Homes and Home Working: A Property Law Perspective.

Structured Abstract

Design/methodology/approach

This paper identifies conceptions of 'home' from non-law disciplines. It examines the extent to which property law in England and Wales supports or challenges those conceptions. It examines the extent to which working in homes disrupts or distorts those conceptions. It assesses the extent to which property law engages with that disruption.

Purpose

This paper's purpose is to examine whether disciplines outside law demonstrate consensus on the attributes of home, whether, to the extent that there is consensus, property law supports those attributes, whether those attributes can be reconciled with working from home, and how far property law is able to address uncertainty regarding the regulation of working from home.

Findings

A lack of clarity in how 'home' is defined and perceived in non-law disciplines, and a tendency in those disciplines to produce static and decontextualized notions of home is reflected in inconsistent property law approaches to protection of important 'home' attributes. Recognition by property law of the prevalence of home working is relatively undeveloped. An under-appreciation of 'context' dominates both cross disciplinary perceptions of home, and the support which property law provides to those perceptions.

Research limitations/implications

This paper focuses on conceptions of 'home' drawn from disparate disciplines and seeks to find consensus in a diverse field. It concentrates on the regulation by covenants of the use of homes for non-domestic purposes in England and Wales.

Practical implications

Suggested alterations to property law and practice, and to the imposition and construction of covenants against business use, might better reflect the prevalence of working from home, and clarify the circumstances in which homes can properly be used for work purposes.

Social Implications

This paper identifies that in its inconsistent recognition of 'home' attributes in general, and in the lack of established principles for regulating the use of homes for business purposes in particular, property law offers insufficient certainty to occupiers wishing either to work at home, or to resist doing so. It identifies that a broader cross disciplinary investigation into the inter-relationship between living spaces and working spaces would be beneficial.

Originality/value

The originality of this paper lies in its examination from a property law perspective of established cross disciplinary conceptions of home in the context of the recent growth of working in homes.

INTRODUCTION

'Home' defies easy definition. Practically, home might be viewed as a location for meeting the personal needs of everyday life. Emotionally, home might be perceived as the location of a sense of belonging, where people can foster personal relationships, and care for themselves and others.

The close association of 'home' with domestic, as opposed to commercial, environments must now engage with the widespread use of homes for non-domestic purposes. In April 2020, 46% of employed people in the UK performed some, or all, of their employment duties in their homes. Of those, 86%, equating to approximately 12 million people, did so

because of the COVID-19 pandemic.[1] A significant level of home working is likely to continue.[2]

This article focuses on the conduct in homes of activities which might until recently have been undertaken in specified workplaces. Notwithstanding the extensive literature devoted to it, this article does not discuss either the status[3] or the regulation[4] of *domestic* labour. The decision to focus this discussion away from domestic labour is not intended to deny the significance either of that labour or of the debates which accompany it, but recognises the inherent legitimacy of, and the remote likelihood of a realistic challenge to, the use of residential property for attending to personal needs. Similarly, the focus of this article on the significant disparity between different people's capacity to work in their homes based on their financial resources and on the nature of their property tenure is not intended to be exclusionary of other discussions of the discriminatory effects of working in homes related to gender, ethnicity or social class.[5]

This article investigates how notions of home inter-relate with the regulation of the use of residential properties by the imposition and enforcement of covenants. It identifies how disciplines outside law have sought to establish meanings of 'home' and how property law supports or opposes those meanings. It identifies how increased home working has altered

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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/lloyds-to-move-700-staff-into-full-time-homeworking-roles-covid> accessed 4 December 2020, Tom Ball, 'Hybrid working 'to become norm in public sector' *The Times* (London, 22 February 2022), 12, Bryan Luffkin, 'The Companies doubling down on remote work' *BBC Online* (London, 25 July 2022) <www.bbc.com/worklife/article/20220722-the-companies-doubling-down-on-remote-work> accessed 6 September 2022

[3] See, for example, Laura Schwartz, 'Domestic Labour and the Feminist Work Ethic' in *Feminism and the Servant Problem, Class and Domestic Labour in the Women's Suffrage Movement* (Cambridge University Press 2019) 120-146

[4] See, for example, Terri Nilliasca, 'Some Women's Work: Domestic Work, Class, Race, Heteropatriarchy, and the Limits of Legal Reform', 16 Mich J Race & L 377(2011)

[5] See, for example, Annie Phizacklea and Carol Wolkowitz, *Homeworking Women: Gender, Racism and Class at Work* (Sage Publications Ltd 1995)

conceptions of home, and examines how, and how successfully, property law has adapted, and might further adapt, to that increase.

CROSS DISCIPLINARY PERCEPTIONS OF 'HOME'

Meers' categorisation of 'home' as 'an essentially contested concept',[6] perhaps paradoxically, appears to provide more clarity and finality than has previously been evident in discussions of home. Attempts by non-law disciplines to describe 'home' have resulted in diverse conceptions and understandings. 'Home' has become a 'repository for complex, inter-related and … contradictory socio-cultural ideas about people's relationship with one another… and with places, spaces and things'.[7] Researchers' tendency to examine discipline specific dimensions of home[8] has created a body of research on home environments which is 'particularly daunting… diverse…[and] unintegrated',[9] and the size of which has been described as 'counterproductive'.[10]

Attempts to define 'home' have tended to focus on occupants' experiences. Some analyses have attempted to create 'lists' of attributes, resulting in 'disparate ideas and observations'.[11] Hayward[12] lists nine 'dimensions of home' in order of importance, including home as 'a set of relationships' (No.1), 'a place of privacy' (No.4) and as 'a personalized space' (No.6). Després[13] draws on studies conducted in the USA, the UK and Israel to identify general categories of meaning, articulated as 'Home as…', including 'Security and

[6] Jed Meers, ''Home' as an essentially contested concept and why this matters', Housing Studies Vol 38 Issue 10 (2023), DOI: 10.1080/02673037.2021.1893281
[7] Shelley Mallett, 'Understanding home: a critical review of the literature', The Editorial Board of *The Sociological Review*, 2004 62, 84
[8] Shelley Mallett (n7) 64
[9] Amos Rapoport, 'Thinking about Home Environments, A Conceptual Framework' in Irwin Altman and Carol Werner (eds) *Home Environments* (Plenum Press 1985) 255
[10] Amos Rapoport (n9) 255
[11] Judith Sixsmith, 'The Meaning of Home: An Exploratory Study of Environmental Experience', Journal of Environmental Psychology (1986) 6, 281
[12] D G Hayward, 'Dimensions of Home' in S Weidemann and J R Anderson (eds) *Priorities for Environmental Design Research* (EDRA 1976)
[13] Carole Després, 'The Meaning of Home: Literature Review and Directions for Future Research and Theoretical Development', Journal of Architectural and Planning Research, 1991, Vol 8 No 2, Special issue: The Meaning and Use of Home, 96-115

Control', 'a Reflection of One's Ideas and Values', 'Permanence and Continuity', 'Relationships' and 'a Refuge from the Outside World'.[14] One study asked apartment residents to identify the order in which they felt their home was 'the sole area of control for the individual', 'the most appropriate framework for the family', 'a place of self-expression' and the source of 'a feeling of security'.[15] In another, Sixsmith[16] identified 20 collective categories of meaning of 'home', the most frequently identified being 'Belonging' (encompassing comfort, relaxation and familiarity), 'Self Expression' (the notion that at home 'you can do what you want'), and 'Spatiality' (defined as 'the spatial properties and the activities that those spaces allow').

From this 'complex and multi-dimensional amalgam'[17] of home attributes, three features have been chosen for analysis of homes and home working from a property law perspective. The first is that home should be an environment which occupants can *control*, or 'a world in which [people] can create a material environment that embodies what [they] consider significant'.[18] Investigating the needs which respondents believed the home filled beyond the functional, Sebba and Churchman identified that the aspect most frequently cited by fathers and by children, and the second most frequently cited by mothers, was home as 'the sole area of control for the individual'.[19] Occupants perceived 'home' as answer[ing] the need for a space of one's own, … over which others have no jurisdiction',[20] that control being a condition for 'freedom of behaviour, … self-expression and … a feeling of security'.[21] They concluded that the uniqueness of home for occupants lay in it being 'their territory'.[22]

[14] Carole Després (n13) 98
[15] Rachel Sebba and Arza Churchman, 'The Uniqueness of the Home', Architecture & Behaviour Vol 3 No 1 7-24 (1986), 8
[16] Judith Sixsmith (n11) 287
[17] Lorna Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?', Journal of Law and Society Vol 29 No 4 December (2002), 580-610, 607-8
[18] Mihaly Csikszentmihalyi and Eugene Rochberg-Halton, 'Home as Symbolic Environment' in M Csikszentmihalyi and E Rochberg-Halton (eds) *The Meaning of Things – Domestic Symbols and the Self* (Cambridge University Press 1981) 123
[19] Rachel Sebba and Arza Churchman (n15) 9
[20] Rachel Sebba and Arza Churchman (n15) 9
[21] Rachel Sebba and Arza Churchman (n15) 10
[22] Rachel Sebba and Arza Churchman (n15) 11

The second attribute selected is *choice* in how homes are used. Rapoport[23] argues that a simple conceptual framework for thinking about home is 'the notion that *choice* is important in peoples' interaction with all environments and is central regarding home environments. It seems characteristic of [home environments] … that *they are chosen*. One could … argue that *if they are not chosen, they are not home*. An imposed setting is unlikely to be a home environment…'.[24]

The third attribute selected is a home's capacity to *separate* occupants from public life. Porteous describes home as a 'haven … in a public world where we are valued less for ourselves than for the roles we play. … the possession of a home confers … valuable rights of privacy and autonomy'.[25] This 'ideology of 'separate spheres''[26] is widely repeated: Home has been described as 'a distinct private sphere',[27] 'a refuge from the outside world'[28] and as 'a place of privacy'.[29]

Justification for the choice of these three attributes reflects Meers' recommendations which accompany his categorisation of 'home' as 'an essentially contested concept'.[30] It is not argued that these three attributes are definitive or exhaustive: They comprise *a* set of attributes which homes might reasonably be expected to have, and with which home working might interfere. 'Control', 'choice' and 'separation' are all open to infinite interpretation, and such interpretations are likely to be highly subjective and context specific. They are in part chosen because of their dominance and recurrence in the literature, indicative both of some consensus and of their evident enhanced importance

[23] Amos Rapoport (n9) 256
[24] Amos Rapoport (n9) 256
[25] J D Porteous, 'Home; the territorial core', (1976) 66 Geographical Rev 383-90, 386
[26] Sherry Ahrentzen, 'A Place of Peace, prospect, and…a PC: The Home as Office,' Journal of Architectural and Planning Research 1989 Vol 6 No 4 271-288, 272
[27] Shelley Mallett (n7) 71
[28] Carole Després (n13) 98
[29] Amos Rapoport 'A Critical Look at the Concept 'Home'' in D Benjamin D Stea and D Saile (eds) *The Home: Words, Interpretations, Meanings and Environments* (Avebury 1995) 25, 34

[30] Jed Meers (n6) 12

relative to other attributes. This article also seeks to demonstrate that it is to these attributes that home working is most pertinent.

Perhaps most significantly, their selection results from pragmatic recognition of biases evident in property law. Identifying the absence of a clear legal concept of 'home', with reference to the competing interests of occupiers and secured creditors, Fox[31] identifies that unlike the concrete financial claims of creditors, the emotional interests of occupants have neither been recognized, nor translated into a coherent legal concept. She identifies that occupants' 'highly personal' sense of attachment may be portrayed as 'sentimental and emotive'[32] and therefore 'trivialized',[33] and that it 'transcends quantitative, measurable dimensions' rendering it 'complex' and 'ambiguous'.[34] Citing Dovey's observation that the rational attitude 'is biased towards the tangible'[35] she concludes that a rationally underpinned legal system will tend to 'prefer the interests of creditors in the … [property's] value' to the non-economic interests of occupants.[36] Acknowledging that bias, this article recognises that some perceptions of home, for example as 'a set of relationships with others' or 'an indicator of personal status'[37] do, or are likely to, transcend quantitative, measurable dimensions. It is suggested, however, that not all perceptions of home do so, or do so equally. Whether homes allow occupiers sufficient control, choice, and separation of private and public spheres, is, it is suggested, potentially more amenable than other attributes to quantitative measurement. Accordingly, if the preference of a rationally underpinned legal system towards what is measurable (if not strictly tangible) is, perhaps reluctantly, accepted, logically property law should focus on home attributes which are more amenable both to measurement and to legal regulation.

[31] Lorna Fox (n17) 607-8
[32] Lorna Fox (n17) 607-8
[33] Lorna Fox (n17) 607-8
[34] Lorna Fox (n17) 586
[35] K Dovey, 'Home and Homelessness' in Irwin Altman and Carol Werner (eds) *Home Environments* (Plenum Press 1985), 34
[36] Lorna Fox (n17) 609
[37] Amos Rapoport (n29) 34

Even within the disciplines from which they originate, the meanings, significance and even the existence of these three attributes of home are disputed. Moore[38] identifies researchers' focus on narrow populations,[39] and presentation of largely positive views of 'home'. Mallett[40] challenges the notion of home as place of control or privacy, noting that divisions between spaces for living and working have never been absolute and that historical house design has long featured public, social spaces. The 'idealized, romanticised…nostalgic'[41] concept of home as a refuge is widely criticised: Meers identifies the 'tight relationship' between the home and domestic violence.[42] Home can be a site of fear and isolation.[43] Equally problematic, and pertinent to this discussion, is the almost exclusive focus by researchers on conceptualising home 'through the lens of owner-occupation'.[44] The strength of these objections is not contested. It is submitted, however, that the absence from the experience of many occupants of the desirable attributes of adequate control, choice and separation of public and private spheres is an argument for the means of achieving them to receive more, not less, attention.

The use as a reference point of a 'list' of three attributes must also be defended. Defining 'home' in this way can lead to the process, vividly described as 'list fetishism',[45] by which the listed items are portrayed as 'universal', and 'generalized'[46] with the associated implication that all experiences are, or should be, experienced equally. An associated objection is that the listed meanings are 'static' and 'not placed in their original context'.[47] As well as focussing on small, geographically restricted groups, many prominent studies of 'home' focus on the subjects' personal experiences to the exclusion of their personal circumstances,

[38] Jeanne Moore, 'Placing *Home* in Context', Journal of Environmental Psychology (2000) 20, 207-217, 210
[39] E.g. Amos Rapoport (n29) 34, who notes Hayward's focus on 'a small sample of young residents of Manhattan, possibly atypical even of the US in the 1970's.'
[40] Shelley Mallett (n7) 72
[41] Shelley Mallett (n7) 72
[42] Jed Meers (n6) 5. See also Craig Gurney, *Out of Harm's Way? Critical Remarks on Harm and the Meaning of Home during the 2020 COVID-19 Social Distancing Measures*, Working Paper, UK Centre for Collaborative Housing Evidence, Glasgow 2020
[43] Jeanne Moore (n38) 212
[44] Jed Meers (n6) 11. See also Sarah Blandy & Caroline Hunter (2009) 'A review of 'Conceptualising home: Theories, laws and policies', *European Journal of Housing Policy,* vol 9, issue 4, 480-2
[45] Craig Gurney, *The Meaning of Home in the Decade of Owner Occupation: Towards an Experiential Research Agenda*, University of Bristol, School for Advanced Urban Studies Working paper (1990), 28
[46] Jeanne Moore (n38) 210
[47] Jeanne Moore (n38) 210

or of what Moore calls 'the wider cultural contexts or socially shared meaning'[48] which may have influenced their perceptions. This article attempts to avoid this consequence: It uses 'control', 'choice' and 'separation' not as descriptions of essential and universal attributes of home but as *indicia* of what a home might be. It then explores whether, in its engagement with and regulation of home working, property law is more successful than other disciplines in recognising the role which context plays in perceptions of home.

PROPERTY LAW AND CONTROL, CHOICE AND SEPARATION

Just as different disciplinary approaches to interpreting 'home' produce disparate, discipline-specific ideas, so different legal disciplines have constructed conceptions of home confined to considerations particular to those disciplines: Capital Gains Tax relief is available in the disposal of a disponee's 'only or main residence'[49] and 'home rights' protect non-owning spouses or civil partners from eviction or exclusion from the family home.[50]

Property law appears to avoid establishing a coherent approach to the maintenance by home occupiers of control, choice and separation. Occupiers appear to enjoy extensive territorial control from aspects of the adverse possession regime, for example, the long limitation period for actions to recover land[51] and the favourable position, compared with that of the possessor, of the registered proprietor.[52] In leasehold land, the principle of 'exclusive possession', allowing tenants of property to exercise territorial control by excluding anyone from the property, is integral to the existence of a lease.[53] It is suggested, however, that the apparent ability of homeowners to control their environments is frequently more theoretical than reflective of lived experience. This is particularly true for leasehold owners, whose titles typically include covenants which reserve to landlords

[48] Jeanne Moore (n38) 210
[49] Taxation of Chargeable Gains Act 1992, s 222(1)(a)
[50] Family Law Act 1996, s 30
[51] Limitation Act 1980, s 15
[52] Land Registration Act 2002, Sch 6
[53] *Street v Mountford* [1985] AC 809

extensive control over use of properties. Short lease terms and relatively insecure tenancy arrangements create an imbalance of power between residential landlords and tenants. Leasehold owners are less likely than freeholders to be advised on restrictions in their titles. Leasehold titles are frequently not publicly recorded, and are less susceptible to oversight: Leases not exceeding three years need not be documented,[54] and only leases exceeding seven years must be registered.[55] The existence and relevance of covenants by which landlords control the use of property are more likely to be appreciated by parties to short leases, and are less susceptible to challenge based on age or relevance than the existence of historic freehold covenants might be. The direct landlord/tenant relationship of privity of estate makes enforcement of leasehold covenants conceptually clearer, and hence more likely to occur, than the enforcement of freehold covenants, which depends on the successful 'running' of the benefit and the burden. The remedies for breach available to landlords, including forfeiture or the loss of a rent deposit, are more immediate, accessible and draconian than the remedies available to the holder of the benefit of a covenant in freehold land.

An uneven picture with regard to control and choice can also be seen alongside an apparently highly prescriptive approach taken by both property law and property practice towards separation, evident from the imposition of covenants which regulate the use of homes. Land Registry investigations indicate that such imposition is widespread. Investigations were made of properties on four freehold 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[56] and 1975[57], of approximately 100 and 30 houses respectively, had identical covenants requiring that 'No trade or business … shall be carried on upon the property hereby conveyed'. Properties on two further developments from 1989[58] and 2016,[59] of approximately 50 and 350 homes

[54] Law of Property Act 1925, s 54
[55] Land Registration Act 2002, s 27
[56] LR Title Number SF 405425
[57] LR Title Number SF 470071
[58] LR Title Number SF 264877
[59] LR Title Number SF 622489

respectively, required the purchaser 'Not to carry on any trade or business on the land …' and 'Not to use the Property … other than as … one private residential dwelling [or] for any trade or business'.

The frequency with which such restrictions appear reflects their routine inclusion in conveyancing precedents. In a precedent transfer of 'a building plot', Practical Conveyancing Precedents 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.[60]

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'.[61] The National Landlords Association Assured Shorthold Tenancy Agreement requires tenants 'Not to carry on in the Property any trade profession or business'.[62] Other precedent Housing Association tenancies routinely contain equivalent provisions: The Sutton Housing Society imposes covenants requiring tenants 'Not to carry on any trade, business or profession…'.[63] Sanctuary Housing, managing 90,000 homes, states in its Residents' Handbook that 'You should not work from home or start a business from your home without written permission from us'.[64] This qualified restriction might be interpreted as allowing greater choice, but it is perhaps significant that the landlord need not act reasonably when consent is sought.

Reasons for apparent adherence to the 'separate sphere ideology'

While it might appear logical to attribute the routine imposition of such covenants to a conscious desire by the parties imposing them to restrict owners' choice over how their property is used, and rigidly to separate business and domestic activities, such attribution may be misplaced; it assumes covenanting parties have fully considered the covenants' nature, purpose and context. Moore's criticism that the formulation of lists of meanings of

[60] Trevor M Aldridge, *Practical Conveyancing Precedents*, (Sweet & Maxwell 2020) Form 1.522
[61] Trevor M Aldridge (n60) Form 5-B20
[62] National Landlords Association, 'Assured Shorthold Tenancy Agreement', accessed 16/11/21
[63] Sutton Housing Society, 'Assured Tenancy Agreement', accessed 16/11/21
[64] Sanctuary Housing, 'Residents' Handbook', accessed 16/11/21

home is insufficiently attentive to context may be equally applicable to the imposition of lists of covenants which *prima facie* both restrict choice and enforce separation.

Even a limited contextual examination of a covenant against business use, confined to the document in which it appears, can create uncertainty as to its intended purpose: The covenants to one Staffordshire property investigated prohibit use for a trade or business, but the accompanying covenants prohibit the keeping of pigs, poultry and chickens, the parking of commercial vehicles, caravans, and trailers, and require maintenance of the land adjoining the road as 'an ornamental garden and entrance driveway'.[65] One interpretation of the entire document is that the intention was less to remove choice and to enforce separation of activities in itself, and more to prohibit activities which are practically disruptive or visually unappealing and hence perhaps harmful to property values or enjoyment more broadly.

Property practice raises a broader issue regarding the precise intention behind the imposition of covenants prohibiting particular uses, and indeed whether any concrete intention in fact exists. Practitioners selling new estates are likely, for simplicity and speed, to have instructions that the covenants imposed on each property should closely resemble the covenants imposed on other properties on the same development, and even on other developments. If sellers envisage the creation of schemes of development, resulting in mutually enforceable regimes of covenants, the importance of uniform schemes of covenants increases; differences between the covenants imposed is 'a powerful indication that there was no intention to create reciprocally enforceable rights'.[66] In these circumstances, little or no consideration will be given to the individual context of each home, and a consideration of context will deliberately be discouraged in favour of considerations of consistency, efficacy and cost.

Contributing to uncertainty as to how far such covenants are really intended to separate domestic and work activities is the reliance by practitioners on familiar wording. An early

[65] LR Title Number SF 470071
[66] *Emile Elias & Co Ltd v Pine Groves Ltd* [1993] 1 WLR 305 at 311 E-G per Lord Browne-Wilkinson

case on the construction of covenants against business use concerned an 1825 covenant 'not…during the term hereby granted [to] exercise…or permit …to be [exercised]…upon the premises any trade or business of any description whatsoever'.[67] The similarity of that 1825 wording to wording routinely used two centuries later would perhaps suggest that practitioners drafting covenants perhaps have little regard to context. Routine imposition of familiar covenants creates an inherent tension between detailed consideration of context, and the realities of practice.

Inattention to context in the imposition of covenants is perhaps understandable. Requiring parties to consider and record more comprehensively their true intentions regarding separation and the context in which covenants are imposed presents practical difficulties. The nature of 'context', in the sense of the circumstances pertaining at a particular place and time, means that there may be 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, strenuously record for posterity the reasons for imposing a covenant or the context of that imposition if such matters appear obvious or unimportant. Nor does 'context' necessarily constitute one set of circumstances mutually understood when a covenant is imposed. In *Addiscombe Garden Estates Ltd v Crabbe*[68] the parties had entered into a 'licence' for the use of tennis facilities for a monthly fee. The court held that on its proper construction it was a business lease. 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. What emerges is an indecisive picture of whether, and how far, property law and practice attempt to promote notions of control, choice and separation, and with particular reference to separation, whether any particular intention behind the routine imposition of covenants against business use exists. Property law appears, when encouraging the imposition of covenants in standard forms, to be promoting an essentially

[67] *Rolls v Miller* (1884) 27 Ch D 71
[68] *Addiscombe Garden Estates Ltd v Crabbe* [1958] 1 QB 513

'static' notion of what a home is and should be, while remaining largely indifferent to the contextual differences between properties, types of tenure, and types of occupier.

PERCEPTIONS OF HOMES AND WORKING IN HOMES – DISRUPTION AND DISTORTION

It is perhaps significant that recognition of the ubiquity of home working and of its potentially disruptive effect on 'idealized' perceptions of home has long co-existed with attempts to categorize those perceptions. Reflecting what is perhaps an extreme interpretation of the 'separate sphere ideology', Randall[69] notes that the attribution to the terms 'home' and 'work' of exclusive and insular meanings has been given 'legitimacy',[70] with the result that those who work from home can be perceived as lacking 'normative dignity',[71] a view reinforced by Bulos and Chaker's suggestion that paid work undertaken in a private domestic space can be perceived as 'deviant' or 'subversive'.[72]

The encouragement of employers to develop remote working arrangements to reduce energy consumption, and the associated terms 'teleworking' and 'telecommuting' appear to have emerged in America in the 1970's following the oil crisis, and later in response to environmental legislation.[73] Home working appears to have grown throughout that decade: Bulos and Chaker refer to the findings of the British Department of Employment in 1979 that 1.7 million people worked in or from their home.[74]

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[69] J Randall, ''At home', 'at work': A boundary crossed' in M A Bulos and N Teymur (eds) *Housing: Design, Research, Education* (Avebury 1993) 109, 118
[70] J Randall (n69) 118
[71] J Randall (n69) 118
[72] Marjorie Bulos and Waheed Chaker, 'Sustaining a Sense of Home and Personal identity' in D Benjamin D Stea and D Saile (eds) *The Home: Words, Interpretations, Meanings and Environments* (Avebury 1995) 227, 229
[73] Tammy D Allen and others, 'How Effective is Telecommuting? Assessing the Status of Our Scientific Findings' Psychological Science in the Public Interest, 2015 Vol 16(2) 40-68, 41
[74] Marjorie Bulos and Waheed Chaker (n72) 228

Significant objections to homeworking appear to have accompanied its growth: Ahrentzen identifies that the dimensions of the 'home as a refuge' metaphor 'explode'[75] when the home is more than a private space. Significantly, most of her interviewees had rooms used exclusively for work[76] which may explain the finding that for some homeworkers, particularly those operating family businesses, home remained a refuge.[77] For many, however, homeworking caused the refuge attribute to deteriorate into a sense of isolation and entrapment, a sentiment encapsulated by one response that, 'when you work at home, it is not a refuge from work – the work is always there'.[78]

In similar terms, Bulos and Chaker describe home working as 'a physical, interactional and personal disruption to homefullness'.[79] Particularly significant to this finding is the fact that for their interviewees, home working was a 'personal and positive choice',[80] made to enhance their home and family life: They had, in essence, actively exercised choice, in order to exert a higher degree of control over their lives, but had, presumably inadvertently, diminished the separation attribute of their homes. The result was that the disruption they were experiencing was occurring in the context of a quest for 'the very ideal of home'.[81]

In a study of teleworkers and office workers performing identical roles, Holdsworth[82] identifies some of the much-repeated apparent benefits of homeworking, including 'better balance of home and work life', 'reduction in commuting' and 'increased productivity'[83] while noting that such accounts were largely self-reported by those requesting home working, with the evident incentive to claim success for their choice. Conversely, she explores problems associated with teleworking, notably 'social isolation', 'lack of support'

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[75] Sherry Ahrentzen 'Blurring Boundaries: Socio-Spatial Consequences of Working at Home', Publications in Architecture and Urban Planning, 1987, 96-104, 98
[76] Sherry Ahrentzen (n75) executive summary, 2
[77] Sherry Ahrentzen (n75) 99
[78] Sherry Ahrentzen (n75) 100
[79] Marjorie Bulos and Waheed Chaker (n72) 227
[80] Marjorie Bulos and Waheed Chaker (n72) 234
[81] Marjorie Bulos and Waheed Chaker (n72) 234
[82] Lynn Holdsworth, 'The Psychological Impact of Teleworking: Stress, Emotions and Health', New Technology, Work and Employment, Vol 18 No 3 (2003) 196
[83] Lynn Holdsworth (n82) 197

and the 'blurring of boundaries' between work and home life, not only for teleworkers, but also for their families,[84] leading to frustration, anger and stress.[85] She found that teleworkers experienced more mental and physical ill health than their office-based equivalents.[86] Significantly, she noted that while office workers reported experiencing more stress, the teleworking group showed more symptoms of stress. The increase of home working after March 2020 has again highlighted its potential for harm. NatCen Social Research identified that even when demographic and financial circumstances, and even loneliness, were controlled for, there was still 'a significant relationship between working from home and increased mental distress'.[87]

The precise nature of this relationship between working from home and increased mental distress is beyond the scope of this article, but there is at least a suggestion that insufficient space is a significant contributory factor, particularly for tenants: In England, the average size of a socially rented property is 66 m2, compared with 108 m2 for owner occupied property.[88] Thornock & others[89] identified that both actual elements of a home, particularly density of occupation, and perceptions of crowding, noise, and ambiguity were associated with reduced family functioning,[90] co-operation[91] and study and social skills.[92] Contributing to this deterioration in family functioning might be the apparent indifference of social landlords to tenants' needs or wishes to work at home: The Joseph Rowntree Foundation identified that housing association and local authority allocation policies generally took no account of households' needs or desires to work or study from home, and that social tenants were rarely allocated a home with a spare room.[93] It also found that most social

[84] Lynn Holdsworth (n82) 198
[85] Lynn Holdsworth (n82) 203
[86] Lynn Holdsworth (n82) 208
[87] V Kolbas, I Taylor and NR Smith '*Stay home: affecting lives'* July 2021, NatCen Social Research, 4
[88] Department for Local Government and Communities (UK), English Housing Survey 2019-20 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/945376/2019-20_EHS_Headline_Report_Section_1_Households_Annex_Tables_.xlsx accessed 7/2/22

[89] C M Thornock and others 'There's No Place Like Home: The associations between residential attributes and family functioning', Journal of Environmental Psychology, 64 (2019) 39-47
[90] C M Thornock (n89) 43
[91] C M Thornock (n89) 40
[92] C M Thornock (n89) 40
[93] Joseph Rowntree Foundation, 'Social tenants' access to home working opportunities', 2002 https://www.jrf.org.uk/reports/social-tenants-access-home-working-opportunities, accessed 16/11/21

landlords' tenancy agreements discourage or forbid use of the home for business purposes, and that of 25 housing associations surveyed, few had ever granted tenants permission to work from home.[94]

ENGAGEMENT BY PROPERTY LAW WITH THE POTENTIALLY DISRUPTIVE EFFECTS OF HOME WORKING

To date, working in homes does not appear to have resulted in litigation. This is perhaps unexpected: Both home working and covenants which appear to prohibit it are very common. A natural inference might be that property law has successfully engaged with working in homes, and does not consider it problematic. Such an inference may, however, be misplaced. The absence of litigation to date does not preclude future enforcement: Property law disputes over issues previously considered settled are not unknown.[95] Airbnb has operated in Britain since 2009, but the first prominent case on whether letting out properties through its platform breached a leasehold covenant prohibiting use 'other than as a private dwelling house' appears to have been in 2016.[96] Home working which parties with the benefit of covenants were willing to tolerate when temporary social distancing measures were in place may be challenged as such conduct becomes permanent. It would appear unlikely that parties with a commercial interest in maintaining the purely residential character of properties, for example developers selling the first homes in large developments, or landlords keen to maintain the value of their reversionary interests, would be willing to allow home working to continue without restraint. There is ample evidence that property practitioners are advising clients on whether working at home may be a breach of covenant.[97] Perhaps most significantly, the abundant caselaw on what constitutes a business offers little reassurance that a dispute on whether home working

[94] Joseph Rowntree Foundation (n93) 2

[95] See for example *Bakewell Management Ltd v Brandwood* [2004] UKHL 14 concerning the prescriptive acquisition of rights over common land.

[96] *Nemcova v Fairfield Rents Ltd* [2016] UKUT 303 (LC). See also *Bermondsey Exchange Freeholders Ltd v Ninos Koumetto* [2018] 4 WLUK 619

[97] 'Could Working from Home be Breaking the Law' Gordon Brown Law, www.gordonbrown law.co.uk, accessed 7/9/22, 'Dwellinghouse covenants from a Coronavirus angle', Winstons Solicitors, info@winstonsolicitors.co.uk, accessed 7/9/22, 'Is Working from Home a Legal Headache?' www.PropertySurveying.co.uk, and Jason Hunter and Ed John, 'Property Law: can I work from home if it is rented?' Financial Times, May 1, 2020

breaches a covenant prohibiting business use would be determined using clear and settled principles.

Courts have employed a variety of imperfect, incomplete and inconsistent methods to interpret covenants against business use, demonstrating no obvious objective of either preserving or relaxing the separation attribute apparently promoted by the widespread imposition of such covenants. One approach has been to define 'business' by reference to decisions on comparable activities. Activities held to be 'a business' include a school,[98] teaching music,[99] the keeping by a builder of building materials in a garden,[100] letting the end walls of houses for advertising,[101] a hospital for poor persons who paid according to their means,[102] and a Tennis Club.[103]

This approach has limited utility. These decisions all substantially pre-date modern, and particularly remote, working practices. They also determine whether a *particular* use constitutes a 'business', and therefore falls on the 'wrong side' of a notional divide of the public and the private, with little guidance on where that divide lies more broadly, and on whether an activity differing from the closest applicable authority is also a 'business'. An underappreciation of the factual and contextual differences between the cases also hinders the identification of broad principles on how covenants should be interpreted. *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 proceedings. While *Bramwell*, *Tritton* and *Westripp* concerned the construction of specific covenants, the issue in *Addiscombe* was whether the agreement was a business lease under s23 LTA.

[98] *Cooke v Colcraft* (1773) 2 Wm B1 856
[99] *Tritton v Bankart* (1887) 56 LT 306
[100] *Westripp v Baldock* [1939] 1 All ER 279 CA
[101] *Tubbs v Esser* (1909) 26 TLR 145
[102] *Bramwell v Lacy* (1879) 10 Ch D 691
[103] *Addiscombe Garden Estates Ltd v Crabbe* [1958] 1 QB 513

Courts unable to identify a specific applicable authority on whether a use is a 'business' appear to have sought a general definition, within or outside which a particular use falls. An agreed definition might provide a 'general rule' of where the division of the public and the private lies. One definition emerges from *Rolls v Miller,*[104] in which a leasehold covenant prohibited '…any trade or business… whatsoever'.[105] The Court of Appeal held that a charitable 'Home for Working Girls' was a breach.

Lindley LJ appeared to define 'a business' broadly: He said it could be 'almost anything which is an occupation as distinguished from a pleasure, [or] which is … a duty which requires attention is a business.'[106] This intriguingly broad definition, which appears both to replicate aspects of the separation attribute of home by distinguishing 'an occupation' from 'a pleasure' and to cover most, if not all, home working, has attracted significant judicial support. The House of Lords applied it in *Town Investments Ltd v Department of the Environment*,[107] 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',[108] appearing to attribute to it significant authoritative weight.[109]

When seen in its proper context, however, Lindley LJ's definition of a 'business' assumes a less certain form: In his surrounding reasoning, he remarked that:

> When we look into the dictionaries [on] 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 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.[110]

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[104] *Rolls v Miller* (1884) 27 Ch D 71
[105] *Rolls v Miller* (n104) 71
[106] *Rolls v Miller* (n104) 88
[107] *Town Investments Ltd v Dept. of Environment* [1978] AC 359
[108] *Town Investments* (n107) 383
[109] Peter Sparkes, *A New Landlord and Tenant*, Hart Publishing 2001, 542
[110] *Rolls v Miller* (n104) 88

Far from saying that 'business' has a universally broad definition, he appears to have been discarding the dictionary definition in favour of a 'contextualised' definition, requiring consideration of 'the ordinary sense of the words used', and the 'object of the covenant'. His frustration at the absence of a clear dictionary definition appears to 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'.[111]

An entrenchment of this definition can be seen in *Abernethie v AM & J Kleinman Ltd.*[112] The claimant ran a Sunday School gratuitously in his home. The issue was whether that was a 'business' for the purposes of the LTA. The Court of Appeal's unanimous finding that it was not might be interpreted as indicative of a perceptible, although perhaps unconscious, 'blurring' of the boundary between private and other uses. Edmund Davies LJ, quoting Lindley LJ briefly, appears to have fallen into the 'trap' of incorrectly attributing to a broad dictionary definition the status of legal principle.[113] 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'. [114] 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'.[115]

This approach 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 appears to have determined the outcome, but the consideration of context itself appears to have been selective. Confining his consideration to the intention behind the 1954 Act, Harman LJ noted that its purpose was 'protecting business tenants', and that

[111] *Rolls v Miller* (n104) 88
[112] *Abernethie v AM & J Kleinman Ltd* [1970] QB 10 CA
[113] *Abernethie* (n112) 18
[114] *Abernethie* (n112) 17
[115] *Abernethie* (n112) 18

to apply its terms to the circumstances of the case was 'to fall into…the pond of absurdity'.[116]

The application of *Rolls* in *Town Investments Ltd* [117] appears to indicate an increasing role for the consideration of context in the construction of business use restrictions. 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 rents on renewal leases. The definition of 'business' in the order mirrored that in Part II LTA. A majority of the House of Lords held that the premises were so occupied. Citing with approval a selected passage from Lindley LJ in *Rolls*, and describing 'business' as 'an etymological chameleon' [which] suits its meaning to the context in which it is found',[118] Lord Diplock held that the occupants were 'carrying out … a duty which requires attention.' Stressing the importance of context, he held that that object called for 'a broad construction of 'business''.[119] Specifically, the breadth of the object (to restrain rising rents) justified giving it a meaning 'no less wide than that which it has been interpreted as having in covenants in leases restricting the user of demised premises'.[120] 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.

If, as 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 the 'words used', the 'object' of the covenant and the 'context' in which the words appear, the practical obstacles to interpreting covenants are evident. Each factor can and 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.

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[116] *Abernethie* (n112) 18
[117] *Town Investments* (n107) 359
[118] *Town Investments* (n107) 383
[119] *Town Investments* (n107) 383-4
[120] *Town Investments* (n107) 384

'Context' appears to be promoted as aiding understanding: Words viewed in isolation risk being misunderstood; those viewed in their proper context do not. But to prevent misunderstanding effectively, 'context' itself must be properly understood. The difficulties of defining 'context' might usefully be divided into those relating to its 'scope', in the sense of what is within the context and what is not, and those relating to its 'timing', in the sense of whether it is the context 'now' or some previous context on which the court should focus.

In relation to 'scope', 'context' might embrace both a potentially infinite set of prevailing economic, political and social concerns, and also concerns particular to the parties. Which are relevant appears in large part to be a matter of judicial discretion: Notwithstanding the emphasis which courts place on the importance of context in aiding construction, their own consideration both of the 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 this does not appear to have influenced the decision. Likewise, neither the passing of almost 100 years between the decisions in *Rolls* and *Abernethie*, nor that *Abernethie* concerned the interpretation of a statute, rather than a covenant, appear to have influenced that later decision.

In relation to the 'timing' aspect of context, neither *Rolls*, *Abernethie* nor *Town Investments* explicitly determine whether 'context' means context at the time of creation, or context at the time of interpretation of a covenant (including, for example, whether government instructions encouraging home working are implemented or removed), or some combination comprising unspecified proportions of the context 'then' and the context 'now'. If the court's focus should be on the context when the covenant was imposed, perhaps because this constitutes a finite set of circumstances pertaining at a particular time, different difficulties emerge: It is evident that when covenants are imposed, consideration of the context surrounding that imposition is frequently incomplete or absent. Subsequently to attach significant weight to that poorly considered and increasingly remote

and unidentifiable context at the point of construction would appear to be a misplaced exercise.

It might be supposed that a growing appreciation of the importance of context would be accompanied by greater clarification of its meaning and of how it contributes to the construction process. The 'Arbnb ruling' in *Nemcova v Fairfield Rents Ltd*[121] indicates minimal, if any, progress in this area: Determining a related issue of whether letting a property to Airbnb clients breached a covenant prohibiting use 'other than as a private residence', the Upper Tribunal held that 'each case is fact specific, depending on the construction of the particular covenant in its own factual context. It is not therefore possible to give a definitive answer to the question… other than to say somewhat obliquely that "It all depends"'.[122] It also noted, perhaps inconsistently with the assertion that 'it *all* depends', that while context was important, it was not 'everything'[123] and that the emphasis should be on 'the meaning of the relevant words used in their particular *fact-specific* context'.[124] It is not immediately clear what 'fact-specific' adds to 'context', and it might be that the Tribunal's candid admission that the answer 'all depends' reveals more about the uncertainty inherent in the construction process than was perhaps intended.

The uncertainty inherent in the inter-relationship between the words used, the object and context of the covenant may be compounded by the addition of a fourth factor to be considered when interpreting a prohibition on business use, that of whether prohibition is in the 'public interest'. An emergence of the relevance of 'public interest' to construction of covenants, and of a tension between it and more 'traditional' construction methods is evident in *C&G Homes Ltd v Secretary of State for Health.*[125] The Court of Appeal held that provision of supervised housing for Care in the Community patients breached a covenant

[121] *Nemcova v Fairfield Rents Ltd* [2016] UKUT 303 (LC)
[122] *Nemcova* (n121) [55]
[123] *Nemcova* (n121) [40]
[124] *Nemcova* (n121) [41] (emphasis added)

[125] *C&G Homes Ltd v Secretary of State for Health* [1991] Ch 365

against business use. In 1989, a health authority, having purchased houses for this purpose, covenanted;

> Not…to carry on…any trade, business of manufacture whatsoever…and not to use the … dwelling houses for any … purposes other than those … of a private dwelling house.[126]

Patients receiving support services occupied each house. The plaintiff claimed that this use breached the covenants. The Court of Appeal's finding for the plaintiff attracted the criticism of parliament, whose members signed an Early Day Motion, stating its 'deep regret' at the decision.[127] 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 the use envisaged by the defendant to facilitate implementation of the Care in the Community Policy.[128] In his view, the 'planning view' of the matter, known to both parties was 'certainly a factor to be [considered] in construing the covenant'.[129] With apparent disregard, however, both for the 'chameleon like' quality of the word 'business', and for consideration of context both at the time of imposition and at the time of construction, 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'.[130]

The same issue arose in *Re Lloyd's and Lloyd's Application.*[131] The applicants, who wished to run a community care home, applied under the 'public interest' ground in ss 84(1)(aa) and 84(1A)(b) LPA to discharge a 1935 covenant prohibiting use of the property to 'carry on or permit … any trade or business'. 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 public interest'.[132] He identified 'overwhelming' evidence that government policy required

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[126] *C&G Homes Ltd* (n125) 365
[127] https://edm.parliament.uk/early-day-motion/3495/c-g-homes-ltd <accessed 26 November 2020
[128] *C&G Homes Ltd*, (n125) 380
[129] *C&G Homes Ltd*, (n125) 380
[130] *C&G Homes Ltd*, (n125) 380
[131] *Re Lloyd's and Lloyd's application* (1993) 66 P &CR 112
[132] *Re Lloyd's application* (n131) 122

such provision, that the need for it was 'desperate', and that both the property and that the applicants could meet that need.[133]

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 created 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 treatments of the covenants. Nourse LJ in *C&G* appeared reluctant to prioritise the public law position over the strict wording of the covenant. HH Judge Marder QC's reasoning suggests a refusal to allow private law rights to promote discriminatory behaviours or to restrict choice in how premises are used by prohibiting 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'.[134]

Two tentative conclusions emerge. Firstly, that the uncertain contribution to the construction process made by examination of the words used, the object and the context of the covenant renders it very difficult for homeowners to identify whether a chosen use breaches a covenant against business use. Secondly, that choice in how the property is used appears to widen where it can be demonstrated that the chosen use is in the public interest. To this extent, 'traditional' methods of construction, and construction by reference to what is in the public interest, appear to exert opposing forces, at least in respect of some chosen activities. If the supposition that use in the public interest increases choice in how premises are used is correct, this then poses the question of what is in the public interest, and what happens if public interest arguments exist for both widening and restricting choice. An

[133] *Re Lloyd's application* (n131) 122
[134] Graham Thornicroft, Adina Halpern, 'Legal landmark for community care of former psychiatric patients', BMJ, Vol 307, 24 July 1993, 248

indication of the uncertainty which can result when courts must balance competing public interests can be found in *Alexander Devine Children's Cancer Trust v Housing Solutions Ltd*,[135] in which affordable housing built in breach of covenant overlooked the planned gardens of the adjoining children's hospice. The Supreme Court's decision both to refuse the builder's application to modify the covenants, and to leave the consequences of that refusal for resolution by future litigation illustrates well the complexity which characterises attempts to reconcile historic covenants in well-established forms with conflicting public interest requirements.

Currently, public interest appears to have only a limited influence on the construction of covenants. Arguments can be made that consideration of what is in the public interest should not be confined to applications to modify and discharge covenants, and should contribute more to their construction.[136] The existence of a statutory regime requiring determination of what is or is not in the public interest reflects parliamentary recognition not only that what is in the public interest can be identified and objectively measured, but also 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.

CONCLUSIONS AND RECOMMENDATIONS

To the extent that some consensus can be found on what attributes a home *should* have, and on the potential risk to those attributes which homeworking presents, property law appears to adopt an indecisive or indifferent position. That indecision or indifference may be unproblematic: It is perhaps unrealistic to expect property law to engage with the emotional connection between occupants and homes, or to 'have a view' on whether home working, whether voluntary or enforced, should be encouraged. But that indifference has

[135] *Alexander Devine Children's Cancer Trust v Housing Solutions Ltd* [2020] UKSC 45
[136] Michael W. Poulsom, 'Working from Home and Restrictive Covenants: An Analysis' (2021) 85 The Conveyancer and Property Lawyer, Issue 1, 71-83

the significant practical consequence that property law is unable clearly and concisely to address mundane yet, to home occupants, essential questions of whether they can choose to work in their homes without the threat of enforcement proceedings, or indeed whether, by reference to title covenants or to the harm to which home working might expose them, they can legitimately object to being compelled to do so.

1. *A formal recognition of the concept of 'home' as a domestic space – An 'over-arching principle'.*

One solution, recognised as highly speculative, might be for property law to establish an 'over-arching principle' of 'home as a domestic space'. This, it is argued, differs both in nature and scope from a universal *definition* of home, which 'will never be settled upon and nor should it be'[137] and from a universal *concept* of home, the 'value, utility and even the existence' of which will remain contested.[138] An example of such a 'principle' (in the sense of a proposition supporting a chain of reasoning) is evident in welfare law: In any determination concerning a child's upbringing, 'the child's welfare shall be … paramount'.[139] A statutory or judicial statement that a home is, for example, '*a chosen and controlled separate domestic space*' or '*a space for living in, and for working in if the occupant chooses to*' would not simply be a philosophical exercise: It might provide a context in which both the imposition and the interpretation of covenants could be conducted, reinforcing the status of the property as 'a *home*', rather than another type of land.

2. *Amending property law and property practice indirectly to achieve a formal recognition of the concept of 'home' as a domestic space.*

[137] Jed Meers (n6) 4

[138] Chris Bevan 'Challenging 'Home' as a Concept in Modern Property Law: Lessons from the Supreme Court Post- *Stack* and *Jones*' 197, Modern Studies in Property Law, Vol 8 (2015) 195, 197

[139] Children Act 1989 s 1(1)

Practical obstacles to agreeing and creating a broad 'over-arching' principle of 'home as a domestic space' in law are inescapable; objections already applied to the development of the concept of home, that it is unnecessary, adds '[nothing] to property law reasoning'[140] or is impossible to agree or to draft appear insurmountable. Perhaps more significantly, there is an evident risk that such a principle, even if agreed, would be as susceptible to criticism that it is as 'static' and as 'decontextualized' as the cross disciplinary notions of home which support it. Consequently, a series of practical changes might allow property law incrementally to provide greater certainty in the regulation of, and attitudes to, homes and home working.

A relatively minor drafting change might be for covenants only to prohibit conduct which is a nuisance or annoyance, thereby essentially dispensing with 'business user' covenants, and relying entirely on nuisance and annoyance covenants. Covenantors might also be required only to refrain from activities which devalue either the property, or those nearby. Statute might encourage such drafting by providing that no prohibition on the use of premises for business purposes is breached by conduct which does not also constitute a private or public nuisance, or which does not cause financial loss.

A broader reform might involve formally applying the principle of discharge and modification of covenants by reference to the 'public interest' to the process of construction. Statute might provide 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 subsequent authorities is too abrupt a change.

Another approach might be to acknowledge practitioners' enthusiasm for established wording prohibiting 'business' use, and courts' reluctance to define 'business', and for

[140] Chris Bevan (n138) 197

statute to define it. 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'[141] which would add little to Nourse LJ's dicta in *C&G* to the effect that 'business' means what the courts have said it means.

When home working is widespread, and the need for clarification on whether it is permitted is pressing, one approach to defining 'a business' might (notwithstanding concerns over the transposal of definitions) be to adopt an existing definition. S 43ZA LTA 1954 expressly excludes 'home business tenancies' from Part II LTA. S 43ZA(3) LTA defines a 'home business' as 'a business which might reasonably be carried out in a home'. A statutory provision might state that covenants against business use shall not prohibit use for a 'home business' (as defined). The issue of what 'might reasonably be carried on in a home' is, it is suggested, more capable of resolution than the issue of what constitutes 'a business'. Perhaps more importantly, such a provision might address concerns that the conceptions of homes are static and disregard context: It would focus the court's attention away from such historic factors as the words used, object and context at the time of imposition, and towards what might reasonably be carried on in a home *now*, 'now' being when, perhaps long after imposition of the covenant, a dispute arises.

Perhaps the least satisfactory solution to clarifying whether residential occupiers may, or indeed should, work in their homes, but also the one most likely to succeed immediately, is to address the issue by way of government guidance. Such guidance exists in planning law. Under s57 Town and Country Planning Act 1990 ('TCPA'), any development of land requires planning permission. Under s55(1) TCPA 'development' includes 'any material change in the use of … land'. The TCPA does not directly address home working, but government guidance accompanying the Act stated until 4th January 2022 that planning permission is not normally required 'provided that a dwellinghouse remains a private residence first and

[141] Charities Act 2011 s4(3)

business second'.[142] At the time of writing, this guidance had been removed, presumably either to be replaced with new guidance (perhaps even more relaxed in its scope) or not to be replaced at all, thereby stating by deliberate omission that home working does not require planning permission.

Similar, but more detailed guidance exists in relation to short tenancies in specific forms. A model Assured Shorthold Tenancy and Guidance produced by the Ministry of Housing Communities and Local Government contains a covenant that 'The Tenant must not use the Property for the purposes of a business … except with the prior written consent of the Landlord, *which must not be unreasonably withheld or delayed*'.[143] Accompanying guidance states that 'The Tenant should normally be allowed to carry out a 'low impact' business from home, provided that the property remains a private residence first and business use is secondary'.[144] Significantly, the guidance also states that the landlord's permission is not required for all home working, and that office-based workers or teachers (the examples given) should not have to seek consent to work at home. Where consent *is* required, it states that the 'main reasons' for withholding consent are intended to be that the proposed use would cause a nuisance to neighbours, might result in significantly more wear and tear, or might give rise to a business tenancy.[145]

Affording greater publicity to such guidance, while recognising its proper status, might temporarily address immediate concerns over whether current working practices are permitted. Home workers are likely to be reassured if they can identify a relative lack of concern at government level about 'low impact' home working, and can recognise their chosen work activity in that class. Subsequent statutory or judicial recognition of that guidance, and its extension to long leaseholders and freeholders, could both broaden and

[142] Department for Levelling Up, Housing and Communities, *When is Permission Required?,* https://webarchive.nationalarchives.gov.uk, accessed 27/1/22, 5
[143] Ministry of Housing, Communities and Local Government, Model Agreement for an Assured Shorthold Tenancy and Accompanying Guidance, https://www.gov.uk/goverrnment/publications accessed 1/10/21 (emphasis added)
[144] Ministry of Housing (n143) 28
[145] Ministry of Housing (n143) 28

strengthen that reassurance. In the longer term, home working without adequate clarification of the legal status of that use presents the risk of increasing disregard for other forms of regulation of the use of homes, a possibility exposed by the growing practice of commercial tenants of unilaterally 'switching' their advance rental payments from quarterly to monthly with apparent disregard for their lease terms.[146] Continued and increasing home working will necessitate integrated cross disciplinary investigations into a more nuanced, flexible and 'context focused' relationship between living and working spaces.

[146] Pui-Guan Man, 'Frasers 'switches' to monthly rent cycle', Estates Gazette 12 February 2022, 19