

UPPER TRIBUNAL (LANDS CHAMBER)



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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – MODIFICATION – redevelopment of the site of a former dwellinghouse destroyed by fire – multiple redevelopment proposals for one or two houses – whether a reasonable user – whether restriction secures practical benefits of substantial value or advantage – application refused – Law of Property Act 1925 grounds (a), (aa) and (c)

IN THE MATTER OF AN APPLICATION UNDER SECTION 84 OF THE LAW OF
PROPERTY ACT 1925

BETWEEN:

NIGEL BRIANT

Applicant

-and-

HUGO BALDACCHINO

Objector

Re: Smugglers Hyde,
47 Brook Lane,
Corfe Mullen,
Wimborne,
Dorset. BH21 3RD

Andrew Trott FRICS
4-5 March 2020
Bournemouth & Poole County & Family Court

Andrew Francis for, and instructed by, the applicant
Charles Auld, instructed by Porter Dodson, for the objector

The following case is referred to in this decision:

Re Williams' Application [2017] UKUT 341(LC)

Introduction

1. The applicant, Mr Nigel Briant, wishes to redevelop his property, Smugglers Hyde, 47 Brook Lane, Corfe Mullen, Wimborne, Dorset, BH21 3RD (“the application land”). He has obtained several planning permissions that would enable him to do so in various ways but in each case he is prevented from doing so by a restrictive covenant that was imposed under a transfer of the application land on 2 September 1987 in which the transferee covenanted:

“Not to erect any further building of any kind on the property hereby transferred save for an extension to the existing garage and then only in accordance with plans first submitted to and approved in writing by the Transferors (such approval in respect of plans for any garage extension not to be unreasonably withheld).”

2. At the date of the transfer Smugglers Hyde, the existing dwelling on the application land, comprised a two-storey partially thatched cottage with a large garden. The transferors, Mr and Mrs Stanley, retained some land at the south of the site which had the benefit of the covenant under the 1987 transfer. Mr and Mrs Stanley obtained planning permission for the development of the benefited land by a single dwelling. This house, known as Kestor, 49 Brook Lane, was built in 1989 and purchased by Mr Hugo Baldacchino in April 2014.
3. Smugglers Hyde was badly damaged by fire in 2007. It was purchased by Mr Briant in March 2009. Mr Briant subsequently demolished parts of the building but some of it remains, including the gable end with a pitched tiled roof which is closest to Kestor.
4. Since he purchased Smugglers Hyde Mr Briant has made 24 planning applications for residential development, 11 of which were granted (including one on appeal), 12 refused and one withdrawn.
5. Having failed to reach agreement with Mr Baldacchino about the redevelopment of Smugglers Hyde, Mr Briant applied to the Tribunal on 24 April 2019 under section 84 of the Law of Property Act 1925 for the modification of the restrictive covenant to enable one or more of the following planning permissions to be implemented, each of which was for the development of a single detached house:

(i) Reference A1F: 3/15/1189/FUL, granted 5 April 2016¹

(ii) Reference A2F: 3/18/2273/FUL, granted 19 October 2018

(iii) Reference A3R: 3/18/2054/FUL, granted 24 September 2018

(iv) Reference B1F: 3/18/2946/FUL, granted 13 December 2018

¹ This planning permission was implemented upon (i) satisfaction of pre-commencement conditions on 24 October 2018 and (ii) a material operation comprising the partial demolition of the existing house on 12 November 2018.

(v) Reference B2F: 3/19/0382/FUL, granted 12 April 2019.

6. Planning permissions A1F and A2F are both for single houses at the front (west) of the application land fronting Brook Lane. Both permissions would allow the development of a second house at the rear (east) of the property under planning permission A3R which would have a separate access onto Brook Lane at the north west of the site.
7. The remaining planning permissions, B1F and B2F, would allow the development of two houses in a configuration where each house fronts Brook Lane. The house permitted under B1F would adjoin Kestor, while B2F would be located further north.
8. The possible combinations of two houses for which Mr Briant seeks modification of the restriction are therefore either A1F or A2F with A3R, or B1F with B2F. It is not sought to build either B1F or B2F with A3R, even if that was physically possible.
9. Mr Briant seeks modification of the restriction under grounds (a), (aa) and (c) of section 84 of the Law of Property Act 1925. Although he did not formally abandon grounds (a) and (c), Mr Briant did not pursue them at the hearing.
10. Mr Baldacchino objected to the application on 4 July 2019. It is accepted that he has the benefit of the restriction.
11. Mr Andrew Francis of counsel appeared for the appellant and called Mr Briant as a witness of fact and Mr Malcolm Kempton FRICS, Director of Kempton Carr Croft, as an expert valuation witness. Mr Charles Auld of counsel appeared for the objector and called Mr Baldacchino as a witness of fact and Mr Robert Christopher Hall MRICS of FORALLSURVEYS LLP, Chartered Surveyors, as an expert valuation witness.

Facts

12. The experts produced a statement of agreed facts which included a schedule of approved plans relating to the five planning permissions relevant to the application.
13. The application land is located on the west side of Corfe Mullen, a large village some 3km south west of the market town of Wimborne and about 9.5km north west of Bournemouth. Access is from Brook Lane to the west. The parties agree that although Brook Lane is adopted and made up in part, it is unadopted and unmade outside the application land.
14. The application land has a frontage of approximately 30m to Brook Lane and a boundary length of 56m with Kestor. The northern boundary with 157 Hillside Road is 34m long. The total site area is 0.14Ha. The site slopes from north to south. The northern boundary is some 2.75m above the level of the southern (Kestor) boundary.
15. To the north and east of the application land are houses in Hillside Road. To the south is the house and garden at Kestor, beyond which are houses in Haven Road. To the west is Brook Lane and open countryside beyond.

16. At its closest point the remains of the existing house at Smugglers Hyde is 4.5m from the boundary with Kestor. This is a two-storey gable end with a ridge height just under 8m above the level of the boundary. The gable end is 4.5m wide. At first floor level there is a bedroom window facing south towards Kestor. At ground floor level there is a door with windows either side. At the rear of the property, now demolished, was a single-storey flat roof sun room which extended a further 2.5m to the east. At the front of the house, also demolished, was a pitched roof porch extending 1.6m to the west of the main elevation with windows facing south towards Kestor. Smugglers Hyde was 20.6m long with its main elevations facing west (front) and east (rear). The windows in these elevations did not directly overlook Kestor. There is a detached garage at the far north west of the plot.
17. There was no agreement about the accommodation in the original cottage. Mr Briant produced “indicative” floor plans apparently showing how the cottage could be reconfigured. This showed five bedrooms, including two at ground floor level, one of which was accessed through the kitchen and the other through the living room. There was a single (windowless) bathroom on the first floor and a WC on the ground floor. No stairs are shown at first floor level. I do not consider this to be a sensible or realistic layout. Smugglers Hyde was a cottage with limited accommodation being only one room deep.

The proposed development

Schemes A1F and A2F

18. These are alternative proposals for the development of a single detached house at the front of the application land where the existing dwelling was located. In A1F the proposed house has been rotated clockwise by about 40° from the alignment of the original cottage onto a north east to south west alignment. This means the rear elevation of the proposed house would face south east towards the rear garden of Kestor.
19. The southern elevations of A1F (9.25m wide) and A2F (11.25m wide) are both less than 3m from the boundary with Kestor, i.e. closer than the existing cottage. Each such elevation is designed so that the building is stepped up in two stages away from Kestor, with a single storey element being closest to the boundary.
20. The approved plans of the five planning permissions with which this application is concerned all refer to an Ordnance Datum (“OD”) level of 50.00m. Using this level for comparative purposes, the existing house has a ridge height of 58.2m and the proposed houses at A1F and A2F have a ridge height of 58.5m i.e. they are 0.3m higher.
21. There are no windows in the southern elevations of either A1F or A2F. At ground floor level in A1F there are windows in the family room and sitting room which face towards Kestor, but these are side windows to bays and are located further away. In A2F ground floor bedroom windows face south towards Kestor, although this room is located at the far (north) side of the house. The side bay window in the family room at the front of the house in A2F also faces south. The upper floor windows in the rear (east) elevation in both schemes are either roof lights or have obscured glazing.

22. The accommodation in A1F and A2F is similar. A1F has four upper floor bedrooms (three en-suite), a family bathroom, two downstairs WCs, a kitchen, four reception rooms, a utility room and an integral garage. There is also a garden and cycle store with external access only. A2F has a fifth bedroom (en-suite) downstairs instead of a reception room, and only two of the four upper floor bedrooms have an en-suite bathroom. Also, A2F does not have an integral garage. Instead there is a separate 2.5m high flat roofed single-storey double garage situated to the front of the proposed house close to Kestor (1m from the boundary at its closest point and just under 3m from the house).
23. The existing garage at the north of the site is shown as being retained in the approved plans for A1F, but this would have to be demolished if proposal A3R were to be built at the rear of the application land. The approved plans for A2F do not show the existing garage being retained but instead show the proposed access to, and site of, the house proposed under A3R to the rear (east) of A2F. Both A1F and A2F show vehicle turning areas close to Kestor.

Scheme A3R

24. This proposal is for the construction of a detached house to the rear of either A1F or A2F. Vehicular access would be along a driveway and turning area running along the length of the northern boundary of the application land.
25. The approved plans show the property as having four bedrooms (one en-suite), one of which is downstairs, a family bathroom, a kitchen, two reception rooms, a utility room and a ground floor shower room. There is no garage. A garden shed and cycle store is shown adjoining the boundary with Kestor at the end of their respective gardens.
26. The kitchen and dining/sitting room windows in the southern elevation (9.5m wide) directly face the rear garden of Kestor. The two upstairs bedroom windows in the southern elevation are shown with obscured glass to the lower panes. At its closest point the proposed house is some 10.5m from the boundary with Kestor. The roof ridge height is 9.95m above the OD level of 50.00m. This is higher than either A1F or A2F because A3R would stand on higher ground to the north east.

Schemes B1F and B2F

27. Unlike A1F and A2F these schemes are not mutually exclusive. It would be possible to construct them both at the front of the application land: B1F to the south adjoining Kestor and B2F to the north adjoining 157 Hillside Road. But it would not then be possible to construct A3R. The "A" scheme divides the application land from north to south allowing one house to be built at the front of the application land and another at the rear, whereas the "B" scheme divides the land from east to west, allowing two houses to be constructed at the front of the site.
28. At its closest point B1F would be approximately 2.5m from the boundary with Kestor and 10.6m from the house. It would be aligned east to west rather than north to south as in the case of the A scheme houses. This means the length (15m maximum) rather than the

width of the house would adjoin Kestor. The upper floor is stepped back by between 1.5m to 4.4m.

29. The maximum roof ridge height of B1F is 57.50m, i.e. 7.5m above the OD level and 1m less than the A scheme houses.
30. The accommodation of B1F comprises two reception rooms, a combined kitchen/dining room/family room, a utility room and a downstairs shower. There are three upstairs bedrooms, one en-suite, and a family bathroom. There is one window in the south elevation facing Kestor. This is a small window on the stairwell which is not shown as having obscured glazing. There are also three roof lights in this elevation.
31. B1F has a separate flat roofed double garage at the front of the house, close to the boundary with Kestor. This is a similar arrangement to that shown for A2F but the garage is smaller and located slightly further away from the boundary.
32. The approved plans state the height of the garage to be 2.5m but it measures 2.9m on the scale plan (the other dimensions are accurately shown). The plans for B1F also show a garden studio at the end (east) of its rear garden close to the boundary with Kestor. It is a 2.7m high single storey timber clad structure measuring 6m x 4m. It contains one room and a WC. The window faces northwards, away from Kestor.
33. The proposed house at B2F will be largely shielded from Kestor by B1F, although being on higher ground its roof ridge height (8.4m above OD) is 0.9m higher than B1F. It is a three-bedroom house with a kitchen and three reception rooms. There is also a basement recreation room. It has an integral double garage. There is a similar garden studio to that at B1F at the rear of the garden.
34. B2F projects further east than B1F and so the windows of the sitting/dining room and the garden room may be visible from the garden, but probably not the house, of Kestor.

Statutory provisions

35. The applicant, whilst not formally abandoning grounds 84(1)(a) and (c) of the 1925 Act, only pursued ground 84(1)(aa) in detail at the hearing. This ground provides that the Tribunal may discharge or modify a restrictive covenant on being satisfied:

“(aa) that (in a case falling within subsection (1A) below) the continued existence thereof would impede some reasonable user of the land for public or private purposes or, as the case may be, would unless modified so impede such user;

...

and an order discharging or modifying a restriction under this subsection may direct the applicant to pay to any person entitled to the benefit of the restriction such sum by way of consideration as the Tribunal may think it just to award under one, but not both, of the following heads, that is to say, either –

(i) a sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge or modification; or

(ii) a sum to make up for any effect the restriction had, at the time when it was imposed, in reducing the consideration then received for the land affected by it.

(1A) subsection (1)(aa) above authorises the discharge or modification of a restriction by reference to its impeding some reasonable user of land in any case in which the Upper Tribunal is satisfied that the restriction, in impeding that user, either–

(a) does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; or

(b) is contrary to the public interest;

and that money will be adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification.”

The applicant did not rely upon section 84(1A)(b) and the objector did not rely upon section 84(1)(aa)(ii).

The case for the applicant

36. As a preliminary point of construction Mr Francis submitted that the restriction did not seem to prevent a single building being constructed on the application land following the destruction by fire of the original house that was there when the restriction was imposed, even if the replacement building was not a facsimile of what was there before.

37. The restriction prevented “any further” building, because the transferors did not want any building on the land other than Smugglers Hyde, apart from a possible extension to the existing garage. Mr Francis submitted that it was unlikely that the parties had contemplated an event by which the cottage was wholly or substantially destroyed and that had they done so they were likely to have agreed that the replacement (but not necessarily replication) of the cottage in the same position and with the same dimensions would not breach the restriction.

38. Mr Francis said the main ground of the application was section 84(1)(aa). He submitted that the proposed user under any of the five proposed schemes was reasonable because they each had planning permission. Assuming (without acceptance) that the restriction prevented a one-house scheme then it would impede any proposed combination of development on the application land.

39. Mr Francis submitted the restriction did not prevent the construction of a replacement house and that this did not necessarily have to be a facsimile of Smugglers Hyde.

However, while the restriction prevented (i) a house which might not be regarded as a “true” replacement, and (ii) the prevention of more than one house, it did not secure the benefit of protecting the objector from:

- (i) the consequences of the ordinary and reasonable use of a house and gardens;
 - (ii) driving onto and parking on the application land;
 - (iii) the use of Brook Lane by traffic serving the application land; and
 - (iv) changes to the application land which did not constitute a building, e.g. a patio or driveway.
40. The practical benefits that the objector said were secured by the restriction were the maintenance of the peace and quiet currently enjoyed, the prevention of overlooking and the protection of the pleasant outlook from the house and garden of Kestor. Mr Francis noted that all such benefits had to be considered against the current environment of Kestor. It adjoined residential development to the east and south from which it was partially shielded by Leylandii trees which were potentially susceptible to die back or statutory orders to cut back. The secluded feel of the end of Kestor’s rear garden would not be jeopardised by the proposed development due to differences in ground level and a 2m high wooden fence along the boundary. The patio area at the rear of Kestor faced east, away from the proposed development.
41. Mr Briant gave evidence about his ownership of Smugglers Hyde, the planning history of the site and his attempts to negotiate with Mr Baldacchino and to address his concerns.
42. Mr Kempton began his analysis of whether the restriction secured practical benefits of substantial value or advantage to the objector by considering the effect of re-building the existing Smugglers Hyde Cottage in its original form and which, on the applicant’s case, would not breach the restriction. The south west elevation of the original cottage was 4m from the boundary of Kestor and directly faced its garden. Mr Kempton said Kestor would be “significantly overlooked” by the first floor bedroom window in this elevation.
43. Mr Kempton reviewed the five proposed schemes by reference to their relative effect on Kestor compared with a re-built replica version of Smugglers Hyde. He noted that neither A1F nor A2F had clear glazed windows overlooking Kestor. Although both houses were larger than the existing cottage their first floors were set back from the boundary and the proposals offered better privacy and less overlooking than would a replicated Smugglers Hyde. A3R was 10.6m from the boundary and 38m from the house at Kestor. Mr Kempton thought it would be less prominent than some of the surrounding houses on higher ground in Hillside and Haven Road. The lower panes of the bedroom window facing Kestor would contain obscured glass and there would be no adverse impact on privacy.

44. B1F was designed to ensure the first floor of the building was stepped back from Kestor. Only one roof light would overlook Kestor at first floor level and that was partially obscured by other roof lines. There would be less overlooking than from the original cottage. A planting scheme and a condition ensuring a 2m high fence along the boundary with Kestor further secured the objector's privacy. B2F would either be obscured from Kestor's view by B1F or, if B1F was not built, would be far enough away that overlooking was not a problem.
45. Mr Kempton thought any of the proposed houses or combination of houses would have less impact on the amenity of Kestor than the existing cottage. The upper storeys were further away and had no overlooking windows that were not either roof lights or fitted with obscured glass. The presence of a separate garage to the front of the property in schemes A2F and B1F would not be demonstrably harmful to the outlook from the kitchen at Kestor.
46. Mr Kempton did not think light pollution would be a problem from any of the proposed houses. There were no windows directly overlooking Kestor and the large ground floor bi-fold doors in A1F and A2F were orientated away from Kestor and, in any event, were shielded by the proposed boundary and landscaping treatment. Either A1F or A2F would replace Smugglers Hyde at the front of the application land. They were family homes and one was unlikely to generate more noise than the other. There were already houses in Hillside and Haven Road adjoining or near to Kestor, and the construction of A3R at the rear of the application land would make no discernible difference to local noise levels.
47. Mr Kempton thought any replacement for Smugglers Hyde would generate similar levels of traffic and any additional vehicular movements from A3R to the rear of the site would not be discernible or cause any harm. In any event traffic to and from the north of the application land would not pass Kestor. There was adequate off-street car parking provision in all the schemes.
48. Given the slope of the application land towards Kestor the possibility of surface water flooding caused by the proposed development had been raised. Mr Kempton did not think this would be a problem and could be addressed by providing adequate soakaways or permeable paving and/or diversion of surface water into the main surface drainage system located in Brook Lane.
49. Mr Kempton compared the temporary disturbance arising from the construction of the proposed houses with that which would be caused by the replacement of the existing dwelling. He concluded that, as the application land would have building works on it at some stage anyway, there would be no temporary loss of value to Kestor. He thought A3R, being 30m from the house at Kestor, would have no impact on its amenity during construction.
50. Mr Kempton concluded that none of the proposed houses would adversely affect Kestor's privacy, overlooking or general amenity. On the contrary, he thought the proposals would be an improvement compared with the original house at Smugglers Hyde. Consequently,

Mr Kempton did not consider there would be any diminution in the value of Kestor if the restriction was modified and that no compensation was payable.

The case for the objector

51. Mr Auld submitted the restriction strictly prevented any further building “of any kind” other than an approved extension to the garage. The total demolition and replacement of Smugglers Hyde would be a breach of the restriction. The restriction secured four things:
- (i) that there would only be one building plus a garage on the application land;
 - (ii) that such a building, at circa 137m², was relatively small, especially when compared with the size of its plot;
 - (iii) that the building was located at the west of the site leaving the remainder of the site undeveloped as an oasis of tranquillity in an otherwise intensely urbanised area to the south, east and north; and
 - (iv) recognition that Kestor was located at a lower level than the application land.
52. Mr Auld said the applicant’s intentions for the site were unclear and ambiguous. The application form referred to modification of the restriction to enable one or more of the planning permissions for A1F, A2F, A3R, B1F or B2F to be implemented. But the statement of case said the applicant accepted that if implemented the planning permissions for A3R and B1F (but not A1F, A2F or B2F) would breach the covenant and that was why the application for modification had been made. Then in the applicant’s skeleton argument Mr Francis had suggested that the covenant did not prevent the building of a single building on the application land, even if it was not a facsimile of Smugglers Hyde.
53. The existence of a planning permission was normally persuasive of what constituted a reasonable user and Mr Auld accepted that planning permission for a single house would be a reasonable use for the purposes of ground (aa). But here the applicant wanted to build two houses, either B1F and B2F or A1F or A2F and A3R. These proposals involved the intensive redevelopment of the site with buildings on 50% of the application land. That level of development was not a reasonable user of the site.
54. The more intensive the proposed form of development, the greater was the practical benefit of the restriction. It was a question of fact and degree. In preventing a proposal to build a block of flats on the application land the restriction would clearly secure substantial practical benefits, but in preventing a technical breach such as re-building a replica of Smugglers Hyde there was no apparent benefit to the objectors. As the proposed development moved further away in terms of size and location from the original Smugglers Hyde so too did the benefit of the restriction increase. If the applicant wished to implement planning permission 3/13/1183/FUL for the replacement of a building similar to the original, it was not something the objector could oppose.

55. Mr Baldacchino said he was not bothered by the single upstairs window in the original cottage at Smugglers Hyde which overlooked part of Kestor. What concerned him was the significantly larger scale of the proposed development: A1F and A2F were each some 400m² in area and, as Mr Briant accepted, very much bigger than the original Smugglers Hyde (about 137m²). These buildings would be closer to Kestor, with longer elevations. Mr Baldacchino said he had consistently made clear to the applicant that he did not want to see two houses on the application land.
56. If the proposed development were to proceed Mr Baldacchino said it would transform the feeling of openness currently enjoyed in the house and garden at Kestor. Being able to prevent the very large increase in visual bulk resulting from the various proposals was of substantial benefit to the objector. The overbearing nature of the proposed development was exacerbated by the difference in level between the two sites and Mr Auld said the 2m high fence to be provided would effectively be 3m high on Kestor's side. He queried why the objector should have to endure a prison wall to achieve the privacy already secured by the restriction.
57. There would be an increase in light and noise pollution coming from these larger properties which might have 10-12 bedrooms compared with the two bedrooms in Smugglers Hyde. There would be more people and more cars. Two of the proposals also showed garden studios adjoining the boundary with Kestor. These would be additional sources of disturbance. The increase in traffic would cause problems on Brook Lane which was single track. Restricting the size of any development would also help reduce the surface flooding that already affected Kestor.
58. Mr Baldacchino emphasised that his objection was not motivated by a desire for compensation.
59. Mr Hall appeared as an expert valuer for the objector having originally been instructed by Mr Baldacchino in April 2014 to undertake discussions with Mr Briant about a possible variation to the restriction. Mr Hall made no reference to ground (aa) in terms in his report and appears to have been instructed to comment on several specific issues identified by his client. As such his report did not represent his objective and independent view about whether, by impeding any or all of the proposed developments, the restriction secured to the objector practical benefits of substantial value or advantage.
60. Mr Hall said he had been asked to identify "the original premium paid to purchase Kestor knowing that the covenant will protect against further future development of Smugglers Hyde". He did this by comparing the purchase price of Kestor in April 2014 (£405,000) with the average price of three houses in the same postcode area (BH21) which were sold between July 2013 and March 2014 (£300,000). Mr Hall described the difference in prices as a premium of 25%. He then did a similar exercise for 2019 (the date of his report) and again averaged the prices of three houses said to be comparable to Kestor and which were sold between March and July 2019 (£490,000). He then took 25% of this figure, saying "the material loss to my clients because of the non-compliance [with] the restrictive covenant by Mr Briant is £122,500 plus the inconvenience, hassles and cost".

61. Mr Auld conceded in his closing submissions that Mr Hall’s evidence was “not ideal”, that it “did not exhibit the objectivity of an expert” and that it “may not have been appropriate”. But he said the objective evidence of value (the details of the transactions relied on by Mr Hall, if not their relevance) had been agreed and the restriction had a financial value which could be £122,500 or a more modest sum but it was clearly substantial. Both this financial benefit and the amenity benefit spoken to by Mr Baldacchino were substantial and meant that ground (aa) had not been made out.
62. Each of the five proposed houses was either closer or substantially more prominent than Smugglers Hyde; even B2F and A3R, if built as single properties, would dominate from higher ground. A3R would be clearly visible from the bedroom window of Kestor and from its garden. If the Tribunal considered ground (aa) had been made out, at least for one house, Mr Auld cautioned it might become the thin end of the wedge opening the door to subsequent applications such as the possible sub-division of A1F into two semi-detached houses. To allow one substantial house would seriously weaken the restriction and the Tribunal should exercise its discretion to prevent it. Temporary construction disturbance might not be sufficient by itself to justify refusing the application but the serious impact on Kestor of allowing two houses to be built supported limiting any modification to allow only a single house at the western end of the application land.

Discussion

The proposed development

63. I agree with Mr Auld that the applicant’s intentions for the development of the application land are unclear, which is perhaps unsurprising since 24 planning applications were made in respect of the site between 2009 and 2019, 10 of which were granted in the first instance and one on appeal. Mr Auld identified contradictions in the applicant’s intentions as shown in the application form and his statement of case. Mr Francis explained this in his closing submissions as a “scattergun approach” done at a time when Mr Briant was a litigant in person and acting without the benefit of legal advice. In his skeleton argument Mr Francis said that “what [the applicant] seeks to achieve, if the Covenant is modified, is the following outcome in order of first preference”:

- (a) Implementation of consent for A3R, a single house on the south east of the application land at the rear;
- (b) Implementation of consent for B1F, a single house on the south of the application land facing Brook Lane (the applicant gave a unilateral undertaking to the local planning authority on 10 December 2018 not to implement A3R and B1F together).

If the Tribunal did not allow the application under (a) and/or (b) above Mr Francis said the applicant would seek to implement the following consents:

- (c) B2F as a single house. This would be an alternative to A1F or A2F being the smaller house more distant from Kestor;

- (d) A1F as an alternative to A2F and B2F;
 - (e) A2F.
64. In his opening submissions Mr Francis said the applicant wished to develop the application land by a pair of houses:
- (a) A3R and A2F; or
 - (b) A1F and A3R; or
 - (c) B1F and B2F; but not
 - (d) A3R and B1F.
65. Having heard the evidence, I understand the applicant's preference to be the modification of the restriction to allow any of the three combinations of pairs of houses described in the previous paragraph. If the Tribunal is not minded to modify the restriction to allow any such combination, the applicant wishes it to be modified to allow the construction of a single house in the order of preference stated in Mr Francis's skeleton argument.

The restriction

66. Mr Kempton's evidence was predicated on the assumption that the existing dwelling could be replaced without breaching the restriction. This assumption is contested by the objector.
67. The restriction was "not to erect any further building of any kind", subject to the exception concerning the extension of the existing garage. Smugglers Hyde already existed when the restriction was imposed. "Further" means either "to a greater extent" or "additional". The second meaning would prevent the erection of an additional, i.e. second, building. But the first meaning also seems to be intended since otherwise the exception would have been unnecessary.
68. In circumstances where the existing building was destroyed by fire I do not consider the restriction would prevent re-building on the original footprint and to the same size (137m²). Nor do I think it would be necessary to replicate the previous building to conform with the restriction. But that does not mean because the applicant could replace Smugglers Hyde that he would actually do so. But it is something which Mr Briant appears to have considered because in the early days of his ownership he sought and obtained planning permission for a "replacement similar to original" (reference 3/11/0614/FUL granted on 28 August 2011 and renewed on 17 February 2014). In his closing submissions Mr Auld said that if the applicant wanted to proceed with this replacement scheme it was not something the objectors could oppose. I agree. It is therefore reasonable to consider the effect on the amenity and value of Kestor of modifying the restriction to allow one or more of the proposed redevelopment schemes by

comparison with the effect on its amenity and value of replacing Smugglers Hyde (or a modern equivalent of the same size) on its original footprint.

Ground (aa): reasonable user

69. Although Mr Francis notionally relied on grounds (a) and (c), the main ground upon which the applicant relied was (aa).
70. Mr Auld argued that the development of the application land by two houses was not a reasonable user of the land. I disagree. There is planning permission for three combinations of two houses on the site and the application land is in a residential area. As the Tribunal observed in *Re Williams' Application* [2017] UKUT 341(LC) at paragraph 19:

“The reasonableness of the user is to be considered on the assumption that the restriction does not exist (otherwise the question is begged) and only in relation to the application land. I am not concerned about whether the user is reasonable from the viewpoint of the objectors; the effect of the proposed user on them is considered under [section 84 (1A)].”

By this criterion I am satisfied that any of the applicant's proposed developments for two houses (A1F or A2F with A3R, or B1F with B2F) would be a reasonable user of the application land.

71. But this does not mean that each of the five proposals would be a reasonable user if developed on its own, even though each one has a separate planning permission. The existing cottage at Smugglers Hyde was located at the front of the application land, as are all the proposals except A3R which is located at the rear of the site, only 1.2m from the boundary with 155 Hillside. It is accessed by a driveway and turning area that runs the length of the northern boundary. This development was apparently conceived as part of a two house scheme with either A1F or A2F; it does not appear to be designed as a stand-alone house occupying the whole of the application land.
72. Although only the five planning permissions forming the subject of this application were discussed in detail at the hearing, summary details of all the planning applications made from 2009 to 2019 were provided. It was not until planning permission for A1F was granted in April 2016 that further applications followed to “sever the land” and develop the land at the rear as a separate dwelling. Two such applications were granted planning permission: 3/16/1856/FUL (on appeal) and 3/18/0883/FUL. The planning officer's report on the application for A3R noted that it had an identical setting to that approved under 3/18/0883/FUL but offered accommodation on two floors rather than one. The planning officer said the description of the proposal for A3R made no reference to a further dwelling at the front of the plot but that it had to be considered in the light of the extant consent for A1F. In fact the approved location plan (D.02) for A3R showed the site of A1F. So the

planning application for A3R, which was confined to the rear of the application land², was considered in the context of there being another house on the front of the application land and not as a stand-alone backland development on the whole of the application land. That was also the case when the planning inspector considered the appeal in 3/16/1856/FUL in which he discussed the relationship between the front (A1F) and rear (equivalent to A3R) houses in his decision.

73. It is not the role of the Tribunal to second guess what decision the local planning authority would have reached had an application been made for the development of A3R as the only house on the whole of the application land. But the proposed house is positioned at the rear of the application land a long way back from Brook Lane and it is obviously a development that, because of its size, design, layout and location, contemplates the existence of another house on the front of the application land, as is evidenced by the planning history. Under these circumstances I do not believe an objective observer would consider the backland development of A3R on its own to be “some reasonable user of the land”, i.e. the whole of the application land and not just that part of it which formed the subject of planning permission 3/18/2054/FUL (A3R), even though that planning permission could be implemented independently of any other development.
74. On the other hand, both A1F and A2F are large detached houses located at the front of the site with their main frontages facing Brook Lane and with large gardens to the rear. Their independent development would be in keeping with the surrounding area and would be a reasonable and appropriate use of the whole of the application land. The plans for A1F showed only one free-standing house with its own back garden. It was approved as such and, unlike the plans for A2F, did not indicate the possibility of a second house at the rear of the application land. I think the free-standing development of either A1F or A2F would be a reasonable user of the application land.
75. B1F and B2F are different insofar as they divide the application land from east to west and not from north to south. Both houses face Brook Lane and take direct access from it. They were designed as a pair and planning applications for them were considered on the same day (13 December 2018). B1F was approved but the application in respect of the northern part of the site was refused, both initially and on appeal, on the grounds of its scale, bulk, siting, visual appearance and, in combination with other extant permissions on the site, its dominant appearance which was out of keeping and “harmfully discordant” with the spacious, semi-rural character of the immediate area. B2F was the subject of a revised application which addressed the impacts on the character of the area identified in the previous proposal. The planning officer said, “it will no longer result in significant harm that would justify refusal”.

² This is clear from several references in the planning officer’s report where she said, among other things, that the proposed house at A3R was 2m “from west boundary (with 47 [Smugglers Hyde])”; that it had a “similar sized plot” to 3/18/0883/FUL; that the south west boundary of the site “is adjacent to *far end* of the garden to No 49 Brook Lane [Kestor]” (emphasis added); that the north west boundary “is adjacent to the rest of the land currently forming part of No 47 Brook Lane [Smugglers Hyde] but outside of the [planning] application site”; and that although the plot size was not identified in the A3R planning application “it is shown on application 3/18/2273/FUL [A2F] which is also under consideration.”

76. Although both B1F and B2F are located at the front of the site, the main axis of each building runs from east to west and their layout and design reflect their proximity to each other. The obvious orientation, if there were to be only a single house on the application land, would be north to south like A1F and A2F. This maximises the frontage of the site whilst minimising overlooking of the closest neighbouring properties and presents a narrower end elevation towards them.
77. On balance I think that either B1F or B2F would be a reasonable user of the application land if developed as a single house, mainly because they front Brook Lane and, unlike A3R, would not give the appearance of incongruously isolated backland development.
78. There is agreement that the restriction impedes any such reasonable user. The issue therefore resolves into whether, by impeding such a user, the restriction secures to the objectors any practical benefits of substantial value or advantage. The applicant does not argue that impeding the user would be contrary to the public interest.

Ground (aa): practical benefits of substantial advantage

79. The practical benefits identified by the objector are the prevention of overlooking, protecting the outlook from Kestor and avoiding an overbearing building being constructed next door, preventing noise, disturbance, artificial lighting and increased surface water flooding. These benefits, individually or collectively, are said to be of substantial advantage to the objector.
80. Mr Baldacchino said the prospect of replicating the existing cottage, which would involve a first floor bedroom window overlooking Kestor (at least obliquely) did not concern him; he would rather have that than a substantially larger house built close to his property, i.e. A1F, A2F or B1F. The construction of a second house at A3R would compound the problems of outlook and overlooking given its location on higher ground to the east.
81. The applicant has designed the proposed houses to minimise their impact on Kestor. The first floors of A1F, A2F and B1F are set back from the boundary and between them have only one clear glass window directly overlooking Kestor to the south.³ The rear elevation of the properties would incorporate obscured glazing or roof lights to minimise overlooking. But in the case of A1F the re-orientation of the rear elevation towards the south east means the property is directly angled towards Kestor's rear garden and both A2F and B1F involve the construction of a detached garage at the extreme south west of the application land very close to, and visible from, Kestor.
82. Overlooking is also a concern to the objector because of the difference in levels between the application land and Kestor. This would be particularly noticeable in A1F where there are separate patios in front of the family and sitting rooms with the latter being at a higher level (by 0.6m). These rooms and patios would directly face the end of Kestor's rear garden which is its most secluded part. The house at A3R, while further away, would stand on higher ground and would face southwards, directly towards the rear garden of

³ A clear window to the stairwell half-landing in B1F (Revision A)

Kestor. The floor of the dining/sitting room of A3R, which has full height windows, would be some 1.5m above the ground level at the boundary with Kestor, the garden of which is lower still.

83. Only the planning permissions for A2F and B1F are subject to a specific condition requiring the construction of a 2m high fence along the whole of the boundary with Kestor. The planning permissions for A1F and A3R are to be carried out in accordance with the approved plans. The approved plans for A1F and A3R only refer to the existing boundary fence (which is less than 2m). Mr Auld submitted that the erection of a 2m high fence would be tantamount to enclosing the rear garden of Kestor within a prison wall. But the existing fence, approximately 1.87m (6ft) high, is only slightly lower so the effect of such enclosure would probably be marginal.
84. Proposals A1F and A2F are significantly larger than the existing cottage at Smugglers Hyde. Although precise floor space figures were not agreed A1F and A2F are both approximately 400m² which compares to 137m² at Smugglers Hyde, i.e. each would be approximately three times as large. In cross-examination Mr Briant said he did not have the details of the respective areas to hand but accepted that A1F and A2F would be very much bigger than Smugglers Hyde. The bulk appearance of A1F and A2F from Kestor is mitigated by the design of the southern flank walls and the stepping back in each case of the first floor level and the use of varied roof lines. They would not present the appearance of a solid two-storey wall in a single plane. But the buildings would be close to the boundary with Kestor, on high ground and highly visible from it, both from the house and the garden.
85. The southern flank wall at Smugglers Hyde was some 4.5m wide; the equivalent walls of A1F and A2F measure 9.25m and 11.25m respectively⁴. The visual impact of each property would be significantly greater than Smugglers Hyde. A1F would have a greater effect on overlooking Kestor due to its orientation onto a north east to south west alignment, but A2F would have a greater effect on the outlook from Kestor given its larger depth, its orientation and a separate detached garage at the front, close to the boundary.
86. The impact on Kestor of overlooking from or outlook towards either A1F or A2F would be exacerbated were A3R to be constructed as well. This is backland development on a part of the application land not previously developed. It stands on higher ground than Kestor and would look directly towards it. Its development would fundamentally alter the character of the immediate area and would effectively enclose Kestor on three sides by housing. A3R's southern elevation will be some 9m wide and clearly visible from the garden of Kestor (but probably not the house if either A1F or A2F were built).
87. In my judgment, by impeding the development of A1F or A2F with A3R the restriction secures practical benefits of substantial advantage to the objectors due to cumulative effect of overlooking, outlook and the impact of the general disturbance (noise, lighting, traffic movement) associated with two households adjoining Kestor. I therefore refuse the application in so far as it would allow either A1F or A2F to be developed together with A3R.

⁴ At first floor level.

88. I next consider whether A1F or A2F would, if developed as a single house, satisfy ground (aa).
89. The design of A1F respects the longitudinal form of the original cottage at Smugglers Hyde and has a narrower south western elevation than A2F, albeit considerably wider than the original cottage. The longitudinal axis of A1F has been realigned compared to Smugglers Hyde. This seems to have been welcomed by the local planning authority. The planning officer's report said the visual impact of the "replacement dwelling" was much improved by alterations to the design of the front elevation "and the re-orientation of the footprint of the proposed replacement dwelling compared to that of the existing dwelling on the site, although the southern end of the proposed dwelling would be closer to Brook Lane and also closer to the boundary to [Kestor]."
90. In planning terms the benefits of reorientation appear to have outweighed the disadvantages to the objector of moving A1F closer to the boundary. But in terms of the current section 84 application it is the impact upon the objector's amenity rather than upon the streetscape generally that is paramount. The local planning authority did not insist upon a similar realignment of A2F. The planning officer's report noted that "Unlike the extant consent [A1F] and previously refused proposals, the siting of the dwelling follows that of the original property. This orientation means that the southern wing will lie further into the site." That was said to have "the benefit of pulling the southern part of the dwelling away from the highway."
91. The reorientation of A1F meant it was possible to accommodate its length, which at 24m was 3m longer than Smugglers Hyde, along the frontage of the application land without (i) building over the site of the existing garage/proposed driveway to A3R, or (ii) building much closer to the garden boundary of Kestor. But by so doing it was brought closer to the house at Kestor than Smugglers Hyde and, unlike the existing building, directly faces Kestor's rear garden.
92. The proximity of A1F to Kestor, its orientation towards Kestor's back garden and, despite the applicant's efforts to reduce the impact of the building by adopting a stepped design, the overbearing impact of its comparative size and bulk are factors which are prevented by the restriction and, in my judgment, by so doing the restriction secures to the objector practical benefits of substantial advantage. I therefore refuse to modify the restriction to allow the development of A1F as a single house.
93. A2F is aligned along the same axis as the original cottage at Smugglers Hyde and therefore its rear elevation does not directly overlook Kestor. But the proposed house is substantially larger than the original cottage and the south west elevation (11.25m at first floor level, albeit stepped back) is similar in length to the flank wall of B1F (12m). The overall bulk of A2F would be readily apparent from the house at Kestor since both its front and side elevations would be visible. A2F, like B1F, would have a detached double garage at the front of the house adjoining the boundary with Kestor.
94. In my judgment the proposed house at A2F would materially alter the outlook from Kestor and would be obtrusive and unduly overbearing. It has the largest footprint of any of the

houses⁵ and would dominate Kestor to the south. By impeding this development I think the restriction protects the amenity of Kestor and secures practical benefits of substantial advantage to the objector. I therefore refuse to modify the restriction to allow the construction of A2F as a single house.

95. I consider next whether the restriction, by impeding the combined development of B1F and B2F would secure practical benefits of substantial advantage to the objector.
96. B1F would largely shield B2F visually from Kestor, although B2F extends further to the east and stands on higher ground. The south facing ground floor windows in the garden room and the sitting/dining room of B2F would overlook Kestor's rear garden, although not the house, and these would be further away than the windows of A3R (15m compared to 10.5m at the closest respectively). B1F would present a longer flank wall than the existing cottage, A1F or A2F. Even allowing for the set back at first floor level and a 2m high fence the proposed building would dominate the view from the rear of Kestor and from its garden. At the front of B1F a separate garage and turning/parking area would be very close to the house at Kestor. The garden studio in the rear garden of B1F would adjoin Kestor and would encourage domestic activity on a regular basis at the most sensitive location for the objector's use of his garden. The site plan for B1F (approved drawing D.03) shows a slightly higher (2.25m) fence between it and Kestor for a length of 11m close to the house. There is force in Mr Auld's argument, given that Kestor is at a lower level than B1F, that such a high fence would create a dominant sense of enclosure.
97. The effect of two households being located on the application land would not be as significant as they would be in the alternative arrangement of A1F or A2F and A3R where the garden of A3R adjoined Kestor. The plot of B2F is separated from Kestor by that of B1F and is just under 13m away at its closest point.
98. It is likely there will be more vehicular movements from two households than from one and more general disturbance arising from daily activities.
99. In my judgment the restriction, by impeding the construction of B1F secures to the objector practical benefits of substantial advantage and, in particular, the ability to prevent the construction of an overbearing (albeit stepped) flank wall near to and parallel with the boundary with Kestor. I reach that conclusion when considering B1F alone or as part of a development with B2F notwithstanding the additional disturbance and overlooking that B2F would introduce.
100. The next question is whether, unlike B1F, B2F could be developed as a single house and satisfy ground (aa). I found above that the use of the application land for the construction of B2F as a free-standing house was reasonable. It is located at least 13m from the garden of Kestor and the two houses will be at least 20m apart. But the south west elevation of B2F was designed in conjunction with B1F. The latter had no clear glass windows facing B2F to the north and so planning permission was granted allowing B2F's south facing elevation to contain several ground floor windows, e.g. to the sitting/dining room, garden

⁵ including the garage

room and a second sitting room. Without B1F to shield them, these windows would look directly towards Kestor, although, being set back, the windows in the sitting/dining room of B2F would not be visible from the house. There is only one roof light facing towards Kestor at first floor level.

101. The ground floor level of the south west elevation of B2F is 51.6m compared with the house at Kestor of some 49.75m and the middle of the garden at Kestor of some 50.0m. B2F stands further above Kestor than A1F and will be visible from it, notwithstanding the construction of a 2m high fence. Despite its relative distance from Kestor compared with B1F the conspicuity of B2F on higher ground and the overlooking of Kestor from the ground floor habitable rooms (where the use of obscured glazing would not be appropriate) and patios, together with the associated lighting, would have a significant effect on the privacy and amenity of Kestor and its garden. This is a material factor and, on balance, I consider that the restriction secures to the objector practical benefits of substantial advantage in the case of B2F also.
102. I have found that by impeding any of the two-house schemes (A1F or A2F with A3R or B1F with B2F) and all the single house schemes (A1F, A2F, B1F and B2F), the restriction secures practical benefits of substantial advantage to the objector.⁶ In reaching this conclusion I have considered the comparative effect of each proposal against that of a replacement for Smugglers Hyde. In each case the effect of the proposed development would be more prejudicial to the amenities secured to the objector by the restriction to a degree that establishes substantial practical benefits.

Ground (aa): practical benefits of substantial value

103. Having determined that the restriction secures to the objector practical benefits of substantial advantage it is not necessary for me to consider whether any practical benefits of substantial value are secured by the restriction. But it is appropriate that I should comment briefly on Mr Hall's evidence for the objector.
104. I was critical of Mr Hall's evidence at the hearing and in his closing submissions Mr Auld fairly recognised its limitations (see paragraph 61 above). Mr Hall said there was a premium value associated with the restriction and that a purchaser would pay more for Kestor with it than without it. Mr Hall's valuation approach did the opposite of what is required when calculating compensation under section 84(1)(ii). Instead of considering by how much the consideration received by the covenantee for the application land was reduced by the imposition of the restriction, he considered by how much the value of the covenantee's benefited land had increased because of the restriction. Mr Hall calculated this as a 25% premium, although in fact this was the estimated discount from the market value of Kestor; the premium should have been taken (on Mr Hall's figures) at 33%. I think it is fanciful to suggest that a purchaser would pay a third more (£122,500) for Kestor with the restriction than without it. Nor did Mr Hall distinguish any effect on value of the various schemes of development. He treated them all, whether a single house or two houses, as having an equally detrimental effect. I do not accept that assertion.

⁶ A3R as a single house scheme was found not to be a reasonable use of the application land.

105. I did not find Mr Hall's evidence helpful, other than providing valuation comparables agreed as to price and date of sale by Mr Kempton. In my judgment Mr Hall's evidence was partial and directed towards supporting his client's case.

Grounds (a) and (c)

106. Having found that the appellant has failed to satisfy ground (aa) in respect of all the proposals, it is necessary to briefly consider the appellant's case on the other two grounds, (a) and (c), upon which he notionally relies. Ground (c) fails since the proposed modification of the restriction has been shown in each case to cause injury to the objector. Proposal A3R was not considered as a single house development under ground (aa) because I did not consider it to be a reasonable user of the whole of the application land on its own. That qualification does not apply to ground (c). I consider that by itself A3R would injure the objector for the reasons given in paragraph 86 above. The application under ground (a) is unsustainable in my judgment. The purpose of the restriction was to limit the size and location of the single dwelling house on the application land. That purpose can still be fulfilled notwithstanding the destruction of the original cottage at Smugglers Hyde and I do not think the restriction is obsolete.

Determination

107. I am not satisfied that the applicant has established any of the pleaded grounds in respect of proposals A1F, A2F, A3R, B1F or B2F, whether singly or in combination, and I refuse the application in respect of them.
108. In reaching this decision I have had regard to section 84 (1B) of the 1925 Act which, among other things, requires me to take into account any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant area. The applicant has shown an unusually keen appetite for making planning applications; no less than 24 have been made in the period of his ownership. This reflects Mr Briant's apparent desire to maximise, sometimes incrementally, the application land's development potential. I do not criticise him for that, but this strategy was combined with what Mr Baldacchino clearly considered to be an annoying persistence in pursuing negotiations for the modification of the restriction that has cast him in poor light as a neighbour. This impression was reinforced by Mr Briant's disingenuous answer to my questions about why he erected a sign at the rear of 155 Hillside Road – which he was interested in buying – stating that three houses were going to be built on the application land. Nor was Mr Briant's case helped by the fanciful description of Smugglers Hyde as a five bedroom property, a description which I assume was designed to make it look more similar to his proposed properties than was actually the case.
109. The objector has accepted in terms that he could not object to the replacement of Smugglers Hyde by a similarly sized and located dwelling. While Mr Briant has satisfied the planners – at least for half the applications he has made – that the proposed development should be for a larger house or for two houses, he has not satisfied the different requirements of section 84. Nevertheless, the pattern of planning decisions indicates the application land is suitable for residential redevelopment and a more modest

proposal, reflecting (but not necessarily replicating) what was on the application land before is more likely to succeed.

110. This decision is final on all matters except the costs of the application. The parties may now make submissions on such costs and a letter giving directions for the exchange and service of submissions accompanies this decision. The parties' attention is drawn to paragraph 12.5 of the Tribunal's Practice Directions dated 29 November 2010.

A J Trott FRICS
Member Upper Tribunal (Lands Chamber)
10 July 2020