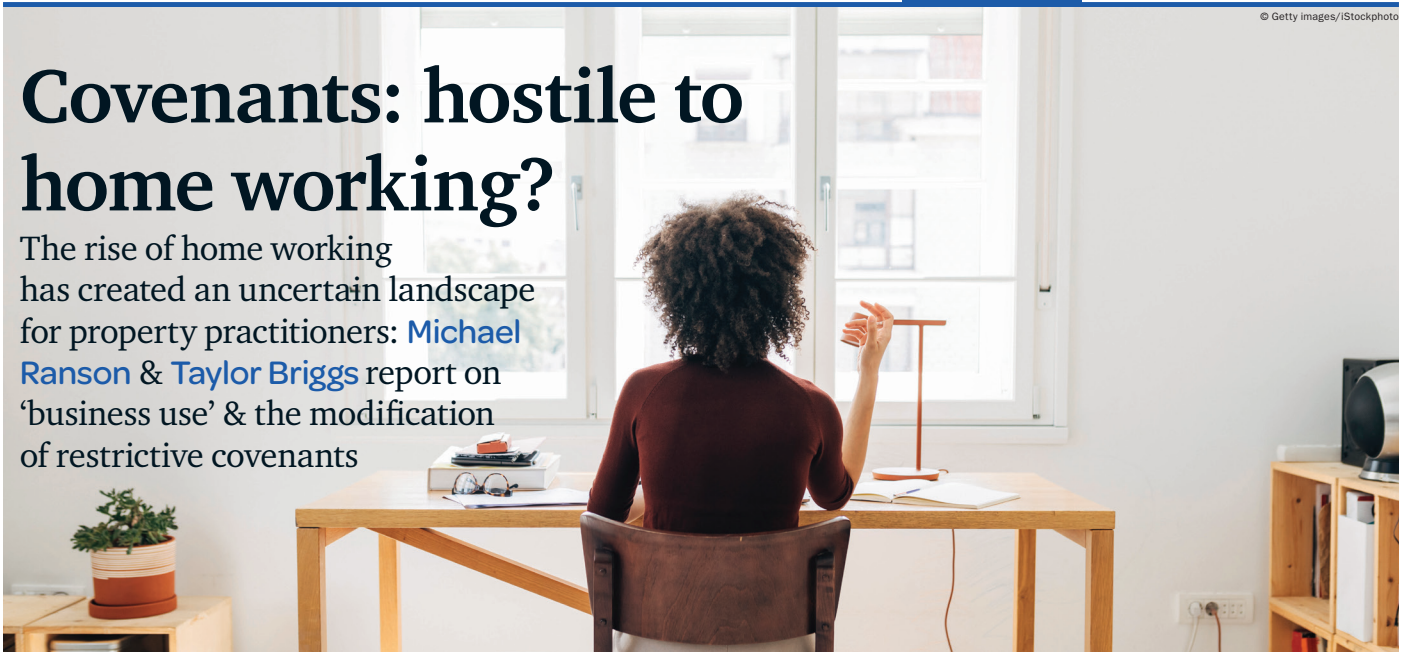

Covenants: hostile to home working?

The rise of home working has created an uncertain landscape for property practitioners: Michael Ranson & Taylor Briggs report on 'business use' & the modification of restrictive covenants

IN BRIEF

- *Hodgson v Cook* is a recent Upper Tribunal authority on the interrelationship between home working and covenants preventing business use.
- This article explores that case and the tribunal's jurisdiction to modify or discharge such covenants.

The COVID-19 pandemic brought about numerous changes to our daily lives, one of which was in respect of our working habits. According to the Office for National Statistics, despite 'work from home' guidance having been lifted as long ago as January 2022, almost a third of working adults reported that they worked partly at home and partly in an office elsewhere, with over 15% working from home exclusively, between September 2022 and January 2023.

This raises a range of legal issues, including data protection compliance, buildings and contents insurance requirements, planning control and the tax treatment of homes which have now become, at least in part, offices. The focus of this article, however, is on covenants—both freehold and leasehold—which restrict non-residential use. This type of covenant—variously requiring use as a private dwelling, stipulating that no trade or business should be carried on, and/or prohibiting the registration of companies at the address—is commonly encountered and, prior to lockdown, typically perceived as being entirely unproblematic, despite breaches potentially leading to injunctions, damages and even loss of the property altogether.

Today, however, they appear out-of-step with the rise in home working, and incompatible with the way in which many people want to use their home and live their lives. While there are a range of options available ranging from the practical, such as indemnity insurance or negotiating a release, to more technical legal arguments like convention by estoppel or waiver, practitioners asked to advise about such covenants will invariably need to wrestle with s 84 of the Law of Property Act 1925 (LPA 1925).

The modification of covenants

This is the relatively well-known but often little-understood discretionary jurisdiction of the Upper Tribunal (UT) to 'discharge or modify restrictive covenants affecting land'. There are, at least in theory, four grounds on which an application may be advanced:

- the covenant is obsolete (s 84(1)(a));
- the beneficiaries of the covenant have agreed to its discharge or modification (s 84(1)(b));
- the proposed discharge or modification would not injure the beneficiaries (s 84(1)(c)); or
- the covenant impedes 'some reasonable user' of the land in question (s 84(1)(aa)).

Of these, the 'reasonable user' (ground (aa)) is encountered most often, with other grounds frequently pleaded as mere makeweights. Practitioners should not fall into the trap of thinking that this means ground (aa) is easy to establish or that it is enough to prove that a use is reasonable. Ground (aa) also brings into play the detailed additional requirements of s 84(1A), LPA 1925, relating to matters such as the nature of the benefit of the covenant, the public interest and adequacy of money as compensation, and s 84(1B), LPA 1925, which requires the tribunal to have regard to 'the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas', together with 'the period at which and context in which the restriction was created or imposed and any other material circumstances'.

The complex interrelationship between some of these statutory provisions is usefully distilled into seven questions in the case *Re Bass Ltd's Application* (1973) 26 P & CR 156:

(1) Is the proposed user reasonable? (s 84(1)(aa))
(2) Do the covenants impede that user? (s 84(1)(aa))
(3) Does impeding the proposed user secure practical benefits to the objectors? (s 84(1A))
(4) If the answer to question 3 is yes, are those benefits of substantial value or advantage? (s 84(1A)(a))
(5) Is impeding the proposed user contrary to the public interest? (s 84(1A)(b))
(6) If the answer to question 4 is no, would money be an adequate compensation? (s 84(1A))
(7) If the answer to question 5 is yes, would money be an adequate compensation? (s 84(1A))

The first two *Bass* questions are relatively easy, and an applicant with any real hope of success should not struggle to answer both with a resounding 'yes'.

Things then become more difficult. The third and fourth questions involve fact-sensitive matters, but beneficiaries of covenants who are in the habit of charging money in exchange for releasing a covenant should note that the benefit of obtaining a 'release fee' has been held not to be a 'practical benefit' for the purposes of s 84(1A), LPA 1925.

Question five is seldom relevant in residential s 84 claims, but one can see circumstances in which it could be relevant to home working covenants. While an individual homeowner may struggle to persuade the tribunal that preventing them working at home is contrary to the public interest, the position might be radically different in the event of another pandemic or government drive to promote home working.

This does not appear to be a point which has yet been tested in a post-lockdown case.

As to the final two *Bass* questions, in a case where the practical benefit is not substantial, one would typically expect a small amount of money to be adequate compensation. If one proves that preventing the use is contrary to the public interest, then the compensation payable could be substantial.

An illustrative example

One can see ground (aa), and some of the *Bass* questions, in action by looking at the way the UT recently approached an application for the modification of a covenant hostile to home working in *Hodgson and another v Cook and others* [2023] UKUT 41 (LC), [2023] All ER (D) 54 (Feb). Mr and Mrs Hodgson, the owners of a house on a residential estate, were the original covenantors, having covenanted with the developer that, *inter alia*: 'No trade business or profession shall be carried out upon the plot and the plot shall not be used for any other purpose other than as a private dwelling.'

During the pandemic, Mrs Hodgson relocated her beauty therapy business to a cabin in the garden. Having obtained retrospective planning permission for this use, the applicants sought modification of the covenant on grounds (aa), (b), and (c).

As to breach, the tribunal held that covenants which are restrictive of business use do not 'prohibit all activity with a commercial purpose', as they are 'not intended to prevent owners from occasionally working from home, alone on a laptop in a spare room' ([54]). Provided that the relevant tasks are 'consistent with ordinary residential use' and undertaken 'in connection with a business which is mainly carried on elsewhere', there is unlikely to be a breach. On the facts, however, there was such a breach, as there was 'no doubt' that Mrs Hodgson conducted her business exclusively from home. Accordingly, the tribunal was not required to draw the 'dividing line' between conducting a business from home—something seemingly done by 15% of working adults—and occasionally working from home.

As to modification, the UT concluded, seemingly guided by the *Bass* questions, that it did not have jurisdiction under ground (aa) ([61]). The tribunal accepted that the continued existence of the covenant would impede some reasonable user of land, as 'low level use of an existing building in connection with a small scale business is generally consistent with a residential neighbourhood' ([53]). However, the tribunal rejected the applicants' submission that the restriction did not secure to the persons entitled to the benefit of it 'any practical benefits of substantial value or advantage'. In reaching this conclusion, the tribunal emphasised the nature of the housing estate, concluding that it had not been designed with business users in mind and the density of development was such that any 'noisy or unsightly' use of one property was likely to have an impact on the enjoyment of neighbouring properties ([59]). The tribunal accepted the objectors' 'thin end of the wedge' argument, noting that modification would 'remove the sense of certainty about what might be permitted in the future and raise concerns about the loss of amenity that might follow' ([60]). Every house on the estate had the potential to be put to some business use: if Mrs Hodgson's business were permitted, then enforcement against other residents would be difficult to justify. The tribunal concluded that, by ensuring the quiet enjoyment of the other houses, and underpinning their value, the covenant secured 'a practical benefit of substantial value or advantage' ([61]).

The UT also rejected the applicants' argument that the restriction was contrary to the public interest, but on the basis of arguments seemingly advanced by reference to the specifics of Mrs Hodgson's business rather than the broader public policy of not, in 2023, preventing home working. As so often where ground (aa) fails, the tribunal further concluded that grounds (b) and (c) were not made out.

Leasehold covenants

Like many s 84 applications, *Hodgson* was concerned with a freehold covenant, but the UT's jurisdiction also extends to covenants contained in certain leases. It can be an unpleasant surprise for a landlord who has granted a lease on heavily negotiated terms which are important to them, to find that their tenant is later able to ask the tribunal to have those terms discharged or modified.

Not all leases fall within the scope of s 84, however. Under s 84(12), LPA 1925, the lease in question must have been granted for a term of more than 40 years, and 25 years of the term must have expired. If the lease itself meets those requirements but the restriction is more modern—perhaps because it was introduced in a variation—then the tribunal will typically be reluctant to modify or discharge a restriction introduced within the last 25 years. For houses or flats built more than 25 years ago, however, it is likely that leasehold covenants hostile to home working will fall within the tribunal's jurisdiction.

A landlord should not necessarily expect more favourable treatment than, say, a neighbour who has the benefit of a freehold covenant. The tribunal will, however, look at a wide range of matters relevant to the objector's interests and, where the objector is a landlord, these will include how long is left on the lease, the other obligations owed by the tenant and, importantly, the landlord's interests in land—both the reversion and nearby properties. There are a number of cases in which landlords such as the Church Commissioners have persuaded the tribunal that the modification or discharge of a covenant in one lease on their estate—sometimes comprising thousands of leases—could lead, in effect, to the breakdown of a cohesive system of enforcement of covenants across the estate. This is another manifestation of the 'thin end of the wedge' argument which found favour in *Hodgson*. It may be, therefore, that a large landlord is sometimes better placed to resist a s 84 application than someone who has the reversion to a single property.

An uncertain landscape?

The decision in *Hodgson* suggests that exclusively working from home is likely to fall foul of covenants which are restrictive of business use. However, the position in respect of those who work partly at home and partly elsewhere is less clear. The tribunal declined to offer much in the way of general guidance just as, in the separate context of a 'live/work' development, the Court of Appeal in *AHGR Ltd v Kane-Laverack and another* [2023] EWCA Civ 428, [2023] All ER (D) 40 (Apr) in April 2023 declined to provide a definition of 'work'. Appellate guidance on these important concepts would be most welcome to both litigants and practitioners alike.

In our view, the person working at home every so often 'alone on a laptop in a spare room' is likely to be treated differently in the context of breach of covenant to the person with a dedicated home office who invariably works from home. Many clients will, of course, fall somewhere between those two extremes and perhaps have a dedicated workspace at home where they work a few days each week. The search for the 'dividing line' to which the UT referred, with its concomitant neat delineation between breach and no breach, is currently difficult, if not impossible, to draw.

These uncertainties, coupled with the continued popularity of home working, mean that we may well see these covenants gaining prominence in months and years to come. In particular, there may be an increase in attempts to enforce such covenants, whether as a genuine bid to prevent home working or simply to extract money for a release. Practitioners, whether transactional advisers or litigators, and whether advising buyers, sellers, lenders, landlords or neighbours, all need to be alive to these issues and understand the ways in which associated risks can be mitigated. NLJ

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