

A guide to modifying or removing restrictive covenants

Before considering the process which has to be gone through in order to remove or modify restrictive covenants it's probably worth taking a look at what a restrictive covenant is and the impact it can have. In simple terms, a restrictive covenant is a clause written into a contract or the deeds for a piece of land or property, which imposes strict limits on what the owner of that land or property is allowed to do with it. As well as being legally binding, a covenant of this kind is attached to the land in question, rather than any individual owner. This is an important distinction, because it means that, as the land is passed from person to person, the restrictive covenant still applies. There are particular types of restrictive covenant which appear more often than others, and the most common – and thus the most likely to be encountered – include the following:

- A restriction on the owner making alterations to a property, which might prohibit acts such as adding an extension to a property or converting a house into flats
- A restriction on building structures of a substantial nature on specified areas of land
- A restriction on operating a business or trade from the land in question

In some cases, a restrictive covenant will have been placed on some land in order to minimise any possible damage to the land and protect its value. Other examples of restrictive covenants are designed to protect the living standards of multiple residents. A developer or property management company, for example, might add a restrictive covenant or covenants to a transfer deed in order to stop subsequent owners taking steps which would negatively impact on the lives of other residents. The concept of a negative impact is clearly open to interpretation, of course, which means that covenants of this kind might prohibit a wide range of actions, from fitting a satellite dish to the exterior of a property to neglecting the upkeep of a garden or keeping livestock on the land.

One important aspect of restrictive covenants to take on board is the fact that they are not only included in contracts for new builds, but can also be attached to older buildings. In the majority of cases, the fact that a covenant has been in place for a number of years will have zero impact on how valid it is or isn't. While it's true that older restrictive covenants are still legally binding, however, they are often much more difficult to enforce in practical terms. This can be because they have, over time, become historically obsolete, or because the way in which the covenant is worded is ambiguous enough for it to be called into question.

The fact that a restrictive covenant on a property applies to all subsequent owners no matter how long ago it was put in place means that it is very important for anyone purchasing a property to ensure that their solicitors check through the deeds of that property extremely rigorously. The prospective owner needs to have any restrictive covenants called to their attention as soon as they are discovered, because once the transaction has been carried out and the title deeds signed the new owner will be held accountable for any breaches of restrictive covenants.

Another aspect of restrictive covenants which is particularly relevant to the issue of attempting to have them modified or removed is the question of whether the 'benefit of the covenant' still rests with the current owner, or whether it has been passed on to a private company or another individual, as sometime happens. If the benefit of the covenant has

been transferred in this way, then the new recipients will be the party which has to be contacted with any questions regarding the covenant, or if an attempt is going to be made to find a way round the covenant via removal or modification. Occasionally, an entire property deal can fall through because a restrictive covenant is discovered which is deemed to impact on the future value of the property. This could apply to a covenant which prohibits the building of an extension on a property. In some cases, a mortgage provider might refuse to lend on a particular property because they've decided that the presence of a particular covenant would inhibit the likelihood of the prospective purchaser being able to sell the property on in the future. If this does happen, then the prospective buyer might well be able to utilise the actions of the lender as a means of persuading the party receiving the benefit of the covenant to remove the restriction, on the grounds that it is stopping the sale of the property from being completed.

In the most extreme cases a party breaching a restrictive covenant, whether knowingly or unknowingly, could find themselves facing legal action. In the worst case scenario, work carried out in breach of the covenant, such as building on a particular section of land, will have to be demolished.

We've already touched on the fact that the beneficiary of a restrictive covenant might be persuaded to remove or modify that restrictive covenant if they can be persuaded that its presence in the deeds of the land or property are effectively preventing a sale from taking place. A negotiation of this kind needs to take place before a sale is complete, of course, but there are still steps which can be taken if – due to insufficient diligence in checking the deeds in question – a restrictive covenant is discovered after a sale has been completed.

In cases such as this, assuming that it is not possible to negotiate directly with the beneficiary of the covenant and agree – usually for a price – for the covenant to be removed or modified, an application needs to be made to the [Upper Tribunal](#) under [Section 84 of the Law of Property Act 1925](#). The grounds for modifying or removing a restrictive covenant contained within Section 84 can be summarised as follows:

- The covenant has been rendered obsolete by changes in the character of either the property in question or the surrounding area, or if there is any other circumstance which the Tribunal can be persuaded is material to rendering the covenant obsolete.
- The covenant is such that it impedes a reasonable user of the land, or would impede that user if it remained unmodified. In a case such as this the Tribunal needs to be convinced that the covenant, while impeding a reasonable user, does not provide practical benefits of substantial value or advantage to the beneficiaries of the covenant. Another factor which may lead the Tribunal to agree to modify or remove the covenant is if they can be persuaded that it is contrary to the public interest. If the current beneficiary objects to any loss caused by the modification or removal of the covenant, the party applying to the Tribunal will be asked to pay compensation.
- The beneficiaries of the covenant have agreed to discharge or modify it.
- The restrictive covenant could be removed or modified without injury being caused to the beneficiaries.

One strong argument for a restrictive covenant to be lifted or modified is if the covenant in question is stopping planning for development being enacted. The case of [Re Ben Lynch \[2016\] UKUT 488 \(LC\)](#) was one in which the existence of planning permission played a role in the Tribunal agreeing to allow a restrictive covenant to be modified, and more than one house to be built per plot on the land in question. The judgement stated as follows:

'In my view, the application succeeds under ground (aa) [this being the second of the grounds listed above], because unless modified the covenant impedes a reasonable use of the land – namely the implementation of a planning permission which in my view is sufficiently controlled by conditions to adequately protect the amenity of the immediately neighbouring objectors.'

The covenant was modified in this case, and compensation totalling £40,000 paid to the beneficiaries of the covenant.

Anyone seeking to start work on land or property which is covered by a restrictive covenant should seek advice from a legal property specialist, and should never assume that the question of the covenant will be decided in their favour. Any work carried out may ultimately have to be undone, and the application to the Tribunal itself could take as long as 18-24 months to be processed. The first and most important rule is always to have experts in the field check as diligently as possible for the presence of any such covenants.