Working from Home and Restrictive Covenants: An Analysis

Michael W. Poulsom LLB LLM Solicitor (non-practising), Senior Lecturer,

Manchester Metropolitan University

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Abstract

The use of residential property for business purposes has increased significantly. Covenants apparently prohibiting such use are imposed routinely and remain enforceable in relation to large numbers of residential properties. Interpretation of such covenants is inconsistent and inexact, and depends on poorly defined factors. The precise relationship between those factors is also unclear. It is argued that construction of covenants with greater emphasis on the public interest might be advantageous.

Background

Occupiers of houses and flats in England and Wales are increasingly using their properties to conduct their business or to fulfil their duties as employees. In April 2020, 46% of people in employment, in the UK did some work in their homes. Of those, 86%, equating to approximately 12 million people, did so because of the COVID-19 pandemic[1]. A high level of working at home is likely to continue[2].

The freehold or leasehold titles to those houses and flats, and mortgages to which those properties are subject, are likely to contain covenants which appear to prohibit such activities. This article attempts to identify the extent to which the widespread practice of conducting 'business' activities in property intended for residential use might breach those obligations, and what the implications of this are.

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[1]Office for National Statistics, 'Coronavirus and homeworking in the UK: April 2020'<www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/bulletins/coronavirusandhomeworkingintheuk/april2020> accessed 17 August 2020

[2] Kalyeena Makortoff, 'Lloyds to move 700 staff into full-time homeworking roles' *The Guardian* (London, 4 December 2020 <www.theguardian.com/business/2020/dec/04/llods-to-move-700-staff-into-full-time-homeworking-roles-covid>accessed 4 December 2020

Examples of prohibitions on business use in freehold and leasehold titles

Land Registry investigations indicate that covenants prohibiting the use of residential property for business purposes are common. Investigations were made of properties on four residential developments of between 30 and 350 homes built between 1964 and 2016 in one Staffordshire town. As is common, the original transfers were designed to impose identical covenants on all properties on each estate. Properties on two estates built in 1964[3] and 1975[4], of approximately 100 and 30 houses respectively, had identical covenants (and it appears that the transfers may have been prepared by the same firm) requiring that 'No trade or business of any kind shall be carried on upon the property hereby conveyed'. Properties on two further developments from 1989[5] and 2016[6], of approximately 50 and 350 homes respectively, required the purchaser 'Not to carry on any trade or business on the land hereby conveyed' and 'Not to use the Property for any purpose other than as or incidental to one private residential dwelling and not to use the Property for any trade or business'.

The frequency with which such restrictions appear reflects their routine inclusion in conveyancing precedents. Practical Conveyancing Precedents in a precedent transfer of 'a building plot' suggests covenants:

1. Not to use the property or any part of it except as a private dwellinghouse
2. Not to carry on any trade, business or profession on the property or any part of it.[7]

A precedent lease of a flat imposes an obligation simply 'To use the flat only as a home and for not more than one family'[8]. Similar obligations arise in mortgages: A

[3] Land Registry Title Number SF 405425
[4] Land Registry Title Number SF 470071
[5] Land Registry Title Number SF 264877
[6] Land Registry Title Number SF 622489
[7] Trevor M Aldridge, *Practical Conveyancing Precedents*, (Sweet & Maxwell 2020) Form 1.522
[8] Trevor M Aldridge, n7, Form 5-B20

leading UK lender requires that mortgagors 'must not change the use or occupation of the property without our written consent'[9].

Defining 'business'

A householder working at home may ask whether their conduct breaches such a covenant. The answer is unlikely to be straightforward. One approach to identifying whether a covenant prohibiting business use covers a particular use is by reference to decisions on comparable activities. Examples of activity which have been held to be 'a business' include a school[10], teaching music[11], the keeping by a builder of building materials in a garden[12], letting the end walls of houses for advertising[13], a hospital for poor persons who pay according to their means[14], and a Tennis Club[15].

The utility of this approach is limited. These decisions all substantially pre-date modern, and particularly remote, working practices. They also determine whether a *particular* use constitutes a 'business', thereby offering limited guidance on whether an activity which differs from the closest applicable authority, is also a 'business'. The factual differences between the cases also hinder the identification of broad principles. *Westripp* concerned freehold covenants, *Bramwell*, *Tritton* and *Addiscombe* all concerned leasehold covenants. *Bramwell* and *Tritton* concerned ninety-year leases completed decades before the action; the two-year agreement in *Addiscombe* had only just expired at the date of the action. While *Bramwell*, *Tritton* and *Westripp* concerned the construction of specific covenants, the issue in *Addiscombe* was whether the agreement was a business lease protected under section 23 Landlord and Tenant Act 1954.

In the absence of a specific applicable authority on whether a particular use is a 'business', recourse might be had to a general definition. One definition emerges

[9] Nationwide Building Society, *General Mortgage Conditions 2019*, Condition 6
[10] *Cooke v Colcraft* (1773) 2 Wm B1 856
[11] *Tritton v Bankart* (1887) 56 LT 306
[12] *Westripp v Baldock* [1939] 1 All ER 279 CA
[13] *Tubbs v Esser* (1909) 26 TLR 145
[14] *Bramwell v Lacy* (1879) 10 Ch D 691
[15] *Addiscombe Garden Estates Ltd v Crabbe* [1958] 1 QB 513

from *Rolls v Miller*[16], in which a lease granted in 1825 contained a covenant 'not…during the term hereby granted [to] use, exercise…or permit …to be used…upon the premises any trade or business of any description whatsoever'[17]. The defendant ran a charitable 'Home for Working Girls', which the Court of Appeal held to be a breach of the covenant.

Lindley LJ appeared to define 'a business' broadly: He said it could be 'almost anything which is an occupation as distinguished from a pleasure, anything which is an occupation or duty which requires attention is a business'[18].

This definition, which appears to cover most, if not all, 'homeworking' activity, appears to have attracted significant judicial and academic support, perhaps because of its intriguing breadth and engaging simplicity. The House of Lords applied it in *Town Investments Ltd v Department of the Environment*[19], Lord Diplock stating that 'ever since [*Rolls*] there has been a consistent line of cases in which this broad meaning has been ascribed to the word 'business'[20]. This would appear to put Lindley LJ's definition beyond question, and to attribute to it significant authoritative weight[21].

But for several reasons, it is suggested that basing 'a consistent line of cases' on these dicta may have been misplaced; when seen in its proper context, Lindley LJ's definition of a 'business' assumes a rather less certain form: His inclusion of *'almost'* adds a subtle yet important level of doubt to his statement. More significant is his surrounding reasoning: He remarked that:

> When we look into the dictionaries as to the meaning of the word 'business', I do not think they throw much light upon it. The word means almost anything which is an occupation as distinguished from a pleasure, anything which is an occupation or duty which requires attention is a business - I do not think we

[16] *Rolls v Miller* (1884) 27 Ch D 71
[17] *Rolls v Miller,* n16, 71
[18] *Rolls v Miller,* n16, 88
[19] *Town Investments Ltd v Dept. of Environment* [1978] AC 359
[20] *Town Investments,* n19, 383
[21] Peter Sparkes, *A New Landlord and Tenant*, Hart Publishing 2001, 542

> can get much aid from the dictionary. We must look at the words in the ordinary sense, and we must look at the object of the covenant[22].

It appears that a statement which Lord Diplock thought established a consistent line of authority was not intended as an authoritative statement of legal principle but was merely an expression of frustration at the lack of a useful dictionary definition. Far from saying that 'business' has a broad definition in all cases, Lindley LJ was discarding the broad dictionary definition in favour of a 'contextualised' definition, requiring consideration of 'the ordinary sense of the words used', and the 'object of the covenant'. Not only did his frustration at the absence of a clear dictionary definition relate only to the first of these, but he also appears to have attributed equal, although not perhaps very significant, weight to both, finding with little apparent difficulty, that the use complained of fell within 'the words in the ordinary sense…and within the mischief'[23].

His conclusion that the use fell within the mischief which the covenant was designed to prevent (which he described as '[all] too plain'[24]) is perhaps not as well supported as it might be. It appears to rest on his finding that 'persons complain of it, and it is clear that it was not the kind of thing that was contemplated when the covenant was entered into'[25]. Complaints had evidently led to the proceedings, but it is less clear how he concluded that such use was not contemplated when the covenant was entered into. The lease predated the action by almost sixty years, and although from the report it appears (although this seems unlikely) that the plaintiff was the original lessor, the defendant was clearly stated to be an assignee of the original tenant. How he identified what precisely was contemplated decades before remains unclear.

The entrenchment of this broad definition can be seen in *Abernethie v AM & J Kleinman Ltd*[26] in which Lindley LJ's dicta on the meaning of a 'business' were cited with approval by Harman and Edmund Davies LJJ. In that case, the claimant carried

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[22] *Rolls v Miller,* n16, 88
[23] *Rolls v Miller,* n16, 88
[24] *Rolls v Miller,* n16, 88
[25] *Rolls v Miller,* n16, 88
[26] *Abernethie v AM & J Kleinman Ltd* [1970] QB 10 CA

on a Sunday School gratuitously in his home. The issue was not the breach of a covenant, but whether that conduct was a 'business' for the purposes of the Landlord and Tenant Act 1954. The Court of Appeal held unanimously that it was not.

Edmund Davies LJ, quoting Lindley LJ briefly, appears to have fallen into the 'trap' of incorrectly attributing to an intriguingly broad but ultimately unhelpful dictionary definition the status of legal principle[27]. Harman LJ also appears to have supported uncritically the decision in Rolls, describing it as 'so clearly right that one need not really bother with the facts'[28]. Citing Lindley LJ at length, including, perhaps surprisingly, those parts which cast some doubt on its status as a definitive statement of legal principle, he stated that '…one must always construe words of this kind…in the context in which they appear'[29].

This appears to be adding to Lindley LJ's two considerations of 'the words used' and to the 'mischief' which the covenant seeks to restrain a third consideration, that of the 'context'. This consideration appears to have determined the outcome. Confining his consideration of context to the intention behind the 1954 Act, Harman LJ noted that its purpose was 'protecting business tenants, who, until then, had been hardly treated by their landlords', and that to apply its terms to the circumstances of the case was 'to fall into…the pond of absurdity'[30].

Rolls v Miller was applied again in *Town Investments Ltd v Department of the Environment* [31]. In that case the issue was whether premises occupied by civil servants were occupied for the 'purposes of a business' as defined by the Counter-Inflation (Business Rents) Order 1972, which restricted the level of rent on renewal leases. The definition of a 'business' in the order as including 'a trade, profession or employment and includes any activity carried on by a body of persons…' was taken

[27] *Abernethie*,n26, 18
[28] *Abernethie*,n26, 17
[29] *Abernethie*,n26, 18
[30] *Abernethie*,n26, 18
[31] *Town Investments Ltd v Dept. of Environment* [1978] AC 359

verbatim from Part II LTA 1954. A majority of the House of Lords held that the premises were occupied for the purposes of a business. Citing with approval a selected passage from Lindley LJ in *Rolls*, and describing the term 'business' as 'an etymological chameleon' [which] suits its meaning to the context in which it is found'[32], Lord Diplock held that the civil servants occupying the premises were 'carrying out there a duty which requires attention.'

Finding that the object of the Order was to restrain rising rents, he held that that object called for 'a broad construction of the word 'business''[33]. Specifically the breadth of the object justified giving the word 'business' a meaning 'no less wide than that which it has been interpreted as having in covenants in leases restricting the user of demised premises'[34]. By implication, he might have felt it legitimate in different circumstances to define 'business' more narrowly, but the precise 'range' within which the definition might fall remains unclear.

Nor does it appear that judicial consideration of context in *Town Investments* was necessarily comprehensive. Little consideration appears to have been given to the precise context in which the words appeared in the Order or to the differences between the objects of protecting business tenants and of controlling inflation. The inclusion verbatim of a definition from primary legislation designed to achieve the former in secondary legislation aimed at the latter would suggest the drafting of the Order owed more to speed and pragmatism than to considerations of context.

'Words used', 'object' and 'context' – Complementary or contradictory?

It is tentatively suggested that the correct conclusion from *Rolls*, *Abernethie* and *Town Investments* is that proper construction of a covenant against business use requires consideration of three potentially overlapping factors, the 'words used', the 'object' of the covenant and the 'context' in which the words appear. Each can and

[32] *Town Investments Ltd,* n31, 383
[33] *Town Investments Ltd*, n31, 383-4
[34] *Town Investments Ltd,* n31, 384

may influence the others, but the precise weight to be attributed to each is unclear. While the words used and, to a lesser extent, the object might be readily identified, the parameters of what does, or does not, constitute the relevant context are unspecified.

Identification of the proper role of context, and its relationship to the words and object of a covenant, raises several practical difficulties. One difficulty is that the apparent 'object' of a covenant may be open to different interpretations depending on whether the covenant is viewed in isolation or by reference to the other provisions which accompany it. While the covenants to one of the Staffordshire properties investigated for this article prohibit use for a trade or business, the accompanying covenants prohibit the keeping of pigs, poultry and chickens, the parking of commercial vehicles, caravans, boats and trailers, and require maintenance of the land between the house and the road as 'an ornamental garden and entrance driveway'[35]. The intention evident from the document when viewed in its entirety was less to prohibit business activities in themselves, and more to prohibit activities which might be practically disruptive, noisy or visually unappealing and hence perhaps harmful to property values or enjoyment more broadly.

Property practice raises a broader issue relating to 'words used' and the 'object' of a covenant. Practitioners disposing of new estates are likely (to achieve simplicity and speed of marketing and selling) to have instructions that the covenants imposed on each property should mirror, or at least closely resemble, the covenants imposed on other properties on the same development, and even on other developments. To impose identical covenants is cost effective. Developers who have paid substantial fees for complicated acquisitions are unlikely to agree such fees for the disposal of the individual completed properties, which (with some justification) they will perceive as standardised, routine and repetitive.

[35] Land Registry Title Number SF 470071

If sellers and their advisors envisage the creation of schemes of development, the importance of uniform schemes of covenants increases further: Differences between the covenants imposed is 'a powerful indication that there was no intention to create reciprocally enforceable rights'[36]. In these circumstances, little or no consideration will be given to the individual context of each house, and a consideration of context will deliberately be discouraged in favour of considerations of simplicity, consistency, efficacy and cost.

An associated issue is the reliance of practitioners on wording familiar to themselves and their clients. The similarity of the 1825 covenant in Rolls to the wording that a draftsman might use in 2021 would suggest that perhaps little regard is had to context by those responsible for the terms in which covenants are drafted. Routine imposition of familiar covenants, motivated by a need for forms of wording readily recognisable by practitioners, clients and the court, and by the fear of negligence claims resulting from the omission of covenants which are considered 'usual', creates an inherent tension between detailed consideration of context, and the realities of practice.

Broader problems with 'context'

'Context' appears to be promoted as an aid to understanding. Words viewed in isolation are at risk of being misunderstood, in the way that words viewed in their proper context are not. But to operate as a safeguard against misunderstanding, the concept of context itself must be properly understood, and it is suggested that it is at the point of seeking to define the concept that further difficulties emerge. 'Context' might embrace both a potentially infinite set of prevailing economic, political and social concerns, and also specific concerns particular to the parties to the agreement.

[36] *Emile Elias & Co Ltd v Pine Groves Ltd* [1993] 1 WLR 305 at 311 E-G per Lord Browne Wilkinson

Neither *Rolls*, *Abernethie* nor *Town Investments* explicitly state what 'context' includes, or whether it means context only at the time of creation, or context at the time of interpretation (including, for example, the presence of temporary government instructions to work at home where possible), or some combination of the two. It might tentatively be argued that the reference in *Abernethie* to considering words in the context 'in which they appear', rather than 'in which they appear*ed*', might suggest that the circumstances pertaining at the time of construction have greater significance than those pertaining at the time of creation, but this is perhaps speculation. It might also be argued that a decision by those with the burden and the benefit of a historic covenant to leave it un-amended should be interpreted as an invitation to construe it in the light of changing contexts, but equally that decision might result from an inability or unwillingness to secure agreement from all interested parties.

If the correct focus is on the context when the covenant was entered into, this presents its own difficulties: Covenants which are designed to bind and be enforceable by successors in title are intended to endure for the duration of a lease, or in perpetuity. The nature of an obligation which is intended to be so enduring is perhaps compatible with the requirement that it can only be interpreted correctly by reference to a context which becomes increasingly remote and unidentifiable.

Consideration of the 'context' of a covenant also presupposes that that context can correctly be ascertained. The very nature of 'context', in the sense of the circumstances pertaining at a particular place and time, means that there may a tendency for those circumstances, insofar as they are considered at all, to be perceived as unremarkable and thus for them to go unremarked upon or un-noted. Covenanting parties will not, it is suggested, make strenuous efforts to record for posterity the reasons for imposing a covenant or the context of that imposition if such matters are obvious, or even of little importance, to them. Nor can it necessarily be said that the 'context' constitutes one set of circumstances mutually agreed and understood when the agreement was entered into, as illustrated in *Addiscombe*. The parties had entered into an agreement for the use of tennis facilities in return for a

monthly fee. The agreement was called a licence. The court held that on its proper construction it created a landlord and tenant relationship, and was a business lease under s23(2) LTA 1954, giving the defendant security of tenure. Given the evident absence of any common intention as to the legal nature of the agreement, it is suggested that any attempt accurately to identify the context of that agreement (other than perhaps to state that the context was confused or contested) is unlikely to succeed.

It might also be argued that notwithstanding the emphasis placed by courts on the importance of context in aiding proper construction, their own consideration both of the proper context of the relevant words, and of the context in which previous decisions on similar words were made, is sometimes limited or selective. In *Rolls*, the leasehold covenant predated the litigation over it by almost 60 years, but consideration of this does appear to have contributed to the decision. Nor does the separation of almost 100 years between the decisions in *Rolls* and *Abernethie*, or that *Abernethie* concerned the interpretation of a statute, rather than a covenant, appear to have influenced the later decision.

A fourth consideration? Construction by reference to the 'Public Interest'

It has been established that a client asking what they understandably perceive to be a simple question, of whether using their residential property for business purposes is a breach of covenant, will not, if advised accurately, receive a simple reply. Advice that it will depend on the words used, the object and context of the covenant and that in ascertaining each of these, the court may refer to an unknown degree to additional unknown factors is uninformative.

It is suggested that this uncertainty may be compounded by the addition of a further factor to be considered when ascertaining whether a covenant prohibits a particular activity, that of whether prohibition is in the 'public interest'. The widespread practice of working in residential premises has not yet attracted the level of enforcement proceedings which the ubiquity of such covenants and working practices might

suggest would be expected. Perhaps what appears to be a general disinclination to enforce such covenants represents the operation in practice of a broad 'public interest' approach to enforcement, possibly (in view of the frequency with which such covenants arise among neighbours) supported by more pragmatic notions of reciprocity and mutual tacit understanding. If it is in the interests of the public that people should continue being gainfully employed or conducting their business, they should be permitted to do this in their homes, notwithstanding the existence of a covenant which might appear to prohibit this

While public interest considerations do not appear to have played a prominent role in ascertaining whether particular conduct constitutes an actionable breach, it could be argued that aspects of what is in the public interest have indirectly been influential: The objections of neighbours, which appear to have been decisive in *Rolls*, might be construed as in essence a 'public interest' argument, albeit one with a limited geographic scope.

A more visible emergence of the 'public interest' as factor in proper construction of a covenant, and of a tension between it and what might be termed 'traditional' methods of construction is evident in *C&G Homes Ltd v Secretary of State for Health*[37]. The Court of Appeal held that a district health authority's provision of supervised housing for former mental in-patients breached a covenant against business use. In 1989, the district health authority had purchased two houses for this purpose, and had covenanted with the plaintiff;

> Not…to carry on…from the property…any trade, business of manufacture whatsoever…and not to use the said dwelling house for any purpose or purposes other than those incidental to the enjoyment of a private dwelling house[38].

Four former mental in-patients, receiving nursing and support services from the health authority, occupied each house. The plaintiff sought declarations that this user was in breach of the covenants, and damages for reduction in the marketability of

[37] *C&G Homes Ltd v Secretary of State for Health* [1991] Ch 365
[38] *C&G Homes Ltd*, n37, 365

the other houses on the estate, which it claimed resulted from that use. The Court of Appeal's finding that there had been a breach (albeit that the financial loss, if any, caused to the plaintiff fell outside the ambit of the covenant, and was presumably irrecoverable), attracted the criticism of parliament, 112 of whose members signed an Early Day Motion, stating its 'deep regret' at the decision[39].

Parliament's response is unsurprising: As Nourse LJ acknowledged, in 1989 the Town and Country Planning (Use Classes) Order 1987 had already extended use class C3 (dwelling houses) to include use of the type envisaged by the defendant to facilitate implementation of the Care in the Community Policy[40]. In his view, the 'planning view' of the matter, known to both parties was 'certainly a factor to be taken into account in construing the covenant'[41]. With apparent disregard, however, both for the uncertain state of the law on business use in general, and for the 'chameleon like' quality of the word 'business' specifically, he then appears to have attributed greater weight to the concept that '[parties to] a covenant in a long established and familiar form must have intended … it [to] have the effect which earlier authorities have said it has'[42].

The conflict between the 'Care in the Community' policy and covenants against business use arose again in *Re Lloyd's and Lloyd's Application*[43]. The applicants, who had planning permission to use a residential property as a community care home for 10 psychiatric patients, applied under the 'public interest' ground in sections 84(1)(aa) and 84(1A)(b) LPA 1925 to discharge a 1935 covenant which prohibited use of the property to 'carry on or permit … any trade or business whatsoever'. An indication of the difficulties inherent in ascertaining what is in the public interest was the opposition of eight local families. HH judge Marder QC, found that that in impeding the applicant's intended user, the covenant was 'contrary to the

[39] https://edm.parliament.uk/early-day-motion/3495/c-g-homes-ltd <accessed 26 November 2020>
[40] *C&G Homes Ltd*, n37, 380
[41] *C&G Homes Ltd*, n37, 380
[42] *C&G Homes Ltd*, n37, 380
[43] *Re Lloyd's and Lloyd's application* (1993) 66 P &CR 112

public interest'[44]. In support of his finding, he identified 'overwhelming' evidence that longstanding' government policy was leading to the closure of hospitals and institutions, that pursuit of that policy required the provision of care homes in the community of the type envisaged by the applicants, that the need for such provision was 'desperate', and that both the property and that the applicants them were suitable to meet that need[45].

The fact that similar covenants relating to similar properties with similar intended uses were treated differently in *C&G Homes* and *Re Lloyd's Application* can partly be explained by the age of the covenants (those in *C&G* were entered into recently by the parties to the action, while those in *Re Lloyd's* were almost 60 years old), and by the technical differences in the types of action. One was an action to enforce the covenant, the other an application for its modification or discharge. But these distinctions do not wholly explain the different ways in which the covenants were treated. In contrast to the reluctance of Nourse LJ in *C&G* to prioritise the public law position over the strict wording of the covenant, the reasoning of HH Judge Marder QC suggests a determination not to allow the wording of the covenant to prevent the use of the property for a purpose for which he rightly perceived there was a pressing social need. More broadly, one might detect a refusal to allow private law rights to promote discriminatory behaviours or to prohibit activities which are regarded as 'publicly beneficial'. Writing in the British Medical Journal, Thornicroft (who gave evidence for the applicants) and Halpern deplored the freedom evident in *C&G* of property owners 'to restrict the use of private residences in a discriminatory way' and expressed relief that 'the Lloyds's case establishes that community care is in the public interest'[46].

The recent decision in *Alexander Devine Children's Cancer Trust v Housing Solutions Ltd*[47] [2020] UKSC 45 relates to building work carried out in breach of

[44] *Re Lloyd's application*, n43, 122
[45] *Re Lloyd's application*, n43, 122
[46] Graham Thornicroft, Adina Halpern, 'Legal landmark for community care of former psychiatric patients', BMJ, Vol 307, 24 July 1993, 248
[47] *Alexander Devine Children's Cancer Trust v Housing Solutions Ltd* [2020] UKSC 45

covenant rather than to covenants against business use. A developer acquired land burdened by 1972 covenants against building, and, with planning permission, built affordable housing, much of which overlooked the planned gardens of the adjoining children's hospice, which had the benefit of the covenants. Only later did it apply on the 'public interest' ground to modify the covenants. The Supreme Court's decision both to refuse to modify the covenant, and to leave the consequences of that refusal to be resolved by future litigation perhaps illustrates the complexity which characterises attempts to reconcile historic covenants in well-established forms with conflicting public interest requirements.

Directly relevant to the issue of business use covenants, however, is the observation of Fetherstonehaugh and Windsor, who acted for the respondent, that the case confirms that the public interest ground 'remains narrow'[48]. *Re Collins' Application*[49] established that an application under the public interest ground will succeed only where the public interest is shown to be 'so important and immediate to justify the serious interference with private rights and the sanctity of contract'[50]. It is difficult to imagine a more 'important and immediate' need than permitting people to maintain their income by working in their houses while limiting harmful transmission of a virus. It is suggested that no immediate reasons readily emerge as to why an application to modify a covenant so as to permit working from home based on the public interest ground would not succeed.

It can be argued that consideration of what is contrary to the public interest relates only to applications to vary or discharge covenants, and that such consideration neither has, nor should have, any relevance to the proper construction of covenants where no such application is made. To conflate the two is to confuse a relatively recent statutory procedure with methods of construction established through caselaw. But for four reasons it is suggested that what is contrary to the public

[48] Guy Fetherstonehaugh, Emily Windsor, 'A supreme cautionary tale', Estates Gazette, 12 December 2020, 82
[49] *Re Collins' Application*(1975) 30 P& CR 527
[50] *Re Collins' Application*(1975) 30 P& CR 527, 531 per Douglas Frank QC

interest could become as relevant to the construction of covenants as it is to applications for their modification or discharge.

Firstly, in considering whether in impeding some reasonable user of land a restriction is operating contrary to the public interest, a tribunal must necessarily first ascertain what conduct it is that is being impeded. In essence, the scope of the covenant must first be ascertained using normal principles of construction before a decision is made on discharge or modification. It would not seem unreasonable to 'bring forward' consideration of whether what the covenant prohibits is contrary to the public interest so as to influence the determination of what it is that is prohibited.

Secondly, although the discharge or modification of a covenant has a permanence which simply choosing to interpret a covenant in a particular way does not, the distinction between modifying a covenant and interpreting it in a particular way is likely to be of less interest to landowners than it is to their advisers. Whether a covenant is modified or discharged to allow a particular activity, or whether it is deemed not to prohibit a particular activity or to be unenforceable in relation to that activity, is of little consequence to the parties concerned. The outcome for them is that an activity which the covenant appeared to prohibit is now permitted, irrespective of whether the dispute is framed as an action to enforce, or as an application to vary or discharge.

Thirdly, the very existence of a procedure for modifying or discharging covenants reflects parliamentary recognition that the restrictions covenants impose and the context in which they were created can deviate from changing requirements for land use, and that ascertaining their effects goes beyond merely examining their words, object and context at the time of creation. Sections 84(1)(aa) and (1A) were added by the Law of Property Act 1969, and s84 more broadly has been subject to multiple revisions and amendments. The fact that the discharge and modification procedure has itself been revisited and revised is further evidence of Parliamentary recognition of that deviation.

Fourthly, the existence of a statutory regime which requires determination of what is or is not in the public interest is evidence that this can be (or at least is considered by Parliament to be capable of being) identified and objectively measured. The same cannot necessarily be said of the 'object' or 'context', which may be neither recent, readily identifiable, capable of measurement, or even relevant to any current owner or to any reasonable use to which the land might now be put. Furthermore, construction by reference to what is in the public interest confers what might be considered a welcome flexibility which construction by reference to 'words used', 'object' and 'context' does not.

Conclusion

Particularly in the current climate, covenants against business use create unwelcome uncertainty. Their precise effect is poorly defined and understood. Advising a client clearly whether a particular use breaches a covenant to which they are subject is rendered impossible by the number and variety of factors which will, or might, determine the answer. Residential occupiers can reasonably expect clarity on a question as fundamental as whether they can work in their homes, and those wishing to do so can argue convincingly that it is in the public interest that they should be permitted to do so without fear of enforcement proceedings.

The practice of working in residential property will continue. Existing titles to residential property will, without widespread modification or discharge, continue to contain covenants which apparently prohibit such activity. Courts are likely to continue interpreting those covenants by considering their words, object and context, without specifying what precisely each aspect means, or how precisely each contributes to the interpretation process. It will perhaps take litigation arising specifically from remote working practices to offer clarity. In the longer term, a detailed investigation into the imposition, purpose and effect of covenants and of how 'living' and 'working' spaces should be perceived and regulated might resolve

some of the tensions arising from the application of long used drafting practices to modern working practices.

More immediately, changes to current conveyancing practices might be advisable. The routine imposition of covenants against business use owes little, if anything, to proper consideration of context. Indeed such imposition, driven by habit and by pragmatic considerations of speed and cost, accentuates the extent to which the individual characteristics of the property, its locality and local needs for land use are routinely disregarded.

A relatively minor drafting change might be for covenants only to prohibit business activity which is a nuisance or annoyance, thereby essentially removing 'business user' covenants, and relying entirely on nuisance and annoyance covenants. Covenantors might also be required only to refrain from activities which can be demonstrated to have a detrimental effect on the value of either the property itself, or of those in the vicinity. Statute might encourage such drafting by providing that no prohibition on the use of premises for business purposes shall be breached by conduct which does not also constitute a private or public nuisance, or which does not cause financial loss.

Two further reforms are suggested, one ambitious and one pragmatic. The first envisages formally applying the principle of discharge and modification on the basis of the 'public interest' to the process of construction. A statutory provision might state that a covenant should be unenforceable to the extent that an application to discharge or modify it under s84 LPA would succeed, whether or not such an application is made. The full implications of this are outside the scope of this article, and it may be that a full departure from *Rolls* and the authorities following it is too abrupt a change.

The second reform perhaps reflects better the practical uncertainty both of the law and of people's working arrangements. In view of the enthusiasm of practitioners to adhere to well established forms of wording, and the reluctance of courts to provide guidance which is both sufficiently wide and sufficiently specific as to what those words mean, statute might define a 'business' more clearly. Efforts would be required to ensure that in seeking to preserve existing judicial authority, Parliament did not simply define 'business', as has happened with the 'public benefit' requirement for Charities, as having the meaning which 'is understood for the purposes of the law … in England and Wales'[51]. Such a provision would add little to Nourse LJ's dicta in *C&G* to the effect that 'business' means what the courts have said it means.

In a climate in which working from home is widespread, and the need for clarification on whether this is permitted is pressing, a better approach to defining 'a business' might (notwithstanding the concerns already raised over the transposal of definitions) be to adopt an existing definition. S 43ZA LTA 1954 expressly excludes 'home business tenancies' from Part 2 of that Act. S 43ZA(3) LTA 1954 defines a 'home business' as 'a business which might reasonably be carried out in a home'. A statutory provision might state that covenants on residential property against business use shall not prohibit use for a 'home business' (as defined in the 1954 Act). The issue of what 'might reasonably be carried on in a home' is, it is suggested, narrower and therefore more capable of resolution than the issue of what constitutes 'a business'. Most importantly by focusing on the current concern of what might reasonably be carried on in a home *now*, and by encouraging departure from examination solely of such historic factors as the words used, object and context, such a provision might be an efficient and workable solution to what is currently an unresolved problem.

[51] Charities Act 2011 s4(3)