



LP/41/2006

**LANDS TRIBUNAL ACT 1949**

***RESTRICTIVE COVENANT – modification – proposed conversion of dwelling to five dwellings including extensions – whether practical benefits of substantial value or advantage secured – application refused – Law of Property Act 1925 s84(1)(aa) and (c)***

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

**BY**

**RUSSELL VINCE  
and  
VICTORIA VINCE**

**Re: Old Pinfold House,  
16 The Green,  
Barby,  
Rugby,  
Warwickshire,  
CV23 8TS**

**Before: A J Trott FRICS**

**Sitting at Procession House, 110 New Bridge Street, London, EC4V 6JL  
On 31 August 2007**

Mrs Victoria Vince in person for the applicants  
*Joshua Shields*, instructed by Stephenson Solicitors LLP, for the objector

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The following cases are referred to in this decision:

*Re Fairclough Homes Limited's Application* (2004) Lands Tribunal LP/30/2001 (unreported)

*Shephard and Others v Turner and Another* [2006] 20 EG 294

*Re Williams' Application* (1987) 55 P & CR 400

*Re Collins' Application* (1975) 30 P & CR 527

The following cases were also cited:

*Re Bass Limited's Application* (1973) 26 P & CR 156

*Re Dobbin's Application* (2006) Lands Tribunal LP/59/2004 (unreported)

*Re Marcello Developments Limited's Application* (2001) Lands Tribunal LP/18/1999 and LP/31/2000 (unreported)

## DECISION

### Introduction

1. This is an application by Mr Russell and Mrs Victoria Vince (the applicants) under section 84 of the Law of Property Act 1925 (the Act) seeking the modification of restrictive covenants affecting freehold land comprising a house known as Old Pinfold House, 16 The Green, Barby, Rugby, Warwickshire, CV23 8TS (the application land). If successful the application will allow the conversion of Old Pinfold House into five terraced dwellings including two storey and first floor extensions.

2. The restrictions in question are contained in clause 3 of a conveyance of the application land dated 4 August 1978 between Mr and Mrs B S Nangle (the vendors) and Mr and Mrs C J Melchers (the purchasers). The purchasers covenanted:

- “(i) Not to use the property hereby conveyed for any purpose other than that of a single private dwelling-house in the occupation of one family.
- (ii) Not to do or suffer to be done on the property hereby conveyed anything which may be or grow to be a nuisance to the Vendors or their successors in title to the adjoining property.
- (iii) Not at any time to obstruct or otherwise so interfere with (or permit or suffer to be obstructed or interfered with) the access and user of light and air to and for the adjoining property so as to make the same fall below the quantity or quality thereof now enjoyed by such property.”

3. The “adjoining property” refers to two parcels of land. One of these, the “blue land”, is the site of Pinfold House, Almond Close which was retained by Mr and Mrs Nangle as their home. The other parcel, the “green land”, was eventually redeveloped as Pinfold West, 14 The Green.

4. The applicants purchased the application land in 1998. On 22 February 2006 they obtained detailed planning permission from Daventry District Council (reference No. DA/2006/0045) for the “conversion of dwelling to five dwellings including two storey and first floor extensions”. The application provided for ten off street car parking spaces, two per dwelling. There were 17 conditions attached to the planning permission.

5. By an application dated 15 June 2006 the applicants sought the discharge of restrictions (i) to (iii) under grounds (a), (aa) and (c) of section 84 of the Act. The application was subsequently amended to one for modification only of the restrictions. Reliance upon ground (a) was abandoned.

6. There was one objection to the application. This was made by Mr Kenneth Edward Marshall (the objector) the present freehold owner of Pinfold House.

7. Mrs Victoria Vince appeared in person on behalf of the applicants and gave evidence of fact. She called Mr Richard Merrett RIBA as an expert witness.

8. Mr Joshua Shields of counsel appeared on behalf of the objector and called Mr Kenneth Edward Marshall as a witness of fact and Mr William Richard Charles Shearer FRICS, FCAAV, a partner in Bidwells, as an expert witness.

9. I made an accompanied site inspection of the application land and Pinfold House on 3 July 2007.

## **Facts**

10. Barby is a small village located approximately four miles south east of the centre of Rugby just south of the M45 motorway. The application land is located in the middle of the village at the junction of The Green and Almond Close. It is situated in a residential area.

11. Old Pinfold House dates back to the 17<sup>th</sup> century but despite its age it is not a listed building. It is a large detached house comprising over 20 rooms standing in grounds of approximately 0.155 hectares. The house is predominantly two storeys high but there is a single storey flat roof (garage) extension to the east adjoining Pinfold House. There is another single storey extension to the south close to the house known as Pinfold West. There is a 1.2m wide passageway between the garage and the 1.9m high brick wall that forms the boundary with Pinfold House. The western and northern boundaries of the application land comprise a brick wall with mature vegetation that screens the house from the two adjacent roads. Vehicular access is from Almond Close.

12. Pinfold House adjoins the application land to the east. It is a two storey five bedroom detached house of brick and tile construction. The western elevation of the house faces the application land. There are five windows in this elevation only one of which, a games room in the attic, has clear glazing. The remaining windows, in a bathroom at first floor level, a half-landing and a cloakroom and a utility room at ground floor level, all have obscured glazing. Pinfold House is approximately 2.5m from the eastern wall of the single storey garage next door, which is approximately 3m high. Both Pinfold House and the garage extension were in existence when the covenants were imposed in 1978.

13. The proposals include the redevelopment of the single storey garage into a two-storey house. This would have a pitched roof with a ridge height of approximately 7.6m which is a metre lower than the height of the other four new houses further to the west. It is also proposed to extend Old Pinfold House to the rear. This extension would be two storeys in height except for the extension that is to form the dwelling nearest to Pinfold House which would be single

storey with a single pitch roof. There would be no windows in the eastern elevation of Old Pinford House following its conversion and the parties have agreed that there would be no problem of overlooking or loss of privacy.

14. The parties agreed that the restrictions impede a reasonable user of the application land for the purposes of section 84 (1)(aa) of the Act.

### **The case for the applicant**

15. Mrs Vince stated that neither the applicants nor the objector were original parties to the 1978 conveyance under which the covenants were imposed. She noted that the other beneficiary of the covenants (the owner of 14 The Green) had not objected to the proposals. Indeed it appeared that the benefit of these covenants had not been transferred when Mr and Mrs Nangle had sold this property. There was no reference to the covenants in the official copy of the register of title for 14 The Green. There was no building scheme in existence and the restrictions imposed upon the “blue land” (Pinfold House) under the 1978 conveyance were not the same as those imposed upon the application land under that document. The applicants required a modification of the covenants solely to allow the development for which planning permission had been obtained. This would protect the objector from any future redevelopment proposals.

16. Mrs Vince reviewed the six practical benefits that the objector had identified as being secured by the restrictions: maintenance of property value, maintenance of a view, peace and quiet, light, the prevention of increased vehicular movements and the prevention of noise during building operations.

17. The applicants agreed with the conclusions of the objector’s expert, Mr Shearer, that the proposed development would not have a significant impact on the financial value of Pinfold House. Indeed the applicants considered that the proposals would have an uplifting effect on neighbouring property prices due to the improved appearance of the application land and by making improvements to the vehicular access. The applicants relied upon the planning officer’s report and upon a letter from Mr Alex Clarke of Howkins and Harrison, a firm of Chartered Surveyors and Estate Agents based in Rugby, dated 11 December 2006 in which he stated that:

“... In my opinion the market value of Pinfold House, Almond Close, Barby would not be adversely affected by the proposed development of Old Pinfold House. Once the proposed work has been completed there is a possibility that there would be a small rise in values in the general area because of the condition that the house and gardens are currently kept in. Any measurable increase of course would be impossible to predict at this stage.”

The applicants disputed Mr Shearer’s conclusion that the proposed development would reduce the value of Pinfold House by between £5,000 and £10,000.

18. The applicants said that there would be no loss of view from within Pinfold House since all the windows, apart from that in the attic (which would be unaffected in any event), were of obscured glass. Mrs Vince noted that Mr Shearer had reached the same conclusion. She explained that the proposed extension over the existing garages was relatively low and that the extension behind the garages was only single storey. The two storey rear extensions to Old Pinfold House would be at least 10 metres from the objector's property and were only some 3 metres deep. Mrs Vince pointed out that there was already a 1.9 metre high boundary fence that obscured views to the west as well as a large tree in the objector's garden. Furthermore the applicants intended to construct an extension over the existing garages, subject to planning permission, even if the present application failed and therefore the maintenance of a view was not a benefit secured by the covenants, as per *Re Fairclough Homes Limited's Application* (2004) Lands Tribunal LP/30/2001 (unreported).

19. The covenants did not restrict the number of people who could live as a single family in Old Pinfold House and Mrs Vince rejected the objector's argument that the proposed development would necessarily involve increased occupancy and activity. The proposals did not seek to provide additional artificial lighting to that which existed at present. The side/rear passageway already existed and if lighting was required then this could be provided at low level. The passageway would in future be gated which would increase security.

20. The applicants relied upon Mr Merrett's supplementary expert report as being the only objective evidence on the issue of the potential loss of light to Pinfold House. This showed that there would be no loss of sunlight since the proposed extension above the existing garages would be built facing north towards the front of Old Pinfold House and would not obstruct the path of the sun. Mr Merrett considered that the proposals would increase the amount of diffuse light available to the windows in the west elevation of Pinfold House because it was proposed to paint the eastern elevation of the extension above the garages in a light colour. He also suggested that the objector could improve the diffuse lighting by painting his side of the boundary wall white. Mr Merrett rejected the objector's claim that the new development would overshadow his patio area because such development was located to the north and would not obstruct any sunlight. He considered that the objector's existing tree already overshadowed the patio to the west.

21. Mrs Vince described the possibility of an increase in traffic resulting from the proposed development as speculative. The proposed vehicular access to Old Pinfold House from Almond Close was before the entrance to Pinfold House and therefore vehicles travelling to and from the application land would not pass in front of the objector's property. Mr Merrett explained that the present access would be improved by means of widening the entrance and providing better visibility splays. Vehicles would be able to turn within the curtilage of Old Pinfold House and drive out forwards. The applicants had not experienced any difficulty with cars parked in Almond Close and noted in any event that the proposed provision of 10 car parking spaces in the new development exceeded the local planning authority's parking standards. Mr Merrett considered that these new parking spaces would be dispersed and hidden to the objector by landscaping.

22. The prevention of noise and disturbance from the building operations associated with the proposed development was not a benefit secured under the covenants. Those covenants restricted use rather than development. The applicants referred to the case of *Shephard and Others v Turner and Another* [2006] 20 EG 294 in which the Court of Appeal held that a “reasonable user” of land for the purposes of ground (aa) referred naturally to a long-term use of the land rather than the process of transition to such a use.

23. Mrs Vince submitted that any potential impact from the proposed development had been carefully considered at the design and planning stages. Proposals to ameliorate the possible effects of the development had been made to the objector, including re-siting the vehicular access for four of the proposed dwellings onto The Green and restricting the use of the passageway adjoining Pinfold House to just one dwelling rather than four. No response to these proposals had been received from the objector. The applicants considered that, in the light of their arguments regarding ground (aa) and their efforts to minimise the impact of their proposals upon the objector’s property, no injury would be caused to the objector by the proposed modification of the covenants.

24. Mrs Vince also described and relied upon the wider benefits of the development in terms of the immediate neighbourhood and the local community, environmental considerations and its compliance with current policies to encourage affordable housing and to re-use previously developed land, such as Planning Policy Statement 3: Housing.

### **The case for the objector**

25. Mr Marshall explained that he and his wife had lived in Pinfold House for 20 years and that they had enjoyed and grown accustomed to the lifestyle afforded by the property and which was protected by the covenants imposed under the 1978 conveyance. Those covenants had been created by Mr Nangle to protect the quiet enjoyment of Pinfold House for himself and his successors. Mr Marshall felt that the present application threatened to ruin his quality of life and that, if successful, it would have a substantially negative effect upon his property. He had opposed the planning application and referred to a total of 14 letters of objection that had been sent to the local planning authority by local residents.

26. The objector considered the proposals to be over development. Building so close to Pinfold House would make the new development overbearing and, in Mr Marshall’s view, would render the property considerably less valuable. Mr Marshall’s initial reaction to the proposals, and one that was supported by Mr Shearer, was that he would lose light to his property. He said that Pinfold House benefited from direct sunlight from the early afternoon until the sun moved behind Old Pinfold House. He produced three photographs taken between 5.20 pm and 5.50 pm on 12 June 2007 showing the sun shining directly through the half landing and utility room windows. The downstairs rooms leading off the hallway all had glazed doors to enable sunlight and diffuse light to pass through.

27. There would be a significant increase in noise and general disturbance due to the five fold increase in the number of households. The use and enjoyment of the objector’s back

garden would be severely interrupted and his peace and sleep were likely to be disturbed. This would be exacerbated by the use of the adjoining side/rear passageway by four households rather than one. The increased use of this passageway would create a security risk to Pinfold House. There would also be a significant increase in traffic which, apart from the increased noise, was likely to cause problems of on street parking and would create difficulties for service and emergency vehicles needing to gain access to Almond Close.

28. Mr Marshall believed that the applicants had deliberately let Old Pinfold House become dilapidated in order to gain an advantage when seeking planning permission for its redevelopment. He felt that it had been left to deteriorate for over three years. He also considered that the proposed development would cause disruption to his enjoyment of Pinfold House during the building works and that his property may be damaged by the proximity of the excavations. He was unable to comment upon the applicants' view that the Party Wall etc Act 1996 would not apply in this instance.

29. Mr Shearer was satisfied that the restrictions still secured a number of practical benefits to the objector given that there had been no change in character of the application land or the immediate neighbourhood since they were imposed in 1978. He did not believe that the proposals would have a significant impact upon the financial value of Pinfold House. Although he had not been instructed to value the property he considered that the proposed development would diminish its value by £5,000 to £10,000, which Mr Shearer described as representing one to two bids in the market. He attributed this diminution to the greater intensity of use of the application land, the existence of the passageway and the proximity of the building extension. He did not base his view upon any comparable evidence but relied instead upon his experience of valuing residential property.

30. There would be no significant loss of view from inside Pinfold House but the construction of the extensions to Old Pinfold House would reduce the distant views to the west and northwest from the garden and, in particular, the patio.

31. The substantial increase in residential floor space arising from the conversion of Old Pinfold House and the increase in the number of households from one to five meant that there would be a greater intensity of occupation and activity on the application land. Under cross-examination Mr Shearer acknowledged that this was not a necessary corollary of having more dwellings on the site but he considered that it was likely to happen. He felt that some form of lighting would be required in the side/rear passageway and that this would have some impact upon Pinfold House. He also believed that any shared passageway, even if gated, could lead to access for trespassers. However, he acknowledged that this was not an important factor.

32. Mr Shearer considered that the most significant impact arising from the proposals would be the reduction of light to the windows in the western elevation of Pinfold House. The new development would be within 2.6 metres of this elevation and would also overshadow the patio area to the rear of the objector's property. The windows most affected would be those on the half landing and at ground floor level. All of them currently enjoyed direct sunlight, including the cloakroom and the utility room which were partially blocked by the existing garage wall.



He also thought that the bathroom window would be affected because the proposed roof ridgeline would be above it leading to the possibility of shadowing when the sun was low.

33. Mr Shearer said that in his opinion the increased activity and likely traffic movements from the new development would be noticeable in terms of the loss of peace and quiet. The objector would be aware of an increase in such movements.

34. Mr Shields submitted that the considerations that may be taken into account by the Tribunal are wide and that it must consider the overall effect of the proposed works on the objector, as well as the individual effects, as per *Shephard*. He said that the applicants had failed to take a reality check when they argued that there was no certainty that the proposed development would lead to an increase in occupancy and traffic movements. The proposals were for five dwellings rather than one. They provided for 10 car parking spaces. It was inevitable that there would be a substantial and adverse effect upon the objector. That was only common sense. The increased activity associated with an additional four households would interfere with the objector's use of his garden and, in particular, the raised patio area that was in close proximity to the rear passageway. The distant view from the patio to the hills to the north and west were secured by the covenant against nuisance. The applicants had not produced any evidence that such a view would not be lost.

35. The applicants had not maintained Old Pinfold House properly and were using its tumbledown appearance to justify the proposals and to support their claim that neighbouring property values would be uplifted. Their statement that they would extend above the garages even if the application failed ignored the continued existence of the covenants and the need to obtain planning permission.

36. Mr Shields submitted that Mr Merrett's evidence about the possible loss of light was hopeless. Mr Merrett was not an expert on light, he had not inspected Pinfold House either inside or out, he had only considered sunlight in his report and had ignored the importance to the objector of maintaining diffuse light and his survey had been done during the height of summer and not over the course of a whole year. His approach had been unscientific and unprofessional. The local planning authority's observations on light were not relevant to the consideration of the issue for the purposes of this application. The proposals would also interfere with the light to, and the amenity of, the objector's patio area which would be overshadowed by the development. The patio would lose the open air feeling that it currently enjoyed. This was a practical benefit of substantial value or advantage, as per the decision of the Tribunal in *Re Williams' Application* (1987) 55 P & CR 400.

37. Mr Shields argued that the factors set out above constituted an injury that would be caused to the objector if the application were successful.

### **Conclusions: reasonable user and the public interest**

38. The parties agree that the proposed user is reasonable for the purposes of section 84(1)(aa) of the Act and that the continued existence of the restrictions, unless modified, will impede such user.

39. The applicants submitted that the wider benefits of the proposed development that I have outlined in paragraph 24 above were matters of public interest that ought to be taken into account. However, the applicants did not state in terms that section 84(1A)(b) was relied upon, namely that in impeding the proposed user the restrictions are contrary to the public interest. In any event in my opinion whilst considerations of those wider benefits add weight to the applicants' (uncontested) submission that the proposed user is reasonable, the fact that the proposal is consistent with the public interest in the ways described by the applicants does not mean that to maintain the restrictions would be contrary to that interest. As the President of the Tribunal, Douglas Frank QC, said in *Re Collins' Application* (1975) 30 P & CR 527 at 531:

“In my view for an application to succeed on the grounds of public interest it must be shown that that interest is so important and immediate as to justify the serious interference with private rights and the sanctity of contract. In my judgment this case comes nowhere near satisfying that test.”

In this reference I do not consider the issues that were identified by the applicants to be so pressing or so significant as to enable me to say that the continuance of the restrictions is contrary to the public interest.

### **Conclusions: practical benefits**

40. The application as amended is for the modification of the restrictions to permit the implementation of planning permission reference DA/2006/0045 granted on 22 February 2006. In their evidence and submissions the applicants referred to a number of possible amendments to the plans forming part of that planning permission. However, the local planning authority had not approved those amendments at the date of the hearing and the applicants did not state in terms, nor invite the Tribunal to consider, any specific wording to enable these amendments to be taken into account. I return to this point below.

41. Section 84(1A) of the Act states that subsection (1)(aa) authorises the modification of a restriction by reference to its impeding some user of land in any case in which the Tribunal 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. The Tribunal must also be satisfied that money will be an adequate compensation for the loss or disadvantage (if any) which any such persons will suffer from the modification. The objector has identified six practical benefits that the restrictions secure to him and which he considers to be of substantial value or advantage. I consider these below.

### *Maintenance of a view*

42. There would be no loss of view from inside Pinfold House. The five windows on its western elevation all have obscured glazing with the exception of the attic window which is sufficiently high not to be affected by the proposals.

43. I do not consider that the loss of the view from the garden that would result from the proposed development is material. The current views to the north are dominated by the flat roof of the existing garage in the foreground whilst the views to the west are more limited and are already restricted by trees on the objector's property and the application land.

### *Peace and quiet and the increase in the number of vehicles*

44. There would be a significant increase (at least 33%) in residential floor space as a result of the proposed development and there would be five dwellings instead of one. Ten car parking spaces would be provided and vehicular access would be via an enlarged entrance adjoining the objector's property. Despite these factors the applicants persisted in their argument that the proposed development would not necessarily lead to increased vehicular movement or intensified activity on the application land. They supported that argument solely it seems to me on the tenuous ground that the restrictions placed no limit on the number of persons who can occupy Old Pinfold House for the purposes of a single dwelling house. I agree with the objector that such an argument is unrealistic. In my opinion it is highly likely that the vehicular movements and activity generated by five households, in two three-bedroom and three two-bedroom houses, will exceed that of a single household on the application land.

45. The objector is likely to be affected in particular by the use of the passageway adjoining Pinfold House by four households. Some of this passageway already exists but it would in future extend along the whole of the boundary between the application land and the front of the objector's house, a total length of approximately 25 metres. It seems to me to be likely that some form of lighting would need to be provided especially since the northern end of the passageway would be gated and there are two dog-legs along the enclosed route. The passageway would be used, inter alia, for the movement of wheelie bins from the rear gardens of the four houses to the front of the application land for collection. I consider that greater use would be made of the passageway in the future than at present.

46. The increase in vehicular movements would only be seen from the front of Pinfold House and not from the rear garden. Vehicles to and from Old Pinfold House would not normally pass the front of Pinfold House given that Almond Close is a cul-de-sac. But it is likely that there would be an increase in total vehicular movements on the application land of which the objector would generally be aware.

47. The applicants have designed the development to avoid overlooking Pinfold House. There would be no windows in the proposed eastern elevation of the new houses facing the objector's house. In the southern elevation of the house proposed to be built adjoining Pinfold

House there would be a bedroom window at ground floor level. It is unlikely that this would overlook the objector's patio area due the height of the boundary fence. I agree with Mr Shearer's conclusions that the proposals have maintained the objector's privacy as far as possible.

### *Light*

48. Mr Shearer considered the reduction in the amount of light available to the windows in the western elevation of Pinfold House and the likelihood of the patio being overshadowed in the evening to be the most significant factor when considering the practical benefits secured to the objector by the restrictions. By contrast Mr Merrett concluded that there would be no loss of sunlight due to the proposals and that they would increase the amount of diffuse light provided the eastern flank wall of the new extension adjoining Pinfold House was painted in a light colour.

49. Neither Mr Shearer nor Mr Merrett is an expert on light. Mr Shearer's views were informed by a site inspection of Pinfold House in the company of the objector and by his consideration of the available plans and elevations. Unlike Mr Shields he did not dismiss Mr Merrett's report on sunlight as being hopeless but considered that some information was better than none and acknowledged that the series of photographs taken by Mr Merrett showed the path of the sun during the height of summer in May and June 2007. But he argued that those photographs were of no assistance in considering the loss of light within Pinfold House. Mr Marshall's three photographs had been taken inside the house in June 2007 in the early evening and show direct sunlight coming through the windows on the half landing and the utility room despite the proximity of the existing garages.

50. I am satisfied from the evidence that the proposals would reduce the amount of sunlight and daylight (diffuse light) available to the ground floor utility room and cloakroom. The effect (if any) on the half landing, bathroom and attic windows would not be so significant given their orientation, height and position. Mr Merrett's conclusion that the diffuse light would increase if the new flank wall is painted a light colour is conjecture and not based upon expert knowledge.

51. Mr Shields submitted that it was not relevant that the windows in the western elevation of Pinfold House did not serve habitable rooms. What mattered, he said, was that the objector needed to use the rooms served by those windows and could not do so if, for example, he could not read the washing instructions on a label because of poor light. I do not accept that argument. I believe that there is a material difference between the use of these rooms and that of a habitable room. The use of the utility room and cloakroom on the ground floor and the bathroom on the first floor is essentially transitory. The attic room was said by Mr Marshall to be used only occasionally and in any event it is not affected by the proposals. The use of habitable rooms is likely to be for longer and for a greater range of purposes. I distinguish between the ability to read a washing label for 30 seconds in a utility room and the ability to read a newspaper for 30 minutes in a living room. However, I place weight upon the fact that

the downstairs rooms have glazed doors to ensure the maximum distribution of available light and I believe that the proposals would have an adverse impact upon this benefit.

52. I do not believe that the proposed development would cause any overshadowing of the objector's patio. The two storey extension to the south of Old Pinfold House may reduce the sunlight available in the late evening in summer or when the path of the sun is lower in the sky during other times of the year. However no evidence was produced to prove this. The extension above the existing garage which lies due north of the patio will not block any sunlight to the patio although it will reduce the openness of the outlook in this direction. The applicants have sought to minimise any impact in this respect by limiting the rear extension of the new dwelling adjoining Pinfold House to a single storey structure.

#### *Building operations*

53. The applicants stated that the proposed works would take approximately six months. This estimate was not disputed. The objector was concerned about the noise and disturbance likely to be caused during that time and about the possible effects of the works upon the foundations of his property. The applicants referred to the Court of Appeal decision in *Shephard v Turner* in which Carnwath LJ said at paragraph 58:

“In my view, account must be taken of the policy behind para (aa) in the amended statute. The general purpose is to facilitate the development and use of land in the public interest, having regard to the development plan and the pattern of permissions in the area. The section seeks to provide a fair balance between the needs of development in the area, public and private, and the protection of private contractual rights. ‘Reasonable user’ in this context seems to me to refer naturally to a long-term use of land, rather than the process of transition to such a use. The primary consideration, therefore, is the value of the covenant in providing protection from the effects of the ultimate use, rather than the short-term disturbance that is inherent in any ordinary construction project. There may, however, be something in the form of the particular covenant, or in the facts of the particular case, that justifies giving special weight to this factor.”

I do not consider that there is anything in the restrictions that are the subject of this application that would justify giving such special weight to this factor.

#### *Maintenance of value*

54. The applicants relied upon correspondence from Mr Alex Clarke of Howkins and Harrison to show that the proposals would not adversely affect the market value of Pinfold House. Mr Clarke was not called to give evidence and his letter was appended to Mr Merrett's report. So far as I am aware Mr Clarke has not inspected the objector's property from either inside or outside. This evidence was hearsay and unexamined and I attach no weight to it.

55. Mr Shearer has over 30 years experience in the management, sale and purchase of rural and residential property and has also undertaken residential mortgage valuations. He expressed the opinion that the proposed development would not have a significant impact on the financial value of Pinfold House, although he was not instructed to value it. However, he believed that the proposals would have an effect upon value, which he considered to be £5,000 to £10,000, this being the difference of one or two bids in the open market. I found Mr Shearer's evidence to be impartial and balanced and I accept his conclusion on this issue.

### **Conclusions: the substantiality of the practical benefits**

56. In my opinion the maintenance of the view from, and the value of, Pinfold House and the avoidance of building operations are not practical benefits of substantial value or advantage to the objector. However, I am satisfied that the proposed development, despite the best efforts of the applicants to minimise its impact by considerate design, would lead to an increased level of occupancy, activity and vehicular movement and to some loss of sunlight and daylight to Pinfold House which would have a significant combined effect upon the objector. I consider that the maintenance of peace and quiet and the access of light, both of which have remained largely unchanged since the restrictions were imposed in 1978, are practical benefits which, when taken together, are of substantial value or advantage to the objector.

57. It was suggested by the applicants that providing both vehicular and pedestrian access to four of the proposed dwellings from The Green rather than Almond Close would ameliorate the effect on the objector of vehicular movements and the increased use of the side/rear passageway. The details of these proposals were not part of the applicants' evidence and they were put forward in principle only. The applicants have discussed the alternative access arrangements with the local planning and highway authorities but at the time of the hearing no such alternatives had been approved. The objector had declined to comment upon them. The applicants did not ask the Tribunal to exercise its discretion under section 84(1C) of the Act to add further provisions restricting the user of the application land so as to give effect to these alternative access arrangements and in the absence of firm proposals and planning permission for the same I decline to do so.

58. Mrs Vince argued that the Tribunal should consider the substantiality of any practical benefits in the context of what the applicants could develop without breaching the restrictions. The applicants said that in the event that their application failed they intended to develop above the existing garages. Whether this could be done without breaching the restrictions depends upon the details of such a proposal and these were not available at the hearing. The applicants do not have planning permission for such an alternative. My understanding of Mrs Vince's proposals is that any such extension would, to a large degree, echo the form of the building that is currently proposed to be developed next door to Pinfold House. That being so the applicants will still be faced with restrictions (ii) and (iii) even if by retaining the enlarged property within the use of one family restriction (i) is satisfied.

59. In re *Fairclough Homes Limited* (which was cited by the applicants) the President said:

“29. ...How the character of the area and the amenities would be affected by the modification of the restriction is not in my view to be judged by envisaging the worst that could be done without breaching the restriction and comparing it with what the proposed modification is intended to permit....

30. In such a case as this, the provision, it seems to me, operates in this way. By preventing development that would have an adverse effect on the persons entitled to its benefit the restriction may be said to secure practical benefits to them but if other development having adverse effects could be carried out without breaching the covenant, these practical benefits may not be of substantial value or advantage. Whether they are of substantial value or advantage is likely to depend on the degree of probability of such other development being carried out and how bad, in comparison to the applicant’s scheme, the effects of that development would be.”

I place little weight upon the applicants’ submissions on this point because Mrs Vince only outlined a hypothetical alternative form of development about which no details were provided and for which no planning permission has been obtained. Nor is it possible to say whether or not it will breach some or all of the restrictions.

**Conclusions: Grounds (aa) and (c)**

60. I find that the applicants have failed to satisfy the requirements of ground (aa) and having determined that the restrictions secure practical benefits of substantial value or advantage to the objector it follows that he would be injured by the proposed modification. The application therefore fails under ground (c) also.

61. The applicants have not succeeded in establishing any of the grounds relied upon and the application is therefore refused. A letter on costs accompanies this decision, which will take effect when, but not until, the question of costs is decided. The attention of the parties is drawn to paragraph 22.4 of the Lands Tribunal Practice Directions of 11 May 2006.

Dated 14 September 2007

A J Trott FRICS

## **Addendum on Costs**

62. I have now received submissions on costs on behalf of the applicants and the objector.

63. The objector argues that he has been entirely successful and that, on the principle that costs should follow the event, the applicants should pay his costs. He states that the applicants made no attempts at the planning application stage to seek agreement as to what the objector would find acceptable. They later sought to persuade the objector that his concerns could be dealt with without making any material amendments to their plans. The objector informed the applicants at various times that the level of housing was unacceptable but the applications made no proposal to reduce the number of dwellings. Instead they relied upon amendments to their proposals that did not have the benefit of planning permission. The objector's position had remained consistent throughout, namely that to implement the planning permission would have a significantly detrimental effect upon his property and the objector's enjoyment of it.

64. The applicants acknowledge that the objector was successful albeit that he failed on three of the six points which he argued were benefits of substantial value or advantage. However, the applicants consider that the objector behaved unreasonably during the course of his objection and that this behaviour has increased both his and the applicants' costs unnecessarily. Consequently, and in accordance with Lands Tribunal Practice Direction 22.4, there should be no order as to costs.

65. The applicants argue that the objector declined to meet with them prior to the application to the Tribunal being made. The objector cancelled a meeting to discuss the applicants' proposals in March 2006, three months before the application. The applicants had responded to the objector's request in May 2007 to put forward constructive suggestions to help deal with the case, and had formulated constructive proposals to alleviate the objector's three main concerns. Their expert had produced a report on light and had provided alternative options for vehicular access and a rear access passageway. The objector did not respond to these proposals, which were made on 8 June 2007. Instead, and for the first time, the objector said that no negotiation would be possible unless the applicants agreed to reduce the number of dwellings, although he did not specify how many dwellings would be acceptable. The applicants concluded that the objector never had any intention of reaching an agreement prior to the hearing.

66. The applicants also submit that the objector failed to meet them to agree the statement of facts and that the objector inserted misleading comments into a draft of such a statement that increased the time and cost of dealing with this matter. They state that the objector's expert witness had made several errors of fundamental importance and that the objector's arguments about loss of view in particular were ill conceived and exaggerated.

67. The Tribunal's Practice Direction 22.4 states that "... a successful objector will normally get all his costs unless he has in some respect been unreasonable." The objector has succeeded in this case and the applicants failed to establish either ground upon which they relied for the modification of the restrictions. I acknowledge that the applicants acted reasonably in their



attempt to amend their proposals in such a way as to satisfy the objector's opposition to this application. I understand their frustration at the apparent lack of enthusiasm of the objector to engage in meaningful negotiations about such amendments. But the reasonableness of the applicants' behaviour is not the test to be considered and it does not follow that the behaviour of the objector, by contrast, was unreasonable. His opposition to the application was sincerely and firmly held and was based upon his overriding concern, consistently expressed, that the proposals would spoil his enjoyment of his property. Practice Direction 22.4 states that "the nature of proceedings under section 84 of the Law of Property Act 1925 is that the applicant is seeking to have removed from the objector particular property rights that the objector has." In my opinion it was not unreasonable in the circumstances of this case for the objector to be cautious and reluctant to enter into negotiations which he apparently felt might compromise such rights and the benefits that he derived from them.

68. I have considered all the other points raised by the applicants but I do not consider that the identified behaviour of the objector nor the errors of his expert witness materially lengthened the hearing, increased costs or constituted unreasonable behaviour. I therefore determine that the applicants shall pay the objector's costs, such costs if not agreed to be the subject of detailed assessment by the Registrar on the standard basis.

Dated 11 October 2007

A J Trott FRICS