Modification of restrictive covenants – a bumper year

The Upper Tribunal has experienced a bumper year of applications seeking to discharge or modify restrictive covenants affecting both freehold land and (in certain circumstances), leasehold land. Restrictive covenants are essentially contractual obligations attached to land, regulating the use and enjoyment of that land for the benefit of another parcel of land.

One of this years' earlier cases, *Hodgson v Cook* saw the Upper Tribunal refuse to permit the modification of a restrictive covenant in order to allow a home owner to run a beauty business from a cabin in their garden. In quick succession was then the case of *Great Jackson Street Estates Limited v Manchester City Council* where the refusal of the Upper Tribunal to modify a leasehold restrictive covenant, prohibited the development of two redundant warehouses to over 1000 flats, despite the warehouses falling within an area earmarked for residential development and where the Local Authority had previously granted planning permission for the development.

More recently in October, the Upper Tribunal handed down their decision in Kay v Cunningham. The applicant raised a number of novel arguments to support an application to modify a restrictive covenant that prevented their Grade II listed Jacobean Mansion, Lea Hurst, (which was briefly the former family home to Florence Nightingale), being used other than as a "*single private residence*".

Seeking modification or discharge of a restrictive covenant is not straight forward. The application essentially follows a two stage test. Stage one requires the Tribunal to be satisfied that they have the *jurisdiction* to modify or discharge the covenant. The statutory grounds, of which one or more need to be successfully argued by any applicant are;

- that the covenant should be deemed obsolete (by reason of changes in the character of the property or

the neighbourhood or other circumstances),

- that the continued existence of the covenant would impede some reasonable use of the land for public or private purposes or that it would do so unless modified (and that the covenant secures no practical benefits of substantial value or advantage to the person with the benefit of the covenant).
- The proposed discharge or modification would not injury the persons entitled to the benefit of the restriction and money should be adequate compensation for the loss the person with the benefit of the covenant will suffer were the covenant modified or discharged .
- The Tribunal will also have jurisdiction where all parties with the benefit of the covenant consent to the modification or discharge.

Stage two of the test then requires the Tribunal to consider whether it will exercise its discretion to make the change applied for.

In applying Stage 1 to *Kay,* the Tribunal considered that the use of the Grade II Jacobean manor house as an *ad hoc* bed-and-breakfast building was reasonable and was allowed under permitted development rights in any event. The change of use to the premises was considered minor and not one that would normally give rise to concerns. The Tribunal were satisfied that the continued existence of the restriction would impede some reasonable use of the land for public or private purposes and that the beneficiary of the restriction would not be injured by the discharge or modification – the covenant providing no practical benefits that could be described as being substantial in value or advantage to those properties who retained the benefit of the covenant. The likelihood of the occupants of the benefiting properties being disturbed by B&B guests was considered negligible.

A contrary view was reached in *Hodgson*, where the Tribunal decided that the restrictive covenant (to which the applicant was the original covenantor ten years prior) prevented activities that would significantly impinge on the amenity, quiet enjoyment and value of the development. One of the objectives of the covenants being to provide certainty over future development and usage of the estate. And in *Great Jackson*, whilst the entire zone within which the warehouses were situated was earmarked for residential development, the Tribunal could not determine that the covenant prohibiting development was "obsolete". The covenant continued to provide the freehold owner (the council) control over the development of its land (and its reversionary interest).

As to Stage 2 and whether the Tribunal *should* apply their discretion and allow the discharge or modification, Kay had converted the nursing home back to its former glory as a family home following his purchase in 2011. He had been running the B&B since 2019. Kay advised the Tribunal that the property was still his family home and he did not intend to make substantial profits from the running of the B&B. Rather, the intention was to generate a small amount of revenue to help preserve the house for which he had spent some £1m on renovations using traditional and sympathetic techniques and incurred substantial annual outgoings to upkeep. The Tribunal considered that the applicant's conduct was not unconscionable as his motivation was, in part, altruistic rather than wholly pecuniary and allowed the modification.

Kay also highlighted the interesting interplay as between the planning system and the statutory grounds that govern the Tribunal's decision-making process for discharging or modifying restrictive covenants. In determining whether the restrictive covenant secures any practical benefits of substantial value or advantage to the beneficiary of the covenant, the Tribunal is required to take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the area. Undoubtedly, the listed status of Lea Hurst in *Kay* and its relationship to the wider planning environment placing strict limits on the use of the house and the wider estate, rendered the protection offered by the covenant less important than perhaps would otherwise have been the case. That said, the very fact that retrospective planning permission for the beauty salon had been granted in *Hodgson* and similarly permission granted for the conversion of the warehouses to flats in *Great Jackson Street*, this was not sufficient to persuade the Tribunal to find that the required grounds had been made out or to exercise their discretion in the applicants favour.

This year's cases, of which the above are just three, highlight that for any developer or party seeking to acquire land, a careful and thorough review of the property deeds and documentation will need to be undertaken from the outset to examine any existing restrictive covenants and their enforceability. Specialist advice should be sought if there is an intention to develop or use the land in such a way that would breach an existing restrictive covenant. In the absence of being able to achieve an express release from a covenant or secure appropriate indemnity insurance, an application to the Upper Tribunal may be required.

For further information on restrictive covenants, contact our real estate team.

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