Case No: HC-2013-00236

Neutral Citation Number: [2015] EWHC 808 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

The Royal Courts of Justice
Strand
London WC2A 2LL

Date: 24 March 2015

Before :

His Honour Judge Behrens sitting as a Judge of the High Court

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Between :

BIRDLIP LIMITED	**Claimant**
- and -	
(1) ANDREW PENNINGTON HARVARD HUNTER	
(2) MICHELLE HUNTER	**Defendants**

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- -

Martin Hutchings QC and Jonathan Chew (instructed by **IBB solicitors**) for the **Claimant**
Wayne Beglan (instructed by **SJS Law**) for the **Defendants**

Hearing dates: 2nd and 3rd March 2015

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Judgment

Judge Behrens :

1. Abbreviations

1. In this judgment I shall adopt the following abbreviations.

Ashlea	Ashlea House, 46 Bulstrode Park Way Gerrards Cross
Birdlip	Birdlip Ltd
Little Orchards	Little Orchards, Layters Way, Gerrards Cross
The 1909 Indenture	The Indenture dated 3rd May 1909
The 1910 Indenture	The Indenture dated 18th April 1910
The 1925 Act	The Law of Property Act 1925
The Association	The Bulstrode Way and Layters Way 1908 Covenantors Association
UT	The Upper Tribunal (Land Chamber)

2. Introduction

2. Birdlip is the owner of Little Orchards. Mr and Mrs Hunter are the owners of Ashlea. As can be seen from Birdlip's Land Registry Plan, part of Little Orchards' southern boundary is Ashlea's northern boundary. The properties are accordingly adjoining.

3. On 9th August 2012 Birdlip was granted planning permission to build two new detached dwelling-houses on part of Little Orchards. The title deeds for Little Orchards contain restrictive covenants. It is not in dispute that if those covenants are enforceable and not modified they will prevent the development from going ahead.

4. Mr and Mrs Hunter contend that they (and others) are entitled to enforce the covenants as part of a scheme of development to which their predecessor was a party. Birdlip contends that there is no such scheme and that the covenants are unenforceable.

5. Birdlip has instituted 2 sets of proceedings. On 27th March 2013 Birdlip issued these Chancery proceedings seeking a declaration under s 84(2) of the 1925 Act that the restrictive covenants were not enforceable by Mr and Mrs Hunter. Birdlip had sufficient confidence in its claim to issue an application for summary judgment. On 4th November 2014 after 2 days of argument Master Bowles delivered a detailed reserved judgment and a detailed addendum to deal with matters raised after he had sent out a draft of his judgment. It was the view of Master Bowles that Mr and Mrs Hunter did not merely have an arguable case that there was an enforceable scheme. In his view they had a strong case for such a scheme. Accordingly he gave directions for trial. On 21st November 2014 Birdlip sought permission to appeal from Master Bowles's decision. The application for permission was listed before me. However before it was heard the parties agreed to treat the hearing before me as the trial of the action.

6. On 25th April 2014 Birdlip issued an application to the UT under s 84(1) of the 1925 Act for an order modifying or discharging the restrictive covenants. 8 objections have been received from persons who contend that they are entitled to enforce the covenants as part of the scheme. By order dated 9th September 2014 the Registrar ordered that the objector's entitlement to object to the application be determined at a s 84(3A) hearing. That hearing is listed before me in addition to the Chancery trial. It is not in dispute that if the restrictive covenants are enforceable under the local scheme the objectors are entitled to object. On the other hand if there is no enforceable scheme they are not. It follows that the hearing raises the same question as the Chancery trial.

7. This is the judgment in the Chancery action. I shall in addition provide a short additional judgment in the UT proceedings dealing with the objectors' right to object. Before dealing with detailed evidence and submissions I should like to acknowledge the very considerable assistance I have received from the lawyers on all sides. It has been extremely helpful to have electronic copies of all the relevant documents. The skeleton arguments and the oral submissions were clear helpful and thorough. It is also of considerable assistance where, as here, Counsel were able to make their submissions precisely within the time allotted to them. I am grateful to all concerned.

3. The Evidence

8. As the restrictive covenants affecting Little Orchards are more than 100 years old it is unsurprising that there is no direct oral evidence relating to the circumstances in which they were imposed. Equally there is no evidence as to the circumstances relating to other conveyances of land in the area with similar restrictive covenants. In those circumstances although there were witness statements before Master Bowles no oral evidence was called before me.

9. I was invited to consider evidence which fell into 4 categories:

> 1. The Title to Little Orchards. As will appear below this comprises two Indentures made in May 1909 and April 1910. The 1909 Indenture is in manuscript and in some respects the copy now available is difficult to read. I was, however, provided with a typed copy. The 1910 Indenture is only available in abstract form.
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> 2. Conveyances of other properties in the area which contain restrictive covenants in similar but not identical form. 18 such conveyances were produced covering the period between 24th August 1906 and 16th February 1914.
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> 3. Agreements for the sale of Lots 38 and 116. The first is dated 3rd February 1908 and the second is dated 16th February 1914. Each of the agreements is printed on what appears to be a standard form with manuscript additions. Each of the agreements incorporates a lotted plan. Mr and Mrs Hunter rely on the 1908 plan to define the estate over which the local scheme operates. There are, however, significant differences between the 1908 plan and the 1914 plan. Birdlip relies on these differences to show that the area over which the local scheme is said to operate is uncertain. When the matter was first before Master Bowles the 1914 plan had not been found. Thus, his original judgment was written on the basis that the only plan was the 1908 plan. After the discovery of the 1914 plan the application was relisted before Master Bowles for further argument. The addendum to his judgment deals with the effect of the 1914 plan.
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> 4. Historical Evidence. This consists of passages from a 2006 History of Gerrard's Cross by Julian Hunt and David Thorpe; evidence relating to the Association; evidence relating to decisions of the Lands Tribunal where two attempts to modify the covenants by occupiers under s 84 of the 1925 Act were each rejected and evidence relating to another application which was compromised.

4. The Title to Little Orchards

10. The Land Registry plan shows the extent of the land within Birdlip's ownership. The western part of the land, which is shown coloured pink on the plan was conveyed to Birdlip's predecessor in title in an Indenture dated 3rd May 1909. The eastern part of the land originally formed part of the land conveyed to Mr and Mrs Hunter's predecessor in title in an Indenture dated 18th April 1910.

11. In each case the land was conveyed by common vendors – a local estate agent, George Frederick Hampton and a solicitor William Robert Moon. At that time no houses had been built on either plot

12. Each of the conveyances contained covenants referred to in the Schedule. In the 1909 Indenture the covenants were made:

> "… by the purchasers 'for themselves their respective heirs executors administrators and assigns .. with the Vendors their heirs and assigns and other[1] the owner or owners for the time being of the adjoining and adjacent estate now or formerly belonging to the Vendors in the Parishes of Chalfont St Peter Gerards Cross and Iver that the Purchasers their heirs and assigns' would 'at all times hereafter observe and perform the .. stipulations and restrictions specified in the Schedule' to the conveyance."

13. In the 1910 Indenture the covenants were made:

> "…with the intent to bind all persons in whom the hereditaments hereby conveyed shall for the time being be vested but not so as to be personally liable under this covenant after he shall have parted with the same' covenanted 'with the Vendors and the survivor of them their and his assigns and other the owners or owner for the time being of the adjoining or adjacent estates now or formerly belonging to the Vendors in the Parishes of Chalfont St Peter Gerards Cross and Iver that he the Purchaser' would 'observe and perform the stipulations and restrictions contained in the Schedule' to the conveyance 'so far as the same' were 'applicable to the hereditaments' conveyed".

14. The 1900 and 2011 parish maps show that the land conveyed is near the northern boundary of the parish of Gerards Cross which is adjacent to and to the south of the parish of Chalfont St Peter. The parish of Iver is to the south of the parish of Gerards Cross and separated from it by the parish of Fulmer.

15. The obligations in the Schedules to the 2 conveyances were in substantially the same form.

16. The crucial restriction for the purpose of this trial relates to the number of houses that can be erected on each plot. In the 1909 Indenture the restriction was in the following terms:

> No building other than one or two detached residences shall be erected on the said property hereby conveyed …

17. In the 1910 Indenture the wording was identical save that only one detached residence was permitted on the plot.

18. It is not in dispute that one detached residence (Little Orchards) has been erected on the land included in the 1909 Indenture and one detached residence (Ashlea but formerly known as "The New House") has been erected on the land included in the 1910 Indenture.

19. Both of the proposed new houses are substantially on the land included in the 1910 Indenture. It follows that unless the covenant in that conveyance is unenforceable, discharged or modified there will be a clear breach of covenant by Birdlip if the proposed dwellings are erected.

20. In paragraphs 11 – 13 of his judgment Master Bowles summarised the other restrictions in the Indentures drawing attention to the differences between the restrictions in the two Indentures. In their skeleton argument Mr Hutchings QC and Mr Chew made a number of comments on that summary.

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[1] This word is doubtful but I agree with Mr Hutchings QC that it is probably other. It may or may not be followed by a comma.

21. The covenants and stipulations are contained in 11 clauses in the Schedule. The first 8 clauses have subheadings – (1) Fences, (2) Building Values, (3) Prohibitions, (4) Temporary erections, (5) Buildings, (6) Building Lines, (7) Gravel Digging, (8) Roads. The covenant in relation to the number of houses is in the Prohibitions. Clause 9 contains a miscellaneous number of provisions. Clause 10 in the 1909 Indenture relates to banking and Clause 11 relates to variation. There were obligations:

1. For the fencing of the land conveyed or the protection of existing hedge; The fencing is to be of material approved by the Vendors' surveyor and was to be erected within one month
2. For a minimum prime cost of £750 for the house to be built on the 1910 Indenture land and £500 for any house on the 1909 Indenture land;
3. For the houses constructed to be detached;
4. For the houses constructed to be used only as private or professional residences and not to be let out as flats;
5. For no detached privy or water closets to be built on the land;
6. For the land not to be used "*for any purpose which should in any way be a damage to the Vendors their previous or future assigns or tenants or to the owners or tenants of adjoining or adjacent property"*;
7. For washing not to be hung out to dry on the conveyed land;
8. For no temporary or travelling buildings or caravans to be placed on the conveyed land subject to an exception where it was incidental to the erection of permanent buildings.
9. For no permanent building to be constructed on the conveyed land until plans and elevations had been approved by the Vendors surveyor. The Vendors' surveyor's approval of the plans was subject to payment of the fee "*(not exceeding one guinea per house)*" and "*shall be paid by the person by whom the plans are submitted.*" The 1910 Indenture continued:

> Such approval is required only for the mutual benefit of all purchasers to prevent depreciation of the property by the construction of unsightly buildings e.g. the covering of roofs will be restricted to tiles or best quality green Westmoreland slates

That sentence is not to be found in the 1909 Indenture.

10. For restriction of the construction of buildings outside the building line shown on the approved plans or within ten feet of the boundaries.
11. For the purchaser to refuse permission for any traction engines to pass over roads on the estate to deliver materials to the conveyed land.

Both conveyances contained a reservation by the Vendors of their right to vary the stipulations and restrictions. However the wording in the two Indentures is not identical. In the 1909 Indenture the right is "*in regard to the remainder of the properties in the neighbourhood"*. In the 1910 Indenture the right is "*so far as regards the other parts of their Estate"*

The estate referred to in stipulation (11) above and in respect of which the vendors, Mr Hampton and Mr Moon reserved the right to vary the various stipulations in the 1909 and 1910 conveyances is not defined at all in the conveyances.

5. The covenants in the other conveyances

22. As noted above conveyances in respect of 18 other properties were produced. It was conceded that each of the properties were subject to similar restrictions to those in the 1909 and 1910 Indentures. It was also common ground that there were some variations.

23. Thus, there were differences in the numbers of houses that were permitted and the minimum prime cost of the houses to be built.

24. There were differences in the clause relating to the approval of plans by the Vendor's Surveyor. The sentence including the reference to the "mutual benefit" of all purchasers was included in about half (10) of the conveyances.

25. There were differences in the wording of the clause giving the vendor the right to vary. An analysis by Mr Chew of all the conveyances and the 2 agreements has revealed:

1. the expression "the other parts of their estate" is used on 15 occasions. In one of these (only) the parcels clause contains express reference to the land being conveyed being part of the "Gerard Estate at Gerards Cross." Another contains a proviso in relation to variations to 3 specific Lots.

2. the expression "the remainder of their properties in the neighbourhood" is used on 3 occasions.

3. the expression "the right to vary these stipulations and restrictions" is used on 2 occasions.

4. On 2 occasions there is no express right to vary at all.

26. There are variations in the prohibition against banking.

6. The Agreements for Lots 38 and 116

27. In addition to the conveyances I was invited to consider the contracts for the sale of Lots 38 and 116 together with their attached plans

6.1 The terms of the Agreements

28. Each of the agreements is in standard form. Details such as the date, identity of the parties, the price are completed in manuscript. The rest is printed. The covenants are also in standard form with some manuscript variations.

29. Both of the agreements agree to convey "the property described in the Plan on the other side hereof as Lot 38/116". Thus, the Plan is part of the Agreement.

30. The covenants are incorporated in clause 5:

> the purchaser shall covenant 'for his heirs their executors administrators and assigns .. with the Vendors and the survivor of them their and his assigns and other, the owner or owners for the time being of the adjoining and adjacent estate now or formerly belonging to the Vendors in the Parishes of Chalfont St Peter Gerard's Cross and Iver that the Purchasers his heirs and assigns' will 'at all times hereafter observe and perform the said stipulations and restrictions but the Vendors shall not be bound to enforce or effectuate the said stipulations or restrictions or the liabilities mentioned therein.

31. The covenants follow the same format as appears in the conveyances. Both of the agreements contain the reference to the mutual benefit of all purchasers in the clause relating to the approval by the Vendor's surveyor. Both of them use the expression "so far as regards the other part of the estate".

6.2 The 1908 Plan

32. The Plan is entitled "Plan of Building Sites" at Gerrards Cross, Bucks For Sale by Hampton & Son. To the left of the heading is this important note:

THE ESTATE BOUNDARIES ARE EDGED IN RED, AND THE SITES AS AT PRESENT STAKED OUT FOR SALE ARE COLOURED PINK

33. The plan shows a relatively large area of land edged in red. It is bounded on the north-east by the railway; from west to east it extends from just west of Layters Way to Mill Lane – a distance of about a mile. Through the middle of the site running approximately east west is Bulstrode Way which continues into Marsham Way at the intersection with Packhorse Lane. In 1908 Marsham Way ended at Marsham Lane. By 1914 it had been extended to Mill Lane. The southern boundary of the area edged red is more difficult to describe save to note that it is to the south of Bulstrode Way and Marsham Way.

34. Within the area edged red there are areas coloured pink with Lot numbers within them. There are approximately 57 such areas. Each area has a price within it. There are uncoloured areas with the word "Sold" in them. There are 14 such areas. There are a number of other areas. Five areas have the word "Reserved" within them. One area, to the east of Marsham Lane has the words "Suggested for residences with large grounds" within it. That area is not lotted out. Finally there is an area to the south of Marsham Way with the words "Suggested Road" in it.

6.3 The 1914 Plan

35. The 1914 plan has the same title and the same important note as the 1908 plan. There are, however, differences between the two plans.

36. The area to the south of Marsham Way and the west of Marsham Lane has changed. The areas formerly marked reserved have been lotted out. The suggested road to the south – Quakers Way – has been built

37. The area to the east of Marsham Lane is completely different from that shown in the 1908 plan. Marsham Way has been extended to Mill Lane, a new road – Vicarage Way – links Marsham Way to the south of Mill Lane. The whole area has been lotted out.

38. Birdlip places considerable reliance on the fact that the south western boundary of this part of the Estate has changed from that shown in the 1908 plan. In particular the area shown as sold to the north of what was The Vicarage is shown outside the red line in the 1914 plan and inside the line in the 1908 plan.

39. Birdlip also places considerable reliance on the area to the west of Packhorse Lane. The 1914 plan does not purport to show that area in detail at all. To the south of Bulstrode Way it shows only lots 27 and 27A (which are for sale) within the red line. To the north there is a red line abutting Bulstrode Way extending as far as the end of Lot 27. According to the 1908 plan the property opposite Lot 27 had been sold and was within the Estate.

40. The plan incorporates an inset plan for the land available to the west of Lot 27 on Bulstrode Road. The inset plan only shows the western end of Bulstrode Way. Thus it does not show any of the land to the north or the south of Bulstrode Way which formed lots 20 to 35 or 42 to the sold plot opposite plot 20 – a total of 24 lots on the 1908 plan.

41. Some 6 or 7 lots to the south of Bulstrode Way and west of Lot 42 which had been sold by 1914 are shown as outside the red line in the 1914 plan but inside in the 1908 plan when, with one exception, they had not been sold.

7 Historical evidence

7.1 The History of Gerrard Cross

42. Pages 83 to 88 of the History summarise the history of the development of this area. It is not necessary to refer to it in detail. The following points can be noted:

1. Bulstrode Way was laid out in January 1906. The common vendors laid out about 35 building plots along the new road. The development of Bulstrode Way was slow to start. Only 2 plots were sold in 1906 and 5 in 1907. Twenty-two plots were sold in 1908.

2. The first section of Layters Way which contains several notable houses was developed between 1908 and 1910.

3. Marsham Way was laid out on land formerly belonging to Marsham Farm. The first houses were developed in 1906 and development continued until 1922.

4. The book contains a photograph of part of a plan of what is described as "Plan of the Building Plots on Bulstrode Way marketed by Hampton & Sons 1907". The plan is not identical to the 1908 plan but (so far as can be ascertained) the boundaries of the estate on the part of the plan photographed coincide with the red lines on the 1908 plan.

7.2 The Association

43. According to Mr Hunter the Estate Covenants are known locally as the "Moon Covenants". The prime function of the Association, which has been in existence for many years is to monitor and enforce breaches of the covenants. The Association is concerned with breaches of the covenants to the west of Packhorse Lane. Another Association deals with the area to the east of Packhorse Lane. In 1989 the Association obtained an opinion from Counsel to the effect that a building scheme came into force in 1908 and remained in force until that date. It is Mr Hunter's opinion that the Association has been successful in upholding the Moon Covenants and maintaining their integrity. This is important to the Estate as a whole and is well-known to the local estate agents.

7.3 The decisions of the Lands Tribunal

44. As already noted there have been two unsuccessful attempts to vary the covenants in the Lands Tribunal.

45. The first was an application in 1978 to enable two blocks of flats to be built on 2 sites then occupied by 3 dwellings. One site was Badminton House, Marsham Way; the other was Oaklands, Vicarage Way both of which are at the eastern end of the properties on the 1914 plan.

46. The then President, Sir Douglas Frank refused the application. There is nothing in the decision to suggest that the enforceability of the covenants was in issue. Indeed on page 3 of the decision he expressly acknowledged that all of the 63 objectors were entitled to object.

47. The second decision was an application in 1992 to build a second house on a site occupied by Mill Corner, Marsham Way. The then President, V G Wellings QC refused the application. There is nothing in the decision to suggest that the enforceability of the covenants was in issue. In the course of his decision the President commented:

> It has not been argued that there is a building scheme affecting the estate but there may be.

48. He treated the properties in Marsham Way, Vicarage Lane and Mill Lane (northern side) as being entitled to enforce the covenants but did not explain the basis for his decision.

7.4 The compromise

49. Mr Hunter produced the draft of a Deed of Covenant executed on 10th June 1994 executed by the new owners of Laurel House, Marsham Way and the owners of 30 other properties in Vicarage Way, Marsham Way and Mill Lane. It is plain that the draft was executed as the Deed as it is referred to in the Charges Register for Laurel House. However, as Mr Hutchings QC pointed out, it is not clear that, when finally executed, it was in the same terms as the exhibited draft.

50. The recitals to the draft indicate that Laurel House is subject to covenants; that in breach of covenants the old owners commenced the construction of a house; that in 1991 and the old owners applied to the Lands Tribunal to modify the covenants. Negotiations for the withdrawal of the application were successful. As a result Laurel House was sold to the new owners, the new owners admitted that the covenants were enforceable by their neighbours and each of them. By the Deed the new owners covenanted (amongst other things) to observe and perform the existing covenants.

8. The Law

51. There was in fact very little disagreement between Counsel over the relevant law. I was, however, taken to a significant number of the authorities on building schemes.

52. The starting point is often taken to be the summary by Parker J in Elliston v Reacher [1908] 2 Ch 374, 384-5 at first instance:

> "it must be proved (1.) that both the plaintiffs and defendants derive title under a common vendor; (2.) that previously to selling the lands to which the plaintiffs and defendants are respectively entitled the vendor laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiffs and defendants respectively), for sale in lots subject to restrictions intended to be imposed on all the lots, and which, though varying in details as to particular lots, are consistent and consistent only with some general scheme of development; (3.) that these restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold, whether or not they were also intended to be and were for the benefit of other land retained by the vendor; and (4.) that both the plaintiffs and the defendants, or their predecessors in title, purchased their lots from the common vendor upon the footing that the restrictions subject to which the purchases were made were to enure for the benefit of the other lots included in the general scheme whether or not they were also to enure for the benefit of other lands retained by the vendors. If these four points be established, I think that the plaintiffs would in equity be entitled to enforce the restrictive covenants entered into by the defendants or their predecessors with the common vendor irrespective of the dates of the respective purchases. I may observe, with reference to the third point, that the vendor's object in imposing the restrictions must in general be gathered from all the circumstances of the case, including in particular the nature of the restrictions. If a general observance of the restrictions is in fact calculated to enhance the values of the several lots offered for sale, it is an easy inference that the vendor intended the restrictions to be for the benefit of all the lots, even though he might retain other land the value of which might be similarly enhanced, for a vendor may naturally be expected to aim at obtaining the highest possible price for his land. Further, if the first three points be established, the fourth point may readily be inferred, provided the purchasers have notice of the facts involved in the three first points; but if the purchaser purchases in ignorance of any material part of those facts, it would be difficult, if not impossible, to establish the fourth point."

53. Modern authorities emphasise that the key to a scheme is reciprocity of obligation and the intention to create such reciprocity. Thus in Jamaica Mutual v Hillsborough [1989] 1 WLR 1101 (PC) Lord Jauncey put the matter thus:

> "It is now well established that there are two prerequisites of a building scheme namely: (1) the identification of the land to which the scheme relates, and (2) an acceptance by each purchaser of part of the lands from the common vendor that the benefit of the covenants into which he has entered will enure to the vendor and to others deriving title from him and that he correspondingly will enjoy the benefit of covenants entered into by other purchasers of part of the land. Reciprocity of obligations between purchasers of different plots is essential.
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> In Reid v. Bickerstaff [1909] 2 Ch. 305 , 319, Cozens-Hardy M.R. said:
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> > "What are some of the essentials of a building scheme? In my opinion there must be a defined area within which the scheme is operative. Reciprocity is the foundation of the idea of a scheme. A purchaser of one parcel cannot be subject to an implied obligation to purchasers of an undefined and unknown area. He must know both the extent of his burden and the extent of his benefit. Not only must the area be defined, but the obligations to be imposed within that area must be defined. Those obligations need not be identical. For example, there may be houses of a certain value in one part and houses of a different value in another part. A building scheme is not created by the mere fact that the owner of an estate sells it in lots and takes varying covenants from various purchasers."
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> …
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> The existence of these matters is a question of fact to be determined from the terms of the titles and the relevant circumstances surrounding the sales by the common vendor to the various purchasers."

54. The judgment of Lord Browne-Wilkinson in another Privy Council appeal – Emile Elias v Pine Groves [1993] 1 WLR 305, 310G – 311H is to the same effect. Not only must there be a defined area but the purchasers of all the land within the scheme must know where the defined area is.

55. There were a number of discrete points on which Mr Hutchings QC and Mr Beglan cited authority. It is convenient to deal with them at this stage.

Inference and Speculation

56. Mr Hutchings QC warned me against conjecture. In so doing he drew my attention to a passage from the judgment of Kennedy LJ in Reid v Bickerstaff [1909] 2 Ch 305, 327 where he said:

> "But we are bound to deal with this case upon the evidence as it stands, and to shun conjecture, however plausible and attractive by keeping carefully within the bounds of legal inference."

57. It is Mr Hutchings QC's case that Mr and Mrs Hunter's case and Master Bowles' judgment falls into that error.

Importance of Lotting

58. Mr Beglan drew my attention to a passage from the judgment of Wills J in Nottingham Patent Brick v Butler (1885) 15 QBD 261 at 266 where he pointed out

> "that it is in all cases a question of intention at the time when the partition of the land took place to be gathered, as every other question of fact from the circumstances which can throw

> light upon what that intention was. One such circumstance which has always been held to be cogent evidence of an intention that the covenant shall be for the common benefit of purchasers is that the several lots have been laid out for sale as building lots."

59. Mr Beglan pointed out that that passage is cited in full in the 10th Edition of Preston & Newson's Restrictive Covenants where the author points out (at paragraph 2-62) that it was approved by the Court of Appeal and on two occasions by Stamp LJ – once as a judge of first instance and once in giving the leading judgment in the Court of Appeal.

Lack of Uniformity

60. Mr Hutchings QC drew to my attention a further passage in the judgment of Lord Browne – Wilkinson in Emile Elias at 311E-G dealing with this issue:

> "It is one of the badges of an enforceable building scheme, creating a local law to which all owners are subject and of which all owners take the benefit, that they accept a common code of covenants. It is most improbable that a purchaser will have any intention to accept the burden of covenants affecting the land which he acquires being enforceable by other owners of the land in the scheme area unless he himself is to enjoy reciprocal rights over the lands of such other owners: the crucial element of reciprocity would be missing. That does not mean that all lots within the scheme must be subject to identical covenants. For example in a scheme of mixed residential and commercial development, the covenants will obviously vary according to the use intended to be made of each category of lot. But if, as in the present case, the lots are all of a similar nature and all intended for high class development consisting of one dwelling on a substantial plot, a disparity in the covenants imposed is a powerful indication that there was no intention to create reciprocally enforceable rights."

The right to vary

61. There is a conflict of authority as to whether the effect of a power to vary the covenants is consistent or inconsistent with a scheme. Mr Hutchings QC helpfully took me to 3 cases where this has been discussed – Re Wembley Park [1968] Ch 491, 498D – 499B, Whitgift Homes v Pauline Stocks [2001] EWCA 1732 paragraph 101 and Seymour Road v Robin Williams [2010] EWHC 111 (Ch) paragraph 25.

62. In the light of these authorities I agree that the existence of a power to vary is equivocal. I agree with the view of Andrew Francis expressed in footnote 91 of paragraph 8.118 of the 4th Edition of his book – Restrictive Covenants and Freehold Land – a Practitioner's Guide. The existence of the power is just one matter to be looked at in the context of the whole in deciding whether a scheme exists.

The public nature of the Indentures.

63. In paragraph 30 of their skeleton argument Mr Hutchings QC and Mr Chew referred me to the decision of the Court of Appeal in Cherry Tree Investments [2013] Ch 305 in support of a proposition that private documents collateral to a public document are of very limited weight in interpreting those public documents.

64. For my part I derive very little if any assistance from that case. This is not a case where the extrinsic evidence conflicts with the Indentures. My task is to determine whether, as a matter of fact, there was an intention at the time of crystallisation of the scheme that the covenants were to be for the common benefit of purchasers. It is well established that extrinsic evidence is admissible for this purpose and none of the authorities suggest that that extrinsic evidence should be given "very limited weight". There is a full discussion of this

area of the law and of the nature of the extrinsic evidence that has been admitted in paragraphs 2-77 – 2-78 of Preston & Newsom (10th Ed). I shall not lengthen this judgment by setting it out in detail.

9. Submissions

9.1 Mr Hutchings QC's submissions

65. In paragraph 37 of their skeleton argument Mr Hutchings QC and Mr Chew relied on 3 matters in support of Birdlip's case. First they submitted that there was no defined estate; second that Little Orchards did not have the benefit of the scheme and third that it had not been established that the restrictive covenants enured for the benefit of other purchasers as opposed to the vendor.

The estate

66. Mr Hutchings QC made a number of submissions about the estate. He drew my attention to the reference in both the 1909 and 1910 Indentures to the estates in Chalfont St Peter Gerard's Cross and Iver. There is no other definition of the estates in the Indentures. The 1908 plan was not annexed to the Indentures.

67. Second, he drew my attention to the differences between the 1908 plan and the 1914 plan. He laid particular stress on the lots to the south of Bulstrode Road and the area to the north of the Vicarage which are shown inside the estate in the 1908 plan and outside the estate in the 1914 plan. He suggested that the justification given by Master Bowles for adopting the 1908 plan was wrong. He submitted that the inconsistency between the two plans meant that there was no basis for a scheme.

68. Third, he drew my attention to 5 references to particular areas in the Indentures. These include the 3 parishes, the owners or tenants of adjacent property (in subpara 6 of my summary of the covenants), the reference to depreciation of the property (in subpara 9) and the differing references in the right to vary (in subpara 12). He accordingly submitted that what emerges is not a single estate but a range of areas with regard to different stipulations. He accordingly submitted that a defined estate does not emerge from the Indentures and there is no building scheme.

69. Fourth he submitted that the purpose of the 1908 and 1914 plans were to identify the plots for sale and not to identify the estate. He submitted that the inferences drawn by Master Bowles were unjustified. A significant part of the argument relied on the submissions in relation to the Cherry Tree case which I have rejected.

70. In summary Mr Hutchings QC submitted that it was a massive leap of faith to form any view as to what plan might have been attached to the agreements which preceded the 1909 and 1910 Indentures. It fell clearly into the realms of speculation and outside the realm of proper legal inference.

Intention to benefit Little Orchards.

71. Mr Hutchings QC submitted that it had not been shown that there was an intention to benefit Little Orchards and thus there was no scheme. Master Bowles had relied on four points in support of his conclusion – the existence of a standard contract and common restrictions, the express statement in the 1910 Indenture that the approval of the building

materials was for the mutual benefit of all purchasers, the right of the vendor not to enforce the covenants and the right to vary.

72. Mr Hutchings QC criticised the first reasoning as "assumption and guesswork", the second as being unjustified in that the explanation does not appear in the 1909 Indenture and the third and fourth as being wrong in law. For reasons set out above I accept that clauses such as the right not to enforce and the right to vary can point both ways and are to be looked at in the context of all the other evidence.

Intention for Covenants to Enure

73. Mr Hutchings QC submitted that the restrictions were not intended to enure for the benefit of the purchasers. Their purpose was to benefit the original vendors in the building out of their property and to maintain the value of their land. The commercial context gave the vendors a clear reason for imposing the covenants. He drew my attention to the covenants which he submitted were consistent with this. He referred to:

1. the covenants relating to fencing which was to ensure the character at the time of the building of the house

2. the building restrictions. Given that the restrictions were overseen by the vendor the intention was that the restriction was for their benefit.

74. The argument was summarised in paragraphs 92 and 93 of the skeleton argument:

> 92. Read together, as they must be, the intention manifested by the stipulations and restrictions is to ensure that the building development carried out by the initial purchaser was subject to the control of the vendor and to build a high class series of property. The objective intention does not go as far as making these restrictions permanent and enuring: neither the control mechanism of the vendor's surveyor nor the restrictions in relation to the building of the house are consistent with this.
>
> 93 Similarly, the language of the covenant itself, which defines the land by reference to the Vendors' property, is consistent with an intention to protect the vendor, and the vendor's former estate, during the course of the initial building out.

9.2 Mr Beglan's submissions

75. Mr Beglan sought to rely on the judgments of Master Bowles. His basic submissions are contained in paragraph 15 of his skeleton argument:

> 1. Each of the factors identified in the Elliston v. Reacher guidance is present in the case of the Moon Covenants.
>
> 2. It is clear that the covenants are classically of the kind calculated to, and therefore intended to, provide mutual benefit to those on the estate; and general observance of the restrictions was calculated to enhance the value (not necessarily monetary) of the several lots offered for sale – so it is an *"easy inference"* that the vendor intended the restrictions to be for the benefit of all the lots:
>
> 3. To that easy inference must be added the additional factors identified by the Master.
>
> 4. Whilst these cases are all fact specific, it is interesting to note the level of congruity between the conditions of sale in this case and those conditions of sale highlighted by the Vice Chancellor in Allen v Veranne Builders at pp.2-3; in which he concluded that the prima-facie case for a building scheme was overwhelming (p.8).

76. In order to demonstrate the fact specific nature of the cases Mr Beglan took me to the facts of cases where there had been held to be no scheme to demonstrate the differences between those cases and this. Three examples of this will suffice.

77. In Jamaica Mutual (at p 1108 B- C) there was nothing to suggest that the vendors were selling off a number of lots or that the purchaser had assumed any obligation to anyone other than the vendor.

78. In Reid v Bickerstaff (at p 320) there was no plan of the particulars of sale. Furthermore there was an absence of uniformity of the covenants. In those circumstances it was held that the area of the scheme had not been defined and that there was no scheme.

79. In Wembley Park Estate (at p 502) there was no plan and Goff J was unable to discern what properties were included, no evidence of laying out in lots and no evidence of what the purchasers were informed about the plots sold or to be sold.

80. Mr Beglan then dealt with Birdlip's submissions and grounds of appeal.

The Estate

81. Mr Beglan made the point that the fact that other land of the vendor was intended to be benefited was no indication against a building scheme. He submitted that it is plain from a perusal of the 1914 plan that it is not just a sales plan.

82. Mr Beglan went on to consider the submissions in relation to the range of areas in the 1909 and 1910 Indentures. He made the point that this submission ignores the surrounding circumstances.

83. Taking the individual clauses he submitted that it is unsurprising that the damage or annoyance restricted should refer to tenants of adjoining or adjacent property (as those most likely to be affected by that particular issue) and that does not speak to the definition of the estate.

84. He submitted that the explanation in the clause relating to the surveyor's consent is plainly supportive of a scheme of mutually binding obligations, and does not detract from the estate as defined on the plans.

85. Similarly, the traction engine restriction being to the "roads of the estate" did not introduce any new area of the defined estate.

86. Finally he submitted that the difference in the wording in the right to vary clause is that the definition of the estate was intended to be changed.

87. In summary he submitted that the Estate is defined by the red line in the 1908 plan and that this is unaffected by the 1914 plan.

Intention for Little Orchards and for other purchasers to benefit

88. Mr Beglan relied on the authorities already cited in support of the proposition that the question of whether there was a common intention of mutual enforceability at the time of the creation of the scheme is a question of fact to be determined from all the circumstances. Master Bowles was entitled to take the view that the 1914 plan did not assist. Master Bowles did not treat the dispensing power as conclusive. It was one of the factors he took into account. Having looked at the package of covenants Master Bowles was entitled to conclude that there was a clear intention to create mutually binding obligations that were valuable – and indeed of the classical kind – as between the purchasers in the building scheme. Whilst it

is true that the covenants may be of value to the vendor whilst he has unsold property in the estate this ignores the additional value that such building schemes create: A purchaser will value the prospect of being able to ensure that the mutually enforceable covenants of the scheme result in the establishment and maintenance of a low density development of detached and relatively high value properties.

10. Discussion and Conclusion

89. I have set out the relevant law and the rival arguments in some detail above. In those circumstances I can state my views relatively briefly.

90. Although Master Bowles gave two detailed and helpful judgments it is important to bear in mind that the issue before him was whether Birdlip's claim was suitable for summary judgment under CPR 24. To put it another way could he be satisfied that Mr and Mrs Hunter's claim that there was a building scheme which they were entitled to enforce was fanciful. In my view Master Bowles was plainly right to consider that the matter was arguable. Without going into detail the 1908 plan, the lotting of the plots, the similarity of the covenants and the covenant specifically referring to the mutual benefit of all purchasers are more than enough to make Mr and Mrs Hunter's claim arguable. It is true that there are contrary arguments based amongst other things on the 1914 plan but they do not in my view detract from the arguability of Mr and Mrs Hunter's claim. In my view an appeal against Master Bowles' decision has no realistic prospects of success. Permission to appeal is accordingly refused.

91. It was no part of Master Bowles's function to make any findings of fact. That task falls on me as the trial judge. Thus Master Bowles' views on any issue whilst helpful are not in any way binding on me.

The defined estate

92. I accept that for there to be an enforceable scheme it is necessary for the extent of the estate to be defined at the date of the crystallisation of the scheme. There is no evidence that any such plan formed part of any of the conveyances of any of the land. In agreement with Master Bowles I find as a fact that it did not.

93. It is however clear that the 1908 Plan was attached to the contract for Lot 38. That plan identifies the Lots for Sale but also purports to define the boundaries of the estate. As Mr Beglan pointed out the red lines shown on the 1908 Plan encompass a well defined area as the Estate. I accordingly reject the submission of Mr Hutchings QC that the 1908 Plan was only a Sales Plan. It also purported to define the estate.

94. It also seems from the "History of Gerrards Cross" that there was a plan in existence in 1907. No complete copy of that plan is in existence but the part shown in the book is consistent with the 1908 Plan.

95. In my view it is not speculation for me to infer that when the first lot was sold off in 1906 there was a plan which defined the boundaries of the estate in the same way as the 1908 Plan. The actual plan would of course have not been the same because none of the lots marked as sold on the 1908 plan would have been sold.

96. I also consider that when Little Orchards and Ashlea were sold in 1909 and 1910 there would have been a plan attached to the agreements for sale. I accept that it may not have been identical to the 1908 Plan. Other lots will have been sold between 1908 and 1910. Furthermore the shape of some of the lots may have altered. However this was still near the

beginning of the development and I infer that it would still have contained the boundaries set out in the 1908 Plan.

97. For the reasons given by Mr Beglan I am not persuaded that this is affected by the 5 or 6 references in the 1909 and 1910 Indentures to other areas or other estates.

98. I turn to the 1914 Plan. I accept that the 1914 Plan is different from the 1908 Plan and that the differences are as identified above. There may be many reasons why the area to the north of The Vicarage was excluded from the "estate". It may have been a mistake. The Vendor may have exercised his power to vary. This discrepancy does not however persuade me that the boundaries in the 1908 plan were not boundaries of the estate.

99. More difficult is the area to the west of Packhorse Lane which does not show some 24 lots which are on the 1908 plan and the 6 or 7 lots to the south of Bulstrode Way and west of Lot 42. I agree with Mr Hutchings QC that it is impossible to regard the omission of this number of lots as a mistake. However it is to be noted that the red line on the 1914 Plan is not continuous. It comes to an end on each side of Bulstrode Way opposite Lot 27. In my view the proper inference to be drawn is that none of the lots in this area which are not shown were for sale and the 1914 Plan did not purport to show the estate boundaries in this area. It does not persuade me that the 1908 Plan did not show the estate boundaries.

The intention to enure for the benefit of the purchasers

100. I agree with Mr Beglan that this estate has many of the classic features of a building scheme. This is a case where there was a defined estate. It was laid out in lots. I accept, of course, that the lotting was not complete initially. The lotting of the eastern part of the estate appears to have taken place significantly after the initial lotting. Lotting is, as the authorities point out, cogent evidence of an intention that the covenant shall be for the common benefit of purchasers. In a case of partial lotting this inference may not be quite so strong.

101. It is a case where there are substantially common covenants. It is not suggested by Mr Hutchings QC that differences in the number of houses permitted or the value of the prime cost are material. Those differences can plainly be accounted for in the size of the plots.

102. The remaining covenants are substantially the same and appear to derive from a standard form contract. It is true that there are some differences in the wording in the right to vary and no consistency in whether there is an explanation for the need for the vendor's surveyor's approval for the plans. To my mind none of these variations are material. The covenants are substantially the same.

103. I do not accept Mr Hutchings QC's submission that these covenants were taken out solely for the benefit of the vendors. The explanation for the approval of the vendor's surveyor is, as Master Bowles pointed out, an express statement that that covenant was intended to benefit the purchasers. Furthermore I accept Mr Beglan's submission as to the nature of the covenants and the value they provide to the purchasers.

104. It is also, to my mind, of significance that these covenants have been in existence for over 100 years. According to Mr Hunter, the Association has historically been successful in upholding the covenants. Furthermore in the two cases before the Lands Tribunal they have been treated by the purchasers as enforceable by a large number of objectors. A similar point can be made about the compromise agreement. I accept, of course, that in none of these cases was the question of a scheme of development in issue but it is to my mind a factor to be taken into account.

105. I also accept that the provisions relating the right to vary are equivocal and attach no weight to them.

106. When I step back and look at all these facts I am satisfied on the balance of probabilities and thus find as a fact that it was the intention that the covenants should be for the common benefit of the purchasers as well as for the vendor.

107. I am accordingly satisfied that a building scheme is established.

108. It follows that the Claim fails and the Counterclaim succeeds.