

# Planning consent alone will not secure modification of restrictive covenant (Briant v Baldacchino)

27/07/2020

**Property analysis:** The Upper Tribunal (Lands Chamber) (UT) considered an application by Mr Briant to modify a restrictive covenant on the basis of ground (aa) of section 84(1) of the Law of Property Act 1925 (LPA 1925), namely whether the restrictive covenant (i) impeded some reasonable user of Briant's land and (ii) did not secure any practical benefits of substantial value or advantage to Mr Baldacchino whose neighbouring land had the benefit of the restriction. The UT refused the application. Although presented with a number of different planning consents which the UT concluded were a reasonable user of Briant's land, the restrictive covenant, by enabling Baldacchino to impede the schemes, secured practical benefits of substantial advantage to him. This case is a useful reminder that although the grant of planning consent is a starting point, the requirements of ground (aa) are more onerous. In particular, the burden of proving that the restriction does not secure any practical benefits of substantial value or advantage is great. Written by Caroline DeLaney, head of Real Estate Disputes, at Rosenblatt Solicitors.

*Briant v Baldacchino* [\[2020\] UKUT 206 \(LC\)](#)

## What are the practical implications of this case?

Although each case turns on its own facts, this decision provides a useful insight into the UT's approach to an application to modify a restrictive covenant on ground (aa).

Ground (aa) is the most frequently used ground and allows the UT to discharge or modify a restriction if:

- it impedes 'some reasonable user of land for public or private purposes' ([LPA 1925, s 84\(1\) \(aa\)](#)) (Limb 1), and
- in impeding that user, the restriction '[...]does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them' (Limb 2)

The decision is a useful reminder that obtaining a planning consent permitting redevelopment will not, by itself, provide sufficient reason for the UT to permit the modification or release of a restrictive covenant.

Limb 1 remains relatively easy to satisfy on the basis of a viable planning consent, however Limb 2 is free-standing from the consent and is more difficult to overcome. The decision illustrates this by its detailed analysis of the various consents.

It also serves as a reminder to practitioners of the need for thoroughly prepared expert evidence which was criticised as lacking for Briant in this case.

## What was the background?

Briant wished to redevelop his property, Smugglers Hyde in Wimborne, Dorset. The house had burnt down prior to his purchase and Briant had made 24 separate planning applications for permission to redevelop the site in various ways. Of those 24 applications, 11 had been successful and planning consent given. In each case Briant was prevented from undertaking the development by a restrictive covenant '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)'.

Kestor, the neighbouring land owned by Baldacchino had the benefit of the restrictive covenant. Baldacchino strongly objected to any redevelopment on Smugglers Hyde.

Having failed to reach agreement with Baldacchino, Briant made an application to the UT under [LPA 1925, s 84\(1\)](#) for the modification of the restrictive covenant on the basis of one or more of five of the

planning consents. Each consent was for a single detached house but varied in size and configuration.

[LPA 1925, s 84\(1\)](#) gives the tribunal the power to discharge or modify a restriction on a number of specified grounds. Briant's application had originally been made on three grounds but only ground (aa) was formally pursued at the hearing.

Ground (aa) provides that the tribunal may discharge or modify a restrictive covenant on being satisfied that, subject to a subsection ([LPA 1925, s 84\(1A\)](#)) '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' (Limb 1). [LPA 1925, s 84\(1A\)](#) 'authorises the discharge or modification of a restriction by reference to its impeding some reasonable user of land in any case in which the UT is satisfied that the restriction, in impeding that user[...]does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them'.

### What did the UT decide?

The UT refused the application.

It was not satisfied that Briant had established ground (aa) in respect of the five proposals whether singly or in combination. In reaching this decision, the UT had regard to [LPA 1925, s 84\(1B\)](#) which, among other things, required it to take into account any pattern for the grant or refusal of planning permissions in the area. The pattern of planning decisions indicated that the land was suitable for residential redevelopment.

The UT referred to the decision of *Re Williams' Application* [\[2017\] UKUT 341\(LC\)](#) which stated that '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)]'.

The UT was satisfied that any of Briant's proposed developments would be a reasonable user of Smugglers Hyde (Limb 1).

Turning to Limb 2, the UT considered the practical benefits of the restrictive covenant. Baldacchino had identified numerous benefits. They included 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, were said to be of substantial advantage.

Although the UT's view on the various permissions differed slightly, it concluded that in the case of each of the five planning consents before it, the effect of the proposed development would be more prejudicial to the amenities secured to Baldacchino by virtue of the restriction to a degree that established substantial practical benefits to him. Accordingly, Briant failed to satisfy Limb 2.

### Case details

- Court: UK UT (Lands Chamber)
- Judge: Andrew Trott FRICS
- Date of Judgment: 10 July 2020

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