley, 2006). The Abolition of Feudal Tenure etc. (Scotland) Act 2000 imposed a ten year freeze on the removal of feudal burdens (the ‘prescribed period’) to enable registration of notices; the ten year period expired on 28th November 2014, and the process of cleansing the title can now begin in earnest.

**Servitudes**

A servitude is a right to a limited use of an area of land for a specific purpose, for example to walk or drive over it. A deed that creates a servitude does not have to actually call it a servitude, and it may simply be described as a right, burden or condition. A servitude can be created either by express grant by the owner of the burdened property, or by reservation in a conveyance of the burdened property. It would appear therefore that a servitude is analogous to an easement in English law and this is broadly the case. Since the implementation of the TC(S)A 2003 it is no longer possible to create new negative servitudes and those that already exist are converted into real burdens.\(^\text{109}\)

**Discharge of real burdens**

Real burdens like restrictive covenants may be discharged or otherwise dealt with in a number of ways:

- Consent
- Application to the Lands Tribunal (including the new ‘sunset rule’ which is a notice rather than application process if unopposed)
- Negative Prescription
- By the Keeper
- Insurance

**Consent**

As with restrictive covenants, it is possible to approach the owner of the benefitted land and request consent to the discharge of a real burden. If this is forthcoming the parties can sign a

\(^{109}\) Title Conditions (Scotland) Act 2003, s79 and s80.
deed and register this with the land register. The same problems will however exist in Scotland as in England with regard to identifying benefitted owners. Since the TC(S)A 2003 real burdens are registered against both the benefitted and burdened land, but this is not the case with regard to real burdens registered before that date, where the entry will only be against the burdened land. Requesting consent will also make it impossible to obtain title insurance.

**Negative prescription**

The TC(S)A 2003 s18 provides that breach of a real burden prescribes on the expiry of 5 years (previously 20 years). This means that if one were to build a conservatory in contravention of a real burden not to build, after 5 years the burden would be extinguished, but only to the extent of the breach, so that if one were to build another extension, the owners of the benefitted land would still be able to enforce.\(^{110}\) Rules of negative prescription do not exist in England and neither will they if the law is to change as a result of the Law Commission’s proposals. Extinguishment by negative prescription does not result in any change to the register.

**Acquiescence**

The TC(S)A 2003 restated and clarified the rules regarding acquiescence. The position now is that where benefitted owners either consent or fail to object to a breach, involving substantial expenditure, within 12 weeks after the work was substantially completed there is a presumption that the burden was extinguished (TC(S)A 2003 s16(2)). Again, this will not affect the register but will presumably mean that a future conveyance of the formerly burdened land will not in any way be hampered by the breach.

**The role of the Keeper**

The Scottish equivalent of the Chief Land Registrar is the Keeper. As a result of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 the Keeper is at liberty to cleanse the register of real burdens extinguished by feudal abolition, but she was not required to do so until the end of the prescribed period. Now that the prescribed period is at an end applications for rectification may be received, but it is more likely that a request for removal will accompany transfer of land rather than arise independently (Reid, 2003, para. 7.11).

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\(^{110}\) This provision may be one of the reasons why use of indemnity insurance is not as popular in Scotland.
The Lands Tribunal Scotland

The Lands Tribunal Scotland (LTS) was set up in 1971 under the Lands Tribunal Act 1949\textsuperscript{111} to deal with the discharge and variation of land obligations under the Conveyancing and Feudal Reform (Scotland) Act 1970 (Agnew, 1999, p. 10). A more detailed consideration of the role of the LTS can be found in Chapter Seven where an empirical analysis of recent decisions is presented.

Reform of the law and historic real burdens

In 2000 the Scottish Law Commission produced its Report on Real Burdens (Scot Law Com No 181). The need for a review of real burdens was discovered during preparation of the Scottish Law Commission’s report on feudal abolition. Work began towards the end of 1997 and included a seminar to test preliminary ideas, a discussion paper and two empirical studies (Scottish Law Commission, 2000, p. 1). Most interesting to this research are the findings with regard to extinction, which can be found in Part 5 of the report.

In considering reform of real burdens the Scottish Law Commission identified problems that were familiar to the Law Commission in England. One such problem was the issue of the perpetual nature of these obligations. Ultimately their response to this issue was very different to the Law Commission in England. Before comparing the Scottish and English positions it is worth picking out some pertinent findings from the Scottish report. From the outset of their analysis the Scottish Law Commissioners made it plain that age did not equal obsoleteness, ‘Burdens preserving amenity in a residential part of a Victorian suburb may be as relevant today as when first imposed 150 years ago’ (Scottish Law Commission, 2000, p. 66). However, there was a willingness to accept that age will eventually lead to obsoleteness which is not found in the 2011 report of the Law Commission regarding restrictive covenants: ‘But in the end all burdens are likely to become out of date, and when they do the result is to prevent the efficient utilisation of the affected land’ (Scottish Law Commission, 2000, p. 66). Very early on in their chapter on extinction the Scottish Law Commission makes the link between age and discharge:

5.3 It follows from what has been said that an efficient system of real burdens requires an efficient system of discharge, and further, that the system should be linked in some way to the passage of time. Burdens should not survive

beyond the point where they have ceased to be useful; and even before that stage is reached, it should be possible to remove those burdens which interfere with the reasonable use of the affected property.

The Scottish Law Commissioners acknowledged that owners of land should be aware of a burden before purchasing the property, and that there is already a mechanism in place for removal of burdens which are proving problematic. However, they equally found in their research that owners were, in reality, frequently unaware of the real burdens affecting their land and that the costs and risks associated with an application to the Lands Tribunal were often off-putting to potential applicants (Scottish Law Commission, 2000, p. 67).

Discharge and modification

The grounds for an application are set out in the TC(S)A 2003, Pt 9. The 2003 Act has significantly changed the previous position which was set out in the Conveyancing and Feudal Reform (Scotland) Act 1970 s1(3). Under the 1970 Act an applicant could choose one or more of three grounds:

(3) Subject to the provisions of this section and of section 2 of this Act, the Lands Tribunal, on the application of any person who, in relation to a land obligation, is a burdened proprietor, may from time to time by order vary or discharge the obligation wholly or partially in relation to the interest in land in respect of which the application is made, on being satisfied that in all the circumstances,

(a) by reason of changes in the character of the land affected by the obligation or of the neighbourhood thereof or other circumstances which the Tribunal may deem material, the obligation is or has become unreasonable or inappropriate; or

(b) the obligation is unduly burdensome compared with any benefit resulting or which would result from its performance; or

(c) the existence of the obligation impedes some reasonable use of the land.

This was similar to the position in England under the Law of Property Act 1925 s84(1). Indeed grounds (a) and (c) were modelled closely on s84 (Scottish Law Commission, 1998, p.104), although in some instances it seemed easier to prove that a real burden should be discharged than a restrictive covenant.112 Like England under the previous law, in Scotland the statutory provision for removal or modification was a series of what the Victorian Law Commission

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112 For a comparison of the provisions under the Conveyancing and Feudal Reform (Scotland) Act 1970 s1(3) and the Law of Property Act 1925 s84(1) see Agnew, 1999, pp. 84-120.
The Victorian Law Commission describes the s84 threshold tests in the following manner:

The court’s power to vary or discharge a covenant under section 84 of the Property Law Act depends upon being satisfied that one or more of the conditions (threshold tests) in section 84(1) exist. In our consultation paper, we called them the ‘obsolescence test’, the impediment to reasonable user test’, the ‘substantial injury test’ and the ‘consent test’. If a threshold test is satisfied, the court has power to grant an order, but the section does not specify what other matters the court may consider in exercising its discretion.

As part of the reform of the law relating to real burdens, the Scottish Law Commission consulted on reform of the statutory provisions for removal or modification of real burdens. They found that whilst the provisions were successful in removing or modifying burdens (a success rate of around 70%),

113 they criticised the existing threshold tests for being self-contained, for overlapping and for not being suitable for community burdens. The Scottish Law Commission therefore proposed a structure that followed Northern Ireland, with only one ground for discharge (Scottish Law Commission, 1998, p. 113). A burden would be varied or discharged if it was reasonable to do so. Under the TC(S)A 2003 s98(a) the standard by which applications to vary or discharge a title condition is therefore stated as follows:

An application for the variation, discharge, renewal... of a title condition shall, unless it falls to be granted as of right under section 97(1) of this Act, be granted by the Lands Tribunal only if they are satisfied, having regard to the factors set out in section 100 of this Act, that... it is reasonable to grant the application.

The factors referred to in s98(a) are as follows:

100 Factors to which the Lands Tribunal are to have regard in determining applications etc.
The factors mentioned in section 98 of this Act are—
(a) any change in circumstances since the title condition was created (including, without prejudice to that generality, any change in the character of the benefitted property, of the burdened property or of the neighbourhood of the properties);
(b) the extent to which the condition—
  (i) confers benefit on the benefitted property; or
  (ii) where there is no benefitted property, confers benefit on the public;

113 It would appear that the success rate remains about the same since the change in the law, with 66% of cases resulting in an order for modification or discharge (see p. [    ] below).
(c) the extent to which the condition impedes enjoyment of the burdened property;
(d) if the condition is an obligation to do something, how—
   (i) practicable; or
   (ii) costly,
   it is to comply with the condition;
(e) the length of time which has elapsed since the condition was created;
(f) the purpose of the title condition;
(g) whether in relation to the burdened property there is the consent, or deemed consent, of a planning authority, or the consent of some other regulatory authority, for a use which the condition prevents;
(h) whether the owner of the burdened property is willing to pay compensation;
(i) if the application is under section 90(1)(b)(ii) of this Act, the purpose for which the land is being acquired by the person proposing to register the conveyance; and
(j) any other factor which the Lands Tribunal consider to be material.

It has been suggested by Professor Rennie that the increase in the number of factors to be considered, ‘tends to result in more applications for discharge or variation being granted’ (2011, p. 168). Where an application to vary, renew, discharge or preserve the burden is unopposed it will be granted ‘as of right’, in other words automatically. This is significant in terms of reducing the number of title conditions going forward.

It is important to note that, as with the UT(LC), LTS cases are not subject to judicial precedent, so the Tribunal is under no obligation to follow previous decisions. This is because the factual position of each case is unique and the written decisions do not reflect the entire context, which influenced the decision.\(^{114}\) That said, previous decisions do provide an insight into how the Tribunal might apply the s.100 factors. The first case to be decided under s. 98(a) of the 2003 Act is *Ord v Mashford* LTS/LO/2004/16. In this case Mr Ord wished to vary a title condition imposed in 1938 which restricted building to allow the building of a single storey home. A number of neighbours, including the Mashfords, objected. The Tribunal made the important point that the s. 100 factors were not ranked in order of importance, and that the weight applied to any given factor will depend upon the particular circumstances (*Ord v Mashford*, p. 18). With regard to s. 100(a), the Tribunal emphasised that it was not necessary to define ‘neighbourhood’ in all cases, and indeed that was not considered to be significant in that case. The requirement for ‘change’ however is likely to be important (*Ord v Mashford*, p. 18). The Tribunal will therefore need to consider the original intention in order to ascertain whether

\(^{114}\) Site visits for example are carried out as a matter of course (but, it would seem not compulsorily) in opposed cases.
change has occurred. There is, therefore, a clear link between factor (a) and factor (f). Factor (b) is likely to be significant in many cases, where there is no real benefit no loss would result from discharge or variation. In *Ord v Mashford* the Tribunal considered whether the burden preserved, ‘a special view or... sense of spaciousness’ (*Ord v Mashford*, p. 20). They concluded that while the Mashfords might like looking out onto a field that a house with, ‘a normal level of attention to garden care would preserve many aspects of the amenity currently enjoyed’ (*Ord v Mashford*, p. 22). Factor (c) was given little weight in *Ord v Mashford*, the Tribunal stating that the owners of the burdened land bought subject to the burden which would have been reflected in the price. Professors Gretton and Reid criticise this argument stating that price adjustment for a title condition is rare (Gretton & Reid, 2005, p. 109 cited in Todd & Wishart, 2012, p. 101). Factor (d) was not considered as it relates to positive obligations. The Tribunal’s approach with regard to factor (e) is of particular interest as it considers the significance of age in determining an application. In considering this factor the Tribunal stated:

> The burden is some 70 years old. However, mere duration tells us little as to whether it can be regarded as out of date, obsolete or otherwise inappropriate. At first blush, therefore, there might be little weight to attach to this factor. One possible effect of this provision is to direct attention to the need to have regard to the impact of gradual change in attitudes over time. (*Ord v Mashford*, p. 24)

Factor (h) was considered in *Ord v Mashford* and was in this case held to be the preservation of amenity and therefore linked to (b)(i) the extent to which the condition confers benefit on the benefited property. The relationship between planning permission and title conditions is explicit in factor (g), and it is a factor to which the Tribunal in *Ord v Mashford* gave little weight. This is, to some extent, unsurprising as if planning permission could defeat a burden then private land control would lose its value altogether. Successful receipt of a planning consent does not guarantee success in England either. In *Re Martin* (1988) 57 P&CR 199 Fox LJ stated that planning consent was, ‘merely a circumstance which the Lands Tribunal can and should take into account when exercising its jurisdiction under s 84’ (p. 125). The Tribunal in *Ord v Mashford* approached factor (h) with uncertainty on the basis that it can be assumed that an applicant in every case is prepared to pay compensation and therefore, ‘we would not expect to hear evidence on this’ (*Ord v Mashford* p.25). Factor (i) was not considered in *Ord v Mashford*; section 90(1)(b)(ii) refers to s. 107(4) which refers to the position where agreement to transfer is reached after compulsory purchase is threatened. Finally, factor (j) emphasises the fact that the factors listed in s.100 are not exhaustive, and that the Tribunal may consider any factor which it considers material.
The sunset rule

As is the case in the English sample discussed in Chapter Six, the Scottish Law Commission identified the issue of antiquated use covenants by quoting Lord Shaw of Dunfermline. This concerned the Victorian practice involving, ‘the usual grotesque enumeration of noxious and offensive businesses and trades’ (Porter v Campbell’s Trs 1923 SC(HL) 94 at p. 99 cited in Scottish Law Commission, 2000, p. 72). Their analysis concurs with that of this research at 6.4 that many of the trades no longer exist and even where they do ‘it is difficult to believe that planning permission would be given for change of use’ (Scottish Law Commission, 2000, p. 72).

The Scottish Law Commission acknowledged that the relationship between age and usefulness is complicated and that a new covenant might be as foolish or even more so than an old one. However, they divided old real burdens into three types:

- Obsolete but harmless – this would include the anachronistic use covenants of the kind discussed in 6.4.
- Obsolete but harmful – these would involve covenants adversely affecting use or enjoyment but providing not real benefit.
- Of continuing value.

Their response to the problem of obsolete real burdens is a sunset rule. In effect a sunset rule allows for an obligation to end after a legislatively prescribed period of time. A number of other comparable jurisdictions have a sunset rule of sorts. In Scotland the sunset rule assumes that if a real burden is more than 100 years old it no longer serves a useful purpose (Todd & Wishart, 2012, p. 33). However, the relationship between age and usefulness is by no means considered to be absolute and the rule therefore allows benefitted owners who consider the burden to have value to object to the termination. If an owner burdened by a real burden created in a deed registered at least 100 years ago wishes to discharge the burden, then a notice in the form required under Sch. 2 of the 2003 Act is prepared. The notice specifies whether the real burden is to be wholly or partly terminated and notifies the benefitted owners that they have at least eight weeks to object by applying to the Lands Tribunal for renewal or variation of the real burden. If there is no application to the Lands Tribunal for renewal then the notice can be registered once it is endorsed by a Lands Tribunal certificate confirming that there has been no application to preserve it. When endorsed and registered the real burden is extinguished. If an application is made by the benefitted owner and it is successful then the burden survives. If
unsuccessful then the real burden will be terminated in whole or in part in accordance with the notice.\textsuperscript{115}

Certain types of real burden are excluded from the sunset rule. These are conservation burdens; maritime burdens; facility burdens; service burdens; and certain burdens relating to mineral rights, agricultural leases or rights enforceable by or on behalf of the Crown for military or aviation purposes (s20(3) and Sch. 11 of the 2003 Act).

In addition to the new sunset procedures, there have been changes allowing for the discharge of community burdens. Prior to feudal abolition many such burdens could be discharged by approaching the feudal superior. Since abolition some feudal burdens will be converted into community burdens with the potential for a large number of benefitted owners. Clearly asking numerous people for consent might prove impractical, and so the 2003 Act provides special rules for discharge. A community burden can be discharged by agreement by:

- The whole community (under s.91)
- The ‘manager’ of the community (if there is one with authority to do so)(under ss. 33 and 35)
- The neighbours of the property affected by the variation or discharge (under s.35)

Even with a majority of the community having signed a deed of discharge or variation the minority community members will be notified and have an opportunity to apply to the Lands Tribunal to preserve the community burden for any unit whose owner has not signed the deed. The application to preserve will then be dealt with by the Lands Tribunal in the usual way as part of their judicial role.

Notice applications under s20 have far from flooded in. Table 4.1 below sets out the number of applications made under TC(S)A 2003 for each year from 2005 to 2015.

\textsuperscript{115} For a more detailed explanation of the sunset rule procedure see Todd & Wishart, 2012, pp. 35-40.
Table 4.1 Number of applications under TC(S)A 2003 by year

<table>
<thead>
<tr>
<th>Year</th>
<th>Applications</th>
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<tbody>
<tr>
<td>2005</td>
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<td>2006</td>
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<td>2014</td>
<td>4</td>
</tr>
<tr>
<td>2015</td>
<td>7</td>
</tr>
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</table>


Furthermore, the number of applications which have been opposed is also small. Searching “sunset” on the Lands Tribunal for Scotland Website revealed only nine cases and when these were reviewed only six related to application under s90 of the Act for renewal of title conditions. The cases were dated between 2005 and 2013.

The factors set out in s100 are those which the Tribunal would consider if the owner of the burdened land were making an application for removal or modification of the burden. The difference between an opposed sunset rule application and an application for removal or modification is that the onus shifts from the owner of the burdened land to show that the burden should be removed or modified to the owner of the benefitting land to show that it is reasonable for the burden to remain. In reality the transfer of the onus from burdened owner to benefitting owner is not of great importance ([Council for Music in Hospitals and Others v Trustees for Richard Gerald Associates (2008) LTS/TC/2006/61 and 2007/01, and Trevor Barr v Annabel Macrae (2012) LTS/TC/2009/37](https://www.lts.gov.scot/)).

In all six cases identified on the Lands Tribunal Scotland website the respondent benefitting owners succeeded to some extent. However, in only one of these cases were the respondents entirely successful. In most cases it would seem the order made by the tribunal is for a variation of the burden. The benefitted owner runs the risk of an adverse costs award under s103 if an objection is lodged and the tribunal find in favour of the applicant.

The report of the Scottish Law Commission resulted in some largely descriptive journal articles from commentators, most of which were broadly positive about the proposed sunset rule (for
example, Wortley, 2001 and Steven, 2001). Gray and Gray were a little more sceptical, arguing that the neighbour burden was ‘coming into its own’ (1999, p. 232) and had begun to function to protect environmental amenity not always protected by the planning system. Gray and Gray also countered the suggestion made by the Scottish Law Commission that past burdens ‘clutter up the register and create unnecessary transaction costs’ (Scottish Law Commission, 2000 para 5.66), with the argument that there is a hidden agenda concerned with promoting the deskillling of the conveyancer (Gray and Gray, 1999, endnote 72). It is submitted that if a large proportion of obsolete restrictive covenants are dealt with by way of indemnity policy then they are not benefitting from much in the way of legal skill and further, that a client wants simplification as this equates to lower fees.

4.7 Comparison of legislative mechanisms

The Law Commission in England also consulted on amending s84, stating that ‘the provisions of section 84 are complex and difficult, and they lack sufficient transparency’ (Law Commission, 2008, para. 14.43). This proposal would bring the law closer to Scotland, Northern Ireland and Ireland where ‘reasonableness’ is the only ground for modification or discharge and ‘purpose’ is one of the factors to take into account. However, these changes did not find favour with the consultees and the only proposed reforms of s84 relate to its application to easements, profits and the new Land Obligations. There is further discussion of the consultees’ responses in the thematic analysis in Chapter Eight.

In the sections above regarding the Law in Australia, Northern Ireland, Ireland and Scotland the mechanism for removal of restrictive covenants is outlined. There follows a comparison of the approach of each jurisdiction. In each of the four jurisdictions legislation provides a list of factors for the court to consider. The Australian State of Victoria has also proposed changing the law to replace the ‘threshold’ tests with a list of discretionary factors. The following are the broad headings under which the four jurisdictions apply (or propose to apply) the discretionary tests: change in circumstance, time, purpose of the covenant, extent of benefit, extent of detriment, compensation, planning, agreement, other material factors. These are considered briefly below:

116 In this case the comparison is with Victoria.
Change in circumstance and time

All the four jurisdictions cite change in circumstance as a factor that the court should consider in determining an application. The change in all the jurisdictions may be to the benefitted or burdened land or to the neighbourhood. The Scottish Law Commission saw this as a replication of ground (a) (Scottish Law Commission, 2000 p. 117). However, the Victorian Law Commission considered it to be a lower threshold than the obsolescence requirement in s84. As s 84(1)(a) rarely succeeds to the extent that the Law Commission in Paper 186 suggested it cease to be a ground for discharge or modification it would be counter intuitive for a ‘change in circumstance’ to merely equate to obsolescence. Instead it is proposed that the test be interpreted more widely along the lines of the equitable doctrine of changed circumstances found in the United States. This is necessarily closely linked with the purpose for which the restriction was created (Restatement (Third) of Property, Servitudes (2000) §7.10). Perhaps the rationale for narrowly drawing this factor in Scotland is to avoid overlap. Whilst overlap may be undesirable it is also one would imagine unavoidable. Only the Scottish legislation specifically refers to time and this is likely because with the sunset rule the age of a burden has become a matter for specific legislative consideration.

Purpose of the covenant

Again purpose is considered in all the jurisdictions and was also suggested by the Law Commission who found that in practice the UT(LC) took into account the ‘purpose’ of the restrictive covenant and that it exercised its discretion based on ‘reasonableness’. They suggested that application of the ‘purpose’ test would negate the need for the ground of obsoleteness and that s84(1)(a) and s84(1)(c) could be conflated. In Scotland whilst all the factors are weighted evenly Todd and Wishart state that ‘purpose may have priority’ (2012 p. 96). If the purpose of the covenant can no longer be served to use it artificially to restrict some other use of the land is contrary to utilitarian principles.

Extent of the benefit, detriment and compensation

These three separate factors seek to balance the rights of the competing parties. In Scotland, Ireland and Northern Ireland this is done by considering whether the restriction is really that beneficial. This is a separate condition from change of circumstance or purpose in that the restriction may have never conferred any real benefit on the land. It could be argued that if
there was no benefit then the original covenantor would not have agreed to the restriction however the Scottish Law Commission makes the point well when it states:

Thus real burdens should not be viewed in the same light as contracts individually negotiated and freely entered into. Nor should it be assumed that burdens are written with the particular property in mind. Sometimes they owe more to a conveyancer’s bank of styles than to the wishes of the original parties or the needs of the property. A style may have been used inappropriately or unwise. In our view, a burden which was always pointless should not be treated more favourably than one which once had a purpose which has now disappeared (Scottish Law Commission, 2000 para. 6.72).

In Victoria, rather than considering the extent of the benefit, the Commission considered the extent to which removal or variation would be detrimental. This, it is suggested, amounts to the same thing. In addition both the Scottish legislation and the Victorian proposal mention compensation, the former makes reference to willingness of the burdened owner to pay, the latter the extent to which compensation would adequately compensate. These concepts currently form part of s84(1) with benefit being covered in s84(1A)(a) and detriment being dealt with in s84(1)(c).

Planning

All the jurisdictions include consideration of planning consent as a relevant factor and this is also the case in s84. The analysis of UT(LC) decisions presented in Chapter Seven showed that applicants take the need for planning consent very seriously with 90% of those relying on s84(1)(aa) obtaining planning permission prior to application to the UT(LC). The extent of the relationship between private and public land use controls has been considered elsewhere in this thesis but the acknowledgement of the relationship is clearly made by the legislature.

Agreement

It is suggested that it is uncontroversial to suggest that where there has been agreement between the parties that a restriction should be modified or discharged that the Lands Tribunal should allow such modification or discharge. All the jurisdictions make reference to this as a factor and it operates as s84(1)(b) in England. From the analysis of UT(LC) decisions it is clear that agreement is rarely relied upon as a ground and even less frequently succeeds (see Figure 7.9).
Other material factors

This is provided as factor by all of the jurisdictions but it is not entirely clear what kinds of factors the Tribunal might consider. In Scotland the Law Commission merely stated, ‘This is not intended to be limited to matter ejusdem generis with those which precede it’ (2000 para. 6.83).

4.8 Conclusion

A number of key conclusions can be drawn from this comparison between the law of restrictive covenants in England, America, Australia, Northern Ireland, Ireland and Scotland. Firstly, it is clear that the device of private control of land by way of restrictive covenant or real burden has proven useful and popular. Secondly, the relationship between private bargain and judicial intervention has developed over time\textsuperscript{117} and has been controversial.\textsuperscript{118} Finally, and importantly for this research, a number of jurisdictions have recently made or proposed statutory changes, apparently in response to perceived problems regarding old or, more importantly, obsolete covenants. In particular the change from ‘threshold’ to ‘discretionary’ tests for modification or removal of covenants in Northern Ireland, Ireland and Scotland and the proposed change in Victoria; the ‘sunset’ and ‘negative prescription’ changes in Scotland and proposed time limitation in Victoria. These issues will be taken up further in Chapters Eight and Nine.

\textsuperscript{117} In England the parameters of \textit{Tulk v Moxhay} were initially unclear and became more fixed. Whilst in America the rules originate from \textit{Tulk v Moxhay} the law has not developed in the same way. There have been various statutory amendments in England, Ireland, Northern Ireland, some Australian States and most notably in Scotland.

\textsuperscript{118} See for example Epstein and Reichman in 4.2 above. See also thematic analysis in Chapter Eight.
CHAPTER 5 – METHODOLOGY AND RESEARCH DESIGN

5.1 Introduction

As has been stated in Chapter One, this thesis combines traditional doctrinal analysis with comparative and socio-legal research. This chapter aims to explain in detail the rationale and design of the socio-legal empirical element of this research. It is important to put the methodology selected for this research within the broader historical context of legal research and to consider the relationship between research in law and the wider arena of the social sciences, as this research will borrow much of its methodology from social science. This chapter is divided into four substantive sections. Section 5.2 considers research philosophy and contrasts positivist and interpretivist stances. It reflects on the growth of mixed methods research and provides a justification for this approach with regard to this thesis. Section 5.3 sets out the research design. Section 5.4 considers ethical issues in this research. Finally, section 5.5 explains the methodology for analysing the data collected from interviews and the written responses to the Law Commission consultations.

5.2 Research philosophy

Before embarking on a research design it is first necessary to explore the philosophical viewpoint, as ultimately the research philosophy will inform the research design. In order to do so, some of the main issues and controversies in both law and social science research need to be considered to enable this project to be placed within its philosophical context. This section ties in with the theoretical context discussed in 2.2.

Epistemological considerations

‘An epistemological issue concerns the question of what is (or should be) regarded as acceptable knowledge in a discipline’ (Bryman, 2008, p. 13). At two separate ends of the epistemological scale are positivism and interpretivism. These terms and their application to this research are discussed below.

*Positivism*

Positivism is aligned with the approaches adopted in the natural sciences and, according to Payne and Payne (2004), has three main aspects; it is phenomenological (distinguishing...
between an external world and the observer who experiences it), it is empirical (using observable evidence to establish knowledge) and it is objective (requiring the knowledge acquired to be free from belief, values or feelings).

Positivism has been strongly linked to empirical research based on the collection of data which are not the result of judgement or interpretation (‘brute data’) (Hughes and Sharrock, 1997, p. 42) and it was the dominant paradigm in the first half of the 20th century. Positivism suffered criticism for a number of reasons, including the assertion that science could only contend with observable phenomena and not embrace abstract or hypothetical entities, and the fact that whilst science might suggest that facts and values can be separated this is not in fact possible (Robson, 2011, p. 21).

During 1970-1985 a number of writers wrote books that criticised the positivist paradigm and proposed an interpretivist approach using qualitative methods. The extent of this shift in epistemology in the social sciences was described by Denzin and Lincoln (1994, p. ix):

Over the past two decades, a quiet methodological revolution has been taking place in the social sciences... The extent to which the “qualitative revolution” has overtaken the social sciences and related professional fields has been nothing short of amazing.119

That is not to say that positivist research no longer occurs in social sciences and the law, there are still projects undertaken which are explicitly positivist in approach and many more which could be argued to have an implicitly positivist underpinning, not to mention many more mixed methods projects which are predominantly positivist.

**Interpretivism**

Interpretivism is an epistemology which states that the social sciences are different from the natural sciences. This difference requires a separate research procedure which reflects this distinctiveness. Interpretivism sees the world as culturally derived and suggests a historical context (Blaxter, Hughes and Tight, 2007). Review of the history of restrictive covenants and proprietary rights shows that their creation was in response to a social need; the problems now created by them are as a result of a change in social need. Interpretivist epistemology may be criticised on the basis that it can lead to an ‘anything goes’ methodology where due attention is not given to the provision of a convincing interpretation of data (Onwueguzie, 2005, p. 378).

119 in the preface to the 3rd edition of their handbook on qualitative research Denzin and Lincoln list contributions on; critical social science, endarkened transnational feminist praxis, critical pegagogy, Asian epistemologies, disability communities and many more (Denzin and Lincoln, 2011, ix).
Ontological considerations

Ontology considers the question of whether ‘social entities can and should be considered objective entities that have a reality external to social actions, or whether they can and should be considered social constructions built up from the perceptions and actions of social actors’ (Bryman, 2008, p. 18). These two positions are referred to as objectivism and constructionism.

Objectivism can be defined as reality independent of consciousness and is frequently linked to a positivist epistemology.

‘Constructionism is an ontological position (often referred to as constructivism) that asserts that social phenomena and their meanings are continually being accomplished by social actors’ (Bryman, 2008, p. 19). The position taken in this research therefore has some similarities with a social constructivist position. George (2005) defines the position as follows, ‘concepts used to understand and describe the world are historically and culturally specific and relative, and a belief that knowledge is sustained by social processes’ (George, 2005, p. 801).

There is often considered to be a link between certain epistemological and ontological positions and research strategies. This is reflected in the Table 5.1 below:

Table 5.1 Differences between quantitative and qualitative research strategies (adapted from Bryman, 2008 p. 22).

| Fundamental differences between quantitative and qualitative research strategies |
|---------------------------------|---------------------------------|
|                                  | Quantitative                    | Qualitative                    |
| Principal orientation to the role of theory in relation to research | Deductive; testing of theory | Inductive; generation of theory |
| Epistemological orientation     | Natural science model, in particular positivism | Interpretivism |
| Ontological orientation         | Objectivism                     | Constructivism                 |

Quantitative and qualitative methods

Quantitative and qualitative methods may be distinguished by the reliance of the former on numbers, statistics and hard data; and the interpretation of words and rich data in the latter.
The paradigm wars

Traditionally social writers have selected their research paradigm and have refused to acknowledge the prospect of any common ground between their selected approach and the competing paradigm. Egon Guba, a qualitativist, argued that, ‘the one [paradigm] precludes the other just as surely as belief in a round world precludes belief in a flat one’ (Guba 1987, p. 31). The debate between the quantitative/ positivists and the qualitative/ interpretivists has been referred to as the ‘paradigm wars’ (Howe, 1998 and 1992; Smith, 1983; Johnson and Onwugbuzie, 2004; Tashaskkori and Teddlie, 1998). Howe describes this debate as the ‘incompatability thesis’ stating that it is a problem not at a practical level but at an epistemological level, in other words the issue is not whether the choice being between a research method traditionally associated with qualitative or quantitative research is the correct one, but rather whether the philosophical choice of paradigm is correct. A positivist purist believes that the more traditionally scientific approach of quantitative research is the preferred method and that such research is incompatible with an interpretivist epistemology. Whilst a truce may have been called in the paradigm wars with the growth of mixed methods, some commentators argue that the wars are not yet over (Bergman 2008 p. 2). Indeed there is now considerable debate between mixed methods writers as to the paradigmatic basis on which to proceed with their research.

Mixed methods

One response to the paradigm wars of the purists has been to argue that whilst there are some paradigmatic differences there are also similarities between the paradigms which may sometimes be overlooked, including the fact that both use empirical observations, both describe data and speculate as to the reasons for the outcomes and that both sets of writers incorporate safeguards into their research (Johnson and Onwugbuzie, 2004). Howe argues that quantitative and qualitative methods are not incompatible, referring to this contention as his ‘compatibility thesis’ (Howe, 1988). This thesis supports the view that combining methods is a good thing and not ‘epistemologically incorrect’ (Howe, 1988, p. 10).

Mixed methods research refers to research which combines research methods that cross the two research strategies; in other words both quantitative and qualitative research (Bryman, 2008, p. 603). In the early days of mixed methods research it was merely the methods of the research rather than the methodology which was mixed (Creswell, 2011). Creswell states that the position has now changed to include mixed methodology as well as methods:
Mixed methods research is a research design with philosophical assumptions as well as methods of inquiry. As a methodology, it involves philosophical assumptions that guide the direction of the collection and analysis and the mixture of qualitative and quantitative approaches in many phases of the research process. As a method, it focuses on collecting, analysing, and mixing both quantitative and qualitative data in a single study or series of studies. Its central premise is that the use of qualitative and quantitative approaches, in combination, provides a better understanding of research problems than either approach alone. (Creswell and Plano Clark, 2007, p. 5 cited in Creswell, 2011 p. 271).

Mixed methods have grown out of both practitioner research (Bergman, 2008, p. 3, and Greene, 2008, p. 7) and from a theoretical base. Greene describes the usefulness of mixed methods from the practitioner route as a way of dealing with the need for generality and particularity (Green, 2008, p.7). Sieber stated that, ‘the integration of research techniques within a single project opens up enormous opportunities for mutual advantages in each of the three major phases – design, data collection, and data analysis’ (1973, p. 1337). Whilst mixed methods may be in its adolescence (Teddlie and Tashakkori, 2003) its popularity is undeniable with a growing number of books published as well as chapters within more general methodology texts and a dedicated journal, the Journal of Mixed Methods Research.

Making paradigmatic sense of mixed methods

Mixed methods research has been criticised on the basis that epistemological assumptions and methods are inextricably linked and therefore cannot be mixed, this purist stance is often linked to Guba and Lincoln (1985). Further criticisms include the notion that mixed methods promise inclusivity but are in fact, ‘a pragmatic research approach that fits most comfortably within a postpositivist epistemology’ (Giddings, 2006, p. 195). Giddings argues that often mixed methods research projects are structured in a positivist or postpositivist way and that the qualitative aspect is ‘fitted in’ (Giddings, 2006, p. 200). Bergman also notes a tendency back towards positivism and postpositivism in mixed methods (Bergman, 2008, p. 3). Giddings further argues that the selection of mixed methods (as opposed to qualitative methodology) is driven by economic concerns rather than ideological intent. It has been suggested that mixed methods are now expected and as a result, in order to obtain funding, quantitative writers are now adding to their research with a small amount of token qualitative research in order to rebrand their work (Bergman, 2008). Research design with a predominant quantitative element and secondary qualitative element has been called quasi-mixed studies (Tashakkori and Creswell, 2007). Concern is expressed about the relationship between the different paradigms
which may have to be reconciled in mixed methods although Bergman notes that this is less of a problem with practitioner research than with research employed by theoreticians.

One solution to the paradigmatic debate surrounding mixed methods is offered by pragmatists. The advantage of the pragmatic philosophy is that it enables the writer to focus on the research question or questions and to utilise whatever methods are most suited to providing a solution. Pragmatism rejects the either-or of the incompatibility thesis and embraces both points of view. Whilst positivists adopt deductive (theory testing) reasoning and interpretivists adopt inductive (theory generating) reasoning pragmatists may use both during a research cycle. Whilst positivists take an objective stance and interpretivists a subjective stance, pragmatists may use both. With regard to axiology, positivists believe that inquiry is value-free and interpretivists that it is value-laden, pragmatists are not concerned about the impact of value systems on what they research (Tashakkori and Teddlie, 1998). Proponents of pragmatism argue that the polarisation of epistemology and methodology is simply outdated, ‘... the epistemological purity that was popularized in previous decades no longer represents best practice and, moreover, may now be considered inappropriate, unreliable, invalid or outmoded’ (Onwuegbuzie and Leech, 2005, p. 382).

5.3 Socio-legal and empirical legal research

Having identified that the overall approach to this research is pragmatic; it is necessary to consider how that fits into legal research methodology and what the necessary conventions are. This research forms part of socio-legal empirical research and this section will briefly consider what these terms mean and how this research fits within this tradition.

There is no universally accepted definition of empirical research. For the purposes of this study the definition has been selected from *The Oxford Handbook of Empirical Legal Research*, ‘the systematic collection of information (“data”) and its analysis according to some generally accepted method’ (Cane and Kritzer, 2010 p. 4). Whilst the term ‘empirical legal studies’ (ELS) became fashionable in around 2000, it has roots spreading back as far as the 1920s and 1930s and in its early incarnation had links to the American Legal Realist movement (Kritzer, 2009). Empirical research is often associated with statistical techniques and quantitative data but as Epstein and King state, ‘the word “empirical” denotes evidence about the world based on observation or experience. That evidence can be numerical (quantitative) or nonnumerical (qualitative); neither is any more “empirical” than the other’ (Epstein and King, 2002 p. 2).
Socio-legal studies was recognised by the Economic and Social Research Council’s ‘Review of Socio-Legal Studies’ as having been in existence since the 1960s (Thomas, 1997 p. 2), but again its roots can be traced back to legal realism (Tamanaha 1997 p. 8). In Britain the setting up of the Oxford Centre for Socio-Legal Studies, funded by the Economic and Social Research Council (ESRC) in 1972, was an important event in the development of socio-legal studies. This was followed by creation of a new journal, *The British Journal of Law and Society* in 1974 (renamed the *Journal of Law and Society* in 1982). The Socio-Legal Studies Association (SLSA) was founded in 1990 with an original stated purpose of encouraging ‘socio-legal scholars to meet and disseminate their work’ and now includes ‘regular channels of communication and promoting and supporting the work of socio-legal academics’ (SLSA, 2013). There is no agreed definition of socio-legal studies. Harris states that it may be defined to cover the study of law in its social context but that he prefers to use it to reflect the study of law and legal institutions from the perspectives of the social sciences (Harris, 1983, p. 315). The mixing of legal research methodology and social science methodologies is sometimes referred to as ‘inter-disciplinary’ research.

To the extent that this research is socio-legal in nature, the term is used in its broader sense as ‘law in its social context’. This project focuses on the extent and possible solutions to a problem in the application of law, and as such is situated in a social context. Land law has not been a popular subject area for socio-legal research. It is not entirely clear why this is the case but it might be related to the relationship between teaching and scholarship. The Joint Academic Standards Board sets out requirements for the necessary content to be covered in a qualifying law degree and land law and equity and trusts are required, often taught under the umbrella of property law. Land law and equity are regarded by students as difficult technical traditionally ‘black letter’ subjects (Green, 1985, Phillips et al., 2010, p. 349), and pressure is therefore on teachers to make the subject matter as straightforward as possible (Auchmuty, 2012). This may result in a lack of time to consider socio-legal contexts of land and equity, resulting in few students carrying out research for dissertations. This is likely to have a knock on effect on the research interests of academic staff. The relationship between research and teaching is by no means settled, with some studies suggesting that research has little impact on teaching. Indeed, in their 1996 study Hattie and Marsh found there to be no relationship between teaching and research. Indeed, in their 1996 study Hattie and Marsh found there to be no relationship between teaching and research. In addition to potential challenges between teaching and research, costs of empirical research can be an issue. Bright and Dixie, for example, cite financial constraints as a challenge to their research on green leases (2014). Auchmuty contrasts the approach of two writers to
show how a socio-legal approach can be taken to the same area of law. Pawlowski and Brown (2002) provide a detailed doctrinal analysis of the law relating to undue influence by way of a detailed discussion of the case law, whereas Fehlberg (1997) researches this area of the law in context. Fehlberg’s study is qualitative in nature and involved interviews with sureties, debtors, lenders and lawyers.

It is not necessary for socio-legal research to be empirical but arguably empirical legal research must proceed out of a socio-legal approach and cannot operate in a vacuum (Hunter, 2012). This research is therefore both empirical and socio-legal.

**Socio-legal empirical research and a mixed methods paradigm**

Historically Empirical Legal Studies (ELS) referred to research that employed statistical and other quantitative methods. However, it has more recently been acknowledged that evidence can be either quantitative or qualitative (Epstein and King, 2002, p. 2). Studies in the *Oxford Handbook of Empirical Legal Research* include both quantitative and qualitative studies utilising a range of sources including surveys, observations, interviews and documents. It is therefore a relatively wide approach to research but one that is very much a ‘law in action’ rather than a ‘black letter law’ methodology. With regard to subject matter ELS has tended to focus on crime, criminology and the judiciary especially within the American tradition. The writer conducted survey of the topic areas covered in the *Journal of Empirical Legal Studies* (established in 2004 and edited at Cornell Law School). This was done by examining the titles (and where necessary the abstract) of articles from 2005-2015. This revealed that the vast majority of the material published relates to courts and the judiciary. A similar exercise was undertaken with regard to *The British Journal of Law and Society* and *Journal of Law and Society*. It revealed that this journal reflected a much broader spectrum of research including; interdisciplinary research, legal theory, history, contract and commercial law, social welfare and benefits, health and safety, employment and legal education. The most commonly researched areas however appear to be those of crime and criminology, the courts and issues arising out of family law. This finding is borne out by the directory of members of the Socio-Legal Studies Association which lists the highest number of members under criminal law (with criminal justice and criminology also well represented) followed by dispute resolution and family law.

As stated above, socio-legal empirical studies adopt both qualitative and quantitative research methods and a number also use a mixed methods approach. There are a number of benefits to
mixed methods research outlined by social scientists which apply equally to socio-legal research. Hammersley (1996, p. 167) identifies three such approaches:

- Triangulation – using three methods of research to corroborate another
- Facilitation – using one method of research to aid another
- Complementarity – using different methods for different aspects of the same research project

This research will use qualitative data obtained from the Upper Tribunal (Lands Chamber) and the Lands Tribunal Scotland, the Land Registry and interviews. However the method for analysing the Tribunal decisions and land registry titles will be quantitative. Quantitative methodology was also applied in sampling. Different methods of analysis will answer different research questions (see Table 5.3) and to that extent the use of different methods suggests complementarity. However, in some aspects of the research more than one source of data will be used and in these instances the use of multiple approaches will triangulate and facilitate.

**Risks association with empirical research**

One of the risks associated with empirical research is that it is merely ‘naive empiricism’ which produces nothing of any real value. It may be argued that expending time and effort on accumulating facts that produce no tangible accomplishment may be wasteful to say the least.

In describing a study carried out by the Institute of Law at Johns Hopkins in the 1920s Hurst stated:

> they worked hard as if they believed that wisdom might be had from accumulation of facts; if you piled up a big enough stack of facts, somehow some juice of new understanding would squeeze out of the bottom from the sheer weight of the pile (Hurst, 1961, p. 365).

Lawyers have been criticised by social scientists for failing to be sufficiently attentive to the ‘rules’ of empirical research methodology (Epstein and King, 2002). Epstein and King carried out a comprehensive study of legal literature in the United States and found little awareness of the rules of inference which social science methodology requires. Lack of proper training in empirical research skills has been identified as a concern in the legal academy (Nuffield Enquiry on Empirical Legal Research, Genn et al., 2006). However, legal empirical writers argue that whilst empirical research must be carried out transparently, research can be successful without formal training (Halliday and Schmit, 2009, Galligan, 2012).
In order to avoid the making of unreliable inferences a number of techniques were used. These are set out in Table 5.2 below.

Table 5.2 Reliability measures

<table>
<thead>
<tr>
<th>Empirical Research Phase</th>
<th>Analytical Tool</th>
<th>References</th>
</tr>
</thead>
<tbody>
<tr>
<td>Title Analysis</td>
<td>Descriptive Content Analysis</td>
<td>Krippendorff, 2013</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Neuendorf, 2002</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(see 5.4)</td>
</tr>
<tr>
<td>UT(LC) and LTS Decisions Analysis</td>
<td>Descriptive Content Analysis</td>
<td>Krippendorff, 2013</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Neuendorf, 2002</td>
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<tr>
<td></td>
<td></td>
<td>(see 5.4)</td>
</tr>
<tr>
<td>Interviews</td>
<td>Thematic Analysis</td>
<td>Braun and Clarke, 2006</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(see 5.6)</td>
</tr>
</tbody>
</table>

5.4 Research design

Having selected a mixed methods paradigm for this research there remain a number of choices as to at what point in the research each method is used. Tashakkori and Teddlie (1998) organise the possible mixed methods research designs as follows:

- Equivalent status designs: sequential (QUAN/QUAL and QUAL/QUAN) and parallel/Simultaneous (QUAN + QUAL and QUAL + QUAN)
- Dominant-less dominant designs: Sequential (QUAN/ qual and QUAL/ quan) and Parallel/Simultaneous (QUAN + qual and QUAL + quan)
- Designs with multilevel use of approaches

The design of the empirical research is an equivalent status sequential QUAN/QUAL design. Essentially there were two, equally important, phases of the data collection and analysis. Firstly, the Land Registry titles and Tribunal decisions were collected and analysed. Secondly, the interview and Law Commission data was collected and analysed.

The rationale for a sequential design is that it allows the quantitative data analysis to inform the qualitative data collection. In this research quantitative analysis was carried out with regard to decisions of the UT(LC) and the title sample. This analysis informed the interviews conducted in the qualitative phase. A sample of land titles was also obtained and again analysis of this data

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120 It is important to note that reference to the quantitative phase throughout this (and other) chapter(s) refers to the type of analysis rather than the type of data; the data itself is qualitative rather than quantitative in nature but the analysis is quantitative (using descriptive statistics, for example).
informed discussions at the qualitative phase. The follow-on qualitative research was designed to enable experts to give their opinions.

There are a number of advantages of this type of strategy, not least that it is a straightforward approach. It enables the writer to assess the results of the quantitative phase before moving onto the qualitative phase. This can be very useful if the results of the first phase of the research are unexpected. It is a design which is popular with novice writers (Creswell, 2003; and Tashakkori and Teddlie, 1998). The separation of the two main phases also makes the design easy to implement and report. The main weakness of the strategy is that the two discrete phases lengthen the data collection phase of the research. There have also been criticisms of this type of research design from an epistemological stance. Giddings argues that much mixed methods research is ‘positivism in drag’:

A design is set in place, a protocol followed. In the main, the questions are descriptive, traditional positivist research language is used with a dusting of words from other paradigms, and the designs come up with structured descriptive results. Integration is at a descriptive level. A qualitative aspect of the study is often “fitted in.” The thinking is clearly positivist and pragmatic. The message often received by a naïve writer, however, is that mixed methods combines and shares “thinking” at the paradigm level. (p. 200)

The danger Giddings highlights is that whilst mixed methods are not problematic in themselves the emphasis towards positivistic quantitative research may dilute the significance of interpretivist/ constructionist stances which might be associated with a stronger qualitative approach. This research makes no apology for mixing paradigms or for its pragmatic stance as it is submitted that pragmatism is an appropriate response to complexities of law and law reform.

Below is a table relating the individual questions asked by this research to the appropriate method. In the sections that follow a more detailed research design is outlined.
Table 5.3 Summary of research design in relation to each research question

<table>
<thead>
<tr>
<th>Research Phase</th>
<th>Research questions</th>
</tr>
</thead>
</table>
| Literature Review                                   | 1 Where do restrictive covenants fit within the broader context of private land ownership and control?  
2 To what extent is there a link between age and obsoleteness with regard to restrictive covenants?  
3 To what extent does the continued registration of obsolete restrictive covenants conflict with the principles and practicalities of land registration?  
4 Is there a mechanism or suite of reforms that could reduce the quantity of obsolete restrictive covenants whilst maintaining the correct balance between the rights of landowners and third parties? |
| Analysis of Land Registry and Lands Tribunal Data   | 2 To what extent is there a link between age and obsoleteness with regard to restrictive covenants?  
4 Is there a mechanism or suite of reforms that could reduce the quantity of obsolete restrictive covenants whilst maintaining the correct balance between the rights of landowners and third parties? |
| Analysis of Interview and Consultation Data         | 2 To what extent is there a link between age and obsoleteness with regard to restrictive covenants?  
4 Is there a mechanism or suite of reforms that could reduce the quantity of obsolete restrictive covenants whilst maintaining the correct balance between the rights of landowners and third parties? |
| Interpretation                                      | 1 Where do restrictive covenants fit within the broader context of private land ownership and control?  
2 To what extent is there a link between age and obsoleteness with regard to restrictive covenants?  
3 To what extent does the continued registration of obsolete restrictive covenants conflict with the principles and practicalities of land registration?  
4 Is there a mechanism or suite of reforms that could reduce the quantity of obsolete restrictive covenants whilst maintaining the correct balance between the rights of landowners and third parties? |

**Quantitative research phase**

In social science research quantitative analysis of survey data is commonly analysed using statistical analysis software such as Minitab or SPSS. Qualitative data from interviews is most commonly analysed using qualitative analysis techniques such as thematic analysis. Qualitative data analysis software such as NVivo can be used to facilitate this analysis. It is possible to use quantitative analysis techniques to analyse qualitative data and, in fact, this is not uncommon in health, psychology, sports, and education (Fakis, A., Hilliam, R., Stoneley, H., and Townend., M, 2014); however it would not seem to be so common in legal research. The rationale for
utilizing a quantitative analysis in this study was that there was a clear gap identified in the literature. Whilst numerous reviews of the law in this area had been carried out,\textsuperscript{121} no study had been undertaken to answer the question, ‘to what extent is there a link between age and obsoleteness with regard to restrictive covenants?’ using anything other than anecdotal evidence. No study could be found which utilized the publicly available land registry data to conduct a quantitative analysis.\textsuperscript{122}

It was therefore decided that these land registry data and another publicly available source of data, Upper Tribunal (Lands Chamber) and Lands Tribunal Scotland\textsuperscript{123} decisions should form the basis of the first phase of this research. The rationale for this approach was twofold; firstly the data itself would provide reliable basic information regarding the nature and extent of restrictive covenants in England and secondly analysis of the data would inform the proposed expert interviews. Whilst the data from both data sets was qualitative, simple quantitative analysis techniques would be applied. In terms of quantitative analysis of the Lands Tribunal decisions these would be counted and grouped in a number of ways; according to the age of the covenants, the type of the covenants, the part of s84 LPA relied upon etc. With regard to the title analysis, the titles would be grouped and analysed again in terms of age of the covenants, the type of the covenants, whether the covenants have been modified etc. The two data sets could be analysed separately and together, for example the most frequently occurring covenant age on registered titles might differ from the most frequently occurring covenant age in applications for removal. Qualitative analysis would be undertaken with regard to the basis on which judgements were made in the Lands Tribunal and also the likely extent to which the type of covenants and wording of the covenants might make them unnecessary or unenforceable.

It was anticipated that access to reliable data would reduce the number of questions and time spent talking to experts. It would be undesirable to ask lawyers to comment on the number and nature of restrictive covenants when these data could be obtained elsewhere, as clearly their response would be anecdotal and possibly subject to bias. It was felt that obtaining interviews with lawyers would be difficult as they are busy people and therefore keeping the interview short would increase participation.

\textsuperscript{121} See 3.3.
\textsuperscript{122} The Scottish Law Commission conducted a study of Deeds of Conditions as part of its Report in 2000 (Scottish Law Commission, 2000, p. 496-504).
\textsuperscript{123} Hereafter collectively referred to as the Lands Tribunal.
**Analysis of titles - simple content analysis**

Registration of land has been compulsory across England and Wales since 1990 (subject to the occurrence of a trigger event) and at the time of obtaining the sample there are more than 23 million titles (Gov.UK, Land Registry). According to the Law Commission, ‘recent Land Registry Figures suggest that at least 65% of freehold titles are subject to one or more easements and 79% are subject to one or more restrictive covenants’ (Law Commission, 2008 para. 1.3). However, in order to ascertain the type and age of the restrictive covenants it was necessary to analyse a sample of titles.

At first sight with such a large population it would seem to require a very large sample in order to generalize. However this is not the case; using an online sample size calculator and selecting a confidence level of 95% (used by most writers; Robson, 2011, De Vaus, 2002, [http://www.surveysystem.com](http://www.surveysystem.com)) and a confidence interval of 4 the sample size would be 600. The confidence interval determines that we may be 95% confident that the results in the population will be the same as the results in the population as a whole. The confidence level is defined as the ‘probability that a value in the population is within a specific, numeric range from the corresponding value computed from a sample’ (Alreck and Settle, 2004, p. 61). The confidence interval may also be referred to as the ‘margin of error’, for example, using a confidence interval of 4 when 47% of the sample picks an answer you can be "sure" that if you had asked the question of the entire relevant population between 43% (47-4) and 51% (47+4) would have picked that answer ([http://www.surveysystem.com](http://www.surveysystem.com)). Larger populations do not need significantly larger samples in order to be acceptable (Alreck and Settle, 2004, De Vaus, 2002).

In order to be able to make reliable inferences from the data it was necessary to devise a suitable method of analysis. A fairly simple version of content analysis was deemed appropriate, ‘content analysis is a research technique for making replicable and valid inferences from texts (or other meaningful matter) to the contexts of their use’ (Krippendorff, 2013, p. 24).

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124 Subsequently the Land Registry reported reaching and exceeding 24 million titles (HM Land Registry, 2015).
125 Increasing the confidence level to 99% and the confidence interval to 1 would have made the research more accurate. However, this would have increased the sample size to 16,629 and the cost would have risen into the tens of thousands of pounds.
There are a number of advantages to using content analysis as a research tool, not least the fact that as a technique it is unobtrusive and it can handle data that is both unstructured and voluminous (Krippendorff, 2013, pp.45-46). The data comprised in the Land Registry data was neither as voluminous nor as unstructured as the data analysed in many empirical legal research projects. Eisenberg, Fisher and Rosen-Zvi, for example, analysed a sample of 3,342 decided cases in their study which analysed the effects of individual justices on case outcome in Israel (Eisenberg et al, 2012). In another study a sample of 3,300 federal cases in two districts in different states in the US were analysed with regard to their settlement rate (Eisenberg and Lanvers, 2009). In studies such as these research assistants may be essential as a result of the volume of data. The data collected in this research was both adequate for the purposes of generalizability and manageable as a solo research project. Content analysis is also used where the content of the data is unstructured and ideological positions need to be considered (see for example, Evans et al, 2007). In this study the data to be coded was much more straightforward; essentially involving lists of behaviour which was forbidden with regard to a parcel of land.

Sampling

The Land Registry was asked whether a list of all titles from which to search was available but unfortunately it was not. The next best option was therefore considered to be to obtain a sample using postcodes. The Royal Mail is able to provide a licence to use the entire list of 1.8 million postcodes. A number of problems were identified with this approach; firstly each postcode will equate to a number of properties, secondly not all properties are registered so a selected property might not reveal a title. The 1,732,172 postcodes obtained from the Royal Mail were entered onto a spreadsheet and then an online random number selector (research randomizer)126 was used to select 600. For each one of the postcodes a search was carried out to identify all the postal addresses for that postcode and then, again using research randomizer, an individual address was selected. The address was then inputted into the land registry website and a title obtained. Addresses from Northern Ireland and Scotland were rejected as these relate to different legal jurisdictions. There were also a number of postcodes which, even though provided by the Royal Mail, did not reveal addresses when searched and others which were PO Boxes. A number of addresses were revealed to be unregistered so another random search of 150 postcodes was carried out to bring the sample up to the desired 600 titles.

126 http://www.randomizer.org/.
The sample was split initially between those titles revealing a restrictive covenant and those with no restrictive covenant. In the sample 70.2 % revealed one or more restrictive covenants. The titles containing restrictive covenants were then further analysed into categories according to the age and type of the covenant. The results of this analysis are set out in detail in Chapter Six.

It is submitted by many that content analysis fits within the positivist paradigm of social research (Neuendorf, 2002, p.11). It therefore requires a compliance with a number of criteria which are described below in the context of this research:

**Reliability**

Three types of reliability are identified: stability, reproducibility and accuracy (Krippendorf, 2013, pp.24-25). Stability is the extent to which the same coder would code the same content in the same way twice. The coding frame and the data in this research was such that this did not present a challenge. Having decided on the different categories, for example ‘not to erect a television aerial’ stability, should the whole exercise be repeated, should be high.

Reproducibility or intercoder reliability refers to the extent to which different coders would code the data in the same way. As the data was coded by only one coder this was not considered to be an issue. As the coding frame was straightforward and the data relatively uncomplicated it is likely that a different coder would code the same data in the same way if the task was replicated. The final aspect of reliability relates to accuracy. This is the extent to which the classification of a text corresponds to a standard or norm (Weber, 1990, p. 17). As has been suggested above there are a number of studies relating to content analysis of US court documentation which allows a writer to utilize the classification of another coder. This is clearly not the case with regard to the classification of this data.

**Validity**

Validity of research asks the question, ‘are we measuring what we want to measure’ (Neuendorf, 2002). Validity can be divided into external and internal validity. External validity is also referred to as generalizability and it relates to the extent to which the study could be replicated. This was achieved in this research by obtaining a random and significantly significant sample. Internal validity was not relevant to this research as it only relates to studies where the
researcher aims to link a cause with an effect and is not applicable to observational/descriptive studies such as the coding of restrictive covenants.

Creating the Coding Scheme

Before the data could be coded it was necessary to design a coding scheme. In so doing the first decisions related to the recording unit; in this instance it was appropriate to code each covenant. The second decision related to the categories of covenant. The choice here was whether to: (a) select a number of known types of covenant and make these the only categories (deductive coding); or (b) to use what was found in the sample to draw up a list of categories (inductive coding). It was decided that the latter would be a more comprehensive method. As there is no regulation on how covenants are drafted there are any number of different types of covenant which might exist (subject to the covenants complying with the rules in Tulk v Moxhay). It is worth noting that whilst the requirements of Tulk v Moxhay must be fulfilled in order for the covenant to be enforceable, failure to comply with the requirements did not prevent registration. Therefore, there were a number of covenants on the titles which did not comply with these requirements. For example, on a number of titles positive covenants were registered as restrictive. This is an example of how failures in drafting can lead to cluttering of titles. The coder therefore went through the sample of titles and gave each covenant identified a code (see Appendix 4 for an extract of the spreadsheet).

Lands Tribunal decisions

In order to answer the question ‘What makes a restrictive covenant obsolete?’ a number of different approaches were adopted. The first approach was to look at cases which came before the Upper Tribunal (Lands Chamber) and Lands Tribunal Scotland and analyse what the Tribunal Judge held in each case. All the decisions relating to restrictive covenants which were provided on the tribunal websites (www.landstribunal.gov.uk/Aspx/Default.asp and www.lands-tribunal-scotland.org.uk/decisions/previous -decisions) were analysed and the results of this analysis can be found in Chapter Seven. Where the issue of obsoleteness was considered by the Tribunal the factual and legal basis for the decision was analysed.

Qualitative Research Phase

The initial phase of the research addressed the question, ‘to what extent is there a link between age and obsoleteness with regard to restrictive covenants?’ The results of this analysis are
found in Chapters Six and Seven. The main focus of the research asked the question, ‘is there a mechanism which could reduce the quantity of obsolete restrictive covenants whilst maintaining the correct balance between the right of landowners and the rights of third parties?’ This question is considered to a certain extent in Chapter Two; where the literature regarding proposals for reform is reviewed and analysed.

A further way in which this question is addressed is to compare the law in England with the law in Scotland. The Title Conditions (Scotland) Act 2003 provides for a range of mechanisms to reduce the number of land obligations. One of these mechanisms, the ‘sunset rule’ was mooted as a potential solution to the problems of obsolete restrictive covenants in England (Law Commission, 1991, para. 3.1). In order to decide whether a similar scheme could work in England it was decided that further research should be carried out with regard to the success of the relatively new Scottish law. A review of the literature revealed that this research had not previously been undertaken. Once the extent to which the Scottish scheme was a success had been ascertained it would be possible to consider possible reform of the law in England. The qualitative phase was therefore divided into a Scottish and English phase. Each phase would require information to be obtained from expert participants. The relevant experts in this area are; solicitors, advocates/barristers, and academics.

There are a number of different possibilities for obtaining information from participants. The two main approaches considered were, to conduct a survey of lawyers to ascertain how they deal with restrictive covenants and why; the second was to conduct interviews with a smaller number of expert participants. An interesting example of survey research was a project conducted by The Central Research Unit carried relating to feudal conditions in Scotland (Cusine and Egan, 1995). However, a large-scale survey of lawyers presented a number of challenges which led to the rejection of this method. The most significant issue was that in order to ascertain how frequently an individual lawyer encountered restrictive covenants, how often these clash with a client’s proposed use of the land, and how this problem is overcome, would have required participation over time. As a former solicitor the writer was aware that this information is simply not readily available and therefore responses to frequency of problematic covenants would be based on the participant’s perception.

However reference to the link between age and obsoleteness was found in both the interviews and the consultation responses.
It was therefore decided that the most appropriate method for collecting qualitative data was by way of interviews. The aim of the interviews would be to gain insight into the research question, ‘is there a mechanism which could reduce the quantity of obsolete restrictive covenants whilst maintaining the correct balance between the rights of landowners and the rights of third parties?’ In order to answer this question it was decided that the Scottish participants would be interviewed first with a view to assessing the success of the change in the law in Scotland and the English participants would be interviewed with a view to commenting on whether the law or practice could be improved in England.

Selection of participants

The first question to be considered was how to select a sample for the interviews. In order to select a sample it is first necessary to consider the relevant population. Earlier in the research design the notion that the appropriate population was all relevant practitioners had been rejected. Instead the population for both the Scottish and the English phase of the research was considered to be a subset of this population which will be referred to as ‘expert participants’.

The research questions necessitated a special type of participant; as Hennink, Hutter and Bailey state,

The purpose of qualitative research is to gain detailed understanding of a certain phenomenon, to identify socially constructed meanings of the phenomenon and the context in which a phenomenon occurs. This not only requires a small number of participants so that issues can be explored in depth, but also necessitates the recruitment of participants with specific characteristics that can best inform the research topic (2011, p. 84).

These ‘expert participants’ were lawyers and academics who had either demonstrated an interest in the area of reform of the law relating to real burdens or restrictive covenants, or who could be considered experts on the basis that they had been involved with litigation relating to the removal or modification of real burdens or restrictive covenants.

The Scottish Study

A list of participants for the Scottish study was drawn from the following:
• Written respondents to Discussion Paper 106\textsuperscript{128} in the following categories:\textsuperscript{129}
  o Solicitors
  o Academics
• Solicitors and advocates who had represented either applicants or respondents in ‘sunset rule’ cases.
• The Property Law Commissioner at the time of the reforms
• The current Property Law Commissioner

The English Study

A similar process was undertaken with regard to the English participants. The list of participants was drawn from the following:

• Written respondents to Consultation Paper Number 186 in the following categories:
  o Solicitors
  o Barristers
  o Academics

Individual consultees did not always provide the name of an associated firm or organisation. In this case checks on the relevant websites were made to ascertain whether the respondent was a solicitor, barrister or legal executive. Where the individual was not affiliated with the aforementioned professional bodies they were disregarded as a possible interview candidate.

Where a firm of solicitors were listed an individual was selected to approach either by way of introduction by an existing contact, either outside or within the organisation, or by selecting the most appropriate or senior practitioner as identified from the firm’s website.

The written responses

In addition to carrying out interviews with Scottish and English lawyers, copies of the written responses to both the Scottish and English consultations were obtained and these were analysed along with the interview responses.\textsuperscript{130}

\textsuperscript{128} Addresses were obtained by consulting the Law Society Scotland website. Some of the solicitors were not listed, perhaps because they had left the profession or retired.

\textsuperscript{129} Only these categories of respondent were selected as some of the other respondents, such as local councils, conservation groups or developers, were likely to have vested interests and were unlikely to have the necessary technical expertise.

\textsuperscript{130} See Chapters Seven and Eight in this regard.
Selecting the sample size

Deciding the appropriate sample size for a piece of research is a challenge faced by all researchers. It is important to note that for the purposes of qualitative, rather than quantitative research it is not necessary that sample size be sufficient to make generalizations regarding the population as a whole (King and Horrocks, 2010, p. 29). The sample need not be random for the findings to be of value (Hennink, Hutter and Bailey, 2011, p. 84). In this study the sample size was, to some extent, determined by the relatively small expert population. In the Scottish study this population was 23. The theoretical principle guiding the number of participants to recruit is called saturation (Hennink, Hutter and Bailey, 2011, p. 88). This is the point at which the information provided begins to repeat itself. Of course it is not possible to know when this point is reached until the interviews are under way; making it very difficult to select a sample size at the outset. Guest, Bunce and Johnson (2006) carried out a study aimed at ascertaining how many interviews are enough. Their research was in the field of health science but remains informative for many types of research. They based their answer to the question of how many interviews were required on the point at which, in their research, the number of new codes significantly diminished; in other words the same answers were being repeated. They found that data saturation had for the most part occurred by the time they had analysed twelve interviews. It is important to note that the point at which data saturation occurs will depend upon the homogeneity of the population and the depth of the objectives. Their goal was to describe a shared perception, belief, or behaviour among a relatively homogeneous group and therefore they found that a sample of twelve was likely to be sufficient. I would suggest the same is true, to some extent of this study. The main question for the Scottish participants was the extent to which the change in the law has been a success. There may be a range of opinion on this matter but, based on the lack of criticism of the reforms in the literature, it was thought unlikely that the diversity of this opinion will be large. It was therefore decided that 10 participants be chosen at the outset, representing approximately 50% of each of the following subgroups:

- Academics who responded to the law commission consultation (2)
- Solicitors who responded to the law commission consultation (4)
- Advocates who had acted in LTS cases relating to the ‘sunset’ rule (4)

In addition to these ten it was hoped that both the Property Law Commissioner at the time of the reforms and the current Law Commissioner would agree to be interviewed.
Where a participant declined to be interviewed they would be replaced with either a replacement recommended by the desired participant or with another from the same group until either saturation was reached, ten participants were recruited or the list of twenty three possible participants was exhausted.

It was thought that the diversity of opinion might be greater with regard to the English Study as the Law Commission’s proposals had resulted in a range of responses. A larger initial sample was decided upon. However, it is important to note that with both samples where saturation was reached earlier no further interviews would take place unless already arranged. A similar process was undertaken with regard to selection of participants. Fifteen participants were selected representing 50% of each of the subgroups:

- Academics who responded to Consultation Paper Number 186 (3)
- Solicitors who responded to Consultation Paper Number 186 (7)
- Barristers who responded to Consultation Paper Number 186 (2)
- Lawyers who have represented clients in the UT(LC) in 2013/14 (5)

Again it was decided that where a participant declined to be interviewed they would be replaced either with a replacement recommended by the desired participant, or with another from the same group until either approximately fifteen participants were recruited, saturation was reached or, the list of thirty seven possible participants was exhausted.

**Conducting interviews**

Unlike the structured approach found in quantitative studies, qualitative research tends to favour a less structured approach. This allows the interviewer to gain an insight into the interviewee’s point of view (Bryman, 2008, p. 437). The question to be answered in the Scottish interviews was ‘is there a mechanism which could reduce the quantity of obsolete restrictive covenants whilst maintaining the correct balance between the rights of landowners and the rights of third parties?’ in answering this question the writer wanted to know whether the Scottish respondents thought that the sunset rule or other Scottish law reforms provided such a solution.

Qualitative interviews can be semi-structured or completely unstructured. An unstructured interview may rely on a brief set of prompts and allow for a conversational style (Bryman, 2008, p. 438). Whilst flexibility was thought to be important, a semi-structured rather than unstructured style was thought preferable. When preparing a semi-structured interview the
writer produces a list of questions or fairly specific topics to be covered, often referred to as an interview guide. In order to produce an interview guide it was necessary to translate the research question into suitable interview questions (Kvale and Brinkman, 2009, p. 132). Firstly, the main research question was modified to reflect the nature of the interviewees; in other words the fact that they were Scottish expert participants. The research question for this phase and the resultant interview guide are shown in Appendix 5.

Types of interview questions

Kvale and Brinkman (2009, pp. 135-136) identify seven different types of interview question:

- introductory
- follow-up
- probing
- specifying
- direct
- indirect
- structuring
- silence
- interpreting

The purpose of the proposed interviews was to obtain expert opinion on a relatively specific area. As such the questions (as set out in Appendix 5) are relatively direct. These direct questions are likely to be followed by probing questions, the aim of which is to ascertain more information or a more detailed response. It is likely that in some instances interpreting questions may also be required to ensure that the interviewee’s response is fully understood.

Face-to-face interviewing versus distance interviewing

As the first tranche of interviews were to be carried out with Scottish participants it was impractical to carry out face-to-face interviews. The advantages and disadvantages of the different methods are set out in the Table 5.4 below.
Table 5.4 comparison of face-to-face and telephone interviews

<table>
<thead>
<tr>
<th>Advantages of face-to-face interviews</th>
<th>Advantages of telephone interviews</th>
</tr>
</thead>
<tbody>
<tr>
<td>More accurate responses – it is possible that interviewing face-to-face will allow a more accurate response as non-verbal cues will assist both the writer and the respondent.(^{131})</td>
<td>Writer safety – this is only relevant where the writer is meeting the respondent is a dangerous neighbourhood. This is not relevant to meeting professionals in their offices.(^{132})</td>
</tr>
<tr>
<td>Greater effectiveness with complex issues – it is often more difficult to discuss more complex issues over the telephone. It may also be useful to show the respondent some information and this is much easier to do in person.(^{133})</td>
<td>Cost-efficiency – clearly there are no travel costs involved.(^{134})</td>
</tr>
<tr>
<td>More thoughtful responses – some research indicates that the faster pace of the telephone interview leads to less thoughtful responses. Busy solicitors may look at emails whilst being interviewed on the telephone, this will not happen face-to-face.(^{135})</td>
<td>Time efficiency and convenience – travelling to Scotland from Portsmouth will take a considerable amount of time and expense.(^{136})</td>
</tr>
<tr>
<td>Better response rates – some writers have found that better response rates are achieved face-to-face.(^{137})</td>
<td>Better response rates – some writers have found that response rates are better when telephone interviews are offered as an option.(^{138})</td>
</tr>
</tbody>
</table>

Like ‘live’ interviews, telephone interviews enable the interviewer and interviewee to be interactive. This is one of the main advantages over a written response. The main disadvantage is that the interviewer cannot see the subject and therefore non-verbal elements are missing; this is less of an issue in this research than it might be in sociological research where visual cues could be significant. It is also possible that the interviewee may be more concerned about the recording of the interview over the phone as a result of connotations of telephone ‘tapping’ (Gillham, 2005). In terms of quality of the data produced by the two interview methods it would appear that there is no consensus. In a review of the literature relating to the quality of face-to-face versus telephone interviewing Sturges and Hanrahan (2004) found mixed reports on whether or not one method provided higher quality data as compared to another. In their own study Sturges and Hanrahan conducted 21 face-to-face interviews and 22 telephone interviews. They compared the results of the interviews with regard to depth of response and

\(^{131}\) Shuy, 2002, p. 541.  
\(^{132}\) Ibid. p.540.  
\(^{133}\) Ibid. p.542.  
\(^{134}\) Ibid p.540.  
\(^{135}\) Ibid. p.543.  
\(^{136}\) Ibid. p.543.  
\(^{137}\) Ibid. p.540.  
\(^{138}\) Ibid. p.543.  
\(^{139}\) Sturges and Hanrahan, 2004, p. 111.
found it to be broadly the same. They also found that all of the interviewees were grateful for the opportunity to choose between the telephone and face-to-face interviews. Those who selected telephone interviews did so for reasons of convenience and perceived partial anonymity, interestingly those who chose face-to-face interviews also selected this method as it was convenient for them (2004, p. 113).

Pilot

It is generally accepted that piloting of interviews should take place to ensure that the style and content of the questions are appropriate prior to the actual interviews (Silverman, 2013; Hennik, Hutter and Bailey, 2011). In this research it was considered important to pilot the interviews, not only to check the questions but, equally importantly, to check the recording equipment. One of the difficulties faced in piloting the interviews was that the writer had no Scottish lawyers as personal contacts and therefore had to use an English lawyer to pilot the questions. The pilot was a telephone interview during which time the interview guide was used as a starting point for further questions. The interviewer wrote notes during the interview in case of problems with the recording equipment and this proved very challenging as the interviewee had agreed to being recorded and therefore any pauses by the interviewer to write notes seemed inexplicable. The interviewer amended the interview guide to make suitably sized spaces for the writing of very brief notes and it was decided that note taking would have to be minimal where consent to recording was obtained. The interview was kept to the proposed 15 minutes and this felt sufficient to get the information required without entering into excessive extraneous discussion. The voice recording quality was good.

The pilot also provided an opportunity to test transcription skills and software. Software known as Transcribe was used to assist in the process but it was still found that a 15 minute interview would take one hour to transcribe. Transcription was carried out without the use of transcription codes as linguistic features are not considered to be of real importance in this study.

5.5 Ethical Considerations

Epistemology and ethics

It seems appropriate that the epistemological stance taken in considering ethics in this research is utilitarian to fit with the approach outlined in Chapter Two. As previously stated,
utilitarianism judges actions on their propensity to produce the most happiness or pleasure for the greatest number (King and Horrocks, 2010, p. 105). Although possibly not as fashionable in qualitative research as social and communitarian ethics, the utilitarian approach best aligns itself with law reform where the greater good is likely to take precedence. The main difficulties with utilitarian ethics identified by King and Horrocks relate to the problems associated with predicting the future consequences of actions. Indeed one of the benefits of qualitative research is that the results reveal themselves during the process. That said, the moral principles which emerge from utilitarianism are useful in designing any research. These principles identified by King and Horrocks (2010, p. 106) are: respect for persons, benefice and justice. Respect for persons demands that individuals are fully informed about the research and participate voluntarily. This principle is demonstrated in the information sheet provided to participants and attached at Appendix 3. Benefice relates to the responsibility of the writer to secure the well-being of participants. This is not a significant challenge with the type of participants in this research but it nevertheless a consideration. Finally, the concept of justice relates to the benefits and burdens of the research. Again it is anticipated that this aspect will not be controversial within this study.

**Ethical codes**

The guiding ethics for this research were taken from the University of Portsmouth Ethics Policy 2013. The following general principles were therefore considered:

- to respect the rights and interests of participants in the research, and to take account of the consequences for them.
- to respect individuals as autonomous agents with rights regarding decision and choice, and to conduct research on the basis of informed consent.
- to reflect on the broader social and cultural implications of the research.
- to ensure that appropriate additional protection, information and support is provided for individuals with any diminished autonomy (including minors) arranging consent by representatives as necessary.
- to act in accordance with the Mental Capacity Act 2005 when recruiting participants who lack capacity.
- to assess the risks of harm and potential benefits to participants and researchers.
- to respect confidentiality and to ensure the security of personal and sensitive information, adhering to the requirements of the Data Protection Act 1998.
- to embrace the obligation to maximise possible benefits and to avoid or to minimise possible harms resulting from the research.

(University of Portsmouth, 2013, p. 3)
Apart from the principle relating to capacity all of the principles above were thought pertinent to this research. With regard to the first of these principles the rights of the participants were respected by contacting them initially by email which made it easy for them to decline should they not want to participate. The writer considered the potential consequences for participants and concluded that these were minimal. The participants would be taking some time out of their day when they could be doing fee-earning work and would be quoted (if they agreed) in the final thesis. With regard to consent the writer followed the procedures laid down by the University of Portsmouth and sent the participants consent forms to sign and return. Most participants preferred to give verbal consent. This did not surprise the writer who felt that the copious paperwork would not be popular with lawyers who are surrounded by this as part of their professional practice. With regard to the third principle, the writer aims to provide a critique of an area of law and proposal for reform and to engage with the professional community in so doing. It was felt that this was a positive exercise aimed at filling a gap in knowledge and providing the professional community with new information and guidance. It was thought the risks of harm to interviewee and interviewer were minimal. The interviewer found the process of interviewing expert participants, who were engaged and interested, extremely stimulating. With regard to confidentiality most participants were happy to be recorded and quoted verbatim. One participant did not want to be recorded, one wished to remain anonymous and two wanted to sign off on any direct quotation. It should be remembered that it is the business of a lawyer to provide considered opinion and, unlike in professional practice, this study carried no risk of professional negligence litigation resulting from those views. With regard to maximisation of benefit, it is hoped that this will come from publication of all or parts of the research. This research obtained ethical approval and the relevant paperwork is appended at Appendix 7.

Further guidance was obtained from the ‘statement of principles of ethical research practice’ published by the Socio-Legal Studies Association (2009). Many of the principles contained within this statement correspond with those of the university. However the society’s second principle relating to obligations to the academic and wider communities was thought particularly pertinent:

Principle 2: Socio-legal writers should consider at all times their responsibility for maintaining the reputation of socio-legal studies as a valid contribution to scholarship.
2.1 The integrity of the discipline.

2.1.1 Members should publish and disseminate the results of socio-legal research where appropriate for the benefit of the community. This includes publishing in a variety of media including popular journals.

2.1.3 Socio-legal writers should make the results of investigations available to those they have researched.

2.2 Competence.

2.2.1 Members should not undertake work of a kind that they are not competent to carry out and should not ask socio-legal writers under their supervision or guidance to carry out work which the socio-legal writers are not competent to carry out, or they themselves are not competent to supervise.

2.2.2 Members should have due regard for the weight to be attached to other people’s research and encourage others to do the same.

2.2.3 Members should satisfy themselves that the methodologies used are appropriate to the research to be carried out.

(Socio-Legal Studies Association, 2009)

The participants in this research were legal professionals. There were therefore no issues with regard to capacity to participate in the research.

Consent

One of the most important ethical issues to consider when carrying out interview research is gaining the informed consent of the participants prior to taking part in the research. The consent should be ‘knowing’ and free from duress or inducement. In order for the consent to be knowing the participants need to be fully aware of what they are consenting to. In order to obtain this level of consent the participant should be able to consider and potentially negotiate the terms of their involvement (King and Horrocks, 2010, p.110). In this study this issue was dealt with by way of the information sheet and consent form.

Anonymity

The interviews were asking the participants for their own opinions on a matter of professional practice. It was believed that these opinions could not in any way harm the participants. However whether the participants wanted their views to be published was, of course, a matter of personal choice. The participants were then offered the opportunity to remain anonymous in
the report if they so desired. Anonymity was provided by removing the names of those participants from the final report and replacing their name with a number (Participant 1) etc. Anyone wishing to ascertain the identity of a participant would have access to the sampling criteria and would therefore be able to draw up a list of names in the same way the writer had. This was not thought to present an undue risk to the wellbeing of participants.

The paperwork provided to the proposed participants covered most of these principles. One of the areas of difficulty is the length of time the data is retained. It was decided that the data need only be retained for the length of the study and any subsequent publication.

5.6 Analysis of interview data

In order to carry out analysis of the interviews a qualitative analytic method had to be selected. There are a number of options including; conversation analysis, interpretative phenomological analysis, grounded theory, discourse analysis or narrative analysis.

**Conversation analysis**

Conversation analysis is described as ‘the fine-grained analysis of talk as it occurs in interaction in naturally occurring situations’ (Bryman, 2008, p.494). This type of analysis applies to natural conversation only and is therefore inappropriate for interviews or for the analysis of written responses.

**Interpretative phenomological analysis (IPA)**

Smith and Eatough state that ‘the aim of IPA is to explore in detail individual personal and lived experiences and to examine how participants are making sense of their personal and social world’ (2007, pp. 35-36). IPA applies to interviews, focus groups and diaries but the focus on understanding personal experiences (King and Horrocks, 2010, p. 2050) makes it inappropriate for the more formal texts to be analysed in this research.

**Grounded theory**

Grounded theory is difficult to summarise in brief as it has developed and divided since its early days. As King and Horrocks explain, ‘grounded theory, when first developed relied on a process of inductive theory-building based on the observation of the data’ (2010, p. 19). It can be applied to both spoken and written texts in order to gain an understanding of participants’ lived experiences (King and Horrocks, 2010, p.142).
Discourse analysis

Discourse analysis can be explained as ‘the study of language in use. It is the study of meanings we give language and the actions we carry out then we use language in specific contexts (Gee and Hannaford, 2012, p. 1). Discourse analysis can be applied to both spoken and written texts.

Narrative analysis

Narrative analysis focuses on the ways in which people make and use stories to interpret the world and views narratives as ‘social products that are produced by people in the context of specific social, historical and cultural locations’ (Lawler, 2002, p. 242).

Thematic Analysis

For the purposes of this research thematic analysis was deemed an appropriate choice because of the freedom and flexibility it allows (Braun and Clarke, 2006, p. 78). Thematic analysis is frequently carried out but infrequently defined (King and Horrocks, 2010, p. 149). Braun and King state that, ‘thematic analysis is a method for identifying, analysing and reporting patterns (themes) within data’ (2006, p. 79). Discourse and narrative analysis were deemed inappropriate for this research on the basis that they tend to focus on the structure of language whereas in this research the focus was on the meaning of what was said rather than looking at how it was said. Conversation analysis was rejected as it allows only for analysis of conversation and in this part of the research interviews were to be analysed alongside written texts. The analysis carried out has similarities to both grounded theory and interpretative phenomenologic analysis. As described below the thematic analysis was inductive rather than theoretical, as with grounded theory. However the study was built on theoretical preconceptions and was not therefore directed fully towards theory development in the way that is required by grounded theory. Also, unlike grounded theory, the interview process was not cyclical so that all the interviews were conducted and coded rather than the coding of data leading to further data collection. IPA has some similarities with the thematic analysis carried out in this research in terms of the steps of the process; familiarisation with the data, identifying themes, clustering themes and constructing a summary table (King and Horrocks, 2010, p. 205). IPA also accepts that the writer can never entirely step outside their own position in producing their analysis, a point which is important to this research as the writer has first-hand experience and therefore cannot be entirely distanced from the subject matter of the
study. However, unlike this research IPA tends to focus on individual personal experiences in a social context and is wedded to a pre-existing theoretical framework.

The thematic analysis framework presented by Braun and Clarke was adopted to provide clarity and structure to the analysis. Their six phase process is set out in Table 5.4 below.

Table 5.5 Phases of thematic analysis (Braun and Clarke, 2006, p. 87)

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<thead>
<tr>
<th>Phase</th>
<th>Description of the process</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Familiarizing yourself with your data:</td>
<td>Transcribing data (if necessary), reading and re-reading the data, noting down initial ideas.</td>
</tr>
<tr>
<td>2. Generating initial codes:</td>
<td>Coding interesting features of the data in a systematic fashion across the entire data set, collating data relevant to each code.</td>
</tr>
<tr>
<td>3. Searching for themes:</td>
<td>Collating codes into potential themes, gathering all data relevant to each potential theme.</td>
</tr>
<tr>
<td>4. Reviewing themes:</td>
<td>Checking if the themes work in relation to the coded extracts (Level 1) and the entire data set (Level 2), generating a thematic ‘map’ of the analysis.</td>
</tr>
<tr>
<td>5. Defining and naming themes:</td>
<td>Ongoing analysis to refine the specifics of each theme, and the overall story the analysis tells, generating clear definitions and names for each theme.</td>
</tr>
<tr>
<td>6. Producing the report:</td>
<td>The final opportunity for analysis. Selection of vivid, compelling extract examples, final analysis of selected extracts, relating back of the analysis of the research question and literature, producing a scholarly report on the analysis.</td>
</tr>
</tbody>
</table>

There are a number of decisions to make before and during the thematic analysis (Braun and Clarke, 2006, p. 81). Below is a description of the decisions made which inform the analysis in this thesis.

**What counts as a theme?**

In order to decide what counts as a theme it is necessary to consider the question of prevalence of the theme. On a simple level it would be possible to simply count the number of instances of a theme across the data set: for example 50% of interviewees expressed a negative attitude towards the costs of the UT(LC). Braun and Clarke state that quantifiable measure (as illustrated in the costs example) may not directly equate to the ‘keyness’ of a theme. In this research it was thought necessary to consider whether a speaker made reference to a theme more than once and how much time they spend expanding upon the theme.

**A rich description of the data set, or a detailed account of one particular aspect?**

The choice between providing a rich thematic description of the entire data set and a detailed nuanced account of one particular theme or group of themes was a difficult one. Making the
question into the themes was not an option for two main reasons; to do so is not analysis in any real sense (Braun and Clarke, 2006, pp. 85-86) and it is inappropriate where the interview is only slightly structured as themes arise which are not directly (or even indirectly) related to the research questions. It was decided that a rich thematic analysis would be carried out in order to present a broad picture of the views of the interviewees.

**Inductive versus theoretical thematic analysis**

Inductive thematic analysis links the themes strongly to the data and has similarities to grounded theory. This approach does not require a strong link between the specific questions and the themes, ‘inductive analysis is therefore a process of coding the data without trying to fit it into a pre-existing coding frame, or the writer’s analytic preconceptions’ (Braun and Clarke, 2006, p. 83). This was considered a desirable approach as, especially with regard to the Scottish interviews, the writer was uncertain at the research design stage what sorts of themes might emerge. The alternative was a ‘theoretical’ thematic analysis which provides a less rich description of the data overall and a more detailed analysis of some specific aspect of the data.

**Semantic or latent themes**

A further decision relates to the level at which the themes are to be identified: at a semantic or explicit level, or at a latent or interpretative level (Boyatzis, 1998 cited in Braun and Clarke, 2006, p. 84). A semantic approach was chosen for this analysis as the analyst is not looking for anything beyond what a participant said or what has been written. The aim was to then move beyond summary of the semantic content to interpretation where the broader meanings and implications are theorized in relation to the previous literature (Braun and Clarke, 2006, p. 84). A thematic analysis at the latent level goes beyond the semantic content of the data to identify underlying ideas, assumptions and ideologies (Braun and Clarke, 2006, p.84). Whilst a latent level analysis would have been interesting it was considered inappropriate for the research questions and epistemology of the study.

**Epistemology: essentialist/ realist versus constructionist thematic analysis**

An essentialist/ realist approach theorizes motivations and meaning in a straightforward way assuming a largely unidirectional relationship between meaning and experience and language. On the other hand, a constructionist perspective suggests that meaning and experience are socially reproduced (Braun and Clarke, 2006, p. 85). For this research an essentialist/ realist approach was taken as this was considered appropriate for the types of discourse analysed.
The six-phase process

Phase 1 – familiarising yourself with the data

The data for this phase of the research were 101 pieces of data comprising 18 interviews and 83 written extracts. The written extracts were part of responses received by the English and Scottish Law Commissions in response to their consultation papers. In some cases the responses were a short email, in other cases they were more detailed reports running to thirty or more pages. In the first instance the responses had been requested from the consultees, and these were most often received by email. The balance of the responses were requested from the two Law Commissions. In the case of the Scottish Law Commission a copy of the responses was lent to the writer to scan and return. Each response was read and the part(s) of the responses that related to how old covenants should be dealt with was copied into a separate document and imported into a qualitative data analysis package. With regard to the interviews these were transcribed by the writer and then each interview transcript was checked against the original recording for accuracy. The whole of each transcript was then imported into the software package.

Phase 2 – generating initial codes

Once all the data had been imported the process of generating codes began. The writer used QSR NVivo to assist with this process. NVivo is a qualitative data analysis software package which helps a writer to organise and analyse data. The software does not analyse the data itself but rather helps to organise and search for codes. In phase 2 each piece of data was read through and codes were identified. In this iteration of the coding process the Scottish and English data was analysed separately. The approach taken was ‘data driven’ (Braun and Clarke, 2006, p. 90) to the extent that a code was created whether or not it related to the research questions. In this phase a large number of codes were generated and no relationships or hierarchy between the codes was established. The initial models for Scotland and England are presented in Figures 5.1 and 5.2 below.
Figure 5.1 Initial Thematic Map England
Figure 5.2 Initial Thematic Map Scotland
Phase 3 – searching for themes

As has been stated above, phase 2 did not allow for any connections to be shown between the different codes or any hierarchy demonstrated. This phase therefore involved looking at all the codes and exploring the relationship between them. Some codes were promoted into themes at this phase, others became subthemes and some were rejected. It also became clear that certain codes arose across both the Scottish and English data and these were therefore considered together from this point. The resultant developed thematic map is presented in Figure 5.3 below.

Figure 5.3 Developed thematic map.
This map is complicated and lacks balance with some themes, notably ‘problems’ containing a large number of subthemes and others containing relatively few subthemes.

**Phase 4 – reviewing themes**

This phase involved refining the themes to produce a set of themes that better represented the data. Some subthemes contained only a few references and in some instances these might have come from only one or two sources. In instances such as these the subtheme might be rejected as was the case with ‘leasehold in Scotland’ or merged as in the case of ‘title as a mirror’ and ‘clutter’. In this phase the themes were also considered in terms of their relationship with the research question, ‘whether the existence of obsolete restrictive covenants is problematic and whether there is a mechanism which could reduce the quantity of restrictive covenants whilst maintaining the correct balance between the rights of landowners and the rights of third parties?’ Mapping this question against the themes suggested that a reworking of the main themes as follows:

- Whether the existence of obsolete restrictive covenants is problematic.
- Whether there is a mechanism which could reduce the quantity.
- Whether the balance between the rights of landowners and the rights of third parties can be maintained.

Looking at the problems theme in Figure 5.3 there seemed to be a distinction between a problem with the law *per se*, for example that obsolete restrictive covenants might hamper the conveyancing process, and a number of constraints on this system, for example that solicitors were risk averse in the way they deal with obsolete restrictive covenants. A further theme of ‘constraints’ was therefore created which also provided an appropriate link to the theme of ‘mechanism’, as any proposed mechanism may deal with the problem but will not work effectively unless it also addresses these constraints. The final thematic map is therefore set out in Figure 5.4 below.
Phase 5 – defining and naming themes

Phase 5 involved taking each of the four themes in turn and using NVivo to produce a report. This report, referred to by NVivo as a ‘coding summary by node’, collects together all the extracts for each of the themes. The data within this report was then analysed to see exactly what the data was saying about each theme. At this stage it was also possible to use the attributes stored within NVivo to ask questions of the data. For example ‘what did legal professionals say about obsolete restrictive covenants?’

Phase 6 – producing the report

The final stage of the analysis involved reporting on the data and this report forms the subject matter of Chapter Eight.

5.7 Conclusion

This chapter has explained the rationale for the pragmatic approach to this research and the mixed methods design. It has summarised the methods of data collection adopted and the rationale for analysis of this primary data. In the following three chapters the data is presented and analysed. Chapter Six presents and analyses the data collected from the Land Registry sample, Chapter Seven presents and analyses the Tribunal data and finally Chapter Eight presents and analyses the interview and Law Commission consultation data. Chapter Nine brings the data together and maps makes recommendations for reform.
CHAPTER 6 – LAND REGISTRY DATA ANALYSIS

6.1 Introduction

The overarching aim of this chapter is to address the following research question, ‘To what extent is there a relationship between age and obsoleteness with regard to restrictive covenants?’ In 6.2, this chapter seeks to answer the question by examining the type of covenants found on the titles within the sample. In order to ascertain whether restrictive covenants continued to serve their purpose, or whether it was potentially obsolete, it was necessary to categorise them so that the usefulness of each category could later be considered. Table 6.1 therefore lists all the categories, or codes, and shows how frequently they occurred within the sample as a whole. Figure 6.1 represents this information graphically in order to provide a clearer visual representation. Section 6.3 examines the age spread of covenants across the sample, and considers the relationship between age of covenants and housing policy and legislation. In 6.4, the sample is divided into two subsamples, ‘old’ and ‘new’, in order to ascertain whether ‘old’ covenants are of a different type to ‘new’ covenants. In this section the two subsamples are compared. In order to do so, Table 6.2 lists both the number of covenants in each age category and the number that you would expect to find (if there were the same number of covenants in both the old and new subsamples). Producing an ‘expected’ count allowed the writer to compare the ‘old’ subsample to the sample as a whole and see where a covenant was significantly more frequent in the ‘old’ subsample (see Table 6.3). Those covenants where there was the highest positive difference between the actual count and the ‘expected count’ are then considered further. Section 6.5 looks at the relationship between the covenants and changes in society, with particular reference to the reduction of some types of covenant in response to new legislative measures particularly in planning and public health, and 6.6 considers whether ‘anachronistic’ covenants could be swept away.

In the sample of 600 titles there were 421 titles containing restrictive covenants; a total of 70.2% of the sample. In many instances where a title contained restrictive covenants these were imposed by more than one deed. Resultantly there were 699 deeds containing restrictive covenants. For the purposes of this analysis the deeds rather than the titles were analysed.

6.2 Types of covenant
As mentioned in Chapter Five, there were a number of choices with regard to coding the covenants in terms of how general or specific the categories should be; too general and nuances in the data would be missed, too specific and there would be insufficient numbers within each category to make comparisons and to draw inferences. The final coding frame included 31 codes. The codes and the percentage of the sample which contained each code can be seen in Table 6.1 below. A more detailed description, including examples, of each code can be found at Appendix 6.139

Table 6.1 Number of covenants in each code with percentage of titles containing each covenant

<table>
<thead>
<tr>
<th>Covenant</th>
<th>Count</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deed not supplied on first registration</td>
<td>52</td>
<td>7.4%</td>
</tr>
<tr>
<td>Number of units restricted</td>
<td>121</td>
<td>17.3%</td>
</tr>
<tr>
<td>Building line</td>
<td>95</td>
<td>13.6%</td>
</tr>
<tr>
<td>Requirement for approval of plans</td>
<td>157</td>
<td>22.5%</td>
</tr>
<tr>
<td>Restriction of building or alteration</td>
<td>204</td>
<td>29.2%</td>
</tr>
<tr>
<td>Building materials restricted or specified</td>
<td>22</td>
<td>3.1%</td>
</tr>
<tr>
<td>Minimum value</td>
<td>92</td>
<td>13.2%</td>
</tr>
<tr>
<td>Overage/clawback/ pre-emption</td>
<td>9</td>
<td>1.3%</td>
</tr>
<tr>
<td>Excavation restricted</td>
<td>62</td>
<td>8.9%</td>
</tr>
<tr>
<td>Light/ views</td>
<td>40</td>
<td>5.7%</td>
</tr>
<tr>
<td>No bricks to be made/ burnt</td>
<td>32</td>
<td>4.6%</td>
</tr>
<tr>
<td>Restriction relating to services/utilities</td>
<td>65</td>
<td>9.3%</td>
</tr>
<tr>
<td>Residential use only</td>
<td>243</td>
<td>34.8%</td>
</tr>
<tr>
<td>Residential use with specified exceptions</td>
<td>64</td>
<td>9.2%</td>
</tr>
<tr>
<td>Use restricted</td>
<td>89</td>
<td>13.0%</td>
</tr>
<tr>
<td>Sale of intoxicating liquor prohibited</td>
<td>110</td>
<td>15.7%</td>
</tr>
<tr>
<td>Restriction on removal of trees</td>
<td>54</td>
<td>7.7%</td>
</tr>
<tr>
<td>Advertising hoarding prohibited</td>
<td>91</td>
<td>13.0%</td>
</tr>
<tr>
<td>Restriction on fence height/ position</td>
<td>71</td>
<td>10.2%</td>
</tr>
<tr>
<td>Restriction on keeping animals</td>
<td>59</td>
<td>8.4%</td>
</tr>
<tr>
<td>Restriction on caravans or temporary buildings</td>
<td>98</td>
<td>14.0%</td>
</tr>
<tr>
<td>Restriction on parking/ blocking estate roads</td>
<td>58</td>
<td>8.3%</td>
</tr>
<tr>
<td>Restriction on parking caravans etc on driveways</td>
<td>63</td>
<td>9.0%</td>
</tr>
<tr>
<td>Restriction on rubbish/ pollutants</td>
<td>38</td>
<td>5.4%</td>
</tr>
<tr>
<td>Nuisance/annoyance</td>
<td>296</td>
<td>42.3%</td>
</tr>
<tr>
<td>Covenants relating to planning/ right to buy</td>
<td>28</td>
<td>4.0%</td>
</tr>
<tr>
<td>Other</td>
<td>43</td>
<td>6.2%</td>
</tr>
<tr>
<td>Restriction on TV aerial/ satellite dish</td>
<td>35</td>
<td>5.0%</td>
</tr>
<tr>
<td>Deed supplied illegible</td>
<td>1</td>
<td>.1%</td>
</tr>
<tr>
<td>Requirement for deed of covenant on sale</td>
<td>3</td>
<td>.4%</td>
</tr>
<tr>
<td>Land Registry lost deed</td>
<td>2</td>
<td>.3%</td>
</tr>
</tbody>
</table>

139 Appendix 6 refers to 28 codes rather than 31 for reasons stated below.
Figure 6.1 provides a graphic representation of which covenants were found to be the most popular. Certain of these covenants will be considered in more detail below. It can be seen that a number of covenant codes appear only once or twice; one of these codes is a comment rather than a covenant, that the deed provided by the land registry is illegible. In two instances the Land Registry was unable to locate the deed. The last of these codes is a requirement for the covenantor to ensure that on sale the purchaser enters into a deed of covenant in the same terms. This type of covenant is more appropriate where the covenant is positive, and indeed in the two deeds where this covenant was present there were also positive obligations. These three codes are removed from further analysis.

![Figure 6.1 Covenants by number](image)

**Nuisance Covenants**

Before moving onto any further discussion it is necessary to consider, albeit briefly, the most popular covenant found in the sample, the covenant not to create a nuisance. This category is an amalgamation of two categories which were identified initially; not to carry out a noxious or noisy
trade and not to create a nuisance or annoyance. Examples of the wording of this covenant can be found in Appendix 6, but in many instances the wording was very similar. An example of both types of wording is quoted below:

‘That no noxious noisy or offensive trade or manufacture shall be carried on or permitted or suffered to be carried on upon the said land or any part thereof’ (WK118554)

‘(4) Not to do cause permit or suffer upon the land hereby transferred anything which may be or become a nuisance or annoyance or which may cause damage to the Transferor...’ (WM452449)

There is some debate as to where the meaning of the word ‘nuisance’ in a restrictive covenant sits within the common law of nuisance. Under the common law, in order to be successful in a claim for nuisance, the claimant must prove; an indirect interference with the enjoyment of land, that the interference was unreasonable and that the interference caused damage to the claimant. If all occupiers benefit from the protection of the common law one might think that a restrictive covenant is unnecessary. Indeed in Harrison v Good (1870-71) L.R. 11 Eq. 338 this was the position taken by Vice-Chancellor Bacon:

Throughout the whole of this case I have been endeavouring to find out where the legal nuisance is. If it is not a legal nuisance, I have nothing to do with it. Unless the nuisance complained of is one for which an indictment will lie, or an action can be maintained, in my opinion it is no nuisance within the terms of this covenant (p. 353).

This position was not accepted in Tod-Heatly v Benham (1888) 40 Ch. D. 80 where Lindley L.J. stated, ‘the whole object of having a covenant against nuisance is to give the covenantee some protection in addition to what he would have had without the covenant;’ (p. 94). In any event a covenant not to create a nuisance is usually coupled with a requirement not to create an annoyance, and the authorities suggest that such a covenant does afford more protection than the tort of nuisance (Shepherd v Turner [2006] EWCA Civ 8, Ives v Brown [1919] 2 Ch. 314). In Dennis v Davies [2009] EWCA Civ 1081 it was held that the meaning of nuisance and annoyance covenants were wide enough to include building an extension to an existing house which, when built, would be an annoyance. In the case of Coventry School Foundation Trustees v Whitehouse [2013] EWCA Civ 885 the Court of Appeal held that building a school would not breach the nuisance covenant as the additional inconvenience caused by the school related to traffic problems and these would not be on the burdened land. Offensive and noxious trades and businesses must be interpreted in the
context of the place where they are carried out. There is no specific legal definition of ‘offensive’ and each case will very much turn upon its facts.\footnote{140}

### 6.3 Covenant Age

In order to consider whether there was any relationship between age and likelihood that the restrictive covenant was obsolete the first analysis carried out merely correlated covenants to age. The oldest covenant in the sample was dated 2\textsuperscript{nd} May 1836 and the most recent covenant was 17\textsuperscript{th} April 2013 (only three months before the sample was collected). Figure 6.2 below shows the spread of the age of the covenants across the sample.\footnote{141}

![Figure 6.2 Percentage covenants by age](chart.png)

Figure 6.2 Percentage covenants by age

\footnote{140}{For a summary of the authorities on this point see Newsom, 2013 p. 232.}

\footnote{141}{Figure 6.2 was produced using SPSS. Each covenant was categorised in a number of ways including which ten-year period it fell within (see Appendix 4).}
The number of covenants imposed correlates to a large extent with construction of residential dwellings. Whilst restrictive covenants may be imposed on both commercial and residential real estate, the majority of properties within the sample appeared to be residential. Broadly speaking the number of covenants in each ten-year period has increased over the 177 years represented in the sample with the exceptions of the war years, the gradual recovery after the second world war and the property crash in the late 2000s. Figure 6.3 shows the number of houses built in Great Britain between 1900 and 2011.

![Graph showing number of new dwellings built in Great Britain between 1900 and 2011](image)

Figure 6.3. New dwellings built in Great Britain 1900-2011 (Graph is writer’s own using data from Hicks & Allen (1999) and the Department for Communities and Local Government (2014)).

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142 It was difficult to be certain whether each title was residential or commercial but the addresses of most suggested a high proportion of residential properties.

143 This data is extrapolated from Hicks and Allen (1999) and Department for Communities and Local Government (“Live tables on house building table 208”, 2014). The data from 1900-1990 was read from a graph and is therefore an approximation rather than representation of the exact figures. With regard to the government data the figures were presented for a period of time crossing two years and was plotted as the first mentioned year for consistency with the other data.
Although Figure 6.3 does not show the Victorian era, the literature suggests that this was a time of ‘laissez faire’ ideology resulting in scant housing provision (Stewart, 2005 p. 526; Mullins and Muire, 2006, p. 18). Some development was carried out by philanthropists, but as Merrett (1979, pp. 18-19) stated, ‘The most vital achievement of the philanthropic movement was its failure’. The dramatic dips for the two world wars are particularly evident, as are the increases that were to follow. Whilst the First World War did not lead to significant destruction of housing stock it did result in a virtual halt in house building (Holmans, 1987, p. 55). The demand for housing following the First World War was partly the result of the decline in previous decade and partly that those who fought returned with an expectation of improvements in living conditions (Mullins and Murie, 2006, p. 19). Lloyd George’s ‘Homes for Heroes’ campaign obliged local authorities to assess and meet the housing needs of their communities in return for state subsidies (Garside, 1988, p. 30). In the years that followed the First and Second World Wars the bargaining power of the working classes increased, especially after the Russian Revolution of 1917 when the government was able to see the results of mass discontent (Ward, 2011, p. 37). The period between the wars showed considerable growth in housing, especially in the 1930s when 2,700,000 homes were built in England and Wales (Cullingworth and Nadin, 2000, p. 17), but whilst shortages in housing were reduced they were not eliminated (Wilcox, 1999 p. 15). This boom was in part a result of the stagnation in house building during the war, in part the result of an increase in the numbers in employment and in part an increase in the adult population.\footnote{1921-1931 saw the largest increase in the adult population ever (Holmans, 1987, p.61).} Furthermore, innovations in lending and availability of credit further facilitated this growth (Cowan, 2010, p. 336).

The Second World War led to a virtual halt in building as manpower and materials were redistributed to the war effort and the equivalent of a year’s output was destroyed by enemy action (Wilcox, 1999 p. 14). Local authority development dominated the post-war years and increased development made inroads into housing shortages (Mullins and Murie, 2006, p. 40). Successive Conservative governments between 1979 and 1997 reversed this trend with a focus on privatization and deregulation. House building remained relatively steady until the global financial crisis in 2007/8 led to a severe drop in construction. The government reported that the number of applications to start building new homes in UK more than halved between September 2007 and September 2008 (House of Commons Communities and Local Government Committee, 2009, evidence 92).
6.4 Comparison of ‘old’ and ‘new’ covenants

In order to assess the extent to which the age of restrictive covenants registered on titles in England impacts on their likely efficacy, enforceability and usefulness, the sample was then divided into two, ‘old’ and ‘new’ covenants. The definition of an old covenant was one which was dated before 1934. This cut off point was selected as in the 1991 Law Commission Report, the Law Commission recommended that covenants over 80 years old would lapse, ‘our proposal is that after a fixed period of eighty years from the original creation of a restrictive covenant, it is to be considered obsolete unless there is proof that it is not’ (The Law Commission, 1991, para. 3.18).

Nearly 30% of the deeds containing restrictive covenants were ‘old’ in accordance with this definition. The next question is whether the old covenants are more likely to be obsolete. It is important to note at this point that it was never anticipated that exhaustive inferences would be forthcoming from this comparison; clearly in law each case turns on its own individual facts and it is never possible to be certain what would happen if a dispute regarding an individual restrictive covenant were to come to court. The aim of this analysis was merely to ascertain whether trends regarding likely obsoleteness could be identified.

Table 6.2 below shows the number of covenants of each type represented in the sample according to age. As the old covenants made up only 30% (rather than half) of the sample the number of covenants in each category within this subsample will tend to be lower. Therefore, the table also provides an ‘expected figure’ to show the number anticipated if each of the categories, old and new, had been equally represented in the sample.  

\[\text{The ‘expected’ figure takes the total number of each covenant and then multiplies by 0.3 to provide the ‘expected old count’ and 0.7 to provide the ‘expected new count’}.\]
Table 6.2 Difference between actual and expected number of covenants in old subsample.

<table>
<thead>
<tr>
<th>Covenant Description</th>
<th>Old Count</th>
<th>Expected Old Count</th>
<th>New Count</th>
<th>Expected New Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deed not supplied on first registration</td>
<td>20</td>
<td>16</td>
<td>31</td>
<td>36</td>
</tr>
<tr>
<td>Number of units restricted</td>
<td>24</td>
<td>36</td>
<td>97</td>
<td>85</td>
</tr>
<tr>
<td>Building line</td>
<td>57</td>
<td>29</td>
<td>38</td>
<td>67</td>
</tr>
<tr>
<td>Requirement for approval of plans</td>
<td>40</td>
<td>47</td>
<td>117</td>
<td>110</td>
</tr>
<tr>
<td>Restriction of building or alteration</td>
<td>63</td>
<td>61</td>
<td>141</td>
<td>143</td>
</tr>
<tr>
<td>Building materials restricted or specified</td>
<td>9</td>
<td>7</td>
<td>13</td>
<td>15</td>
</tr>
<tr>
<td>Restriction relating to services/utilities</td>
<td>3</td>
<td>20</td>
<td>62</td>
<td>46</td>
</tr>
<tr>
<td>Residential use only</td>
<td>53</td>
<td>73</td>
<td>190</td>
<td>170</td>
</tr>
<tr>
<td>Minimum value</td>
<td>76</td>
<td>28</td>
<td>16</td>
<td>64</td>
</tr>
<tr>
<td>Overage/clawback/ pre-emption</td>
<td>1</td>
<td>3</td>
<td>8</td>
<td>6</td>
</tr>
<tr>
<td>Excavation restricted</td>
<td>34</td>
<td>19</td>
<td>28</td>
<td>43</td>
</tr>
<tr>
<td>Light/ views</td>
<td>11</td>
<td>12</td>
<td>29</td>
<td>28</td>
</tr>
<tr>
<td>No bricks to be made/ burnt</td>
<td>22</td>
<td>10</td>
<td>10</td>
<td>22</td>
</tr>
<tr>
<td>Residential use with specified exceptions</td>
<td>26</td>
<td>19</td>
<td>38</td>
<td>45</td>
</tr>
<tr>
<td>Use restricted</td>
<td>46</td>
<td>27</td>
<td>43</td>
<td>62</td>
</tr>
<tr>
<td>Sale of intoxicating liquor prohibited</td>
<td>43</td>
<td>33</td>
<td>66</td>
<td>76</td>
</tr>
<tr>
<td>Restriction on removal of trees</td>
<td>0</td>
<td>16</td>
<td>54</td>
<td>38</td>
</tr>
<tr>
<td>Advertising hoarding prohibited</td>
<td>14</td>
<td>27</td>
<td>77</td>
<td>64</td>
</tr>
<tr>
<td>Restriction on fence height/ position</td>
<td>17</td>
<td>21</td>
<td>54</td>
<td>50</td>
</tr>
<tr>
<td>Restriction on keeping animals</td>
<td>4</td>
<td>18</td>
<td>55</td>
<td>41</td>
</tr>
<tr>
<td>Restriction on caravans or temporary buildings</td>
<td>38</td>
<td>29</td>
<td>60</td>
<td>69</td>
</tr>
<tr>
<td>Restriction on parking/ blocking estate roads</td>
<td>6</td>
<td>17</td>
<td>52</td>
<td>41</td>
</tr>
<tr>
<td>Restriction on parking caravans etc on driveways</td>
<td>2</td>
<td>19</td>
<td>61</td>
<td>44</td>
</tr>
<tr>
<td>Restriction on rubbish/ pollutants</td>
<td>7</td>
<td>11</td>
<td>31</td>
<td>27</td>
</tr>
<tr>
<td>Nuisance/annoyance</td>
<td>95</td>
<td>89</td>
<td>201</td>
<td>207</td>
</tr>
<tr>
<td>Covenants relating to planning/ right to buy</td>
<td>0</td>
<td>8</td>
<td>28</td>
<td>20</td>
</tr>
<tr>
<td>Other</td>
<td>7</td>
<td>13</td>
<td>36</td>
<td>30</td>
</tr>
<tr>
<td>Restriction on TV aerial/ satellite dish</td>
<td>3</td>
<td>11</td>
<td>32</td>
<td>25</td>
</tr>
</tbody>
</table>

In only a small number of cases was the age distribution between the covenant types broadly as expected; notably this was with regard to the most popular covenant, that against creating a nuisance or annoyance. Of most interest to this research are the covenants that are represented in higher than expected numbers in the old covenant category, these are shown by a high positive percentage difference in Table 6.3 and include the following:

- Deed not supplied on first registration
- Building line
- Building materials restricted or specified
- Minimum value
- No bricks to be made/ burnt
- Use restricted
- Sale of intoxicating liquor prohibited
- Restriction on caravans or temporary buildings

Table 6.3 Difference between actual and expected number of covenants in old subsample.

<table>
<thead>
<tr>
<th>Covenants</th>
<th>Old Count</th>
<th>Expected Old Count</th>
<th>Difference</th>
<th>% Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deed not supplied on first registration</td>
<td>20</td>
<td>16</td>
<td>4</td>
<td>22%</td>
</tr>
<tr>
<td>Number of units restricted</td>
<td>24</td>
<td>36</td>
<td>-12</td>
<td>-52%</td>
</tr>
<tr>
<td>Building line</td>
<td>57</td>
<td>29</td>
<td>29</td>
<td>50%</td>
</tr>
<tr>
<td>Requirement for approval of plans</td>
<td>40</td>
<td>47</td>
<td>-7</td>
<td>-18%</td>
</tr>
<tr>
<td>Restriction of building or alteration</td>
<td>63</td>
<td>61</td>
<td>2</td>
<td>3%</td>
</tr>
<tr>
<td>Building materials restricted or specified</td>
<td>9</td>
<td>7</td>
<td>2</td>
<td>27%</td>
</tr>
<tr>
<td>Restriction relating to services/utilities</td>
<td>3</td>
<td>20</td>
<td>-17</td>
<td>-550%</td>
</tr>
<tr>
<td>Residential use only</td>
<td>53</td>
<td>73</td>
<td>-20</td>
<td>-38%</td>
</tr>
<tr>
<td>Minimum value</td>
<td>76</td>
<td>28</td>
<td>48</td>
<td>64%</td>
</tr>
<tr>
<td>Overage/clawback/ pre-emption</td>
<td>1</td>
<td>3</td>
<td>-2</td>
<td>-170%</td>
</tr>
<tr>
<td>Excavation restricted</td>
<td>34</td>
<td>19</td>
<td>15</td>
<td>45%</td>
</tr>
<tr>
<td>Light/ views</td>
<td>11</td>
<td>12</td>
<td>-1</td>
<td>-9%</td>
</tr>
<tr>
<td>No bricks to be made/ burnt</td>
<td>22</td>
<td>10</td>
<td>12</td>
<td>56%</td>
</tr>
<tr>
<td>Residential use with specified exceptions</td>
<td>26</td>
<td>19</td>
<td>7</td>
<td>26%</td>
</tr>
<tr>
<td>Use restricted</td>
<td>46</td>
<td>27</td>
<td>19</td>
<td>41%</td>
</tr>
<tr>
<td>Sale of intoxicating liquor prohibited</td>
<td>43</td>
<td>33</td>
<td>10</td>
<td>24%</td>
</tr>
<tr>
<td>Restriction on removal of trees</td>
<td>0</td>
<td>16</td>
<td>-16</td>
<td></td>
</tr>
<tr>
<td>Advertising hoarding prohibited</td>
<td>14</td>
<td>27</td>
<td>-13</td>
<td>-95%</td>
</tr>
<tr>
<td>Restriction on fence height/ position</td>
<td>17</td>
<td>21</td>
<td>-4</td>
<td>-25%</td>
</tr>
<tr>
<td>Restriction on keeping animals</td>
<td>4</td>
<td>18</td>
<td>-14</td>
<td>-343%</td>
</tr>
<tr>
<td>Restriction on caravans or temporary buildings</td>
<td>38</td>
<td>29</td>
<td>9</td>
<td>23%</td>
</tr>
<tr>
<td>Restriction on parking/ blocking estate roads</td>
<td>6</td>
<td>17</td>
<td>-11</td>
<td>-190%</td>
</tr>
<tr>
<td>Restriction on parking caravans etc on driveways</td>
<td>2</td>
<td>19</td>
<td>-17</td>
<td>-845%</td>
</tr>
<tr>
<td>Restriction on rubbish/ pollutants</td>
<td>7</td>
<td>11</td>
<td>-4</td>
<td>-63%</td>
</tr>
<tr>
<td>Nuisance/annoyance</td>
<td>95</td>
<td>89</td>
<td>6</td>
<td>6%</td>
</tr>
<tr>
<td>covenants relating to planning/ right to buy</td>
<td>0</td>
<td>8</td>
<td>-8</td>
<td></td>
</tr>
<tr>
<td>Other</td>
<td>7</td>
<td>13</td>
<td>-6</td>
<td>-84%</td>
</tr>
<tr>
<td>Restriction on TV aerial/ satellite dish</td>
<td>3</td>
<td>11</td>
<td>-8</td>
<td>-250%</td>
</tr>
</tbody>
</table>
The disparity between the distribution of the types of covenants between the two categories can be seen in Figure 6.4 below.
Figure 6.4 comparison of the actual and expected number of old covenants in each category.
What follows is a consideration of these highly represented old covenants to establish; firstly why they were more popular in the old sample than the new, and secondly the likelihood that they might be obsolete.

**Deed not supplied on first registration**

With regard to the first of these covenant types it is unsurprising that a disproportionately high percentage of this covenant was found within the old subset. The land registry can only reflect on the register deeds that are presented to them at first registration.\(^{146}\) If a deed is referred to within the deed which is evidencing title, but the deed itself has been lost, it is clear it once existed but its content cannot be put on the register. Clearly older deeds have had many more years to become mislaid. Interestingly, across the whole sample this category was not uncommon; 7.6% of deeds containing covenants fell within this category. This is not a covenant type that is likely to cause many problems. A policy can be obtained online for a residential property at the cost of a few hundred pounds; this policy will benefit successors in title and mortgage lenders so, in theory, only one owner will have to pay the premium (subject to ensuring the level of indemnity keeps up with property prices).

**Building line**

Building line covenants are those which restrict the distance a building can be erected from the road. For example; ‘No building shall be erected within ten feet of Cravells Road or the Harpenden Road’ (HD349973). As stated above, the building line will be construed in accordance with the layout of roads at the date of the covenant; in the case of the example above this is 25\(^{th}\) July 1863. There can, therefore, be difficulties in interpreting these covenants, as measurements will need to be made from plans which are often badly drawn and may lack a scale. The reasons for the popularity of these covenants within the older sample is likely to be related to the fact that prior to the development of a comprehensive planning system,\(^{147}\) restrictive covenants were the only way a developer could ensure that the burdened land was not, in the future, used in such a way as to be detrimental to any retained land. The seller of the land in the 1863 deed was The British Land Company Limited, clearly a commercial entity interested in maintaining the value of its retained land.

\(^{146}\) The procedure for first registration of title where deeds have been lost can be found in Land Registry Practice Guide 2.

\(^{147}\) For a more detailed discussion see below.
Building materials restricted or specified

Building material restrictions appeared in 4% of the old deeds containing covenants, whereas they only appeared in 2.6% of the new sample. Whilst there is a clear difference between the old and the new subsamples, the numbers are not significant and therefore only a brief discussion is warranted. In these covenants the seller stipulates the materials used in building, for example, ‘Each house and fence walls bounding roads to be of rock faced stone masonry...’ (SYK516626). Again the slight reduction in the popularity of this covenant might relate to the increase in planning legislation or building regulations, or perhaps a change in the way that land is sold; perhaps the new subsample contained a higher percentage of land sold already developed.

Minimum value

From the list of the most frequent old covenants there are some that can be dismissed as not being useful, most notably the requirement for a property to be a minimum value, for example, ‘The minimum value of any detached house should be £500 and of semi-detached houses £750 per pair’ (SYK516626). This category of covenant has rarely been added to a conveyance in the last 50 years, and all those 1920s and 1930s covenants will be obsolete as the values are by today’s standards so low. The most modern example of this covenant contained within the sample is in a deed dated 18th April 1990 and the minimum value is £25,000. The land burdened by this covenant was last sold in 2007 for £140,000. The aim of this type of covenant is clearly to ensure a minimum standard of development which might be better controlled through the planning system.
Another category of covenant which has become increasingly unpopular over time is a restriction on making or burning bricks on site. It is assumed that the fall in the popularity of manufacturing bricks on site is largely due to increase in mass production of bricks. In addition making or burning bricks would be an industrial use which would be prohibited on residential land by modern planning legislation.\textsuperscript{148}

\textbf{Figure 6.5 The falling popularity of the minimum value covenant}

\begin{itemize}
\item Covenant not to make or burn bricks on site
\end{itemize}

\textsuperscript{148} The Town and Country Planning (Use Classes) Order 1987 (as amended) categorises different planning uses. Residential use is Class C3 and Industrial is Class B2. While it is possible to change between certain use classes it is not possible to move from C3 to B2 without planning permission.
Figure 6.6 The falling popularity of the covenant restricting making or burning bricks on site.

**Use restricted**

Not all the popular old covenants are so easy to assess, and indeed dismiss, in terms of their usefulness. In the case of covenants where the use was restricted, in some way other than to residential use only, there was a wide range of different types of restriction. In coding the covenants it was found that there was a very large number of covenants relating to using premises as residential only. In fact a covenant restricting use to residential only appeared in almost 35% of the deeds containing covenants. When added to covenants restricting use to residential with some exceptions\(^{149}\) this increased to 44%. However, within the sample it was found that restricting use to residential was not the only way that restrictive covenants were used to control use. There was a large variety of other types of restriction from those aimed at preventing a single specific use such as a garage,\(^{150}\) to listing undesirable uses. Whilst the old sample showed a smaller percentage of covenants restricting use to residential (26% as against 39% in the new subsample), there was a larger percentage restricting specific uses (22% in the old subsample as against only 9% in the new subsample). Often in the old subsample the list of restricted uses was very long, leading the

\(^{149}\) This category of covenant typically restricted use to residential or professional, or residential or retail (see Appendix 4 for further details.)

\(^{150}\) Presumably to protect an existing business.
modern reader to wonder whether it would have been simpler to merely restrict the use to residential. In fact the total percentage of old deeds containing a restriction on use (either residential, residential with exceptions or other) was more than the new subsample, 60% as against 53%.

Looking at all 46 old use restrictions did reveal some wonderfully anachronistic uses; soap factories, glue manufactories, melter of fat, tallow chandler and horse flesh boiler to name but a few. Clearly these uses are both socially defunct and would, in any event, be adequately controlled by environmental health and planning legislation. Seemingly these are the kinds of covenants to which critics of the current system refer (see Ruoff, 1969, p.134; Newsom, 2013, p. vi). Further analysis was required to ascertain the percentage of these old use restrictions which were anachronistic. A use covenant was considered anachronistic if it protected a use no longer carried out, usually because it related to a trade that no longer existed. Clearly this involved a value judgement and the uses considered anachronistic are listed below. In some instances the use could still be carried out in modern society but planning regulation meant that it was unlikely that a restriction was required. In any event these unusual but not anachronistic uses, for example blacksmith, were always combined with other uses which were clearly anachronistic.

| Alkali works | Dogskinner | Slaughterhouse |
| Asylum | Dyehouse | Slover |
| Beanfeasters | Fellmonger | Smith |
| Blacksmith | Gas maker | Soap factory |
| Bleacher | Glass work | Steam engine foundry |
| Boiler | Glue factory | Stove dresser |
| Boiler of horseflesh | Hospital for Infectious Diseases | Sugar baker |
| Boiler of resin or tar | Iron foundry | Tallow chandler |
| Bonegrinder | Lime burner | Tinman |
| Bowking house | Lunatic asylum | Tripeman |
| Candle manufactory | Melter of fat | Velvet dresser |
| Catgutspinner | Manure factory | Vitriol work |
| Chain maker | Pipe maker | Wheelwright |
| Copper work | Printing work | Working brazier |
| Cotton mill | Salt works | |
| Currier | Scavenger | |

Applying this analysis only 19 of the 46 uses were deemed anachronistic. There is little judicial guidance regarding out-moded uses as the owner of the burdened land is unlikely to apply to remove a covenant which causes him no problems. Others, whilst expressed in somewhat quaint language, could still apply today (for example using land for ‘beanfeasters’). In the context of the
whole sample of 699, the 19 deeds containing clearly anachronistic uses makes up only 3%. As this represents a small percentage of all deeds, it would seem that the contribution of these oft quoted covenants to the argument in favour of an easy mechanism for removal is small.

**Sale of intoxicating liquor**

Covenants restricting the sale of intoxicating liquor were popular across both the old and the new subsample. A total of 16% of titles contained a covenant restricting the sale of alcohol. The covenant was more popular in the old sample than new, with 20.5% of the old subsample containing this covenant and 14% of the new subsample containing this covenant. The subdivision into old and new fails to tell the whole story. If we first look at the number of these covenants over time we can see a general rise and then decline in numbers (see Figure 6.7 below).

![Figure 6.7 Age spread of covenants restricting the sale of alcohol](image-url)

If we further show the number of deeds containing this covenant against what we would expect according to the number of deeds represented by the age category, the results are even clearer. We can see in Figure 6.8 that generally until the end of the 1960s the covenant restricting the sale
of alcohol was more popular than expected and thereafter the trend was reversed. Covenants restricting the sale of alcohol seem particularly to have fallen out of favour since the 1980s. This may well be the result in changes in planning and licensing law.

Figure 6.8 Comparison of the actual and expected number of covenants restricting the sale of alcohol across time

Restriction on caravans and temporary buildings

This restriction varies in wording more considerably than covenants relating to sale of alcohol. Examples include:151

‘5. TEMPORARY ERECTIONS - No temporary building of any kind is to be erected on any lot except sheds or workshops to be used only for the works incidental to the erection of the houses or other structures to be built thereon or on an adjoining lot.’ (T230062 – 1887)

‘(e) Not to erect or place or allow to remain upon the property hereby conveyed any hut shed caravan house on wheels or other chattel intended for use as a dwelling or sleeping apartment’. (CL142668 – 1977)

151 These examples were selected randomly from a list of all deeds containing this category of covenant.
‘2. USER (a) No temporary buildings caravans tents encampments or exhibitions shall be allowed... ‘(ESX228936 – 1929)

‘4. No noisy noxious or offensive trade or business should be carried on upon any part of land thereby conveyed nor should any hut shed caravan house-on-wheels or other chattel adapted or intended for use as dwellinghouse or sleeping apartment nor any booths shows swings or roundabouts to be erected placed or used thereon. ‘(HP326309 – 1924)

‘4. No building shall be erected or used as a shop workshop or factory and no trade business calling or manufacture shall be carried on upon any or either of the said plots nor shall any operative machinery be placed thereon nor any hut shed caravan house on wheels or other chattel adapted or to be used for a dwellinghouse or sleeping apartment.’(K918976 – 1899)

‘7. No temporary buildings of any kind shall at any time be erected on any plot other than Sheds and workshops to be used only for works incidental to the erection of permanent buildings thereon No Plot shall be used for the storage of building materials or lumber of any description which may in the opinion of the Vendors be considered an annoyance or prejudicial to the interest of the Purchaser nor shall Gipsies or others be allowed to encamp upon any Plot.’(NGL34501 – 1923)

‘5. No hut shed caravan house on wheels or other chattel intended for use as a dwelling or sleeping apartment shall be erected or placed upon the said land.’ (SGL208075 – 1938)

‘... will not make place or use or permit to be made placed or used upon any part of the premises a hut shed caravan House on Wheels or other chattel adapted or intended for use as a dwellinghouse or sleeping room... ‘(SY577206 – 1888)

Restrictions on the erection of temporary buildings or caravans are more prevalent in the old subsample, where they are contained within 18% of deeds, than in the new subsample, where they are contained within 12% of deeds. The trend is similar (but not as marked) as that of the covenants restricting the sale of alcohol and can be seen in Figure 6.9
Figure 6.9 Comparison of the actual and expected number of covenants restricting caravans and temporary buildings across time.

However, this does not show a new tolerance of caravans, quite the opposite. There is merely a change of focus away from prohibiting temporary buildings and sleeping in caravans, to concerns regarding blocking roads with caravans and boats. This other type of covenant has been dealt with separately as it tends to be more clearly related to concerns about parking and the aesthetics of the neighbourhood (caravans can be unattractive) than to concerns about use (accommodating travellers and fair grounds).
It is hardly surprising that this type of covenant has become prevalent since the 1970s with the increase in cars and therefore parking problems. Whilst caravans have a long history,\textsuperscript{152} they only became really popular much later and this is reflected in the rise of the covenant against keeping one on a driveway or estate road.

6.5 \textbf{Impact of societal change and changes in the legal landscape}

The forgoing analysis is largely positivist and illustrates that there has been a shift in popularity with regard to certain types of covenant. Some popular categories of covenant are relatively steady over time, most notably the covenant not to create a nuisance which is discussed in 6.2 above. Figure 6.11 demonstrates a much closer correlation between the number of nuisance covenants in the sample and the number of covenants expected over time than the covenants discussed above.

\textsuperscript{152} The first purpose built touring caravan was created in 1885 and the Caravan Club of Great Britain and Ireland was founded in 1907 (National Motor Museum, 2009).
This research is interested in not only positivist empirical analysis but also a more interpretivist view of what might have happened over time. Many restrictive covenants are a response to the society in which they are created. This is clearly demonstrated in the anachronistic uses described in 6.4. Advances in technology are reflected in the rise of the number of covenants relating to parking and blocking of estate roads and television aerials. Changes in attitudes may also have an impact; concerns relating to alcohol consumption and the rise of the temperance movement might have impacted on the number of covenants restricting alcohol sale in Victorian England. Whilst licensing legislation had been in existence since at least 1552 (Nicholls, 2009 p. 5) alcohol consumption and drunkenness led to serious concerns during the Victorian era (Harrison, 1971, p. 19). The history of alcohol and the temperance movement are outside the scope of this research but it is worth noting that between 1830 and 1873 there were a large number of national temperance organizations supporting a range of aims from moderation to teetotalism (Harrison, 1971, p. 141) and this may well have impacted on practices relating to land.

Whilst there are some specific reasons for the discrepancies between the expected and anticipated numbers in the subsets, there are also some general reasons. As previously stated, in the early days of restrictive covenants there was no unified system of planning law or policy, and therefore the only way in which development could be restricted was through the private system of

Figure 6.11 Comparison of the actual and expected number of covenants restricting creating a nuisance or annoyance across time.
restrictive covenants. Regulation of development prior to the Public Health Act of 1875 was unusual (Ashworth, 1954, p. 24). Early housing and planning policy was driven by fear of disease, and legislation was enacted with a view to clearing slums (Swenarton, 1981, p. 27). The first planning legislation was passed in 1909, The Housing, Town Planning Etc Act, by the Liberal government. The legislation was a disappointment to the town planning movement, but it did make town planning a local government function (Ward, 2011, p. 29). Further legislation followed in 1919, 1923, 1924, 1930, 1932 and 1935. In the 1930s housing and planning began to be separated legislatively, but it would be a mistake to imagine that local authorities had anything like the powers to control planning that they have at their disposal today. With regard to private schemes developers had the upper hand:

development control, even for an approved scheme, was usually a formality since the scheme itself effectively permitted development to the extent of its proposals. Even in the occasional instances when permission was refused, enforcement powers were very limited (Ward, 2011, p.44).

The Town and Country Planning Act 1947 first gave planning authorities powers to refuse or impose conditions on detailed aspects of all development proposals and effective enforcement powers (Ward, 2011, p. 101).

Whilst this discussion of housing and planning history is necessarily extremely brief, it does provide a context for some of the historical changes in covenant use. The lack of centralised planning policy may be the reason for the increased numbers of covenants in the old sample relating to development issues such as protecting a building line or restricting building materials. This lack of a public law system of planning and public health legislation is likely to have impacted on the popularity of covenants restricting sale of intoxicating liquor and use restrictions. In order to use land for the sale of alcohol now the owner of that land would need planning permission for A1 use under the Town and Country Planning (Use Classes) Order 1987 and, in addition, would need a premises licence for the sale of alcohol under the Licensing Act 2003. This was not the case before the Second World War.

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6.6 Removal of anachronistic covenants from the register

Returning to the research question posed at the beginning of this chapter, ‘to what extent is there a relationship between age and obsoleteness with regard to restrictive covenants? In Chapter Three at 3.4 it was stated that a covenant is obsolete if it either fails to serve its original purpose, or it is no longer of substantial value or utility to the covenantee. The analysis has demonstrated that, particularly with regard to use covenants and certain development covenants, age does impact on whether a covenant serves its original purpose and the extent to which it is valuable or useful. However, we have seen in 6.4 that a relatively small number of use covenants can easily be dismissed as anachronistic. In fact the viability of sweeping away these covenants would be diminished further if one considers the other covenants contained within the same deed. Anachronistic use covenants are commonly included with other covenants which are arguably still valuable, notably the most common of all restrictive covenants, ‘not to create a nuisance or annoyance’. Only two deeds which contained an anachronistic use covenant did not contain a nuisance covenant. Whilst these entire could be removed from the register without loss, they make up only 0.3% of all deeds in the sample. Below is an example of a truly anachronistic restrictive covenant:

1 A Conveyance dated 22 February 1928 made between (1) Clementia Tinball-Carill-Worsley (2) Gerald England Tunnecliffe and Herbert Clifford Brooke Taylor (3) Charles Moss and Herbert Douglas Moorhouse and (4) Manchester Corporation contains the following covenants:-

Purchasers covenant with the Vendor:
...to the intent that this covenant may enure for the benefit of the Carrill-Worsley estate that the said land shall not nor shall any part thereof be used as a place of public workshop or slaughter house or as a manufactory or operation for the making of vitriol glass copper iron or any mineral or minerals or any alkali or other salt or for any chemical operations of any kind or as a brass foundry forge or furnace dyehouse bowking house stove printing works mill or factory and that there shall not be carried on upon or in the said land or any part thereof the trade or business of a melter of fat slaughterer butcher pipe maker or burner lime burner or velvet dresser brickmaker smith wheelwright tallow chandler soap boilier carrier brewer distiller sugar baker brazier human dyer slover or dresser

This issue of multiple covenants contained within a deed is problematic. Arguably where a deed contains one covenant, such as that not to create a nuisance, which may be of value, all the covenants will remain on the title. It is difficult to envisage a process by which the wheat could be sorted from the chaff. The entry above could be removed from the title as it appears to be anachronistic in its entirety.
The relationship between age and enforceability is a separate question. A number of separate issues arise:

- Would the owner of the burdened land ever wish to breach the covenant?
- Has the age of the covenant resulted in problems with identification of the benefitting owner(s)?
- Has the age of the covenant led to a change in the neighbourhood resulting in the covenant becoming obsolete under the Law of Property Act 1925 s84(1)(a)?

These questions are considered separately below.

**Would the owner of the burdened land ever wish to breach the covenant?**

Where this question is answered negatively the covenant is likely to remain on the title. The law in England makes no provision for sweeping away ‘harmless’ covenants. As will be noted in Chapter Seven, applications to discharge restrictive covenants are relatively rare and are expensive. It is argued in Chapter Two that this is contrary to the mirror principle of land registration. The success of Scotland’s reforms may shed further light on this issue; these are also considered in detail in Chapter Seven.

**Has the age of the covenant resulted in problems with identification of the benefitting owner(s) or benefitting land?**

This question may often be answered in the affirmative. The law as it stands makes no requirement that restrictive covenants are registered on the title of the benefitting land. Where the covenant is imposed by an old deed the benefitting land may be identified by an old map with no scale and with no modern points of reference. The extent of the benefitting land may then require considerable research by experts at significant cost. The issue with regard to the benefitting owner may be a separate one which can cause significant difficulty, particularly where the covenant relates to obtaining consent. In some instances the party expressed to benefit no longer retains land, in others a company may have been dissolved, where there is a building scheme the benefitting owners may be all around. Again these are issues of evidence which may need to be presented to the UT(LC) should the owner of the burdened land chose to apply.

**Has the age of the covenant led to a change in the neighbourhood resulting in the covenant becoming obsolete under the Law of Property Act 1925 s84(1)(a)?**

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154 This will change if the Law Commission’s 2011 recommendations become law (Law Commission, 2011).
In Chapter Seven an analysis of recent UT(LC) decisions is presented. From this analysis two things are clear; firstly applications are rarely made under s84(1)(a) alone, and secondly, where such applications are made they rarely succeed.

6.7 Conclusion

This type of analysis of the nature of restrictive covenants registered on titles in England has not been carried out before. The results of the analysis are interesting in that they show that there are anachronistic covenants but that these are often intermingled with covenants that are not. Whilst anachronistic covenants ‘clutter’ titles they are problematic only to the extent that they blur the reflection in the mirror of land registration. This blurring is contrary to a utilitarian philosophical stance. Bentham believed that the law should be codified in such a way that the public at large would have access to it and be able to understand it. Interpretation of restrictive covenants on registered titles is not an area in which the public can proceed without expert help. Whether a proposed activity constitutes a ‘nuisance or annoyance’ for example is not merely a matter of common sense but one which requires detailed consideration of the legal authorities. The legal profession may not object to this lack of clarity on the basis that it provides work for them or that this level of complication is commensurate with the level of training they have undergone. As previously stated in this thesis, some have argued against changes to the law which might result in the de-skilling of the conveyancer (Gray & Gray, 1999, endnote 72). This conclusion is not suggesting that the law of restrictive covenants could be reformed to such an extent that experts would not be required, rather that the goal of reform should be to make the information contained on registered titles as clear and relevant as it can be. The inability for restrictive covenants to adapt to societal changes does impact on their utility, both for the owners of the land affected and society as a whole. Viewing the results of this chapter’s analysis through a utilitarian lens it would seem that the problems related to restrictive covenants both in terms of utility and clarity warrant reform. Bentham’s ideal was that land could be easily transferable. Superfluous and ambiguous information on registered titles hampers this process.
CHAPTER 7 – UPPER TRIBUNAL (LANDS CHAMBER) AND LANDS TRIBUNAL SCOTLAND DECISIONS

7.1 Introduction and jurisdiction

Further to the analysis of old restrictive covenants carried out in Chapter Six, Chapter Seven aims to address further the link between age and obsoleteness and to consider whether there is a mechanism or suite of reforms that could reduce the quantity of obsolete covenants (research questions 2 and 4).

It was thought important to look at the LTS cases as well as UT(LC) cases because it was necessary to ascertain whether the types and ages of restrictions are comparable between the two jurisdictions as this would impact on whether reforms similar to those undertaken in Scotland could work in England.

In order to address the main research questions a further three specific questions were considered:

- How does the UT(LC) deal with applications relating to ‘obsolete’ and other restrictive covenants?
- Why are applications to the UT(LC) relating to restrictive covenants relatively uncommon?
- How do the cases in the UT(LC) compare to those in the Lands Tribunal Scotland (LTS) with regard to volume, age and likelihood of success?

This chapter is divided into four sections. In 7.2 the law and procedures of the UT(LC) and LTS are outlined and compared and the parameters for analysing the sample is introduced. In 7.3 the results of the quantitative analysis are presented. In 7.4 a qualitative analysis of the grounds relied upon in the English decisions and the factors considered in the Scottish decisions are presented. In 7.5 conclusions from the analysis are presented.

7.2 Outline of law and procedure and introduction to decisions

The Upper Tribunal (Lands Chamber)

The Upper Tribunal Lands Chamber (UT(LC)) is the appropriate authority for hearing cases under the Law of Property Act 1925 s84. The UT(LC) is the successor of the Lands Tribunal, which was
established in 1949 to resolve disputes involving land, including restrictive covenants. In June 2009 the Tribunals, Courts and Enforcement Act 2007 changed the name but not the function of the Lands Tribunal. The UT(LC) consists of a Chamber President, currently Keith Lindblom QC (Judicial Conduct Investigations Office, n.d.); six part time judges and three specialist members. In addition to the judges assigned to the Tribunal itself, the Tribunal is able to call upon other judges with the requisite expertise for a particular case.\textsuperscript{155}

**Lands Tribunal Scotland**

The Lands Tribunal Scotland was set up in 1971 under the Lands Tribunal Act 1949 to deal with the discharge and variation of land obligations under the Conveyancing and Feudal Reform (Scotland) Act 1970 (Agnew, 1999, p. 10). Under the Lands Tribunal Act 1949 s2(1) and (3) the Tribunal membership is determined by the Scottish Ministers, based on the recommendation of the Lord President of the Court of Session. One of the members, who must be a lawyer, will be appointed by the Scottish Ministers as President. The Lands Tribunal currently has four members (including the President), however usually only two members sit at any one time (one lawyer and one surveyor). The other members are either lawyers or qualified surveyors. Scotland seemingly lagged behind England with regard to the creation of a Lands Tribunal; this was largely because it was considered that there was insufficient business in Scotland for a separate tribunal (Todd and Wishart, 2012, p. 5).

**UT(LC) and LTS procedures**

The procedure of the UT(LC) is regulated by various directions, statements and rules\textsuperscript{156} as is the procedure of the LTS.\textsuperscript{157} The UT(LC) provide a flow chart, which shows the procedure for applications to discharge or modify restrictive covenants affecting land (Upper Tribunal (Lands Chamber), 2010). This procedure has 26 steps if there are objections to the application, and 14 if there are no objections. The fee for lodging an application to discharge is £800 and the fee for hearing an application is £1,000. In Scotland the fee for lodging an application is £150, a hearing is charged at £155 per day and an order costs £88. The length of time an application takes varies, but

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\textsuperscript{155} For a summary of the changes brought in by the Tribunals, Courts and Enforcement Act 2007 with regard to land and environmental matters see Bartlett, 2010.

\textsuperscript{156} The Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, SI 2010/2600; The Practice Directions of the Lands Chamber of the Upper Tribunal; The Tribunal Forms; The Current Fees Order.

\textsuperscript{157} The Lands Tribunal for Scotland Rules (as amended) 1971; the Lands Tribunal for Scotland Rules 2003; The Lands Tribunal for Scotland Amendment (Fees) Rules 2004.
according to the UT(LC) they seek to determine 75% of all applications within 70 weeks. According to Francis, where there are no objections applications can be disposed of within three months from inception to determination (Francis, 2013 p. 453). In Scotland an unopposed application can take 2 months, an opposed application between 4 and 6 months and where compensation is involved it could take at least a year (Lands Tribunal Scotland, n.d).

The decisions

The websites of the UT(LC) and LTS provide a copy of the most recent decisions. At the time of this analysis, July 2015, the English decisions dated from June 2000 to March 2015 and the Scottish decisions from February 2005 to April 2015. It was decided that the sample of decisions for analysis would be all those contained on the websites at the time of the analysis. This decision was made on the basis that these represent the most recent decisions and also all the decisions that are readily available. All of the 119 English decisions and 117 Scottish decisions listed on the website were read. With regard to the English decisions, 95 were applications to discharge or modify a covenant. The other 24 related to either; a preliminary issue, entitlement to benefit, whether there was a building scheme, costs, jurisdiction, compensation or admission of objectors. In one instance the decision was not provided on the website and in another no date was provided for the covenants. With regard to the Scottish decisions, 59 were applications to discharge or modify a real burden. The other 58 related to; expenses, compensation, positive real burdens, servitudes, leases, questions relating to validity or whether there was interest to enforce.

These were analysed using the following criteria:

- Age of the covenant
- Whether the application was for modification or discharge
- The type of covenant/ reason for modification
- In the case of the English decisions the part of s84 relied upon
- The result (discharge, modification or refusal)
- Whether compensation was granted
- Who was required to pay the costs
- Whether planning permission had been obtained

In most instances the application referred to covenants contained within a single conveyance. However, where more than one deed imposed the covenants, for the sake of simplicity of analysis, only the date of the first deed was included in the analysis.
The analysis with regard to the Scottish cases differed from the English cases in that under the LPA 1925 s84 the applicant choses the ground upon which to make their application; in Scotland the applicant does not have to make any such decision as the court considers all of the factors in s100 TC(S)A 2003.

### 7.3 Analysis of decisions

#### Age of covenants and real burdens

One of the threads running through this research is the relationship between age and usefulness of covenants. In analysing the decisions the covenants and real burdens were categorised according to age; the same exercise was undertaken on a larger scale with the land registry sample.

*Age of covenants in English sample*

Figure 7.1 shows the age spread of the covenants, which were the subject of the applications. This graph shows that the applications tended to relate to newer rather than older covenants. Without knowing the age spread of the restrictive covenants generally these data could be misleading. With that in mind, the age spread of restrictive covenants in the UT(LC) sample was compared to the land registry data and the analysis presented in Chapter Six.
Figure 7.2 is a graphical representation of a crosstabulation of data from the land registry and the UT(LC). As has been stated above, a detailed discussion of the land registry data can be found in Chapter Six. However it is necessary to note here that older covenants were less frequently found in both the land registry and the lands tribunal samples. It is important therefore to put the UT(LC) decisions in this context. What Figure 7.2 clearly shows is that even taking account of the smaller numbers of older covenants in the population (as represented by the land registry data), there is a low representation of these covenants within the UT(LC) applications. There are three possible reasons for this; firstly that it is easier and cheaper to obtain an insurance policy for older covenants, secondly that older covenants are more likely to be of a type that does not prevent development (the most popular reason for making an application) and finally they are more likely to be ignored on the basis that the owners of the benefitted land are less likely to enforce them.
Figure 7.2 Comparison age distribution of covenants in land registry sample and Upper Tribunal (Lands Chamber)
Age of real burdens in Scottish sample

As with the UT(LC) decisions, real burdens were categorised according to age. The result can be seen in Figure 7.3 below. As no sample of titles was obtained from Scotland it is not possible to compare the age spread of real burdens in the LTS with that in the land registry. Figure 7.4 compares the age spread with England and it can be seen that in Scotland there is a greater spread of age; with the LTS dealing with older covenants than the UT(LC).

7.3 Real burdens categorised by age.
Figure 7.4 Comparison between age of restrictive covenants in England and real burdens in Scotland

Relationship between age and success in application

In order to consider whether older covenants are more likely to be obsolete it is necessary to correlate the age of the covenants and the type of order made by the UT(LC) and SLT. Figure 7.5 shows that in England, older covenants are no more likely to be discharged or modified than newer covenants.
Figure 7.5 Orders made by UT(LC) analysed by age of covenant
Figure 7.6 shows the orders made by the UT(LC) where the covenant is ‘old’ and ‘new’

This presentation of the data shows that regardless of whether a covenant was old or new, approximately 50% of applications succeeded (47% of old covenants and 46% of new covenants). A higher percentage of old than new covenants were discharged but in this category the numbers were so small (2 old and 5 new) that it was be unwise to draw too strong an inference from this.

In order to draw a comparison between England and Scotland with regard to the relationship between age and success, the Scottish covenants were also analysed in two groups; ‘old’ and ‘new’. The 80 year cut off from 2013 was used, as it was with England, so that any covenant which predated 1933 was ‘old’ and any that included or post-dated 1933 was ‘new’. Clearly in Scotland ‘old’ is considered to be more than 100 years old but the writer wished to make a direct comparison between the two countries and therefore used the same parameters. In any event in
the Scottish sample only two real burdens were dated between 1912 and 1933. As can be seen in Figure 7.7 below the correlation between age and success was much stronger in the Scottish sample. The data showed that 83% of ‘old’ burdens were modified or discharged as against 62% of ‘new’ burdens. The success rate generally was much higher than in England with 66% of real burdens in the SLT being modified or discharged as against under 50% in England.

Figure 7.7 Orders made by LTS analysed according to covenant subsets ‘old’ and ‘new’

Only 10% of the cases in the LTS were ‘sunset’ rule cases and in any event this fact does not influence the decision making process for the LTS in any way, it merely makes the objector the applicant with the burden upon him to show that the burden remains useful.

**Type of covenant**

The purpose of an application to the UT(LC) or LTS is to modify or discharge covenants which might otherwise be breached by some activity proposed by the owner of the burdened land. This activity most often relates to development of the burdened land in some way. Figure 7.8 below compares
the reason for the application in England to that in Scotland. In both jurisdictions the most popular reason for making an application was that the applicant wanted to increase the density of development on a site. In Scotland this was the reason in 52% of applications and in England it was the case in 63% of cases. The main difference between the two jurisdictions was that in England in 8% of cases the applicant wished to erect a building with a use prohibited by a covenant, and in Scotland in 27% of cases the applicant wished to use an existing building in breach of a real burden.

![Figure 7.8 Comparison between applications in England and Scotland by reason for application.](image)

This is further evidence of the similarity between the two jurisdictions. The majority of applications relate to the modification or discharge of a covenant restricting the amount of development on a site. Table 7.1 provides some examples of these covenants to illustrate how
they are worded and why the applicant wanted to discharge or modify the covenant. Both the type of restriction and the proposals to develop are similar between the two countries.
Table 7.1 Examples of covenants restricting building.

<table>
<thead>
<tr>
<th>File Reference</th>
<th>Covenant Date</th>
<th>Covenant Wording</th>
<th>Reason for Application</th>
</tr>
</thead>
<tbody>
<tr>
<td>LP 2 2012</td>
<td>18 June 1922</td>
<td>13. ... not more than one house with the necessary outbuildings thereto to be erected on any other Lot on this Estate [including lots 16 and 17]... the houses to be erected on any Lot are to be detached or semi-detached only. 14. No part of any dwellinghouse or building to be erected on any Lot (except bay windows and porches) may be erected in front of the building line shown on the said plan but such dwelling houses and buildings need not be set up to such building line.</td>
<td>To construct a new house.</td>
</tr>
<tr>
<td>LP 11 2010</td>
<td>21 March 1955</td>
<td>Not more than one dwellinghouse and garage shall be built on the land hereby transferred.</td>
<td>To construct a new detached house and garage within the grounds of the property.</td>
</tr>
<tr>
<td>LP 30 2010</td>
<td>4 November 1927</td>
<td>3. One house only at a cost of £1,400 shall be erected on the property coloured red [the application land] (such cost to be exclusive of any garage, stabling and outbuildings). No building or erection (temporary or otherwise) shall be erected within 60 feet of the said boundaries of the property coloured red and marked T on the said plan. 4. No house or building shall be erected on the property unless the site plans and elevations thereof shall have been previously submitted to and approved in writing by the Vendor but such approval shall not be withheld unless the erection of such house or building shall have the effect of materially obstructing views now enjoyed from other parts of the Vendor’s Belfield House Estate or lessening the amenity thereof by being unsightly or inappropriate to the site either in respect of position, size or value. A reasonable fee not exceeding £2:2:0 shall on each occasion be made to the Vendor to cover her expenses of approval of plans and elevations. 5. No house shall be let out in separate tenements or as flats. 6. No house or building erected on the property shall at any time hereafter be used for any other purpose than a private dwelling house or the garage, stabling or outbuildings belonging thereto and no trade, manufacture or business of any kind</td>
<td>To demolish the existing house and replace it with a block of 10 flats</td>
</tr>
</tbody>
</table>
(except that of a surgeon or physician) shall at any time be set up or carried on in or upon the property.

<table>
<thead>
<tr>
<th>Scottish Decisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>LTS/TC/2005/15</td>
</tr>
<tr>
<td>LTS/TC/2009/28</td>
</tr>
<tr>
<td>LTS/TC/2012/22</td>
</tr>
</tbody>
</table>
7.4 Analysis of the grounds relied upon in the English decisions and the factors considered in the Scottish decisions

There follows an analysis of the grounds upon which applicants rely in England. It is not possible to make a direct comparison between the English and Scottish decisions, as the decisions within the Scottish sample have been decided upon the weighing up of the ten factors rather than selecting a ground or combination of grounds upon which to proceed. However it was possible to analyse the way in which the LTS considered the factors and how this compared to the way decisions were made in England under s84.

Some of the factors to be taken into account in s100 TC(S)A 2003 are seemingly not covered by s84 LPA 1925. Factor (d) relates to positive obligations and is therefore not applicable to the law in England. Factor (e), time elapsed, is also not referred to in the English legislation but may be considered to be relevant to s84(1)(a) ‘that the condition ought to be deemed obsolete’. Factor (h) is not covered by s84; whilst in Scotland compensation in the context of whether the owner of the burdened land is willing to pay, in England it is a question of whether compensation is adequate compensation. Factor (i) relates to the threat of compulsory purchase which is not considered in England and factor (j) is a ‘catch all’ provision. LPA 1925 s84 makes reference to agreement which is not a factor seemingly covered by the Scottish law.

Analysis of UT(LC) decisions

In England applicants can choose to apply under any one or a combination of the four different paragraphs. It can be seen in Figure 7.9 that applications under paragraph (a) as a sole ground for covenant discharge or modification are relatively uncommon (only 5 such applications were made). It is one of the grounds in nearly 52% of cases. By far the most prolific of the grounds relied upon is the one added by the Law of Property Act 1969; ground (aa). This ground is solely relied upon in 17% of cases and is one of the grounds relied upon in 84% of cases. Figure 7.9 below shows that the combination of s84(1) grounds (a), (aa) and (c) is the most common combination in applications.
Result of applications

In just under half of cases the application to discharge or modify succeeded to some extent. Figure 7.10 below correlates the expected number of successful applications in each combination against the actual number.\(^\text{158}\) This shows that with regard to ground (a) bearing in mind the percentage of applications which were successful you would have expected more than double the number of applications to succeed. It is important to note however that there were only 5 applications in total under this ground and with such a small number it is dangerous to draw too strong an inference. In the most popular combination of grounds for application, (a), (aa) and (c) slightly fewer applications were successful than expected but in the second most popular combination, (aa) and (c), slightly more succeeded.

\(^{158}\) In order to produce the ‘expected’ figure the number of applications made under each ground(s) was multiplied by the percentage of total applications which succeeded to some extent (46%).
Figure 7.10 Comparison between the result of successful applications under the selected grounds and what would be expected.

Section 84(1)(a) - Restriction ought to be deemed obsolete

Applicants to the UT(LC) are clearly not advised to rely on the obsolescence of a covenant as frequently as ground (aa) (that the covenant restricts reasonable user of land, confers not practical benefit and the loss can be compensated in money) when making an application to the UT(LC).

This paragraph states:

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.

Essentially then there are three possibilities open to the applicant to put forward:

1. changes in the character of the property mean that the covenant ought to be deemed obsolete; or
2. changes in the character of the neighbourhood mean that the covenant ought to be deemed obsolete; or
3. other circumstances mean that the covenant ought to be deemed obsolete.

Each of these possibilities is now considered in turn.
“changes in the character of the property”

This is relatively rarely put forward and it is difficult to image in many circumstances where it will succeed (Newsom, 2013, p. 384). Newsom cites the case of Finlay & Co’s Application (1964) 15 P & CR 94 LT as an example. In this case in 1887 a restriction forbidding business use was imposed on the application land. The premises had been used as shops since 1925 and the Tribunal duly modified the restriction in 1963 to allow shop use. None of the applicants in the sample put forward this argument.

“changes in the character of the neighbourhood”

This argument is frequently put forward but rarely succeeds. Indeed it was the favoured argument in those decisions in the sample, which cited paragraph (a). In the subsample, which cited paragraph (a), 44% of applicants succeeded in their application (at least to some extent) but only 13% succeeded on ground (a). The reasons for the lack of success on this ground seem to be in part as result of the way that the changes in the neighbourhood are construed and partly related to the requirement that the restriction “ought to be deemed obsolete”. In the subsample it was apparent that in some cases the applicant, or indeed Counsel for the applicant, did not hold out much hope for success under ground (a) but included it anyway. Notably in Re Sutcliffe’s Application LP/20/2005 Mr Andrew Trott FRICS, the Land Chamber Member who decided the case, stated that ‘Mr Preston acknowledged that this was not the applicant’s strongest argument and I think he was right to do so’ (para 59, p. 14). In some instances within the subsample Members made it clear that the application under ground (a) was misconceived; for example in Re Shaw’s Application LP/71/2007 (where ground (a) was the only ground relied upon) Mr Paul Francis FRICS stated that the application was ‘bound to fail’ (para 32 p. 10). In many cases ground (a) is given little consideration and indeed sometimes it ‘can be dealt with very shortly’ (Francis Re Coles Application LP/2/2003 para 40 p. 12). In two of the cases where ground (a) was unsuccessfully relied upon the applicants were not legally represented (Re Shaw’s Application LP/71/2007 and Re Flowers’ Application LP/52/2008). The lack of success of litigants in person is not entirely surprising bearing in mind the specific meaning attributed to obsoleteness in the context of s84(1)(a). One of the most complicated aspects of ground (a) is what is meant by ‘neighbourhood’. The neighbourhood is not necessarily the same as the area subject to the same restrictions. In some instances the applicant might argue that the appropriate area to be considered as the neighbourhood should be relatively wide so as to increase the chances of success by encompassing the maximum examples of changes in character (often increased development intensity). Objectors
may incline towards the individual street which they may be able to claim is still low density. Even where parties agree that the neighbourhood may be construed relatively widely, and where part of that neighbourhood has changed to become more intensely developed, the Tribunal may still find benefit in the covenant. So, for example, in Re Felton Homes’ Application LP/2/2003. Although the Member, Mr Norman Rose FRICS, agreed with the objector’s expert witness, Mr Charles Hubbard FRICS, that the neighbourhood to be considered was the whole of Caldy this did not prevent the objector’s land continuing to benefit from the covenant where other parts of Caldy had become more intensely developed. In a number of cases within the sample the applicants simply failed to adduce sufficient evidence of change to convince the Tribunal. In Re Cain’s Application LP/30/2007 whilst the Tribunal accepted that the estate had changed since the covenants were imposed in 1937 with some splitting of plots and increases in densities, these changes were minor rather than material. Indeed the Tribunal Chair, Francis, stated ‘some minor breaches can occur without necessarily creating change to the character of the area sufficient to render the original intention of the restriction obsolete’ (para 50 p.16). Even where change has been relatively significant the second question needs to be considered, whether the covenant ought to be deemed to be obsolete. In the sample in one particular example it was accepted that ‘the character of the neighbourhood had changed both physically and socially’ (para 20 p. 7). However the restriction, imposed in 1992 by Neath Borough Council and preventing the sale of alcohol, was still capable of fulfilment.

“other circumstances”

This part of ground (a) is rarely used in practice but when it is it can be very effective. For example in Associated Property Owners’ Application (1956) 16 P. & C. R. 89 it allowed modification of a covenant to allow for densely populated estates in an area which could not be said to have materially changed, on the basis that ministerial permission was deemed to make such development inevitable. Within the subsample in Re Combes’ Application LP/3/2011 a number of covenants were imposed in 2002 when part of a large estate was sold. The covenants were expressed to be for the benefit of the objector and his linear descendants. At the time of the application he retained only a small part of the estate, having sold off the majority in 2008. The applicant had planning permission for redevelopment and sought discharge or modification of the covenants which prevented this development. The applicants’ case was that the sale by the objector of the majority of the estate was a change in ‘other circumstances’. As the retained land contained only a chapel and burial ground (rather than residential buildings), was visited rarely and
was distant from the application land, some of the restrictions were deemed obsolete. One restriction which prevented change of use of agricultural land to garden was not deemed obsolete.

As stated above, there are examples in the subsample of success under ground (a) and these are worth some consideration. In Re Abertawe Bro Morgannwg NHS University Trusts’ Application LT/52/2007 a restriction preventing use other than as a ‘Maternal Clinic’ was discharged as the property had not been used for this purpose for some time and there were no proposals for future funding for this use. It was held that, ‘if the original purpose of a covenant can no longer be served, it is obsolete’ (para 27 p. 7).

Re Hayes’ Application LP/2/2008 is an unusual example of an applicant succeeding in modification of a density covenant. In this case the application land was by far the largest site in an area which had been extensively developed and the proposal to divide into three plots would put it more in line with properties in the immediate vicinity. In Re Morningside (Leicester) Limited’s Application LP/12/2012 a covenant was deemed obsolete in preventing use as a pharmacy when it had been used as a doctors’ surgery for 25 years in breach of covenant for residential use only. In Re Havering College of Further and Higher Education’s Application LP/89/2004 covenants restricting development to a layout popular in the 1930s were not found to be obsolete merely because the development style was old fashioned but were, to some extent, obsolete because surrounding development had made this layout impossible in some places. Finally in Re Marcello Developments Limited’s Application LP/18/1999 and LP/31/2000 restrictions relating to the facing of the road and building line were deemed obsolete. This was in part because the development of the land had not proceeded as had been assumed when the covenants had been imposed.

The clear conclusion to be drawn from the analysis of applications under s84(1)(a) during the last 15 years is that an applicant is very unlikely to succeed. It is no real surprise that this is the case, as insertion of paragraph (aa) in 1969 was an acknowledgement by Parliament that s84(1)(a) was insufficient, the Law Commission in 1967 having stated that the mechanism provided by the Law of Property Act 1925 under s84 had proved to be ‘of very limited value for the grounds on which modification or discharge can be ordered are extremely narrow’ (Law Commission, 1967 p 11). The reason that applicants may still use paragraph (a) as one of their application grounds may well be because, unlike paragraph (aa) it may result in discharge or modification without compensation.
Section 84 (1)(aa) – where the covenant impedes some reasonable user of land

Paragraph (aa) was added by the Law of Property Act 1969. It reads:

(aa) that (in the 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

s84(1)(A) reads:

(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.

As has been demonstrated above this is by far the most popular ground for an application and is also much more likely than ground (a) to be successful.

“some reasonable user”

This is now relatively straightforward to prove and is interpreted literally. As illustrated in Table 7.1 above many applicants want to increase the density of development on their land and this is likely to be considered to be a reasonable user of the land. In considering its jurisdiction under this ground the Tribunal is required to ‘take account’ of planning evidence (s84(1B)). Indeed in 90% of cases planning permission had been obtained for the proposed development. In some of the remaining cases the development was of a kind which would not require planning permission.

The more controversial elements of this ground are contained within s84(1A), whether impeding the proposed use ‘does not secure to persons entitled to the benefit any practical benefits of substantial value or advantage’ or impeding it ‘is contrary to the public interest’. The case of Bass’ Application (1973) 26 P. & C.R. 156 is often cited in cases relating to paragraph (aa) with particular reference to the seven questions which were proposed by Mr Graham Eyre QC for the applicant. The questions are as follows:

**Question 1, under subsection (1) (aa).**
Is the proposed user reasonable?

**Question 2, under subsection (1) (aa).**

Do the covenants impede that user?

**Question 3, under subsection (1A).**

Does impeding the proposed user secure practical benefits to the objectors?

**Question 4, under subsection (1A) (a).**

If the answer to Question 3 is affirmative, are those benefits of substantial value or advantage?

**Question 5, under subsection (1A) (b).**

Is impeding the proposed user contrary to the public interest?

**Question 6, under subsection (1A).**

If the answer to Question 4 is negative, would money be an adequate compensation?

**Question 7, under subsection (1A)**

If the answer to Question 5 is affirmative, would money be an adequate compensation?

As has been stated above, question 1 is often uncontroversial and question 2 may frequently be answered by the very existence of the restriction. In the sample there are a variety of ‘practical benefits’ suggested, including preservation of a view (Walsh’s Application LP/2/2012), prevention of subletting (Lee’s Application LP/16/2011), control of uniform appearance of the block (Roberts’ Application LP/35/2009), the essential character and privacy of the road (Davies’ and Sheenans’ Application LP/65/2006), and preventing development from becoming the ‘thin end of the wedge’ for further development on an estate (Cordwells’ Application LP/40/2006). The rationale of including paragraph (a) as a ground when this is unlikely to be successful may be that if it does succeed it may lead to complete discharge with no compensation. Modification on ground (aa), on the other hand, may require compensation where some loss is suffered. That said, compensation is by no means guaranteed or substantial. In fact compensation was only awarded in 40% of cases where there was an order to discharge or modify the covenant.

In the sample 86% of applicants included this ground. The application succeeded (in full or in part) in 47% of cases which included this ground as against a success rate of 44.5% relating to all applications across the sample as a whole.
Section 84(1)(b) - agreement

The UT(LC) may discharge or modify a restriction under paragraph (b) if:

The persons of full age and capacity for the time being entitled to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interest in the property to which the benefit of the restriction is annexed have agreed, either expressly or by implication, by their acts or omissions, to the same being discharged or modified.

Clearly where there has been express agreement this paragraph is unlikely to be used, as the deed of modification can simply be registered with the Land Registry. However there are some instances where it can be argued that there has been an implied discharge or modification.

In the sample paragraph (b) was relied upon in 19% of cases but never as the only reason; the application only succeeded on ground (b) in 3 cases.

Section 84(1)(c) – discharge or modification will not injure those who benefit

The UT(LC) may discharge or modify a restriction under paragraph (c) if it is satisfied:

That the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction.

The purpose of paragraph (c) is stated by Russell L.J as ‘a long-stop against vexatious objections to extend user’ (Ridley v Taylor [1965] 1 W.L.R. 611 at p.622). In the event it is usually coupled with a claim under paragraph (aa); in fact there were only three instances in the sample where paragraph (c) was not coupled with paragraph (aa). It is worth noting that it is the order that the Tribunal makes in the final analysis which must pass the injury test, not the order sought under the application. It may be, for example, that what was envisaged by the applicant might be injurious but with some additional conditions imposed by the Tribunal it passes the test under (c) (Newsom, 2013, p.429). In Shire Barns Developments’ Application LP/17/2006, the only case within the sample which relied upon paragraph (c) alone, the applicant was never likely to succeed relying upon the fact that the proposed development had planning permission and a rather spurious argument relating to the height of the new house.
LTS decisions

With regard to the LTS decisions it was not possible to carry out a quantitative analysis of the type carried out with regard to the English decisions. However, it was thought particularly important to consider the extent to which the LTS considered age to be a significant factor in applications to discharge or modify real burdens. In some instances the parties themselves, or counsel representing them, gave no weight to factor (e).\(^{159}\) In some cases the LTS did find that the length of time was significant. For example in Smith v Prior LTS.TC.2006.06 it was stated that ‘Section 100(e) requires us to consider the length of time which has elapsed since the condition was imposed – in this case, some 72 years. We do think this is quite significant in this case’ (Smith v Prior). Frequently the LTS found that, whilst age was a factor, it was not the most important one. In a number of cases factor (e) was found to give weight to factor (a) and (f).\(^{160}\) Although the factors are all equally weighted in reality, the LTS gives special attention to factor (f). In Whitelaw v Acheson LTS.TC.2010.29 the LTS stated, ‘Although we have not found consideration of the purpose behind the title conditions to be of any special significance in this case, it is appropriate to follow our usual practice of looking first at this factor, section 100(f)’. The fact that factor (f) is the first to be considered in support in a number of cases.\(^{161}\) From this analysis it is clear that factor (f) will often be the determining factor in a LTS decision; if the purpose of the real burden is still capable of being fulfilled then it is unlikely to be discharged.

Comparison between the two jurisdictions

As stated above, any comparison between the two jurisdictions with regard to Lands Tribunal decisions will be imperfect. However, analysis of the available decisions did draw out some interesting points. In England applicants appear to be reluctant to select only one ground upon which to base their claim, choosing most often a combination of (a), (aa) and (c). This suggests that perhaps a Scottish style list of factors for the Tribunal to consider would be more popular with applicants in England. Ground (a) rarely succeeds in England and in Scotland factor (e) is not considered to be one of the more important factors. However, the relationship between time and usefulness seems to be considered more significant in Scotland than in England where old

\(^{159}\) See for example, McGregor v Collins-Taylor LTS.TC.2007.32; Margaret Cocozza v Lawrence Rutherford and Others LTS.TC.2007.33; Robert Fleeman v David Lyon and Joanne Lyon LTS.TC.2008.60.

\(^{160}\) See for example, Whitelaw v Acheson LTS.TC.2010.29; Scott Gibson v Andrew and Elizabeth Anderson LTS.TC.2011.15, James Anthony Macneil and Others v Bradonwood Limited LTS.TC.2012.22.

\(^{161}\) Most of the cases dealt with factor (f) first and most of the cases also specifically stressed the importance of this factor.
covenants are more often released and where age is considered to add weight to factors (a) and (f).

Costs

Finally, before drawing conclusions on how the UT(LC) operates with regard to controlling obsolete restrictive covenants, it is necessary to consider costs. Costs are an essential part of any litigation and, regardless of whether parties are right or wrong on a point of law; legal advisers must always give clear guidance in this regard. The Solicitors Regulation Authority Code of Conduct sets this out very clearly:

Fee arrangements with your client

IB(1.13) discussing whether the potential outcomes of the client’s matter are likely to justify the expense or risk involved, including any risk of having to pay someone else’s legal fees;

IB(1.14) clearly explaining your fees and if and when they are likely to change;

IB(1.15) warning about any other payments for which the client may be responsible;

IB(1.16) discussing how the client will pay, including whether public funding may be available, whether the client has insurance that might cover the fees, and whether the fees may be paid by someone else such as a trade union;

IB(1.17) where you are acting for a client under a fee arrangement governed by statute, such as a conditional fee agreement, giving the client all relevant information relating to that arrangement;

IB(1.18) where you are acting for a publicly funded client, explaining how their publicly funded status affects the costs;

IB(1.19) providing the information in a clear and accessible form which is appropriate to the needs and circumstances of the client;

Therefore in instances where the applicants have taken legal advice\(^\text{162}\) they will have been advised regarding not only the application costs but also the likely costs of the solicitor and barrister and any experts. In addition to the aforementioned costs, they will be advised regarding the risk of paying the objectors’ costs. Of course the costs risks work both ways around. The UT(LC) has discretion regarding costs subject to Rule 10 of The Tribunal Procedure (Upper Tribunal) (Lands

\(^{162}\) Applicants were legally represented in 75% of cases. It is possible that others took legal advice regarding the strength of their claim prior to the hearing but decided not to be represented a the hearing itself for financial or other reasons.
Chamber) Rules 2010. As can be seen from Figure 7.11 below the most common result is that the applicant pays some or all of the objectors’ costs (in addition to their own legal fees and disbursements). The amount of these costs will vary considerably depending upon whether the objector is a litigant in person claiming for financial loss (in other words loss of earnings), a litigant in person claiming the fixed hourly rate (currently £18 per hour) or the hourly rate or fixed rate of a legal adviser (considerably more than £18 per hour).

Figure 7.11 Costs ordered

In most types of litigation costs ‘follow the event’, meaning that the party who loses pays the costs of the party who wins. Costs in s84 applications are slightly different. The position is set out in paragraph 12.5 of the Practice Directions of the Lands Chamber (Upper Tribunal Lands Chamber, 2010):

12.5. Applications under section 84 of the Law of Property Act 1925
1) On an application to discharge or modify a restrictive covenant affecting land, the following principles will be applied in respect of the exercise of the Tribunal's discretion regarding liability for costs.

2) Where an applicant successfully challenges an objector’s entitlement to object to an application, the objector is normally ordered to pay the applicant’s costs incurred in dealing with that challenge, but only those costs. Where an applicant unsuccessfully challenges an objector’s entitlement to object to an application, the applicant is normally ordered to pay the objector’s costs incurred in dealing with that challenge.

3) With regard to the costs of the substantive proceedings, because the applicant is seeking to remove or diminish particular property rights that the objector has, unless they have acted unreasonably, unsuccessful objectors to an application will not normally be ordered to pay any of the applicant’s costs. And successful objectors will usually be awarded their costs unless they have acted unreasonably.

Figure 7.12 Costs ordered compared to result
This means that more often than not the applicant pays the costs regardless of the result, as can be seen in Figure 7.12 above. It also means that the applicant is unlikely to get their costs paid and these costs may be considerable.

### 7.5 Conclusion

Table 7.2 below summarises the analysis of decisions within the two Lands Tribunals. A number of interesting differences can be noted. Perhaps the most interesting difference is that in Scotland an applicant is more likely to succeed than in England. This is probably not because of the change in the statutory mechanism, as even before the TC(S)A 2003 the success rate was around 70%.\(^{163}\) However, the previously high success rate might be connected to the high percentage of feudal burdens which were often supported by ‘little in the way of interest to enforce’ (Scottish Law Commission, 1998, para. 6.19). As many feudal burdens will now fall away,\(^ {164}\) the LTS will be more often concerned with ‘community’ and ‘neighbour’ burdens. Certainly there was a proportionally higher number of cases in the LTS concerning real burdens than in the UT(LC) concerning restrictive covenants. Whilst in 2013, Scotland had a population of approximately one tenth of the population of England\(^ {165}\), in both jurisdictions there were approximately 6 decisions per year.

Table 7.2 Comparison of UT(LC) and LTS decisions

<table>
<thead>
<tr>
<th></th>
<th>England</th>
<th>Scotland</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chance of success in modification or release</td>
<td>46%</td>
<td>66%</td>
</tr>
<tr>
<td>Ground/ basis upon which the covenant or real burden is modified</td>
<td>A combination of grounds are used but ground (aa) is the most successful</td>
<td>The Tribunal considers a list of factors</td>
</tr>
<tr>
<td>Reasons for application</td>
<td>Most applications are made to enable development and most have planning permission at the time of the application.</td>
<td></td>
</tr>
<tr>
<td>Mean age of covenants/real burdens</td>
<td>1960</td>
<td>1954</td>
</tr>
<tr>
<td>Are old covenants/real burdens more likely to be modified/released?</td>
<td>No, the difference in the percentage between old and new was 1% (47% old succeeded and 46% new)</td>
<td>Yes, 83% old burdens as against 62% new burdens</td>
</tr>
</tbody>
</table>

In the context of these conclusions it is clear why more applications are not made to the UT(LC); it is expensive, and the chances of success are only even. Of course for the type of applications most

\(^{164}\) See Chapter Four above for a more detailed discussion of feudal burdens in Scotland.  
\(^{165}\) Office for National Statistics, 2014.
commonly made, those to intensify development, the risk is often worth the considerable rewards. For those wishing to breach a covenant in another way, for example by putting up a satellite dish or a conservatory, the costs (even if successful), are simply not worth the benefit. This may be why the most common method of dealing with restrictive covenants is simply to breach the covenant and take out an insurance policy.

It could be argued that the process for removal and modification of restrictive covenants is contrary to utilitarian principles. The cost of the process, particularly in England, is considerable even where the applicant succeeds. Furthermore, where the covenant is unlikely to be enforced the owner of the burdened land will often still have to take out an insurance policy many years after a breach.
8.1 Introduction

The main aim of this chapter is to present the results of a thematic analysis of interviews carried out with Scottish and English experts and responses to the Law Commission Consultation carried out in England from 2008 and in Scotland in 1998. The analysis considers research question 4, whether the existence of obsolete restrictive covenants is problematic, and whether there is a mechanism, which could reduce the quantity of restrictive covenants whilst maintaining the correct balance between the rights of landowners and the rights of third parties. However, before the thematic analysis is presented a more detailed discussion of the responses received by both the Law Commission and the Scottish Law Commission is required. Firstly section 8.2 compares the responses from the English and Scottish Law Commissions to provide a context for the analysis to follow. Then section 8.3 provides a more detailed discussion of the challenges found within the English Law Commission data. Section 8.4 considers the challenges faced by the Scottish Law Commission in analysing the results of their Discussion Paper No 106. Finally, section 8.5 contains the results of the thematic analysis of the data.

8.2 Law Commission and Scottish Law Commission responses

The Law Commission received 103 responses to its consultation, and the Scottish Law Commission received 83. In both instances responses came from a range of public and private bodies, both incorporated and unincorporated as well as from interested individuals. The responses were categorised and the breakdown can be seen in Table 8.1 below.

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167 See 5.6 regarding the methodology.
Table 8.1 Respondents to Law Com 186 and Scottish Law Commission Discussion Paper No 106 by type.

<table>
<thead>
<tr>
<th>Category</th>
<th>England Count</th>
<th>England %</th>
<th>Scotland Count</th>
<th>Scotland %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Advocate (or member of the judiciary)</td>
<td>0</td>
<td>0%</td>
<td>2</td>
<td>2%</td>
</tr>
<tr>
<td>Solicitor</td>
<td>3</td>
<td>3%</td>
<td>19</td>
<td>23%</td>
</tr>
<tr>
<td>Academic</td>
<td>12</td>
<td>12%</td>
<td>9</td>
<td>11%</td>
</tr>
<tr>
<td>Barrister (or member of the judiciary)</td>
<td>7</td>
<td>7%</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>Local Authority (or government department)</td>
<td>2</td>
<td>2%</td>
<td>10</td>
<td>12%</td>
</tr>
<tr>
<td>Law Society Committee</td>
<td>1</td>
<td>1%</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>Professional Committee</td>
<td>4</td>
<td>4%</td>
<td>7</td>
<td>8%</td>
</tr>
<tr>
<td>Charity</td>
<td>2</td>
<td>2%</td>
<td>4</td>
<td>5%</td>
</tr>
<tr>
<td>Individual</td>
<td>23</td>
<td>22%</td>
<td>12</td>
<td>14%</td>
</tr>
<tr>
<td>Residents Association</td>
<td>3</td>
<td>3%</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>Business</td>
<td>4</td>
<td>4%</td>
<td>4</td>
<td>5%</td>
</tr>
<tr>
<td>Legal Interest Group</td>
<td>9</td>
<td>9%</td>
<td>4</td>
<td>5%</td>
</tr>
<tr>
<td>Lands Tribunal</td>
<td>1</td>
<td>1%</td>
<td>1</td>
<td>1%</td>
</tr>
<tr>
<td>Solicitors' Firm</td>
<td>10</td>
<td>10%</td>
<td>8</td>
<td>10%</td>
</tr>
<tr>
<td>Church</td>
<td>4</td>
<td>4%</td>
<td>1</td>
<td>1%</td>
</tr>
<tr>
<td>Anon</td>
<td>17</td>
<td>17%</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>Law Society</td>
<td>0</td>
<td>0%</td>
<td>1</td>
<td>1%</td>
</tr>
<tr>
<td>Land Registry</td>
<td>1</td>
<td>1%</td>
<td>1</td>
<td>1%</td>
</tr>
</tbody>
</table>

It is interesting to compare the categories of respondents between the two jurisdictions. In England there were a far greater percentage of responses from individuals than in Scotland. If you combine the individual responses with those that were anonymous (which were also from individuals) these made up 39% of responses in England, as against only 14% in Scotland. Individual solicitors were represented much more highly in Scotland, making up 23% of the total as against 3% in England. The percentage of responses from firms of solicitors was identical between the two jurisdictions. The total percentage of responses from the legal profession\(^{168}\) in each jurisdiction was as follows: England 29%, Scotland 51%.

\(^{168}\) Excluding academics
8.3 Analysis of results of Law Com 186

Official committees have considered reform of the law of restrictive covenants on various occasions, but this thesis examines the law using a different methodology. One of the problems faced by the Law Commission in its analysis of responses to consultations lies in its methodology. The Law Commission asked respondents for their views on a number of points and then, prior to producing a report analysed those responses. In so doing a number of challenges are faced which may skew the analysis:

1. Respondents may be individuals or groups and equal weighting appears to be given regardless of this fact.
2. Individual respondents may be counted twice (as both an individual or a group).
3. Where a response comes from an organisation it is unclear whether the response is from the organisation as a whole or an individual or small group of individuals.
4. Bias in the response is sometimes explicit and other times implicit or hidden.
5. Non expert respondents sometimes fail to address the questions asked by the Commission and instead provide a general comment or objection.

As has been stated above, many of the responses to Law Com 186 came from individuals but some responses came from groups claiming to represent many members. In their analysis of responses the Law Commission refer only to numbers of respondents. For example in the analysis of the responses to questions regarding ‘the transitional arrangements and the problem of obsolete restrictive covenants’ the Law Commission summarise the responses as follows:

13.3 55 consultees answered this question. The most popular option, favoured by 28 consultees, was option (7) – do nothing, and allow existing restrictive covenants to coexist with any new regime (Law Commission, 2011, p. 214).

Some respondents claim to represent large numbers of members: the City of Westminster and Holborn Law Society for example represents nearly 1,000 solicitors (City of London and Holborn Law Society, 2008, p. 1), the Institute of Legal Executives has a membership of 24,000 (Institute of Legal Executives, no date) although only some of those members will have an interest in land law. These are two examples, there are many other large groups represented in the responses. With regard to point 2, it would appear that there is nothing to prevent a consultee’s view being counted more than once. For example the solicitor who wrote the response for the City of Westminster and Holborn Law Society also responded on his own account. A solicitor could

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169 See Chapter Three.
respond as an individual, as part of a firm of solicitors and as part of a legal interest group. There is certainly evidence of residents responding as part of a residents’ association and as individuals. Where a group or organisation responded, whether it was a law firm or organisation representing many law firms, it was unclear whether the views are of that organisation, an individual or indeed a major client of the firm. During the interviews solicitor respondents were asked how and when their firm got involved in Law Commission consultations. The responses suggested that involvement was uncommon and that it may involve only one individual. Concerning point 4, individual respondents often commented that they did not want the law to change because they were concerned about their immediate environment. The following comment is typical:

I would like to voice my disapproval to changes in the law of Covenants. My local council has used covert and pretty unscrupulous methods to get around covenants on a Statutory local park… Covenants are the only devices protecting Slough citizens FROM the barbarians employed to serve them (Anonymous Written response 20).

The final problem identified is that it is not always clear which part of the consultation a consultee is responding to, or indeed exactly what their response is. The writer agrees with the Law Commission’s analysis in 13.3 (quoted above) that 28 consultees favoured option (7), to do nothing. Indeed a further 3 seemed to select both 7 and 5 as options. However, of these 28 consultees only 8 specifically refer to the options. A further 3 consultees refer to the report numbering, which at least makes it clear that they are responding to the question. The remaining 16 merely make a comment which has to then be interpreted within the framework provided by the Law Commission. Where the consultee is for example, a law firm, the response is often clear and considered, for example Latimer Hinks:

Whilst acknowledging the unwelcome complexity of potentially having two separate restrictive covenant regimes (the existing regime and the new land obligation regime) we venture to suggest that this is the lesser evil than the proposal to extinguish restrictive covenants of a certain age and we venture to suggest that whilst there may be much merit in establishing the new land obligation regime we see no reason to amend or interfere with the existing restrictive covenant regime in relation to transactions already concluded.

170 The writer has no reason to think that this is the case but there are examples of double representation of law firms, for example Wragge and Co respond as a firm and part of the London Property Support Lawyers Group. 171 A text search of the word ‘Ealing’ revealed responses by three residents, the Creffield Area Residents’ Association and an individual who has represented residents in their fight with developers. 172 Others would be asked if they wanted to respond and a draft response sent round but the views could essentially be of one solicitor with the others within the firm contributing by omission.
However, with regard to some of the anonymous responses there is no evidence of the consultee having even read the consultation paper. For example this anonymous response:

> I would like to register my strongest objection to the proposed changes to the laws affecting restrictive covenants ... If these covenants are abolished or become obsolete after a certain period, parks, like my local park, Gunnersbury, will be lost and handed over to developers. In a city already overwhelmed by people, crime and concrete, these open spaces are vital for urban residents.

The writer is not suggesting that views of the public should not be considered. On the contrary, were the law with regard to obsolete restrictive covenants to change, the impact would be on all landowners. However, there is evidence of confusion amongst some of these consultees. For example some of the individuals who responded purported to endorse the views of Gerald Moran, an expert solicitor, or Victor Mishiku, founder of the Covenant Movement. These individuals have considerable experience in representing people who wish to oppose development on the grounds of breach of covenant but they express slightly different views in response to the consultation. Gerald Moran in his response appears to support Option 5, ‘Extinguishment on application after a specified number of years’ (Moran, 2008, p. 10) whereas Victor Mishiku appears to support Option 7, ‘No extinguishment or transformation: existing restrictive covenants to co-exist with any new regime’. In his response Mr Mishiku says ‘please leave well alone’ (Mishiku, 2008). In two instances support is expressed for the responses of both individuals when their views are not the same.\(^{173}\)

8.4 Analysis of results of Discussion Paper No 106

Many of the same problems arise in analysis of the responses to the Scottish discussion paper. However, point 5, ‘Non expert respondents sometimes fail to address the questions asked by the Commission and instead provide a general comment or objection’, is much less problematic in the Scottish consultation because there are far fewer non-expert consultees. Responses are also easier to interpret where they relate to old and obsolete burdens as the consultation provides a presumption in favour of a sunset rule rather than a list of options from which to choose. Support for the sunset rule was by no means universal; in fact of the 26 consultees who responded to question 23 only 15 were in support of it.\(^{174}\)

\(^{173}\) Churchfield Station Estates Conservation Group and Professor Alan Gillett.
\(^{174}\) One consultee, the Property Managers Association Scotland Limited did not come down firmly on either side.
The discussion above does not purport to provide a full analysis of the consultation responses but rather highlights the challenges faced by the Law Commission. Consideration of how such problems could be minimised in future can be found in Chapter Nine of this thesis. In his interview with the writer Gerald Moran comments on a trip he took to the Law Commission to look at the responses and states, ‘we wondered quite how the Law Commission are going to come to this because people are coming from all sorts of directions on it’ (Moran).

8.5 Thematic analysis

The methodology for the analysis of this qualitative data is described in detail in Chapter Five. In this chapter the results of the thematic analysis are presented in the context of research questions identified in the chapter introduction above. In the final analysis four main themes were identified with a number of subthemes: 1) the problem; 2) constraints; 3) mechanism; 4) balance. These themes are considered in detail below.

The problem of obsolete restrictive covenants

It is unsurprising that analysis of the data produced ‘the problem of obsolete restrictive covenants’ as a theme, not least because interviewees were asked about this directly. With regard to the written responses to the consultations problems were sometimes identified in response to a specific question. In Law Com No. 186 consultees were asked:

13.89 We invite consultees’ views on the various options for dealing with existing restrictive covenants in the event of the introduction of Land Obligations.

13.90 We also invite consultees’ view on what steps should be taken to remove obsolete restrictive covenants from the register in the event of no other reform to the law of covenants.

(Law Commission, 2008, paras 13.89 and 13.90)

In the Scottish consultation, Discussion Paper No. 106 asked respondents for their comments:

23. A sunset rule should be introduced for existing real burdens (that is to say, a rule that existing burdens come to an end at the expiry of a period fixed by statute), but subject to the possibility of renewal.

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175 See Figure 5.4.
176 See Interview Guide at Appendix 5.
24. (1) Except insofar as they are renewed, all existing burdens should be extinguished at the end of a specified period after the date of constitution.
(2) Views are invited as to whether the specified period should be
(i) in the case of community burdens and conservation burdens (a) 200 years (b) 150 years (c) 100 years or (d) some other figure;
(ii) in the case of neighbour burdens (a) 150 years (b) 100 years (c) 75 years or (d) some other figure.

Three subthemes were identified during the thematic analysis: i) obsolete restrictive covenants, ii) costs, time and complexity and iii) difficulty in identifying the benefitting land. Each of these subthemes will be analysed below.

Obsolete restrictive covenants

As has been stated above it is unsurprising that the data shows a proliferation of references to obsolete restrictive covenants, and the relationship between these and old covenants. What is more interesting is the division in opinion regarding the extent of the problem of old and obsolete restrictive covenants, and the reasons given for these views. As the English Law Commission stated in their analysis, the majority of consultees preferred nothing to be done about obsolete restrictive covenants (Law Commission, 2011, p. 214). The problems faced by the English Law Commission in analysing this data in any meaningful way has been discussed above. The data from the Scottish Law Commission consultation is much clearer. This is because the discussion paper presents a positive statement in favour of a sunset rule, and the consultees are asked whether or not they agree with this statement rather than having a range of options from which to choose.

In both England and Scotland much of the data emphasises the difficulty in the correlation between old and obsolete. An English written response provides a typical example,

many of the covenants that benefit our clients’ titles were imposed a considerable time ago. However, they remain current and of value to our clients and should not be dismissed as potentially obsolete simply on the basis of age (Boodle Hatfield).

A further example of an English written response stated, ‘the relevant point is in any case not how old the covenant or obligation is but whether it serves a useful purpose’ (Anonymous). In Scotland there was also some resistance to the idea that there was a relationship between old and obsolete. One example of such a written response stated, ‘it is not the Trustees’ experience that, of necessity, the age of a burden is the yardstick of its usefulness’ (Church of Scotland General Trustees).

There was a greater difference between the interview responses in England and Scotland with regard to the relationship between old and obsolete. This is most likely because the Scottish
interviews were carried out more than a decade after the law had been reformed, whilst the English interviews were carried out while reform is still awaited. In the Scottish interviews the relationship between age and likely obsoleteness was acknowledged with a general consensus that this relationship was not absolute. Professor Reid, who was Property Law Commissioner for Scotland at the time of the consultation and subsequent reform, stated:

I think it presupposes there is a relationship but also the procedure presupposes it’s not an absolute relationship that is to say there can be plenty of old burdens which are perfectly good and useful so I mean there is some relationship but, it doesn’t, one could not say that because something is old it is necessarily obsolete that would not be true, it may be obsolete. All one can say is perhaps it is more likely to be obsolete.

The notion of a presumption which is a familiar concept to land lawyers was also mentioned by Stephen O’Rourke who stated ‘it is quite reasonable that there should almost be a presumption against it remaining in place’. Reference was also made by some interviewees to the fact that society changes over time. One interviewee, Ross Mackay expressed this relationship in strong terms, ‘I think that in the current climate it’s illogical that 19th century conditions could still apply and be restrictive in nature when the world has turned round substantially in that intervening period’.

In contrast, the English interviewees generally considered the relationship between age and obsoleteness to be weak. A typical response was, ‘just because a covenant is old doesn’t mean to say it is no longer of any relevance’ (Bostock).

Costs and complexity

References to costs, time and complexity of the current system were frequently identified in the data. The general view of the data was that the procedure involved in removing restrictive covenants or real burdens was expensive, with some interviewees mentioning costs in the thousands or tens of thousands of pounds (Wishart; Target; Rennie). Barristers and advocates tended to view the costs of the procedure differently from solicitors and academics, noting that it was neither cheaper nor no more expensive than other types of litigation (Chambers; Weekes).

Advice to clients regarding costs varied. Chambers, an English barrister, said that he would not discourage a client on the grounds of costs, only on the grounds of merits. Whereas, Rennie, a

177 For example in the presumption that equity follows the law with regard to beneficial interests in property.
178 Advocate.
179 Solicitor.
Scottish academic and practitioner stated that he warns clients that the expenses could be substantial if they lose. Costs were also referred to by some interviewees as a motivating factor for settling a claim rather than going to the Tribunal (Moran; Bates; Hill). Bates stated, ‘In my experience quite a few settle for private parties as well as costs are prohibitive’ (Bates).

The fact that the law in this area is unduly complicated is presupposed by the proposal for reform. However, the English Law Commission made less of the perceived complexity that resulted from old or obsolete restrictive covenants than the Scottish Law Commission. Several written responses to the English Law Commission consultation mentioned insurance as the method by which any complexity could be dealt with. The CML stated, ‘Restrictive covenants are extremely useful in land use but there are some very old covenants on title which would appear to be obsolete. However it is too complex for conveyancers to deal with the issue in any way other than through insurance’. In their response Latimer Hinks downplayed the extent that the law in this area was complicated, again suggesting that insurance was the answer: ‘the Commission’s deliberations have very properly focused upon the complicating factor of the existence of old restrictive covenants. We venture to suggest that, in practical terms, the impact of this is limited and can generally satisfactorily be dealt with by arranging appropriate insurance’. Complexity was identified in terms of reading and interpreting the titles, which were sometimes lengthy (Wishart; Reid; Steven; Hill). However, complexity was also identified as an issue preventing reform of the law (Moran).

Other problems

In addition to the problems related to the cluttering of titles with old covenants various other problems were identified. Most notable amongst these were the difficulties in identifying benefitting land. This issue was commented upon by six interviewees and was mentioned in five of the extracts. Some respondents to the consultation commented that there should be no reform that prejudiced the rights of benefitting owners who might not know that they benefit (City of Westminster and Holborn Law Society; Hill). Others commented that where the benefitting land could not be identified the covenant should be removed but that the land registry is unwilling to

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180 The Scottish Law Commission placed more emphasis on this issue in their report, identifying it in their summary of the problems with the law of real burdens. In England the Law Commission in its 2008 consultation and subsequent report in 2011 did not list the perpetual nature of restrictive covenants in its summary of problems, but did comment that ‘section 84 does not provide a wholly satisfactory answer to the problem of obsolete restrictive covenants. An alternative mechanism is required’ (Law Commission, 2008, 13.12).
do this (Target). In response to a comment by the writer regarding identification of benefitting land, Gregory Hill commented, ‘that’s the big problem and it’s a disgrace’ (Hill). There was a tension in the data between respondents stating that where the benefitted land could not be identified there was no benefit and concern that if the benefitted land could not be easily identified then any notice procedure (for example the Scottish sunset) would be unworkable. In his interview Shaw makes both of these points, stating that ‘under English law it’s not easy to see in many cases on who that notice should be served’ and later, ‘if the benefitting land is not ascertainable then nobody has the benefit’ (Shaw). One dissenting voice with regard to identification of benefitting land was Mishiku who stated, in his written response to the Law Commission, that in 22 years he has never had any difficulty identifying benefitting land. It may be that Mishiku is able to identify benefitting land in his capacity as a campaigner because, unlike solicitors, he is not charging for his time and is therefore able to spend more time working out the extent of the benefitting land.

Constraints

The theme of ‘constraints’ was identified in Phase 4 of the coding process (see p. [ ]). Some of the subthemes had previously formed part of the theme of ‘problems’ but it seemed inappropriate for them to be labelled as such. The subthemes are: consultation; lenders; planning; public awareness and solicitors. For the purpose of this theme constraint is defined as a limitation, restriction or challenge to change or reform. Identifying and addressing constraints is important when contemplating law reform as identifying a problem and providing a legislative solution may not lead to the desired change. The clearest example of this is the recent creation of commonhold. This innovation was a long time in the making but in the event fewer than 20 commonholds have been registered since the inception of the Commonhold and Leasehold Reform Act 2002.

Planning

The relationship between planning law and restrictive covenants has been considered in some detail in this thesis (see Chapter Two). In the thematic analysis planning was one of the most populated subthemes, with 68 references across 22 sources. With regard to references in the

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181 See for example the concerns expressed by Walsh and Morris (2015) concerning the practical implications regarding the proposed changes to the law regarding positive covenants.
182 The idea of legislative intervention began with the report of the Wilberforce Committee in 1965 and the Law Commission proposed commonhold as early as 1987 (Xu, 2010).
183 Xu (2010, p. 240).
written data, there were 27 references across 12 sources and 75% of these sources were English rather than Scottish. Analysis of this subtheme is relatively straightforward, with all the written data expressing the concern that planning does not provide adequate protection. The only nuance was the language used to express this view. Those who had personally been involved with planning objections used emotive language describing planning officers or the planning system as ‘overzealous’, ‘unscrupulous’, ‘barbarians’, ‘corrupt’. Two responses suggested that the planners were in cahoots with the developers. These responses were from individuals or residents’ associations which comprised about 60% of the written responses referring to planning. The other responses came from a range of respondents including a legal interest group, a barrister, a solicitor and an academic. As one might expect their response was more measured, for example, ‘I agree that planning control is by no means a full substitute’ (Hill).

During the stages of thematic analysis two other subthemes were subsumed within ‘planning’ as they seemed to be inextricably linked; ‘developers’ and ‘heritage and the environment’. In most instances the relationship between the themes was that developers who were motivated only by profit were insufficiently controlled by the planning system and the result was damage to heritage and the environment. Often these concerns were expressed by individuals who had personal experience and were concerned about damage to their immediate environment:

Any weakening in the law of Covenants would result in not just our estate, but many other Estates and fine houses across the country from being destroyed by developers. Not only are the buildings lost, but the front and rear gardens as well – again matters that concern the present government who are trying to save front gardens and other open spaces – all of which help to reduce flooding and climate change (Creffield Area Residents Association).

It is perhaps unsurprising that the subtheme of planning was less prevalent in the interviews where the respondents were experts rather than members of the public. In the seven interviews where planning was mentioned it was referred to in the context of a system that postdates restrictive covenants (Steven; Weekes; Shaw), as an entirely different system from planning (Anonymous), a system the public are more aware of than restrictive covenants (Bates; Moran) and the notion that a planning consent is evidence to present to the Tribunal in an application for removal or modification of a covenant (Hill).

Public awareness

The subtheme of public awareness was sparsely populated as a theme, but is arguably important. As part of their consultation the Scottish Law Commission carried out some empirical research in
which they aimed to discover the extent to which homeowners were aware of title conditions (including real burdens). They found that whilst about 60% of those surveyed were aware of the existence of title conditions on their land, only about 30% knew what those title conditions were (Scottish Law Commission, 2010, pp. 470-471). It was difficult to decide whether this subtheme should be subsumed within the problem of identification of the benefitted land to which it is closely linked. However, is a different issue. Since the Title Conditions (Scotland) Act 2003 the benefit of real burdens are registered, and the English Law Commission has proposed that the same should be true of Land Obligations. However, even where the public have access to this information, as they currently do with regard to the burden of a restrictive covenant or real burden, they are often unaware at the time at which they wish to breach the covenant with a planned development. As Justin Bates pointed out in his interview, ‘everyone’s heard of planning permission and no one’s heard of the 1925 Act power over restrictive covenants’ (Bates). Similarly Gerald Moran mentioned that the public will often object to a planning application but will not know to mention the covenants.

**Lenders and solicitors**

It was thought appropriate to discuss these two constraints under the same heading, as the two constraints are linked. Both of these subthemes were only found in the interview data. The subtheme of solicitors was found in both English and Scottish respondents but only the English respondents mentioned lenders as a constraint. Depending on the nature of proposed reform solicitors could impose a constraint, as was the case with commonhold where they showed no interest in adopting a new form of land holding. Solicitors were also shown in the data to be a constraint or even a problem with the current law. Most of the comments regarding solicitors were made by solicitors but two barristers and an academic also commented, interviewees suggested that solicitors should do their job better by being able to properly identify the issues with regard to real burdens and act accordingly (Brymer). They were further found to lack confidence or were too cautious (Brymer; Mackay). Another comment was that they are driven by cost pressure or the desire for a ‘quick fix’ (Wishart; Moran). This led to standardised drafting which in turn could result in superfluous covenants. Some interviewees also felt that they disliked litigation or were risk averse (Chambers; Moran; Target), resulting in a reluctance to use the Tribunals and a tendency towards insurance. A more controversial, and possibly slightly ‘tongue in cheek’ take on this
reluctance to use the current mechanism was that perhaps solicitors were lazy (Dixon). Dixon’s comments were particularly interesting in assessing the role of solicitors as a constraint. He commented that restrictive covenants were irritating but not uncertain, and that solicitors complained about them but they were the ones that had drafted them. This is clearly a valid point but Robbie Wishart, a Scottish solicitor, pointed out that solicitors are likely to use standard drafting because the public are unwilling to pay for the time it takes to produce a bespoke deed of conditions. It is likely then that the constraint here is not merely the solicitor but also the client. As Wishart stated, clients do not want to pay high legal fees. Developer clients may also want to use the same standard deed on a number of developments because it is easier for them. It is also worth noting that very often the client in a conveyancing transaction is an institutional lender and the solicitor is governed by the rules of the CML. Some English interviewees commented on the impact of lender clients and the CML on practice relating to restrictive covenants. One interviewee commented that even where there was a long subsisting breach of covenant, a bank requested an insurance policy, perhaps because the banks own the insurers. Certainly there is now a close link between estate agents, banks, conveyancers and insurers. One solicitor explained that he would ‘rarely advise somebody that he needed to get indemnity insurance’ but that lenders often insisted upon it (Shaw, 2015), Bostock (2015) expressed a similar view:

Where a bank is involved they don’t, are not prepared, to make a judgement as to whether it’s required or not whereas someone who’s buying without a mortgage is free to say well for goodness sake this is completely irrelevant now I’m not going to fork out a few hundred pounds for insurance so yeah I think insurance is money for old rope in a lot of cases.

Consultation

The brief analysis of the responses to the consultation presented at the beginning of this chapter set out some of the challenges faced by the Law Commission in using public consultation as the basis for reform. In this section the writer is analysing the comments of the English interviewees. Many of the interviewees were either representatives of law firms that had responded to the Law Commission consultation, or were lawyers who had responded in their own right. The writer was struck by the relatively small response to this consultation and asked the interviewees whether

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184 Martin Dixon is an eminent academic in the field of land law.
185 For example Countrywide plc includes estate agency, surveying services, mortgage brokerage, legal services but do not appear to be related to Countrywide legal indemnities, a company which provides title insurance.
they or their firm were often involved in consultation, and why they thought responses from the profession was relatively sparse. One interviewee’s comment perhaps sums the views of solicitors rather well, ‘I think it’s just too expensive and too boring and too difficult’ (Target). For a solicitor to be spending time, as Lawrence Target was on behalf of his firm, is taking time away from fee earning. On this basis it is sometimes the Professional Support Lawyers who coordinate the response. Smaller firms are unlikely to have professional support lawyers and this may be one reason why they were not well represented in the consultation. Two interviewees stated that their firms did not usually respond to consultations but had on this occasion because of particular interest in the subject area (Bostock; Anonymous). Beyond reluctance to engage in consultations, the data did not reveal a great deal regarding consultation. However, one consultee commented on the methodology, ‘they don’t really come at it with much of a scientific method approach do they it’s all lawyers running it rather than social scientists?’ (Bates). Dixon stated that in his view consultation was too wide and resulted in a mass of biased views resulting in the Law Commission responding to the people with the loudest voices (Dixon, 2015). Andrew Steven, current Property Law Commissioner in Scotland, commented that there was ‘a relatively small team both down in London and up here’ (Steven, 2014).

Mechanism

It was anticipated that analysis of this theme would provide material for the conclusions and proposals section of this thesis. For the purposes of this section a mechanism is a means by which the law and practice in the area of obsolete restrictive covenants may be improved. From the data four subthemes were drawn: current mechanisms; resistance to change; the sunset rule and other Scottish reforms, and other mechanisms. Each subtheme will be considered.

Current mechanism

The current mechanisms identified in the data were the Lands Tribunals and restrictive covenant indemnity insurance. As has been discussed in Chapter Seven, both England and Scotland have legislative mechanisms for the removal or modification of restrictive covenants. In Scotland this mechanism was substantially changed by the Title Conditions (Scotland) Act 2003. In England there are proposals for reform but these do not include changes relating to removal of obsolete/ old covenants. In analysing the comments of respondents in England and Scotland, both in written

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186 A professional support lawyer is a qualified solicitor who generally does not earn fees but instead coordinates data bases, training, marketing materials and precedents.
responses and in interviews, views were divided as to whether the current Lands Tribunal mechanism was sufficient. There was no evidence in the data that respondents thought the Lands Tribunal did a bad job within the parameters of the law and procedures. A number of respondents to the English consultation felt that the Lands Tribunal mechanism was sufficient to deal with obsolete restrictive covenants. For example, in their draft response to the consultation Conveyancing and Land Law, the Committee of the Law Society stated, ‘we do not think that any steps should be taken. It should be left to the parties to apply to the Lands Tribunal under s84, Law of Property Act 1925’. Other respondents suggested that, in any event, the Lands Tribunal was only required when negotiation failed or insurance could not be obtained. The Agricultural Law Association took this line:

> Often obsolete covenants are no more than a minor issue: there may be no land remaining capable of taking the benefit; the prohibited act may not interfere with proposed user; intended breaches may be so trivial to as amount to an acceptable risk; etc. In all but the most awkward cases, insurance is available at acceptable cost. If none of those satisfactorily deals with the problem, s.84 Law of Property Act 1925 provides a jurisdiction to vary or discharge.

Other respondents suggested that changes in the law which would require the covenant to be registered on the title of the benefitted land would make the Lands Tribunal more effective and therefore even less in need of reform (Roberts; National Trust). The notion that the Lands Tribunal was not a day to day method of dealing with covenants was taken up in the interview data, with several respondents suggesting that the threat of a Lands Tribunal application was a useful backdrop for negotiation (Target; Chambers). Scottish interviewees commented that the Lands Tribunal was effective and well respected (O’Rourke) and noted that the success rate of applicants was higher in Scotland than in England (Reid).

The number of references to the need or desire to improve the Lands Tribunal mechanism was comparable to the number of broadly positive references. Of the written responses to the English consultation there were comments that the procedure could be simpler (Hill), swifter (Council of Mortgage Lenders) and that the jurisdiction could be wider (The Chancery Bar Association). English interviewees, also commented that the Lands Tribunal procedure was expensive, time consuming and risky (Bostock; Francis; Moran). These sentiments were not widely echoed by the Scottish interviewees perhaps because the focus of the Scottish interviews was on the reforms rather than the current deficiencies. However, Mackay stated with regard to the

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187 There were about ten sources on each side of the subtheme.
mechanisms, ‘they are clumsy and costly’ (2014).

As has been stated above, some respondents saw the Lands Tribunal as the mechanism of last resort after negotiation or insurance. Like the Lands Tribunal, insurance was not widely referred to in the written responses and was only mentioned in the English responses. Of the six written responses referring to insurance, all except one mentioned it as the accepted solution to the problem of old/obsolete restrictive covenants. Whilst this was clearly the ‘accepted’ solution, whether it was an ‘acceptable’ solution was less clear, but could perhaps be implied by the silence with regard to this point. The only dissenting voice came from Farrer & Co who suggested that if insurance companies were insuring out a non-existent risk then perhaps a procedure to review restrictive covenants could be put in place and regulated by the Land Registry.

Insurance was mentioned by almost all of the interviewees. With regard to the Scottish interviewees this was in response to being asked about whether it was used in Scotland, as the writer was unaware of whether it was a common solution. Two out of six Scottish respondents, an advocate and an academic, had not heard of insurance being used as a way of dealing with restrictive covenants. Those who had heard of it suggested that it was not perhaps as widely used as in England (Mackay, 2014) but was becoming more widely used (Mackay; Wishart; Brymer). These solicitors were not very positive about the use of insurance, for example Wishart stated, ‘I’m not terribly keen on title insurance because it doesn’t fix the problem’. Interestingly the commercial property solicitor of the three felt that it was more common in residential transactions, whereas the residential solicitors considered it to be more common in commercial transactions.

English interviewees were much more openly negative about insurance, commenting that where there was an actual risk you could not get insurance (Chambers; Target); that it was sometimes unnecessary but required by the lenders (Target; Shaw); that solicitors use it because it’s easy and to avoid negligence claims (Francis; Shaw; Dixon) that it doesn’t prevent the risk of injunction (Francis); that it’s rarely if ever claimed upon (Hill; Shaw; Bostock). The literature also supports the view that restrictive covenant indemnity insurance is a flawed system. Kenny (2000) comments that the CML require insurance except where a breach has subsisted for 20 years when ‘there are very many cases where indemnity insurance is a waste of time but the breach has continued for very much less than 20 years’. Lugger (2010) warns that insurance is a risky way of dealing with restrictive covenants.

188 16 of the 18 interviewees mentioned insurance.
There was an underlying sense that insurance is practical but rather contrary to the principles of conveyancing. Bates (2015) stated, ‘it’s the practical answer but at a jurisprudential level it’s the most offensive answer going, the law is either the law to be enforced or you need to stop pretending it matters’. This sentiment was echoed by one of the Scottish solicitors who stated, ‘as someone who was always told conveyancing is logical and there’s no such thing as something that cannot be solved, title insurance was an anathema’ (Brymer). There was a sense amongst solicitors both in England and Scotland that solicitors used insurance as an easy way out. Moran stated ‘solicitors quite simply won’t go out on a limb because it’s much easier to say if there’s any doubt at all go get insurance’.

Resistance to change

Resistance to change was one of the most populated subthemes. Resistance came under two broad headings; that change would be a bad thing and that change was simply too difficult or not possible. Negative views towards change were found in both the written responses and the interviews and in both England and Scotland. Unsurprisingly there was more negativity expressed in the English written sample than the Scottish, as the law in Scotland had already undergone a process of legislative change. Of the 23 written responses coded to the subtheme that change was a bad thing 13 were from concerned citizens, in the guise of residents’ associations, named individuals or anonymous individuals. All made it clear that they were concerned about the damage to their property or local environment that reform of the law of restrictive covenants might entail. They were not really responding to the consultation, in fact there was nothing to suggest that they had read it, as they made reference only to their general resistance to change. For example Creffield Area Residents Association said, ‘please accept this letter as our formal objection to any changes in the law on covenants that would result in the loss of these conservation areas’. Nicholas Black in his response makes it explicit that he has not read the consultation paper, ‘I understand that proposals are mooted to either abolish, or make it more difficult to enforce, restrictive covenants which protect land from development. Is this the case?’ A further 5 responses, 4 of which were from solicitors, stated that the law with regard to restrictive covenants should be left as it is but gave no reason at all for this conclusion (Latimer Hinks; Boodle Hatfield; Trowers & Hamils; Addleshaw Goddard; Wragge & Co; Roberts). Referring back to the points above with regard to the analysis of Law Com. 186, this is further evidence of the difficulty faced by the Law Commission is providing meaningful analysis of the responses. In interview very few respondents expressed wholesale objection to change. Of the two who expressed some negativity the rationale was that they could be beneficial to large landowner clients (Bostock) and
that restrictive covenants were part of the deal that you do when you sell your land (Anonymous). Rather fewer of the written responses, only three, rejected change, not because it was bad or unnecessary but because it was likely to make matters worse (DLA Piper), it was too difficult (Boodle Hatfield) or it was unfair on benefitted owners (Hill). The only interviewee who commented that change was not really possible was Hill who stated, ‘there’s no satisfactory way out of this one but the present system sort of works and I cannot see anything more than tinkering at the edges which would improve it’.

**Sunset rule and other Scottish reforms**

Discussion of the sunset rule and other Scottish reforms was a prevalent theme within the data because it formed part of both Law Commission consultations and was explicit within the interviews. This subtheme can be divided further into the Scottish sunset and an English sunset. Data were coded to this subtheme where respondents discussed the sunset rule either explicitly by mentioning it by name, or where it was mentioned by reference to a time limitation on restrictive covenants or real burdens.

As has been stated above, the Scottish consultees did not universally support the sunset provisions. However all of the Scottish experts interviewed did. This discrepancy may well be a factor of the passage of time, and also that those interviewed were all practitioners or academics rather than other interested groups. Turning first to the Scottish written responses, support for the sunset rule was expressed in a number of different ways. The need for the sunset was expressed as a response to: the difficulty in identifying whether old burdens are binding (Hodge); older burdens are less likely to be useful (Jack; Macgregor; Scottish Natural Heritage); consideration of old burdens wastes time and money (Macgregor; Murray; Steven). In some instances consultees were emphatic in their support of the proposed sunset rule, for example Most stated that, it was ‘an excellent innovative idea and it should not be shied away from or watered down too much’. Others were less enthusiastic but were willing to accept that it may be necessary. For example Scottish Natural Heritage, who acknowledged that they have a vested interest in real burdens, stated that ‘while it might be more convenient for SNH if conservation burdens did not expire, it would be unreasonable for us to argue that either existing or future burdens should stand for all time’. In some instances no reason was given (The Law Society Scotland; Most; Campbelton Faculty of Solicitors; Scottish Law Agents Society). The Scottish Law Agents did not provide a reason for their answer but rather the results of a quantitative survey of their members.

The interviewees supported the sunset rule for a number of reasons. Wishart stated that it ‘gives
you a weapon in your armoury’, and made reference to the fact that it was an administrative rather than a Lands Tribunal process. O’Rourke, Mackay and Steven all pointed to the idea that property use changes over time, as Mackay puts it, ‘it’s illogical that 19th century conditions could still apply and be restrictive in nature when the world has turned round substantially’ (Mackay). Steven also makes the connection between historic burdens and the lack of planning law in the 19th and early 20th century. A number of other less prevalent points came out of the data. Interviewees commented that there had been a considerable amount of reform, Brymer commenting, ‘we’ve got to draw breath and give this a chance to work’. Wishart commented that whilst the reforms had not provided all that had been hoped for they had ‘increased the... academic knowledge of property lawyers in Scotland quite substantially’. The impact of the Scottish Parliament on reform was noted (Wishart; Mackay). Mackay stated, ‘I suppose it’s the one benefit of having our parliament here they’ve had devolved powers for property law since day one and they’ve sort of got to grips with it and brought in a lot of much needed reforms’.

There was no real consensus with the English interviewees with regard to the possible implementation of a sunset rule for England. Some of the interviewees were unequivocal in their condemnation of a sunset rule. Weekes stated that it was ‘a bad idea’ that a length of time was ‘arbitrary’, and expressed concern about depriving people of covenants without ‘good practical reason’. Others were also not keen on the idea of a time limitation but were willing to consider a change involving a rebuttable presumption of obsoleteness (Chambers; Anonymous; Francis). This subtheme is clearly linked to the relationship between age and obsolescence discussed above. The challenges involved in quantifying the written responses with regard to reform of existing covenants have been discussed earlier in this chapter and are replicated in the qualitative analysis. Some of the responses are very brief and therefore may support or reject a sunset rule but provide little more than that. Others are difficult to interpret. However, some themes can be extracted from the data. Whilst the English interviewees were asked to comment specifically on the Scottish sunset rule, the consultees were presented with a list of options for dealing with existing restrictive covenants and were asked for their ‘views on the various options for dealing with existing restrictive covenants in the event of the introduction of Land Obligations’ (Law Commission, 2008, p. 228) and their views ‘on what steps should be taken to remove obsolete restrictive covenants from the register in the event of no other reform to the law of covenants’ (Law Commission, 2008, p. 228). Few of the consultees specifically mentioned the Scottish reforms or indeed the ‘sunset rule’. In fact only three written responses specifically used the word ‘Scotland’ or ‘Scottish’ and
those all did so in a positive way, although caution was expressed by two of these respondents. For example the Agricultural Law Association suggested,

A scheme along the lines of Option 5 might be made to work, although we caution against using mere age as evidence of obsolescence. The Scots system appears at first sight to provide a useful starting point for discussion.

The Civil Committee of the Council of Circuit Judges stated,

We take the view that the best (or, more precisely, the least worst) solution is probably to introduce a system akin to the Scottish ‘triggered sunset’ rule, with the addition (if Land Obligations are introduced) of provisions transforming successfully defended existing restrictive covenants into Land Obligations.

The Chancery Bar Association in their response seem to be broadly in support of a ‘sun set rule’ but refer neither to the rule or indeed the options as set out by the Law Commission. It would seem that their suggestion is rather narrower than the Scottish sunset, as it requires the owner of the burdened land to make a case that the covenant no longer secures any purpose. Again, the difficulty in categorising these responses is evident here. Other respondents seem to favour a sunset but make additional suggestions regarding how it might work (DLA Piper; Addleshaw Goddard; Currey & Co) or favour more than one option which includes the sunset rule (Shaw). None of the consultees who expressed a negative view towards a time limitation regarding restrictive covenants referred to the sunset rule. There was a demographic range in the group of respondents who were specifically negative towards a time limitation. They included the Conveyancing and Land Law Committee of the Law Society, Network Rail, the Diocese of Southwark, a property consultancy and three individuals. In some instances no explanation was given for resistance to the idea. The Conveyancing and Land Law Committee of the Law Society merely stated, ‘we do not think that any steps should be taken. It should be left to the parties to apply to the Lands Tribunal under s84, Law of Property Act 1925’ (Conveyancing and Land Law Committee of the Law Society). Others were explicit with regard to their vested interest (Gillett; Anon 8, Network Rail). Network Rail, for example, stated ‘there should be no change which would risk Network Rail losing the benefit of existing restrictive covenants’ (Network Rail, 2008). The relationship, or perceived lack thereof, between age and usefulness was raised by Mishiku and the Diocese of Southwark.

The view of experts from each jurisdiction to the other was interesting, and may speak to a broader issue regarding the willingness to consider and learn from other jurisdictions. Brymer, a Scottish solicitor, commented that ‘you don’t have a good track record of learning from anyone’.
Chambers, an English barrister stated ‘land law’s very different in Scotland anyway’.

Other mechanisms

Both the written data and more often, the interviews, provided data regarding other mechanisms that are currently used or could be used to improve the law and practice relating to obsolete restrictive covenants. These mechanisms include alternative dispute resolution or a ‘non trial method’ (City of Westminster and Holborn Law Society, Gerald Moran, Bates); a land registry mechanism (Farrer & Co LLP, Trowers & Hamlins, Target); use of the First Tier Tribunal rather than the Upper Tribunal (Bates); a notice procedure (Target; Francis).

Alternative dispute resolution (ADR) has grown in significance as a method of dealing with civil disputes in recent years. The court has a duty under the Civil Procedure Rules (CPR) to encourage ADR.\(^{189}\) ADR is an umbrella term which covers negotiations; mediation, conciliation; the executive tribunal, early neutral evaluation, judicial or expert determination, arbitration and adjudication. Many of these are processes are non-binding\(^ {190}\) and some retain the negative aspects of litigation in that they are expensive and time consuming.\(^ {191}\) Those who advocated ADR provided little in the way of detail regarding how it could be used. In interview, Moran gave the Party Wall Act procedure as an example of good practice (Moran)\(^ {192}\).

Use of the land registry was also mentioned, albeit not frequently. In their written response Trowers and Hamlins state that with regard to obsolete restrictive covenants, ‘no reform is needed: if obsolete and thus superfluous HMLR can already remove such entries, and the persons affected can seek a declaration’ (Trowers and Hamlins). However in interview, Target, a solicitor at Trowers expressed his frustration at trying to get the land registry to remove a covenant where there was no benefitting land. Scottish interviewees also expressed frustration that there had been a function for the Keeper to take an active role in cleansing the register from 28\(^ {\text{th}}\) November 2004 when the Abolition of Feudal Tenure etc. (Scotland) Act 2000 came into force but that when the Land Registration etc (Scotland) Act 2012 comes into force\(^ {193}\) the solicitor will be providing a warranty that the title has been fully examined (Brymer). Reid also expressed concern that the land registry

\(^{189}\) CPR 1.4(2)(e).
\(^{190}\) For example negotiations, mediation, conciliation, the executive tribunal, early neutral evaluation
\(^{191}\) Arbitration falls within this category.
\(^{192}\) The Party Wall Act 1996. The Act provides a notice and dispute resolution procedure with regard to works to shared walls and boundaries.
\(^{193}\) The Land Registration etc (Scotland) Act 2012 came into force on 8\(^{\text{th}}\) December 2014 the date Brymer was interviewed.
was unable to remove unenforceable burdens because they lacked resources and also because they were concerned that they might make errors: ‘they are naturally concerned that if they excise a group of burdens their excision might turn out to be wrong’ (Reid).

The notion of a notice procedure as a mechanism for dealing with restrictive covenants is not a novel one. Indeed the current legislative procedure in England, s84, requires that benefitted owners should be notified:

After an application has been registered and given a case number the Registrar will give directions on how notice of the application must be given by the applicant to those who may own an interest in land with the benefit of the covenant. This may involve placing a newspaper advertisement, placing of notices on the application land where they can be read by the public, or by serving publicity notices on the owners or occupiers of land owners specified by the Registrar in his service directions. The applicant must then certify that they have properly carried out the service directions and provide proof of service. (HM Courts & Tribunals Service, 2015).

The new procedure under s20 Title Conditions (Scotland) Act 2003 (the sunset rule) also provides for notice to be given to those benefitted. In the data there was little detail regarding the way in which a notice procedure would work. The main proponent of a ‘notice’ procedure was Andrew Francis who set out his suggestion in his response to the Law Commission and clearly influenced the response of the Chancery Bar Association (of which he is a member). He elucidated this position further in his interview with the writer. What he proposes is a notice procedure that puts the emphasis on the object or. He suggested that a developer serves notice on the benefitted land and if there is no objection after a prescribed period of time the developer is able to proceed. In the context of the sunset, concern was expressed with regard to identifying those to whom notice should be given (London Property Support Lawyers Group) but Francis counters this by suggesting that advertising could be used. Francis likens this to the proposals with regard to rights of light. His suggestions are considered further in Chapter Nine.

**Balance**

The final theme to be considered is the balance between the rights of property owners and the rights of third parties. This theme considers discussion both in the written responses and the interviews in both England and Scotland. The theme subdivides into concerns regarding infringement of human rights; infringement of property rights and the role of equity.

The most populated of the subthemes regarding balance was that of human rights. Half of those interviewed made mention of human rights, but only about one in ten of the written response
extracts referenced them. Mention in the written responses was confined to the English consultees. Consultees either expressed concern that one or more of the options might not be ECHR compliant (City of Westminster and Holborn law Society; National Trust; Agricultural Law Association; Moran; Hill) or provided comment on how the law could be made ECHR compliant (Council of Licenced Conveyancers; The Chancery Bar Association; Francis; Goymour). Those who commented on making the law ECHR compliant felt that an opportunity to object, compensation or the ‘public and general interest’ argument were likely to prevent problems with human rights infringement. Four of the Scottish interviewees touched on ECHR compliance and none were concerned that their changes in the law might not be compliant. Reid mentioned the fact that the tribunal may award compensation as a way of ensuring compliance. He further stated that it was not only the view of the Commission that the new law was compliant but also that, ‘everything that goes before the Scottish Parliament is scrutinised for ECHR difficulties because it’s beyond, it would be ultra vires for the Scottish Parliament to pass anything so it would also the Commission looked at it but the Parliament will itself have looked at it’ (Reid).

In addition to concerns as to whether a change in the law with regard to obsolete restrictive covenants might negatively impact on human rights, some English interviewees commented that property rights should not be taken away lightly. The general tenor of the concern was that property rights were significant rights and should not be lost without good reason (Weekes), compensation (Target), judicial process (Bates) or too easily (Shaw). Shaw puts the point well when he says, ‘the law gives an opportunity for people to have old covenants removed, s84 of the 1925 Act. It’s quite difficult conceptually for people’s property rights to be swept away by the stroke of a pen’ (Shaw).

The literature reflects different approaches to the status of property rights in different jurisdictions. For example, in Australian, the Victorian Law Commission stated:

> Although covenants are property rights, this does not mean that they should last forever. There is nothing unusual about property rights being subject to expiry by operation of law. Because property rights would otherwise exist indefinitely, statutory time limits are sometimes necessary to ensure that the use of land by subsequent owners is not unduly restricted. Time limits on the exercise of rights are an accepted way of balancing competing interests (Victorian Law Reform Commission, 2010, p.91).

It is worth noting however, that in the footnotes to this extract an example is given of removal of easements after 30 years non-use. The English Law Commission have proposed that after 20 years non-use there should be a rebuttable presumption of abandonment of an easement (Law
They also propose that a 12 year limitation period be applied to enforcement of all land obligations (para. 8.48).

The concept of equity was only mentioned by one interviewee, Target, but the points made were interesting and relate to the balance of rights between covenanator and covenantee. Currently, insofar as successors are concerned, restrictive covenants are enforced in equity. Equity requires a different standard of behaviour from a covenantee than law. So, for example, if a covenantee stands by and watches a covenanator breach a covenant it is likely that he will lose his right to enforce by way of injunction, as ‘delay defeats equity’. In interview Target suggested that solicitors struggle with the concept of equity. It is possible that as a result of this failure to grasp the concept of equity, insurance policies are taken out where equity would dictate there is no need. Dixon also made an interesting point here regarding the Law Commission’s proposals, stating that the approach was ‘somewhat schizophrenic’ in that they wanted to make Land Obligations legal and enhance their proprietary status but equally wanted to make them easier to remove or to reduce the remedies.

8.6 Conclusion

The first conclusion, pertaining to 8.2 and 8.3, is that open consultation regarding law reform is an extremely challenging task and that improvements could be made with regard to analysis and transparency. With regard to the main thematic analysis the writer concludes as follows:

- The law with regard to restrictive covenants is problematic because of its complexity and it can result in disproportionate cost.
- ‘Obsolete’ restrictive covenants are not perceived to be the main problem with the law; issues such as identifying the benefitted land present more of a challenge.
- The public distrust the planning system to protect the value and utility of their land.
- Restrictive covenants as proprietary rights enjoy a special status and this status must be respected in any reform of the law.
- English lawyers are generally not aware of the law in Scotland and are therefore unable to consider whether reforms carried out in Scotland could inform law reform in England.
- Reform of the law in Scotland has generally been well received by lawyers.
- The English data captured some clear public concerns whereas the general public in Scotland tended not to engage in the debate.

These conclusions will be combined with those from the previous chapters in a more detailed analysis in Chapter Nine.
CHAPTER 9 – THE PROBLEM OF OBSOLETE RESTRICTIVE COVENANTS AND RECOMMENDATIONS FOR REFORM

9.1 Introduction

Problems with regard to private land rights and obligations in England have been widely documented and researched. Restrictive covenants have formed part of this consideration both as a discrete problem area and as part of the wider debate concerning reform of covenants (both positive and restrictive), easements and profits à prendre. While England and Wales have grappled with the challenges presented by this complicated and technical area of land law other jurisdictions have likewise considered and, in some instances, enacted reform. This international context has enabled the writer to tap into a rich resource both in terms of law reform research and also literature concerning justifications for private ownership of land and private land rights and restrictions. This chapter has three main aims. Firstly, in 9.2 it examines the gap in the literature and previous research and how the approach taken in this study has addressed this deficit. Then, in 9.3, it returns to the questions posed in Chapter One. Finally, in 9.4 it makes recommendations for reform and further research.

9.2 The context of this research

A review of the English literature and previous research revealed two gaps. Firstly, the writer found little consideration of the link between reform and theoretical perspectives. Secondly, research carried out by the Law Commission lacked an empirical element and did not conform to the conventions of social science methodology.

This research addressed the first deficiency by considering a range of philosophical positions and examining which of these might be an appropriate stance from which to consider issues pertaining to private property. The writer took a pragmatic approach accepting that property law and practice are not ideal, and that any recommendations for reform will be undertaken in this context. Pragmatism is also a stance that allows the researcher to utilise whatever methods are most appropriate to the research questions, without the constraints found in purely positivist or interpretivist methodology. Pragmatism is, according to James, free of dogma (1975/1907, p. 31) which enables the researcher to choose a philosophical position. In this research it was considered appropriate to adopt a utilitarian philosophical perspective. This choice was made on the basis that reform of the law of restrictive covenants is likely to result in loss to some stakeholders and gain to
others. This balance between the rights of different parties is further discussed in Chapter Ten. Adopting a utilitarian approach provided the writer with a benchmark against which to assess the impact of the current law and possible future reform.

The second aspect in which this research was novel was the extent to which it employed a socio-legal empirical approach. As was stated in Chapter Five, socio-legal empirical research is unusual in land law; most published research using this approach has been in the areas of the justice system, crime and criminology, and family law (see p. 112). This research was undertaken in the wake of a substantial report on covenants, easements and profits à prendre published by the Law Commission in 2011. This was one of a number of pieces of research related to covenants undertaken by the Law Commission since the 1960s. The approach taken by this research was, however, very different from these previous studies. The Law Commission in their consultations and subsequent reports appointed an advisory panel to advise on the current state of the law, and assist with production of a consultation paper. The Consultation paper in 2008, which led to the 2011 report, was a lengthy document running to some 324 pages. The Law Commission then advertised the consultation to stakeholders, and invited responses. A relatively large number of responses were received, as was the case for previous consultations. These responses were then collated into the final report. The problems with this approach are discussed in Chapter Eight at 8.3. Perhaps most notable among these problems was the fact that the respondents were a self-selected sample of organisations and individuals, many of whom had a specific agenda which might influence their response. One of the largest groups to respond were lawyers, but the respondents were not representative of the profession as a whole, with a disproportionally high response rate from barristers and London-based solicitors. Responses from large groups of individuals appear to have been counted by the Law Commission as a single response, and so seemingly the same weight was given to the response of 1,000 solicitors and one individual. Furthermore, where a group responded it was unclear whether it was properly responding on behalf of its members.

This research took a very different approach by engaging a number of different techniques, and utilising a number of different sets of data. There had been an assumption for some time that old or obsolete covenants were problematic, and this is reflected in the four Law Commission reports published since the 1960s, along with the report of the Royal Commission on Legal Services published in 1979. However, whilst there was concern that restrictive covenants cluttered titles and hampered conveyancing, no research had to date been undertaken to assess the extent to which this was the case. Having identified this gap in the previous research, it was decided that a
sample of titles would be examined and analysed to address some of the fundamental questions that had been left unanswered by the previous research. As was explained in Chapter Five at p. 118, in order to ensure that the results were reliable, the writer used sampling techniques accepted in social science methodology to obtain a random sample of a size large enough from which to draw inferences relating to the whole population. Having obtained the data, it was analysed using a form of content analysis commonly applied in the social sciences. Lawyers have been criticised for not understanding the rules of social science methodology (Epstein & King, 2002), and the writer endeavoured to ensure that this research complied with the rules relating to reliability and validity. In addition to the analysis of the sample of land registry titles, the writer analysed all the decisions available on the websites of the UT(LC) and LTS. Analysis of cases is one of the main stays of legal research. However, traditionally cases which create judicial precedent are analysed rather than those of lower courts or tribunals. The analysis of the Lands Tribunal decisions combined the empirical techniques utilised in the analysis of land registry decisions, and more traditional doctrinal analysis. Creating a number of criteria against which to analyse the decisions (including age, type of covenant and result) enabled the writer to conduct comparisons between the UT(LC) data and the Lands Registry data and also to compare the UT(LC) data and the LTS data. Lands Tribunal data has not previously been presented or analysed in this way. The Lands Registry and Lands Tribunal data analysis were described as the ‘quantitative phase’ of the research. However, the writer acknowledges two important provisos to this description. Firstly, that the data was in fact qualitative and it was the coding process that allowed for the quantitative analysis. Secondly, that the writer combined quantitative with doctrinal analysis in both Chapters Six and Seven, as the data needed to viewed in the context of the law to which it related.

The second part of the research was labelled the ‘qualitative phase’. This research combined two sets of data. The first set of data was the written responses to the Law Commission’s 2008 consultation, and the Scottish Law Commission’s 1998 consultation. The writer used only the parts of the responses which related to old/obsolete covenants. The second data set was a number of interviews with English and Scottish experts conducted by the writer. This part of the research was more similar to that which had previously been conducted by the Law Commission. However, there were some key differences. Firstly, the writer was explicit in the method of collection and analysis. Transparency regarding collection of the interview data enables those reading the research to be aware of potential bias. Selection of the method of analysis of both sets of data was also made explicit in the research. A thematic approach based on previous research was utilised and the choices made in the analysis are explained in some detail in Chapter Five. Rather than merely
mapping what was written (in the Law Commission responses) and said (in the interviews) against the questions asked, the writer analysed the data inductively. This enabled themes to be drawn from the data which would otherwise have been lost. For example, one theme that was found in the data related to the planning system. This was a relatively highly populated theme in the English data, but was not mentioned in response to either a question asked by the Law Commission, or a question asked by the interviewer. This is a very different approach to that taken by the Law Commission, which counted respondents objection to change, but did not utilise the surrounding data which may have explained why the respondents objected to change. This is just one example of where the Law Commission’s methodology misses valuable data, which could inform their recommendations for reform. The mixed methods approach taken by this research has provided a unique insight into the extent of the problem, and has enabled the writer to approach reform from a position firmly grounded in a range of data.

The discussion above highlights the need, identified in Chapter Five, for lawyers to engage better with social research methodology, to enable socio-legal empirical research to be undertaken more widely across a wider range of legal disciplines. Lawyers have the ability to combine the doctrinal approach, which is inherent in their training, with social scientific approaches, to produce research which can be both respected by and accessed by the wider academic community.

9.3 The research questions

The hypothesis of this thesis was that many of the restrictive covenants registered on titles in England and Wales are obsolete and there should be an easier and cheaper mechanism to declutter the titles of registered land so that they better reflect the current position with regard to the land. The central aim was to assess the extent of the problem of obsolete restrictive covenants and to make recommendations for reform and further research. The following four research questions were designed to address this central aim:

1. Where do restrictive covenants fit within the broader context of private land ownership and control?
2. To what extent is there a link between age and obsoleteness with regard to restrictive covenants?
3. To what extent does the continued registration of obsolete restrictive covenants conflict with the principles and practicalities of land registration?
4. Is there a mechanism that could reduce the quantity of obsolete restrictive covenants whilst maintaining the correct balance between the rights of landowners and the rights of third parties?
Where do restrictive covenants fit within the broader context of private land ownership and control?

In the summary provided in Table 5.3, it was suggested that this question would be broadly answered by the literature. However, the literature revealed a number of themes related to the rationale for private land use controls, and the broader question of justification of private ownership of land. One such theme was the relationship between public and private land use controls. This theme ran through the research as a whole, and forms part of the discussion to follow.

This research concludes that the promotion of restrictive covenants from contractual rights, enforceable only between the original covenantor and covenantee, to proprietary rights was a pragmatic response to the socio-economic conditions of the time. A variety of juridical theories have been expounded for the decision in Tulk v Moxhay (see p. 228) but none are entirely convincing. Perhaps it does not really matter why restrictive covenants, subject to satisfying the complicated rules of transmission of benefit and burden, attach to the land; particularly to the pragmatic researcher. However, without some application of the justifications for private restrictions on land use and indeed private ownership of land it is difficult to sensibly discuss reform of this area. In this research interviewees and Law Commission respondents, in England in particular, were wary of changing the law in such a way that proprietary rights might be compromised.

The literature revealed that the inability of restrictive covenants to adapt to societal change became problematic relatively quickly (Jolly, 1931 p. iv). Legislative change provided an opportunity to create a mechanism for removal or modification to address this problem with the enactment of the LPA 1925. However, the LPA s84 was not a panacea and although amendment of s84 in 1969 went some way towards improving matters it has not been a complete success (The Law Commission in 2008, 13.12).

This thesis has considered the relationship between private law restrictions on land use and the public law system of planning control. Such a consideration is nothing new. As restrictive covenants pre-date the planning system in England reformers have previously questioned the need for them in the wake of the Town and Country Planning Acts. The analysis of titles presented in Chapter Six compared the types of covenants found according to whether they were ‘old’ or ‘new’. The ‘old’ subsample comprised covenants dated up to the end of 1933. The age division was related to a
notional ‘sunset’ period of 80 years rather than to the inception of the planning system, but clearly the covenants within the ‘old’ subsample predated the Town and Country Planning Act 1947. A number of types of covenant were shown to be represented in higher than expected numbers in the old subsample:

- Deed not supplied on first registration
- Building line
- Building materials restricted or specified
- Minimum value
- No bricks to be made/ burnt
- Use restricted
- Sale of intoxicating liquor prohibited
- Restriction on caravans or temporary buildings

It is interesting to note that most of these restrictions could now be left to the planning system. That said, the planning system is not designed solely to protect the specific interests of neighbouring properties, and so whilst it might dictate issues such as the position and materials used to build, it may not do that to the satisfaction of the covenantee. The relationship between the planning system and restrictive covenants also formed part of the analysis of Lands Tribunal decisions in Chapter Seven. In this chapter, all of the decisions of the UT(LC) which were available on the UT(LC) website were analysed. In applying to the UT(LC) the applicant must choose which of the grounds in LPA 1925 s84(1) to rely. It was found that 86% of applicants included ground (aa) in their application. In considering its jurisdiction under this ground, the Tribunal is required to ‘take account’ of planning evidence (s84(1B)). Indeed in 90% of cases planning permission had been obtained for the proposed development. In some of the remaining cases, the development was of a kind which would not require planning permission. The application succeeded (in full or in part) in 47% of cases which included this ground as against a success rate of 44.5% relating to all applications across the sample as a whole. This summary clearly shows the importance of the planning system in evidencing the efficacy of a proposed development for the purposes of modification of restrictive covenants. However, the relatively modest success rates for removal or modification, (47%) against 90% of applications having obtained planning permission, shows that restrictive covenants provide additional protection to covenantees beyond what they would enjoy from the planning system. The relationship between planning and private land use restrictions was also evident in the comparative analysis conducted in Chapter Four, where it was shown that planning permission is taken into account for judicial consideration in applications for removal of restrictive covenants in Northern Ireland, Ireland and Scotland, as well as in England.
As has been stated above, the relationship between public and private land use control emerged from the analysis of the written responses to the Law Commission, and the interviews analysed in Chapter Eight. In this part of the research 186 pieces of written data and 18 interviews from England and Scotland were analysed. The theme of planning arose in 22 sources with 68 references made. Planning was more frequently referred to in the English subsample (75% of written references to the planning system were English). What emerged from this analysis was that members of the public in England who responded to the Law Commission consultation were very concerned about the effectiveness of the planning system in protecting their private land. They also expressed concern about the ability of the planning system to protect the wider environment.

**To what extent is there a link between age and obsoleteness with regard to restrictive covenants?**

As stated in Chapter Three at 3.4, the word obsolete with regard to restrictive covenants is not easy to define, but according to the leading case on the point, *Re Truman*, the question is, ‘whether the original purpose can be served’. The Law Commission in 1991 suggested that it was a case of whether the covenant secured ‘any practical benefits of substantial value or advantage’. These definitions are rather different, with the first likely to cover archaic covenants such as covenants against tanneries, and the second could include covenants which are no longer valuable because of increased intensity of development, for example. This thesis examined restrictive covenants in the context of both their original purpose and the extent to which they were valuable.

This second research question ran throughout this research and is considered in both the literature, and the empirical research. The question of obsoleteness had been considered by the Law Commission, and so is discussed in the analysis of Law Commission reports presented in Chapter Three. The writer noted that the official reports regarding restrictive covenants had taken a varying approach to the significance of age and obsoleteness. This thesis considered reports of the Law Commission in 1967, 1984, 1991 and 2011. In addition to the four Law Commission Reports, the Royal Commission on Legal Services in 1979 commented on the impact of restrictive covenants on conveyancing, and the Conveyancing Standing Committee consulted on the matter of old restrictive covenants in 1985. Only the 1967 report led to reform. This report criticised the procedure for modification of outdated covenants, and led to an amendment to s84(1) to include the new ground (aa). The impact of this change can be seen in the analysis of UT(LC) decisions carried out in Chapter Seven, and further summarised above. As has been stated, ground (aa) was found to be the most popular and successful of all the grounds for modification and discharge of
restrictive covenants. The views of the official reports varied from the Royal Commission stating that ‘may thousands of words of restrictive covenants clutter the titles of house property and bedevil modern conveyancing’ (1979, para. 3 Annex), to the relegation of obsolete covenants to a mere footnote in the 2011 report.

The picture presented by the previous research with regard to the relationship between age and obsoleteness was therefore unclear. This research aimed to answer this question by looking at a statistically significant sample of titles to assess the relationship between age and covenant type, and to draw inferences as to the relationship between age and obsoleteness. Essentially the writer wanted to see if titles were cluttered with old covenants, and whether these could be removed without loss. The analysis revealed that age did impact on covenant type. Some types of covenant were disproportionally represented in the ‘old’ subsample, and these are listed above where they are considered in the context of the debate regarding private and public land use control. As well as considering the extent to which planning law and practice might negate the need for certain restrictive covenants, Chapter Six considered whether some covenants might have become anachronistic as a result of their age. The analysis found that the category of covenants most likely to be anachronistic were those restricting use of the land. In addition to covenants which restricted use of the land to residential there were a number of specific restrictions on use. A general restriction to residential use only was more popular in the new subsample; 39% of titles as against 26% in the old subsample. However, specific restrictions against use were more popular in the old subsample; 22% as against only 9% in the new subsample. It is in this category of covenant that anachronistic uses cluttering titles were found. The writer found that some of the uses restricted in the old sample no longer existed and planning or environmental law would prevent others. These covenants would meet both meanings of obsolete in that the original purpose could no longer be served, and they failed to secure any practical benefits of substantial value or advantage. The analysis did then establish a likely link between age and obsoleteness with regard to covenants regulating use and registered on land in England. However, the analysis also revealed an area in which the old and new subsamples were remarkably similar. This was with regard to covenants restricting creation of nuisance or annoyance. This was the most popular covenant in the sample as a whole being present on 42% of deeds (Table 6.1). The proportion of old and new deeds containing this covenant was broadly as expected (Table 6.2). Analysis of the legal authorities regarding the meaning of nuisance and annoyance, carried out in Chapter Six, demonstrates that this covenant does not lose its usefulness over time. The combination of anachronistic use covenants and useful covenants against nuisance and annoyance, makes removal of clutter
extremely challenging. This is because deeds are registered rather than individual covenants, and therefore any automatic removal of covenants by age would result in loss of both types of covenant.

The relationship between age and obsoleteness was also considered in the comparative analysis presented in Chapter Four. The Scottish Law Commission had considered the relationship between age and obsoleteness in its report published in 2000. Whilst the Law Commission in England did not consider obsolete covenants to be in significant problem in the 2011 report, the Scottish Law Commission in 2000 took a different view. In summary, they found that the relationship between age and obsoleteness was not absolute, but that ‘in the end all burdens are likely to become out of date, and when they do the result is to prevent the efficient utilisation of the affected land’ (Scottish Law Commission, 2000, p. 66). The focus of the Law Commission’s 2011 report, and the Scottish Law Commission’s 2000 report was somewhat different. The former was considering not only restrictive covenants, but also positive covenants, easements and profits à prendre, with the focus being on positive rather than restrictive covenants. The Property Law Commissioner herself stated that ‘the most profound question that the Law Commission has to answer, whatever else it does or does not achieve in this project, is whether positive obligations should be able to run with the land’ (Cooke, 2011, p. 232). The Scottish Law Commission, on the other hand, was considering reform of real burdens in the context of the ending of feudal tenure.

Having established that there was a link between age and obsoleteness with regard to certain types, but not all restrictive covenants in Chapter Six, the analysis of Lands Tribunal decisions presented in Chapter Seven sought to further inform the question. Analysis of the UT(LC) decisions found that applications to the Tribunal to modify or remove old covenants were less common than expected. Analysis of the reasons for applications to the UT(LC) showed that the most common reason for an application was to modify or remove a covenant restricting development. This type of covenant was more frequently represented in the new subsample of land registry titles. Table 6.2 shows that covenants restricting the number of units had a higher than expected count in the new subsample as opposed to the old subsample. Anachronistic covenants restricting use do not hamper development and therefore do not result in applications to the Tribunal. The analysis of UT(LC) decisions revealed several other matters pertinent to the question of age and obsoleteness. Firstly, that the mechanism designed to remove obsolete restrictive covenants, s84(1)(a), is fairly frequently included in an application (52% of cases), but rarely alone (5% of cases), and whilst 44% of cases in which (a) is included succeed (at least to some extent), they only succeed on the basis of
factor (a) in 13% of cases. As has been suggested above, s84(1)(aa) is the predominant ground upon which applicants apply for removal or modification of a covenant. It seems likely that the only reason that ground (a) remains popular in applications is that where it does succeed it will not result in the applicant having to pay compensation. Secondly, age did not impact upon the likelihood of success in the Tribunal (Table 7.2). The picture was somewhat different with regard to the Scottish decisions. The average age of real burdens brought to the LTS was older than in England, and old covenants were significantly more likely to be discharged than new covenants (Table 7.2).

The question of age and obsoleteness was an important theme in the qualitative analysis reported in Chapter Eight. Consultees were asked their views in both the English and Scottish Law Commission consultations, and the writer asked the interviewees for their views on a ‘sunset rule’ and whether obsolete covenants were problematic. Both the English and Scottish data emphasised the difficulty in the correlation between old and obsolete. However, the Scottish interviewees tended to accept that there was a relationship between old and obsolete and that there should be a presumption that after a period of time real burdens were obsolete. On the other hand, the English interviewees tended to consider the relationship to be weak. It is likely that the fact that the law had already been reformed in Scotland to provide a mechanism for removal of old real burdens had influenced those interviewed.

Bringing together both the primary and secondary research with regard to the relationship between age and obsoleteness, it is clear that there is a relationship, but that it is a complicated one. Furthermore, the current mechanism found in s84(1), and operated through the UT(LC), is not designed to deal with removal of clutter. English consultees and interviewees were resistant to the idea that there was a strong relationship between old and obsolete, but as can be seen in the discussion regarding mechanisms for removal they were not entirely resistant to change.

**To what extent does the continued registration of obsolete restrictive covenants conflict with the principles and practicalities of land registration?**

This study focused on restrictive covenants which burdened registered titles. The decision to consider only registered land was a pragmatic one. Most of the land in England and Wales is registered and the titles to registered land are available electronically from the land registry. The history and principles behind land registration are well documented. The three principles of land
registration expounded by Theodore Ruoff: the curtain, mirror and indemnity principle are found within every land law textbook. The Law Commission and The Land Registry conducted a joint project in the 1990s to investigate and report on land registration. The result of this work was a report in 2001, and ultimately the Land Registration Act 2002. The main aim was expressed as follows:

The fundamental objective of the Bill is that, under the system of electronic dealing with land that it seeks to create, the register should be a complete and accurate reflection of the state of the title of the land at any given time, so that it is possible to investigate title to land on line, with the absolute minimum of additional enquiries and inspections (para. 1.5).

The writer found that little had been said by commentators regarding the relationship between obsolete restrictive covenants and the mirror principle of land registration. The most strongly worded statement regarding the problem of obsolete restrictive covenants on registered titles came from the Royal Commission on Legal Services in 1979. They had stated that 'many thousands of words of restrictive covenants clutter the titles of house property and bedevil modern conveyancing’ (para. 3 Annex). This research compared the statutory mechanism in a number of jurisdictions, most notably the other jurisdictions in the UK, and also in the Republic of Ireland. In the comparative doctrinal analysis conducted in Chapter Four it was noted that in Northern Ireland, the Republic of Ireland and in Scotland statutory reform has resulted in discretionary tests, rather than the threshold test which is found in LPA s84(1). These discretionary tests provide a list of factors for the Tribunal to consider in determining an application. The factors are used to evidence the single ground upon which the Tribunal can determine an application. In Northern Ireland the ground is that the continued existence of the restrictive covenant ‘unreasonably impedes the enjoyment of the land or if not modified or extinguished would do so’ (article 5(1) Property (NI) Order of 1997). In Ireland the test for modification or discharge of a covenant is ‘that continued compliance with it [the covenant] would constitute an unreasonable interference with the use and enjoyment of the servient land’ (LCLRA s50(1)). In Scotland the test is that a burden would be varied or discharged if it was reasonable to do so (TC(S)A 2003 s98(a)). Allowing the Tribunal to make a determination based on whether it is reasonable to do so, guided by a list of factors to consider, provides a more flexible approach than the threshold test found in s84(1) which requires one of the grounds to be proven.
Is there a mechanism that could reduce the quantity of obsolete restrictive covenants whilst maintaining the correct balance between the rights of landowners and the rights of third parties?

It is not the purpose of this thesis to set out detailed proposals for reform. The aim is to extract from the findings a number of key areas for further consideration. Firstly, a recommendation is made for changes to the methodology of Law Commission consultation. The writer agrees with the Law Commission’s proposal that the new species of restrictions should be registered on both the benefited and burdened land. This will enable both parties to be in a much stronger position to negotiate where change is desired. However, more could be done to ensure clarity for landowners now and in the future and therefore recommendations are made with regard to reminding owners of the restrictions on their land and also to assist lawyers in ensuring future restrictions are clear and accessible. Both comparative analysis in Chapter Four, and analysis of Tribunal decisions in Chapter Seven revealed shortcomings with regard to dealing with restrictive covenants and Chapter Six demonstrated the link between age and obsoleteness. Therefore recommendations are made for further reform in this regard.

9.4 Recommendations for further research and reform

The future of empirical research in land law

The methodology employed by the Law Commission in collecting and analysing the consultation data is considered in Chapter Eight at 8.3. The result of this analysis raised questions as to whether some of the conclusions were as well supported by the empirical research as they might appear. This is an important area which could benefit from further consideration as the current approach is misleading.

The Law Commission has helpfully published a short note on how empirical research is used on its website (Law Commission, 2015). This is a recent addition appearing four years after the report on easements and covenants. It relates to all Law Commission research and indeed makes no reference to the consultations referred to in this thesis. The paper acknowledges that their consultations:

Can never, by themselves, provide a representative sample of public opinion. They do not represent a statistically significant sample size, for one thing; for another, they do not always come to the attention of a large section of the public; and for another, those members of the public who do contact us are a self-selecting sample, often with special reasons for making contact.
The report goes on to explain that cost is a significant barrier to the Law Commission’s work and it is accepted that this is the case. However, the writer recommends that a number of changes could be made to future projects to enable the results to be more reliable and transparent. The writer recommends consulting with members of the public and the profession separately as their concerns are clearly very different, as is their ability to contribute to law reform. With regard to lawyers, it would be possible to sample from the lists provided by the Law Society, the Institute of Legal Executives and the Bar Council in order to obtain a less London-centric view. Responses from groups as part of an open consultation are clearly valuable and these are some of the most comprehensive responses supplied. However, the Law Commission should require them to confirm how many members they represent, and that they have contacted these members to ask for participation or at least to attest to their agreement to the response provided. Respondents should either be listed as a contributor to a group response, or respond of their own accord. In all cases respondents should be asked to clearly respond to the question posed, as many of the responses to the 2008 consultation were generic rather than specific. The Law Commission should consider how consultation with the public is conducted. Those who responded to the 2008 consultation were unlikely to be representative of the general public view. They were small in number, and many seemed to be part of one or two residents’ groups. Again they didn’t respond to the questions asked by the Law Commission, and in some instances it seemed likely that they had not read the report. Conducting a survey of the general public in which questions were designed specifically for them (as non-experts) would likely yield different and more representative data.

One of the most significant contributions of this research is that it adds to the sparse collection of empirical studies in land law. It demonstrates that mixed methods can be applied to problems in this area of the law, and that whilst such research is relatively time consuming it is a feasible approach for future projects. Indeed the Scottish Law Commission made use of survey data as part of their report into real burdens in 2000.

Understanding restrictive covenants

Jeremy Bentham believed that lawyers benefitted from the opacity of the law, and with regard to restrictive covenants this remains the case. The land register assists at the point of purchase, but some years later when an owner is desirous of alteration or extension it is likely that the title is forgotten. It is therefore suggested that the planning portal makes clearer reference to restrictive covenants and provides a link to a resource maintained by the Land Registry. The Land Registry
Law Com No. 327 proposed that the Land Registry consider short form covenants. Standard wording of popular covenants would enable a consensus amongst lawyers as to the meaning of the covenant. Both the profession and the public could then have guidance on what is meant by standard wording of popular covenants, and guidance for time-limiting certain development covenants to the ‘development period’ should also be considered. Future advances in technology may also have a role to play in perhaps enabling covenants in deeds to be more easily divisible so that those relating only to a development period could be removed from the title after that period had expired leaving only those which are relevant to the land. If this were possible it would go some way to reducing the clutter on titles.

Standardisation would, it is suggested, increase transparency and reduce costs in accordance with the principles of utilitarianism. It is hoped that a link from the planning portal to the Land Registry would encourage owners to check their title so that they are able them to serve a development notice where required (see ‘dealing with restrictive covenants below’) rather than inadvertently breaching’ and then later obtaining insurance for breach.

**Dealing with restrictive covenants**

This research has demonstrated that s84 is not an effective mechanism for dealing with restrictive covenants, being too costly and risky. Development could be facilitated by reform to include a ‘notice of proposed development’, and replacement of the current ‘threshold tests’ contained within s84 with ‘discretionary factors’, such as those used in the rest of the UK and Ireland. Use of the First Tier Tribunal in the first instance and for unopposed applications, may also be a time and cost saving device. A Scottish style ‘sunset rule’ would provide a further tool to facilitate development. Finally, a limitation period would reduce the need for insurance where there has been a historic and often inadvertent breach.
It is proposed that a ‘notice of intended development’, based on the notice of proposed obstruction (NPO) proposed by the Law Commission in their 2014 report on rights to light (Law Commission, 2014) should be further considered. This procedure was referred to by Andrew Francis QC in his interview with the writer, and was supported by him in the rights to light consultation. Essentially the NPO procedure allows a developer to serve notice on a neighbour indicating that light to the neighbour’s property might be obstructed by a proposed development. The neighbour would then have to decide, within a specified period, whether or not to apply to court for an injunction to protect that light. If the neighbour decides not to apply for an injunction then they will lose the right to apply, but will remain entitled to equitable damages. With regard to a ‘notice of intended development’, where the extent of the benefitted land is unclear, the publicity procedure could borrow from the planning system with notices served on neighbours, displayed on the property and published in the local newspaper. The Scottish ‘sunset’ procedure also sets out notification methods which could be instructive.

The analysis presented in Chapter Seven showed that applications to the UT(LC) are uncommon and the chances of success are only about 50% This contrasted with the LTS where there are comparatively more applications and there is a significantly higher success rate. The law with regard to discharge and modification of real burdens in Scotland has been reformed in a number of ways. With regard to the statutory mechanism for removal and modification of real burdens the TC(S)A 2003 replaced the three grounds set out in the Conveyancing and Feudal Report (Scotland) Act 1970 with a single test of ‘reasonablness’. In determining whether it is reasonable the Tribunal consider a list of nine factors set out in TC(S)A 2003 s100. The writer proposes amending the law to replace s84 with a similar discretionary test which would enhance clarity and would provide the UT(LC) with increased flexibility in their determinations.

An English sunset rule would acknowledge the link between age and obsoleteness and save costs where the restrictive covenant was particularly old. Whilst there was some resistance to change amongst both the public and the legal profession it is suggested that this was in part as a result of the way in which the Law Commission presented the consultation and collected and analysed the results. . It is unlikely that a sunset provision would lead to a flood of applications, as this has not been the case in Scotland (see Table 4.1), however it would be a useful tool to save time and cost where a covenant is old.
It may also be possible to utilize the First Tier Tribunal to deal with applications in the first instance. A lower issue fee might be possible until such time as the application is found to be opposed. Where the application is unopposed that could be the end of the matter and the administrative requirements could then be dealt with at this level. Where the application is opposed the parties could be encouraged towards mediation and agreement at this point to avoid unnecessary costs. Clearly some opposed applications regarding modification or removal of restrictive covenants are very complicated; the wording of the covenant may be difficult to interpret, and the extent to which the proposed development impinges on the land of the covenantee may be contested. In these instances it may be appropriate for the matter to be dealt with by the UT(LC), with parties represented at the appropriate level, and with expert valuation evidence. However, where a homeowner wishes to extend their property in breach of covenant, and that property is adjacent to houses which have already been the subject of alteration, the current procedure seems unduly complicated and expensive. In this situation a ‘notice of intended development’ would flush out objections. Alternatively an application to the First Tier Tribunal at a lower issue fee to ascertain whether the application is likely to be opposed, might encourage engagement with the statutory procedure, rather than merely breaching the covenant and then taking out insurance. Further research would need to be undertaken to ascertain the feasibility of such an approach.

The Limitation Act 1980 provides that claims for breach of contract are statute barred under the Act after six years and where the breach relates to an obligation contained within a deed the limitation is twelve years. A limitation period enables lawyers to provide clear advice to a client regarding the likelihood that a claim for a historic breach of contract will succeed. No such clarity is available for breach of covenant claims where the equitable principles of delay, acquiescence and laches have to be considered. The leading case here is Hepworth v Pickles [1900] 1 Ch. 108 where a breach had continued for twenty four years prior to the claim. In that case the Court of Appeal held that the covenant not to use the property as an inn, tavern or beerhouse had been waived. There is no prescribed time period, but it is now considered that once a breach is twenty years old it is no longer enforceable, and this is the time period referred to by the CML. One of the results of this position is that insurance policies are obtained for any breaches of covenant which have occurred in the last twenty years. The lack of clear limitation and the widely accepted 20 year time period results in additional unnecessary costs.

The Law Commission propose that a limitation period of twelve years be imposed for land obligations. The writer endorses this but questions whether in fact the period should be shorter. If
an owner of benefitted land has endured a breach of covenant for more than a decade it could be argued that they do not really consider that they have suffered any loss. It is therefore suggested that a six year limitation would more than suffice. A development becomes immune from enforcement action by the local planning authority if no action is taken within four years of substantial completion (Town and Country Planning Act 1990, s171B), and similar clarity would assist in private land use. Whether it would be possible to impose a limitation period on restrictive covenants which would continue as equitable interests is less certain. Further research should be carried out into the frequency of claims on insurance policies over time to ascertain the extent to which insurance is being taken out in circumstances where risk is negligible.

The question then arises as to where these proposals would sit with the greatest happiness principle. As was stated in Chapter One, pain is considered the stronger sensation and therefore it would be necessary for any change to result in more happiness than pain. A notice procedure would enable those who may be impacted by development to either do nothing, commence negotiations for compensation or oppose the development thus invoking the UT(LC) procedure. Where no action is taken it can be assumed that the owner with the benefit of the covenant does not consider him or herself adversely affected by the proposed development. In any event they would not lose the opportunity to apply to the UT(LC) for an award of compensation if they believed that the development would result in loss. The UT(LC) procedure is, and would continue to be, designed to prevent modification or removal where the injury to the benefitted party outweighed the benefit to the owner of the burdened land.

9.4 Conclusion

This chapter draws together the research conducted in the previous eight chapters to answer the research questions set out in Chapter One. It concludes that there are further lessons that could be learnt with regard to restrictive covenants and that improvements in both law and practice could lead to increased certainty. When the writer commenced this research in October 2010 the Law Commission consultation had been underway for more than two years. Less than a year into the research, in June 2011, a final report was published, and at the time of writing three and a half years have passed and the government’s response is still awaited. Whilst the legal profession may be desirous of change the extent to which any change will occur is unclear.
CHAPTER 10 – CONCLUSION

10.1 Introduction

In Chapter One of this thesis the writer explained the rationale behind selection of restrictive covenants as an area for further research. Whilst working as a solicitor the writer had found that restrictive covenants had sometimes provided a hurdle to the development planned by clients. Sometimes they were revealed to have been historically breached and insurance had to be obtained and the cost grudgingly met by a client. On other occasions they merely needed to be read, understood and then dismissed as unproblematic. In many cases valuable time was required for consideration of these matters and it was often felt that this time could be better spent. These issues are perhaps small in scope. However, once the research was commenced, the writer found that in considering a small area of land law wider concerns quickly become apparent. Perhaps the most significant of these concerns were the nature of human rights and the essence of private ownership of land. The intention of this research from the outset was to consider a practical problem and as a result the writer considered the meanings and implications of socio-legal research in order to create an appropriate research design. The aim of this final chapter is to reflect the tensions between the big issues of private land rights and human rights and the specifics of restrictive covenants and place this research firmly within its social context.

10.2 Balancing the rights of all parties and respecting change

Certain theoretical schools would not consider it necessary to consider the needs of society when assessing property rights as these are deemed absolute and individual. Advocates of natural law emphasise the importance of the notion that private ownership should be subject to only the most minor instances of state intervention. As has been stated from the beginning this is not the perspective taken by this research. The state already interferes with property rights for the greater good of society as a whole or individuals. Property is redistributed on relationship breakdown and on death. The state also restricts the rights of individuals for the greater good of society with various statutory regimes relating to planning and the environment and the common law balances the rights of neighbouring land owners via the law of nuisance. Property can even be taken away where it is required for the benefit of the wider community under powers of compulsory purchase.
The rights of covenanteees

The owner of the benefitted land or ‘covenantee’ enjoys the right to limit his or her neighbour’s use of their land in some way. Chapter Two suggests this right was made to run with land in response to societal need and it evolved from its somewhat vague parameters in *Tulk v Moxhay* to the more restricted rules which apply today. The law also evolved to allow for restrictive covenants to be modified by application of statutory principles in both England and many of the other jurisdictions considered in Chapter Four. In the jurisdictions considered by this research restrictive covenants (or their equivalent) could originally only be modified by consent. Most then invoked a statutory mechanism for modification or removal and many have widened this mechanism to make it easier to succeed. It is therefore suggested that further modification would not be problematic where due process is engaged. Any changes must of course respect the human rights of the covenantee but detailed consideration of the relationship between covenants and human rights in Chapter Three concludes that reform of the law in this area need not be contrary to the ECHR.

The rights of covenants

The fact that a covenantor takes land with notice of a covenant could be argued to be the end of it and this was certainly the view of one of the interviewees in this research. Some commentators have argued that private restrictions on land use are democratic as the purchaser has a choice as to whether or not to buy the burdened land. The tension between theory and reality here is clear. Where housing is in short supply purchasers rarely have a real choice as to the property they purchase. Furthermore, the requirements of the owner of the land may change over time and there is a need for the law to adapt to this change.

The rights of future owners

The perpetual nature of restrictive covenants can be problematic for future as well as current owners. Whilst purchasers might prefer to purchase free of any restrictive covenants, scarcity in the housing stock is likely to mean that they will not be able to avoid this. A utilitarian theory of property rights considers maximisation of the happiness of society and it is therefore argued that restricting development by way of restrictive covenant may at times be anti-utilitarian. Of course, measuring happiness is one of the main challenges of utilitarian theory, and gains in happiness of a home owner facilitated by removal of a covenant against development would have to be weighed against the loss of happiness of a formerly benefitted owner. The thematic analysis conducted in Chapter Eight showed that there would be a significant loss of happiness were old restrictive
covenants to be swept away without redress. Those who expressed concern often mentioned that developers would benefit and no mention was ever made of benefit to those who would buy from developers. The research did not provide any measure of happiness for individuals who may benefit from a change in the law if it were to lead to increased house sizes or more development.

The rights of the wider community

One theme that arose from the research was that restrictive covenants may play a useful role for the wider community. Individuals who responded to the English consultation commented that restrictive covenants play a useful role in preserving the environment and the country’s heritage. There is considerable potential for bias here as it would seem that many of these individuals are benefitted owners who may be interested in preserving the value or amenity of their own property and are using wider social concern to support their private rights. Commentators have also made this point and these arguments are considered in Chapter Two of this thesis. This is certainly an interesting argument. On the one hand, it seems inappropriate for a tool designed to regulate the relationships between private individuals to be used for a different purpose. On the other hand, the relationship between planning regulation and restrictive covenants cannot be ignored. Planning permission is important to those making applications under s84(1)(aa) because it will assist in showing that the proposed user is reasonable. However, the proposals by the Law Commission for a new species of statutory ‘conservation covenants’ suggest that a specific devise designed to protect natural or heritage features of land is more appropriate than utilising a device designed to regulate neighbourly land use for wider social purposes.

10.3 Limitations of this research

There are a variety of data that would have been interesting to consider in this research. The writer chose not to conduct a large scale survey of legal practitioners for the reasons set out in Chapter Five, instead focusing on the views of ‘expert respondents’. Having analysed the responses to the Law Commission reports and ascertained the extent to which representation of the legal profession was skewed towards larger practises it became clear that a more balanced view would have been valuable. That said, the challenges in obtaining the desired data would have been difficult to overcome.

This research has suggested that the pragmatic solution of obtaining restrictive covenant indemnity insurance is frequently used. However, whilst this was revealed to be the case by the English interviews no further supporting data was presented in this research. A survey of the legal
profession such as that carried out by Cusine and Egan (1995) with regard to feuing conditions in Scotland would have clarified the extent of this practice. This was rejected for the reasons set out in Chapter Five.

Analysis of Scottish title data would have made the comparisons carried out in Chapters Six and Seven more comprehensive but cost was a significant problem and the comparative element of the research became more significant as this research proceeded than was anticipated when it began. Analysis of the Scottish Lands Tribunal cases revealed that the types of real burdens found on land that come to the attention of the LTS are analogous to those in England.

In considering the relationship between planning and restrictive covenants this research suggests that the public might be unclear regarding the extent to which their land may be burdened and further research regarding public understanding of the relationship would be worthwhile. A survey of homeowners in England along the lines of the one commissioned by the Scottish Law Commission to ascertain public understanding of private and public land use control would be valuable.

10.4 Contribution to understanding of the law and practice regarding restrictive covenants

Coding restrictive covenants has provided a useful snapshot of restrictive covenants burdening land in England. We now have information that we did not have before regarding: types of restrictive covenant, age of restrictive covenants and the relationship between age and type. Analysis of Tribunal data and comparison between this and the Land Registry data provides an insight into what happens when applications are made under s84.

These data provides a context upon which to consider the law. Interviewing members of the profession and analysing data provided by other stakeholders provided an insight into the practical problems faced in dealing with restrictive covenants. Comparison of the views of English and Scottish interviewees was informative. Whilst English interviewees tended to be reluctant to see any significant change in the law regarding removal of restrictive covenants, Scottish experts were enthusiastic about the changes that had occurred in their jurisdiction. It is not possible to make inferences as to the views of the legal profession in two jurisdictions from a small number of interviews, however these data suggests that lawyers may be concerned about the implications of change at the outset but once the law is changed may likewise change their view.
10.5 Contribution to socio-legal research in land law

This research found that whilst socio-legal studies present a popular challenge to the tradition of doctrinal scholarship, socio-legal research in land law is relatively rare. The reasons for this as discussed in Chapter Five may relate in part to the relationship between teaching and research and is very likely to be influenced by availability of funding.

This research has shown that data which is publically available (although at a cost), and primary data can be collected and analysed in accordance with socio-legal empirical methodology. It has further shown that socio legal empirical research in land law can provide results which enable researchers to speak from a position of confidence about the extent of a problem and make recommendations for reform and further research based on the findings. The methodology used for the quantitative phase of this research could be easily replicated by researchers in the future to conduct similar studies, or expand upon this research, using the simple statistical tools and software (SPSS and Excel) used in this research. This is one of the strengths of positivist research. The qualitative research, being interpretivist, could be replicated but might yield slightly different results. This is because interpretivist research acknowledges that the researcher is imbedded in the research process and therefore substitution of a different researcher will impact on the results of the research.

It is hoped that academics in the field of land law will in future embrace empirical socio-legal methodology as a means of examining the relationship between human beings and their most coveted resource.
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Appendix 1

Email to insurance companies

Dear [        ],

An analysis of the problem and potential solutions pertaining to obsolete restrictive covenants affecting land in England and Wales.

My name is Emily Walsh and I am a former commercial property solicitor now a senior lecturer at the University of Portsmouth. I am conducting some research into ageing/obsolete restrictive covenants as part of my PhD thesis. The main aim of this research is to assess the extent of the ‘problem’ presented by obsolete restrictive covenants in England and Wales and to ascertain whether there is a viable solution to this problem. As part of this research I am interested in obtaining an idea of the cost of taking out insurance relating to both subsisting and proposed breaches of old covenants to approve plans. I would be grateful therefore if you were able to provide a quotation for a maximum of £250,000 of cover relating to the attached title for both a subsisting and a proposed breach of the requirement for plans to be approved. I do not plan to use the names of individual companies within my research.

Kind regards

Emily Walsh
Appendix 2

Participant invitation letters

Dear [        ],

An analysis of the problem and potential solutions pertaining to obsolete restrictive covenants affecting land in England and Wales.

My name is Emily Walsh and I am a former commercial property solicitor now a senior lecturer at the University of Portsmouth. I am conducting some research into ageing/obsolete restrictive covenants as part of my PhD thesis. The main aim of this research is to assess the extent of the ‘problem’ presented by obsolete restrictive covenants in England and Wales and to ascertain whether there is a viable solution to this problem. [You may recall responding to the Law Commission’s Consultation paper No 188 entitled Easements, Covenants and Profits à Prendre in 2008/ I note that you have represented parties in the Upper Tribunal (Lands Chamber)]. It is as a result of your interest and expertise in this area that I am contacting you to invite you to participate in this research.

I would be very grateful if you could spare 15-30 minutes of your time to take part in a telephone interview at a time convenient to you. If you are unable to assist please let me know by email. If I do not hear from you I will telephone you within the next week to see if you are willing to take part and, if so, to arrange a suitable time for the interview.

I attach the relevant background information to assist you in deciding whether you are willing to take part.

Kind regards,

Emily Walsh
Dear [        ],

An analysis of the problem and potential solutions pertaining to obsolete restrictive covenants affecting land in England and Wales.

My name is Emily Walsh and I am a former commercial property solicitor now a senior lecturer at the University of Portsmouth. I am conducting some research into ageing/obsolete restrictive covenants as part of my PhD thesis. The main aim of this research is to assess the extent of the ‘problem’ presented by obsolete restrictive covenants in England and Wales, and to ascertain whether there is a viable solution to this problem. [You may recall responding to the Scottish Law Commission’s Discussion paper No 106 entitled Real Burdens in 1998/ I note that you have experience representing clients in the Scottish Lands Tribunal]. It is as a result of your interest and expertise in this area that I am contacting you to invite you to participate in this research.

As part of my research I am interested in the extent to which the ‘sunset rule’ provided by the Title Conditions (Scotland) Act 2003 has proved successful in addressing similar issues with regard to real burdens in Scotland. I am further interested in the views of Scottish experts on the extent of the problems posed by ageing/obsolete real burdens.

I would be very grateful if you could spare 15-30 minutes of your time to take part in a telephone interview at a time convenient to you. If you are unable to assist please let me know by email. If I do not hear from you I will telephone you within the next week to see if you are willing to take part and, if so, to arrange a suitable time for the interview.

I attach the relevant background information to assist you in deciding whether you are willing to take part.

Kind regards,

Emily Walsh
Appendix 3

Participant information sheet

Study Title: An analysis of the problem and potential solutions pertaining to obsolete restrictive covenants affecting land in England and Wales.

I would like to invite you to take part in my research study. Before you decide I would like you to understand why the research is being done and what it would involve for you. Talk to others about the study if you wish. Ask me if there is anything that is not clear.

What is the purpose of the study?

This research is part of a PhD thesis entitled, An analysis of the problem and potential solutions pertaining to obsolete restrictive covenants affecting land in England and Wales. In the research I aim to answer the following questions.

- To what extent is there a link between age and obsoleteness with regard to restrictive covenants?
- To what extent does the continued registration of obsolete restrictive covenants conflict with the principles and practicalities of land registration?
- Is there a mechanism which could reduce the quantity of obsolete restrictive covenants whilst maintaining the correct balance between the right of landowners and the rights of third parties?

Why have I been invited?

In this research I am interested in speaking to experts in the field in both England and Scotland. I am therefore approaching respondents to the most recent English and Scottish Law Commission reports relating restrictive covenants and real burdens, and practitioners with experience in the Upper Chamber (Lands Tribunal) and the Scottish Lands Tribunal.

Do I have to take part?

It is up to you to decide to join the study. If you agree to take part, I will then ask you to sign a consent form.

What will happen if I take part?

Should you agree to take part I will arrange a short (15-30 minute) telephone/ face to face interview which I hope to record. The interviews will form part of the data for the final report.
and the analysis may include direct quotation. The attached consent form enables you to choose whether or not you are happy to be named and or directly quoted.

**What will I have to do?**

Participation involves completing the consent form provided and answering a small number of interview questions.

**What are the possible disadvantages and risks of taking part?**

Apart from giving up a small amount of your valuable time I do not envisage any disadvantages of participation in this research.

**What are the possible benefits of taking part?**

It is anticipated that your assistance in this research will lead to a better understanding of the practice in the area of restrictive covenants and land burdens and may lead to proposals for better professional practice in the future.

**Will my taking part in the study be kept confidential?**

Where necessary confidentiality will be maintained. Should you wish to remain anonymous your name will not be mentioned in the final report or any subsequent publication. In this case your anonymity will be protected by removing your name from all written records and replacing it with a code (for example respondent 1). Only the researcher and supervisor will have access to view identifiable data should you wish to remain anonymous.

Should you not wish your data to be retained for use in further studies please indicate that this is the case on the consent form. If you consent to your data being retained it will not be used without further approval from the University of Portsmouth Research Ethics Committee.

The interview recording will be destroyed within 28 days of completion of the final thesis.

Participants have the right to check the accuracy of data held about them and correct any errors.

**What will happen if I don’t want to carry on with the study?**

You can withdraw from the interview at any time and are free to insist on anonymity of your data at any time. It may not be possible to withdraw your data once it has been analysed.

**What if there is a problem?**

If you have a concern about any aspect of this study, you should speak to me or my supervisor, and we will do our best to answer your questions. If you remain unhappy and wish to complain formally, you can do this by contacting the Head of the School of Civil Engineering and Surveying. Contact details are provided at the bottom of this sheet.

**What will happen to the results of the research study?**
The research study will form part of a PhD thesis. It is hoped that parts of this thesis will form the basis of one or more articles for publication. If this is the case I will send you a pdf of the relevant publication(s).

**Who is organising and funding the research?**

The research is funded by the University of Portsmouth.

**Who has reviewed the study?**

‘Research in the University of Portsmouth is looked at by independent an group of people, called a Research Ethics Committee, to protect your interests. This study has been reviewed and given a favourable opinion by the Faculty of Technology Research Ethics Committee.’

**Concluding statement**

Thank the potential participant for taking the time to read this information sheet. If you decide to participate you will be given a copy of the information sheet and signed consent form.

**Contact details**

Researcher  
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[dominic.fox@port.ac.uk](mailto:dominic.fox@port.ac.uk)  
023 9284 2420

Dated 19th November 2014
### Appendix 4

#### Extract from coding spreadsheet

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| 268 | Page |
## Appendix 5

### Interview guides

**Version 1 – Interview guide for consultation participants**

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<th>Participant Name:</th>
<th>Date:</th>
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<td>Consent form received? Y/N</td>
<td>Agreed to recording? Y/N</td>
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<thead>
<tr>
<th>To what extent does the sunset rule provide a solution to the problems posed by obsolete real burdens?</th>
<th>Did you agree with the Scottish Law Commission’s proposal regarding a sunset rule? Can you tell me about your response?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Do you believe that obsolete real burdens are problematic?</td>
<td></td>
</tr>
<tr>
<td>• To what extent?</td>
<td></td>
</tr>
<tr>
<td>• What about insurance?</td>
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<td>What makes a real burden obsolete in your opinion?</td>
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<tr>
<td>Do you believe there is a different/ better solution to the problem?</td>
<td></td>
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<tr>
<td>Do you think the new rule is being fully utilized?</td>
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<tr>
<td>• Why?</td>
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| To what extent does the sunset rule provide a solution to the problems posed by obsolete real burdens? | Do you believe that obsolete real burdens are problematic?  
- To what extent?  
  - What about insurance? |
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<tr>
<td>Do you believe there is a different/better solution to the problem?</td>
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<tr>
<td>What makes a real burden obsolete in your opinion?</td>
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| Do you think the new rule is being fully utilized?  
- Why?  
- Why not? |
## Appendix 6

### Description of codes with examples

<table>
<thead>
<tr>
<th>Code</th>
<th>Description</th>
<th>Include/ Exclude</th>
<th>Example(s)</th>
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<tr>
<td>1</td>
<td>Deed not supplied on first registration</td>
<td>Where the title refers to a deed in the charges register and states that it may refer to restrictive covenants but that this deed was not produced on first registration.</td>
<td>HD211371 2 A Conveyance dated 5 November 1937 made between (1) Jacob Nielson and (2) James Henry Frank Sewell contains restrictive covenants but neither the original deed nor a certified copy or examined abstract thereof was produced on first registration.</td>
</tr>
<tr>
<td>2</td>
<td>Number of units restricted</td>
<td>The covenant stipulates a certain maximum number of units.</td>
<td>WK39743 (a) One dwellinghouse only with appropriate outbuildings thereto and costing at a minimum for materials and labour alone of Four hundred pounds shall be erected on the said land hereby conveyed and such dwellinghouse and outbuildings shall be in conformity with plans and specifications which have been previously submitted to and approved of in writing by the Vendors or their Surveyor.</td>
</tr>
<tr>
<td>3</td>
<td>Building line</td>
<td>The covenant specifies a distance that must be maintained between a road and the property or a building line determined by the vendor or local authority.</td>
<td>HD349973 2. No Building shall be erected within ten feet of Cravells Road or the Harpenden Road. WK118554 4. No house or building shall be erected upon the said land unless fronting to the roads and set back from the said roads in accordance with the building lines to be approved by the Vendors and the Local Authorities.</td>
</tr>
<tr>
<td>4</td>
<td>Approval of plans</td>
<td>The covenant states that no building shall be constructed without prior approval of the plans by the Vendor or the Vendor’s Surveyor.</td>
<td>WK118554 ...no house or other erection shall be erected or built upon the said piece of land the plans whereof have not been submitted to and approved and signed by the Vendors.</td>
</tr>
<tr>
<td>5</td>
<td>Restriction on alterations or building</td>
<td>The covenant states that the current building may not be altered or must be a particular type of building</td>
<td>This does not include stipulation on building materials which is included in 6 below. It may include approval of plans if there is a further covenant relating to construction of further buildings.</td>
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<tr>
<td>6</td>
<td>Building materials stipulated</td>
<td>The covenant states that only certain building materials may be used.</td>
<td>Includes reference to not using certain building materials.</td>
</tr>
<tr>
<td>7</td>
<td>Minimum value</td>
<td>The covenant states that any building constructed on the site must be at a minimum cost</td>
<td></td>
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<tr>
<td>8</td>
<td>Overage/ clawback/ pre-emption</td>
<td>The covenant states that the vendor is entitled to an additional payment if certain conditions are met (such as development of additional units) or that if the purchaser wishes to sell the vendor has a right of first refusal.</td>
<td>HD407851 (10.05.2002) A Development Clawback Agreement dated 18 March 2002 made between (1) East Hertfordshire District Council and (2) Riversmead Housing Association Limited contains covenants under section 33 Local Government (Miscellaneous Provisions) Act 1982 relating to certain additional clawback payments.</td>
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<tr>
<td>9</td>
<td>Not to excavate</td>
<td>The covenant states that materials such as sand or earth shall not be dug from the site save for the digging of</td>
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<tr>
<td>No.</td>
<td>Description</td>
<td>Text</td>
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<tr>
<td>10</td>
<td>Light/views</td>
<td>The covenant states that nothing shall be built on the property that shall restrict the light on the vendor’s retained land.</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td>WM210196 The Transferees and their successors in title shall not erect or plant any buildings ornament tree hedge shrub or fence which will exceed three feet in height so as to in any way block the Transferors or their successors in title view from the window situate in the front of the Transferors property...</td>
<td></td>
</tr>
<tr>
<td>11</td>
<td>No bricks made or burnt</td>
<td>The covenant states that there shall be no burning or making of bricks on the land.</td>
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<td>WK118554 5. No lime kiln brick kiln or place for the manufacture of lime or bricks or other similar articles shall be permitted on the said land</td>
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<tr>
<td>12</td>
<td>Build on or interrupt services</td>
<td>The covenant states that the purchaser must not move or building on sewers etc. Includes: interfering with visibility splays, utility company covenants, damaging sewers or drains etc.</td>
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<td>GR153505 (ii) Not to raise or lower the level of the said land which would in any way affect the rights hereby licensed.</td>
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<td>13</td>
<td>Residential</td>
<td>The covenant states that the land may only be used for residential purposes</td>
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<tr>
<td></td>
<td></td>
<td>WK118554 6. Not to carry on or permit to be carried on on the said piece of land or any part thereof any trade or business of any kind and any buildings to be erected thereon and be used as private dwellinghouses only.</td>
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<td>14</td>
<td>Residential with exceptions</td>
<td>The covenant states that the land may only be used for residential purposes or... The exceptions tend to include professional use such as doctor’s surgery</td>
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<tr>
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<td>WK39743 (a) Any dwellinghouse on the said land hereby conveyed shall be used as a private dwellinghouse only but so that this restrictions shall not apply to the practice of a Doctor Dentist Solicitor or Architect</td>
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<td>15</td>
<td>Use restricted</td>
<td>The covenant states that the land may not be used for a particular use or class of uses. This does not include 13/14 above</td>
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<tr>
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<td>SF554425 Not to use or suffer to be used the Property or any part of it or any building on it other than for use</td>
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|   | Not to sell intoxicating liquor | The covenant states the land shall not be used for the sale or manufacture of intoxicating liquor. | WK442539743  
(b) The sale of manufacture of or dealing with wines, beers, spirits, or intoxicating liquors of any descriptions shall not be permitted on the said premises hereby conveyed and so that this restriction shall apply to a club wherein intoxicating liquors shall be sold. |
|---|---|---|---|
|   | Removal of trees/interference with planting | The covenant states that trees must not be removed or that planting is in some way restricted. | WM562036  
2. Not to remove any of the trees or shrubs on the Grantee’s Land save as required for the purpose of the Development and in accordance with the detailed requirements of the Local Planning Authority. |
|   | Advertising hoardings | The covenant states that no advertising bills, placards or hoardings may be displayed on the premises. | WYK292375  
3. No hoarding or other erection shall at any time be erected or placed or suffered to be erected or placed on any part of the property hereby conveyed for the purpose of exhibiting any advertisement or notice other than such as relate to the selling or letting of the property and no advertisement or notice other than as aforesaid shall at any time be affixed to or exhibited upon any part of the property. |
|   | Fence height/position | The covenant states that a fence must not exceed a certain height or must not be built in a certain position. | WYK292375  
6. No boundary walls, fences, or hedges to public or private roads other than existing walls, fences, or hedges shall be more than four feet six inches in height and no back or side walls, fences, or hedges shall be more than six feet in height. |
|   | Animals | The covenant restricts the keeping of certain types of animals. | SYK39243  
no pigs, pigeons, or goats shall at any time be kept on the said property hereby conveyed. |
<p>|   | Caravans | The covenant restricts the | SYK216335 |</p>
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<td><strong>22</strong></td>
<td>Parking and unloading</td>
<td>The covenant restricts parking or driving on parts of the estate or retained land. Includes driving over certain areas.</td>
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<td><strong>23</strong></td>
<td>Parking restrictions on property</td>
<td>The covenant restricts parking on the property itself.</td>
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<tr>
<td><strong>24</strong></td>
<td>Rubbish pollution or dangerous materials</td>
<td>The covenant restricts placing of rubbish in certain areas and/or refers to pollution.</td>
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<tr>
<td><strong>25</strong></td>
<td>Nuisance or annoyance</td>
<td>The covenant prohibits the creation of a nuisance or annoyance on the property. Includes covenants where the reference includes noisy or offensive trades and where it refers only to noisy or offensive trades.</td>
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<td><strong>26</strong></td>
<td>Planning, right to buy and Housing Act covenants</td>
<td>The covenant refers to restrictions related to statute, most commonly the right to buy.</td>
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<td><strong>27</strong></td>
<td>Other</td>
<td>This covers a wide range of other restrictions. Including: Not to hunt or trap</td>
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(h) No caravan boat or other such vehicle shall be allowed to stand in front of any dwellinghouse now or herafter erected.

CE68276
Not to obstruct any joint passageway or drive (if any) hereinbefore referred to at any time.

CE68276
Not to place or park any vehicle or caravan on that part of the Property in front of the building line...

ST15637
Not to dispose of any rubbish or other materials on the Property by burning.
Not to pollute or cause any pollution of any description to the adjoining drainage ditches or the foul drainage system servicing the Property or the Retained Land.

HD419641
4. No noisy noxious or offensive trade or business shall be carried on on the land nor shall anything be done therein which may be or grow to be a nuisance or annoyance to the Vendor or the owners or occupiers of any adjoining property.

WM708350
Pursuant to the provisions of Part V Section 129 of the Housing Act 1985 (as amended by the Housing and Planning Act 1986)
(a) during the period of three years from the date hereof if the Purchaser shall dispose of the Property or any part thereof by a conveyance of the freehold or the grant of a lease for a term of more than twenty one years otherwise than at a rack rent he shall pay to the Council on demand the amount specified in paragraph (b) below...

SYK39243
(6) not to use the garden of the property hereby
|   |   | House name restrictions  
Washing only in designated areas  
Using garage for other than a car  
Allotment covenants  
No clear window/ window location  
No bins visible from the road  
Verges  
Playing of musical instruments  
conveyed for any unsightly purpose  
WK335487  
"The Purchaser HEREBY COVENANTS in respect of Parcels Numbered 1 and 4 that the Purchaser so as to bind the property hereby conveyed into whosoever hands the same may come and so that this covenant shall be for the benefit and the protection of Edstone Hall Estate and each and every part thereof HEREBY COVENANTS with the Vendors and their successors in title that the Purchaser and those deriving title under them will not hunt snare shoot trap poison or kill or permit to be hunted snared shot trapped poisoned or killed any otter badger heron duck teal mallard goose or other water fowl." |
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<td>28</td>
<td>TV aerial/ satellite dish</td>
<td>Covenant prohibits the erection of an aerial or satellite dish or restricts the location.</td>
<td>6. Not to affix or permit or suffer to be affixed external wires supports radio or television broadcast reception apparatus to the exterior of any dwellinghouse constructed or to be constructed within the perpetuity period on the Property or any part thereof</td>
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</table>
Appendix 7

Ethics Form UPR 16 and Faculty ethics approval letter
**FORM UPR16**

Research Ethics Review Checklist

Please include this completed form as an appendix to your thesis (see the Postgraduate Research Student Handbook for more information)

<table>
<thead>
<tr>
<th>Postgraduate Research Student (PGRS) Information</th>
<th>Student ID: 610029</th>
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<tbody>
<tr>
<td>PGRS Name: Emily Walsh</td>
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</tr>
<tr>
<td>Department: SCES</td>
<td></td>
</tr>
<tr>
<td>First Supervisor: Tim Goodhead</td>
<td></td>
</tr>
<tr>
<td>Start Date: October 2011</td>
<td></td>
</tr>
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<td>Study Mode and Route:</td>
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If you are unsure about any of the following, please contact the local representative on your Faculty Ethics Committee for advice. Please note that it is your responsibility to follow the University’s Ethics Policy and any relevant University, academic or professional guidelines in the conduct of your study. Although the Ethics Committee may have given your study a favourable opinion, the final responsibility for the ethical conduct of this work lies with the researcher(s).

**UKRIO Finished Research Checklist:**

(If you would like to know more about the checklist, please see your Faculty or Departmental Ethics Committee rep or see the online version of the full checklist at: [http://www.ukrio.org/what-we-do/code-of-practice-for-research/](http://www.ukrio.org/what-we-do/code-of-practice-for-research/))

- a) Have all of your research and findings been reported accurately, honestly and within a reasonable time frame? YES ☒ NO ☐
- b) Have all contributions to knowledge been acknowledged? YES ☒ NO ☐
- c) Have you complied with all agreements relating to intellectual property, publication and authorship? YES ☒ NO ☐
- d) Has your research data been retained in a secure and accessible form and will it remain so for the required duration? YES ☒ NO ☐
- e) Does your research comply with all legal, ethical, and contractual requirements? YES ☒ NO ☐

**Candidate Statement:**

I have considered the ethical dimensions of the above named research project, and have successfully obtained the necessary ethical approval(s)

**Ethical review number(s) from Faculty Ethics Committee (or from NRES/SCREC):**

BE9E-B0B1-7FC5-7BE4-C71E-1DBB-5350-6CCA

If you have not submitted your work for ethical review, and/or you have answered ‘No’ to one or more of questions a) to e), please explain below why this is so:

**Signed (PGRS):** 

[Signature]

**Date:** 28/01/16

**UPR16 – August 2015**
Dear Emily,

Study Title: Obsolete restrictive covenants: a socio-legal analysis of the problem and solutions

Ethics Committee reference: BE9E-B0B1-7FC5-7BE4-C71E-1DBB-5350-6CCA

Thank you for submitting your documents for ethical review. The Ethics Committee was content to grant a favourable ethical opinion of the above research on the basis described in the application form and supporting documentation.

We note that you submitted under the previous fast track system in and have resubmitted to Tech FEC under the revised system, therefore elements of this are retrospective.

The favourable opinion of the EC does not grant permission or approval to undertake the research. Management permission or approval must be obtained from any host organisation, including University of Portsmouth, prior to the start of the study.

Summary of any ethical considerations

No significant ethical issues were identified.

Documents reviewed

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<td>11/2014</td>
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<td>2 participant invitation letter for Scottish interviews</td>
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<tr>
<td>3 request letter for insurance quotation</td>
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<tr>
<td>4 request letter for written responses to consultations</td>
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</table>
Statement of compliance

The Committee is constituted in accordance with the Governance Arrangements set out by the University of Portsmouth

Yours sincerely

Dr John Williams

Chair Technology Faculty Ethics Committee