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Wilberforce CHAMBERS

WILBERFORCE PROPERTY UPDATE

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BUILDING SCHEMES LAW CLARIFIED *Birdlip v Hunter* [2016]

Martin Hutchings QC

The enforceability of restrictive covenants by and against successors in title of the original parties ('transmissibility') under a 'building scheme' (i.e. a scheme of mutually enforceable covenants covering a defined area) remains one of the more complicated areas of property law. The two familiar prerequisites for a scheme, derived from *Jamaica Mutual Life Assurance Society v Hillsborough Ltd* [1989] 1 WLR 1101, are simple enough to grasp: (i) the clear identification of the scheme area (ii) an acceptance by each purchaser of part of the lands from the common vendor that the benefit of the covenants will enure to the vendor and to others, and that the vendor will enjoy corresponding rights against the other purchasers. But the practical application of the criteria is often more difficult.

The first significant case on building schemes to reach the Court of Appeal for over 20 years *Birdlip Ltd v Hunter and another* [2016] EWCA Civ 603 provides welcome clarification, particularly of the evidential requirements necessary for the establishment of a scheme.

The facts

The question of enforceability arose because Birdlip wished to build two extra houses on a plot on which a house had been built in about 1910 - shortly after a series of covenants had been imposed on the land. Birdlip's neighbours, the Hunters, could not rely on annexation of the covenants. This left them with the possibility of establishing **a building scheme** – as to which, on an initial view, the evidence might have seemed promising for the Hunters.

The Hunters could point to:

- Contemporaneous plans showing the estate. Although the 1910 conveyance of Birdlip's land did not show the defined area within which the scheme was intended to operate, nor did its words allow its identification from extrinsic evidence, nevertheless, two original agreements for sale (which preceded the conveyances of 2 of the other plots within the 'estate') were available. They were dated 1908 and 1914. The reverse of each of these agreements contained a plan and a

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prominent note on the face of the plan, which read 'The Estate Boundaries are edged in red, and the sites as at present staked out for sale are colored (sic) pink'. The 1910 Birdlip conveyance land fell squarely within the estate boundaries as shown on these plans

- Clear evidence from these agreement plans, of the prior lotting of an apparently defined area (prior lotting being one of the badges of a building scheme and often considered to be cogent evidence of an intention for the covenant to be for the common benefit of purchasers)

- The fact that the covenants had been in existence for over 100 years and a local 'Covenants Association' had been successful in upholding the covenants – including in two cases in the 1970s and 1990s, in the Lands Tribunal.

However, an apparent obstacle for the Hunters was that the plan of the estate attached to the 1908 agreement differed significantly from the 1914 agreement plan; yet each was described unambiguously on its face as showing *'the Estate Boundaries'*.

One of Birdlip's key points therefore was that it was now impossible for the Hunters to prove a defined geographical area in which the scheme was to operate. How could it be said that the 1910 conveyance would have been preceded by an agreement containing a version of the 1908 plan, as opposed to a version of the plan as attached to the 1914 agreement? And if it could not now be proved on the balance of probabilities which (if any) of the two available versions of the estate plan was attached to the agreement which must have preceded the 1910 conveyance, how could the Hunters satisfy the primary requirement of showing a known, defined area in which the scheme was to operate?

The Court of Appeal Judgment

The CA granted a declaration that Birdlip's land was not burdened by a building scheme. Lewison LJ found that the major stumbling block to the existence of a scheme was the different definitions of the geographical areas of the 'estate' when comparing the 1908 agreement plan and the 1914 agreement plan. Lewison LJ concluded that the judge's speculation as to the fact that a version of the 1908 plan would have been attached to the 1910 conveyance was *'...no more than speculation which went far beyond permissible inference...'*. Furthermore, the reason why mutuality could not be shown (i.e. whether the plan differences were the result of a mistake or not) was not relevant.

But the decision is not one which turns only on its own particular facts. One of the issues which, pre ***Birdlip***, was unclear, was the extent to which intention could be proved from extrinsic evidence. In a passage which might be said to restrict significantly the possibility of relying on extrinsic evidence, Lewison LJ stated:

> *'25. One would have thought, a priori, that in the case of a scheme of mutual covenants designed to last potentially for ever, that that intention would be readily ascertainable without having to undertake laborious research in dusty archives searching for ephemera more than a century old. In almost all cases to which we were referred where a scheme of mutual covenants was found to exist, the area of land to which the scheme applied was ascertainable from the terms of the conveyance or other transactional documents in question. Conversely where the conveyance or other transactional documents gave no indication of the land to which the scheme applied, no scheme was found.'*

He then reviewed a series of cases starting in 1878, up to the ***Jamaica Mutual*** case in 1989, and concluded:

> *'37. Thus far, the cases in which schemes of mutual covenants have been found to exist have been cases where there is something in the conveyance or other transactional documents to alert a purchaser to the existence of a scheme. However, there are undoubtedly statements in the cases that the existence of a scheme may be inferred purely from the circumstances surrounding the initial sales...'.*

But as Lewison LJ pointed out, the cases in which the wider statements regarding inference had been made, tended to be cases such as auction sales, where the surrounding circumstances at the time of the first sale off, showed that there was *'no point in ...taking restrictive covenants (which he [i.e. the common vendor] will not be able to enforce) unless they were intended to be mutually enforceable by the purchasers...'*. He further doubted whether a scheme could ever be proved by extrinsic evidence alone.

The importance of Lewison LJ's explanation is that it shows that the correct approach to determining the existence of a scheme is to focus primarily on the terms of the conveyance itself – particularly if no other contemporaneous transactional documents are in fact available in relation to the particular plot conveyed.

Thus whilst the textbooks may tell us that whether a scheme exists or not is: a question of fact to be determined from the terms of the titles and all the relevant circumstances surrounding the sales by the common vendor, ***Birdlip*** shows that this does not mean that a scheme can be proved by speculative or indirect evidence, nor by reliance on inference from vague surrounding circumstances and' probably never from surrounding circumstances alone. This clarity is good news for those seeking certainty in this area of law.

The following key conclusions may be drawn from ***Birdlip***

1. The CA was anxious to point out the overriding need nowadays for purchasers of land potentially burdened by a scheme to be able easily to ascertain its existence and geographical extent from the conveyance itself or, other transactional documents. This in a sense chimes with the modern approach to **annexation** of restrictive covenants, exemplified in ***Crest Nicholson v McAllister*** [2003] 1 All ER 46, where Chadwick LJ set out the clear policy reasons of certainty which dictated that s78(1) of the LPA 1925 annexes the benefit of covenants only to such land as the conveyance has identified by express words or necessary implication.

2. Statements in some earlier scheme cases suggesting that the intention of the common vendor to establish a scheme can involve a consideration of a wide range of evidence, must now be viewed with caution. The starting point is always the conveyance itself and the transactional documents - if available. Extrinsic evidence may have a role to play - but it is a secondary one and, it is certainly very doubtful that a scheme can ever be established from extrinsic evidence alone.

3. In considering extrinsic evidence, there is a clear distinction between permissible inferences and impermissible speculation - which those of us who advise clients on enforceability questions should always keep in clear focus.

Martin Hutchings QC

acted for the successful appellant in ***Birdlip v Hunter***

Unreasonable refusal of consent to change of use – *Hautford Limited v Rotrust Nominees*

Decision of HHJ Collender in The Mayor's and City of London Court.

In this case a tenant, Hautford Limited ("**Hautford**"), sought a declaration that its landlord, Rotrust Nominees ("**Rotrust**") was unreasonably refusing consent to the making of a planning application for change of use. Hautford is the tenant of 51 Brewer Street, London W1 ("**the Property**") under a lease of the whole building dated 4th April 1986 for a term of 100 years from 25th December 1985 at a peppercorn rent ("**the Lease**"). Residential use is permitted under the Lease.

The Property is a terraced property in Soho which extends over 6 floors and Hautford sub-let the whole of it to Romanys Limited which trades as an ironmonger from the basement and ground floors. The first and second floors ("**floor 1**" and "**floor 2**" respectively) had until shortly before trial been used for some years by Romanys for storage and as a staff room. The third and fourth floors ("**floor 3**" and "**floor 4**") had been used for residential purposes since the commencement of the Lease albeit that until shortly before trial they were vacant.

Romanys wished to be able to rent out all the upper floors to residential tenants in order to maximise their income from the Property. Residential use is permitted under the Lease. All four floors were refurbished by Romanys

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by the time of trial and had been fitted out for residential use. Floors 3 and 4 were at the time of trial sub-let on an assured shorthold tenancy. However in order to use floors 1 and 2 for residential purposes planning consent had to be obtained for change of use. By clause 3(19) of the Lease the Claimant covenanted:

"...not to apply for any planning permission without the prior written consent of the Landlord such consent not to be unreasonably withheld"

Hautford sought the consent of Rotrust to a planning application for permission to use floors 1 and 2 for residential purposes. Rotrust refused consent on the ground that to give consent may facilitate a claim by Hautford to acquire the freehold of the Property under the Leasehold Reform Act 1967 ("**the 1967 Act**"). Rotrust stated that it wanted to retain control of the Property for estate management purposes as it forms part of a block of properties in Rotrust's freehold ownership called "**the Soho Estate**".

Rotrust alleged that if a claim under the 1967 Act were successful there would be damage to the reversion as it would be deprived entirely of its freehold interest in the Property, and that there would also be an adverse impact on the value of its investment in the Soho Estate.

There are four decided cases which consider the specific question whether a landlord has reasonably refused consent to assignment or alteration on the ground that to give consent would enable the tenant more easily to make a claim to enfranchise. Two of the cases were decided in the Court of Appeal in 1976 without reference to one another (*Norfolk Capital Group Ltd v Kitway Ltd* [1977] 1 QB 506 and *Bickel v Duke of Westminster* [1977] 1 QB 517). In both the Court of Appeal concluded that it was reasonable to withhold consent to assignment on the basis of feared enfranchisement.

The third is a decision of the County Court in *Mount Eden Land Ltd v Bolsover Investments Ltd* which is not reported. The Judge at first instance decided that consent had been unreasonably withheld to alterations to develop residential flats and permission to appeal was refused by Stuart Isaacs QC [2014] EWHC 3523 (Ch). Rotrust objected to Hautford relying on the decision of Mr Isaacs QC as it said it was not properly citable under Practice Direction (Citation of Authorities) [2001] 1 WLR 1001.

The fourth is the decision of HHJ Cowell at first instance in *Henley v Cohen* which is also not reported (dated 28th September 2011) where the Judge concluded that consent had not been unreasonably withheld to alterations to create a flat.

The Judge in the present case considered the general principles applicable to disposition and alteration covenants that are applied when determining reasonableness in the context of applications to the landlord for a change of use. He found that Rotrust had acted unreasonably in withholding consent to the planning application. He considered that the purpose of the covenant was to protect the lessor from the possible effect of an application because as the owner of the land it could be subject to enforcement action if there were a breach of a planning obligation. He accepted the argument that the purpose of the covenant is not to enable the lessor to restrict or limit the permitted residential use under the Lease. He concluded that Rotrust's was seeking to achieve a collateral purpose, i.e. the imposition of a restriction on use that was not negotiated. The original lessee paid a premium for the grant of the Lease as did Hautford on its the assignment. Those premiums will have been negotiated in light of the use to which the tenant would be entitled to put the Property.

He also accepted the argument of Hautford that the decisions in the Court of Appeal cases are properly explained by the fact that the leases in those cases were entered into well before the 1967 Act was passed so it could not have been in contemplation of the parties at the time they were negotiated. In the present case, in leasing the property without a restriction on any part of the building's use for residential purposes, Rotrust must have known that there was a real prospect that a successful claim to enfranchise could be made by a qualifying tenant.

Rotrust has obtained permission to appeal the decision, which can be found here.

Tiffany Scott

acted for successful claimant in Hautford

Noisy Works and Quiet Enjoyment: a salutary tale

Jonathan Seitler QC acted for the successful tenant in Timothy Taylor, instructed by Joanna Lampert of BLP

Reasonableness is a terrific strategy for a number of reasons. First, it is nice to be nice. Secondly, it is hard to expose it as merely a tactic. If you are really being reasonable, there is nothing to uncover. No litigation was ever won with the submission that the Judge should ignore what the other side are saying because they are only being reasonable. Thirdly, it plays well. Very well. Fourth, you never regret it. It is historic stubbornness that is always regretted, not historic reasonableness. And fifth, it contrasts very picaresquely with greed. 'You greedy, me reasonable' is one hell of a starting point in Court.

Timothy Taylor Ltd v Mayfair House Corporation [2016] EWHC 1075 (Ch) was a classic example of rampant reasonableness on one side (mine) and a somewhat contrasting approach on the other. It concerned the vexed question of how the tenant's right to quiet enjoyment and the landlord's duty not to derogate from grant is squared with the landlord's right to carry out works.

Surprisingly, because it is common in modern leases for there to be reserved to the landlord a right to do works and indeed, create a disturbance, in certain circumstances, there is little case law on the point.

The leading case is *Lechouritis v Goldmile Properties* [2003] EWCA Civ 49 where a landlord's duty to repair but in the course of it affect the tenant's business detrimentally ran up against the tenant's right to quiet enjoyment. It was held that covenants pulling in different directions must nevertheless be read together and they must be assessed together *against a criterion of reasonableness*. The landlord must carry out its works taking all reasonable steps to accommodate the tenant's occupation and minimise disturbance to the tenant.

Timothy Taylor Ltd builds on that. The landlord was held not to have struck the balance correctly: it had not discussed its proposals adequately with the tenant nor offered any rental discount during the currency of the works. Indeed, the landlord had rejected a proposal from the tenant for a rent reduction, the evidence being that he took the tenant for the meeting to discuss it to a club where instead of discussing the rent reduction he instead was alleged to have called over a third party, which rather inhibited negotiation about rental levels and works.

The moral of the story for landlords is clear: if you are going to do works, it is not going to be enough to just rely on a right to do them under the lease. Instead you have to *be reasonable*. You have to take the tenant out for a serious discussion. And not be distracted. With plans. And diagrams. And a timeline of works. And you have to listen to concerns. And act on them. Throughout the works. And reduce the rent. 20% for painful levels of interruption is good. For the currency of the works. And you have to keep listening. And acting on what you hear. Nicely.

Then you do your works, make vast amounts of noise, create swathes of dust, hugely increase the value of your building and sit back and rely on your right to build.

It should work. If you are nice about it.

Jonathan Seitler QC

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Construing restrictive covenants over registered land

The decision in *Bryant Homes Southern Limited v Stein Management Limited* [2016] EWHC 2435 (Ch). Joanne Wicks QC appeared for the Claimants.

The decision in *Bryant Homes Southern Limited v Stein Management Limited* [2016] EWHC 2435 (Ch) shows how the usual principles of interpretation are modified in the context of restrictive covenants over registered land.

In essence, it appears that the inclusion of a restrictive covenant in a registrable document has the effect of narrowing the admissible factual background, so that information which is only accessible to the original parties – and crucially not accessible to a future owner or occupier viewing the record of the covenant at the Land Registry – is given little or no weight in the interpretative process.

The facts of Bryant Homes

The case concerned agricultural land in Oxfordshire which had been owned by a Mr Boggis. In 1993, Mr Boggis sold two parcels (known as the Green Land) to the Claimants, a consortium of property developers, with the intention that they would seek planning permission for commercial or residential development. If they were successful, the Claimants would pay Mr Boggis a share of the uplift in value, and in due course would develop the Green Land in accordance with the planning permission.

On 15 December 1993, the parties executed a conveyance of the Green Land ("the 1993 Conveyance"), and by clause 3 the Claimants covenanted with Mr Boggis "and his successors in title the owners or occupiers for the time being of the adjoining land" (known as the Red Land and the Blue Land) that the Claimants would not use the Green Land "for any purpose other than agricultural".

The same day, the parties entered into a further agreement ("the 1993 Agreement"). The Claimants agreed to seek planning permission for residential or commercial development of the Green Land, notwithstanding the restrictive covenant in the 1993 Conveyance. Mr Boggis agreed to release that covenant if and insofar as qualifying planning permission was obtained, once any overage payment (as calculated under the 1993 Agreement) had been paid.

Over the years, Mr Boggis sold parts of the Red and Blue Land to various purchasers. A small strip was sold to Stein Management Limited in June 2013, which thereby purported to have obtained the benefit of the restrictive covenant as against the Claimants.

In February 2015, the Claimants issued Part 8 proceedings for a declaration that no person (including in particular Stein Management Limited) now had the benefit of the restrictive covenant, and a consequential order directing its removal from the charges register of the Claimants' title. Chief Master Marsh directed that the question of the nature and transmissibility of the restrictive covenant be tried as a preliminary issue, and it is that preliminary issue with which this case was concerned.

The parties' submissions

The parties all agreed that the test for when the benefit of a restrictive covenant may run with the land was effectively the same at law and in equity: the covenant had to "touch and concern", "benefit" or "accommodate" the land (see for example *P & A Swift Investments v Combined English Stores Group* [1989] AC 632 at 639ff).

The Claimants submitted that the 1993 Conveyance had to be read alongside the 1993 Agreement made simultaneously between the same parties: otherwise, form would triumph over substance. Read together, it was clear that the covenant in the 1993 Conveyance was no more than a means of securing the due payment of the overage in the 1993 Agreement. The entire arrangement was about the payment of money to Mr Boggis, and as such did not "touch and concern" the Red and Blue Land. To hold otherwise would be to disregard the commercial reality of the scheme.

The Defendants submitted that the covenant – as expressed in the 1993 Conveyance – was in entirely conventional terms and was precisely the kind of covenant which was capable of benefiting the land. The relevant words from the 1993 Conveyance appeared on the charges register of the Claimants' title. The court should be slow to depart from the plain meaning of those words by reference to an unregistered and comparatively invisible provision in the separate 1993 Agreement.

The decision of Norris J

Norris J held that the conveyance *had* created a restrictive covenant which "touched and concerned" the Red and Blue Land and *was* therefore capable of benefiting Mr Boggis's successors in title.

Norris J characterised the question of "touching and concerning" as one of construction, starting from the conventional rule that "the meaning of the contract or conveyance is that which would be conveyed to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of entering the document".

However, applying the Court of Appeal's judgment in *Cherry Tree Investments Ltd v Landmain Ltd* [2012] EWCA Civ 736, he held that the background knowledge would include the fact that the wording of the 1993 Conveyance would be recorded at the Land Registry against the title to the Green Land, and that future owners or occupiers of that land would see that wording, but would have no means of knowing what the 1993 Agreement said. They would have no access to any of the material on the basis of which the Claimants said the covenant was merely intended to secure the payment of money.

As a result, he said, "the reasonable reader would understand that the true nature of the covenant was more likely to be set out in the registered document of title and would not treat the 1993 Agreement as containing material of sufficient weight entirely to recast the nature of the obligation as so disclosed".

Significance of the decision

Norris J's decision is unusual because – contrary to the law's general approach in matters of interpretation – it emphasises the literal wording of the covenant in favour of the commercial reality of the parties' scheme, and accords significant weight to the particular form the parties chose for their agreement.

The practical effect is to increase the chance of enduring proprietary rights being created unintentionally. This has the potential to provide additional opportunities for neighbouring landowners to extract undeserved ransom-payments, contrary to the general policy of the law (the ability to extract a ransom is, for example, not a "practical benefit" for the purposes of resisting discharge under section 84(1)(aa) of the Law of Property Act 1925: see *Stockport MBC v Alwiyah Developments* (1983) 52 P&CR 278).

Moreover, Norris J's approach means that the parties' overage scheme is unworkable from both sides. Mr Boggis could not – at least without negotiating a series of express agreements – effectively retain control over the covenant, and so his ability to release it in return for the agreed overage was undermined. Likewise, the Consortium could not count on being able to implement the planning permission on payment of the agreed overage. This is significant because the use of restrictive covenants to secure overage payments is far from unusual; *Bryant Homes* shows that this practice does not work for either party to the arrangement.

The decision in *Bryant Homes* is important for both transactional lawyers and litigators. For transactional lawyers, it highlights the danger of structuring a deal so that the outward – and importantly, *registered* – appearance is different from the private reality. For litigators, it clarifies how the courts will approach questions of construction where a document is registered.

The Claimants have applied for permission to appeal.

Joseph Steadman

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Human Rights & Private Sector - *McDonald v McDonald*

[2016] UKSC 28; [2016] 3 WLR 45

McDonald v McDonald was a far from typical claim by a private landlord to recover possession from their tenant by means of a *s21* notice. Nonetheless, the Supreme Court took the opportunity to make clear that the individual circumstances of the tenant of a private landlord will never be unusual or unfortunate enough to grant them a defence to a *s21* possession claim on the basis of their human rights under Article 8 of the ECHR. This was an orthodox and unsurprising conclusion, which dovetails with the court's consideration of the position with regard to public landlords in *Pinnock* [2010] UKSC 45; [2011] 2 AC 104, and *Powell* [2011] UKSC 8; [2011] 2 AC 186.

The single, unanimous judgment gave three reasons for this conclusion.

The first was that that, as a matter of first principles, the court could not be required to perform a balancing exercise between the tenant's Article 8 rights, and a private landlord's rights under Article 1 of the First Protocol to the ECHR, in each and every case where it, as a public authority, was asked to make an order for possession. To even allow for the possibility of this would (a) allow private citizens to re-write contractual bargains that they had struck with each other on the basis of the ECHR; in circumstances (b) where Parliament had legislated as to the effect that a *s21* notice was to have on that contract and was therefore to be taken to have itself determined the proper balance to be struck between the parties' respective Convention rights; and (c) where this would operate capriciously as between private landlords who were and were not able to recover possession without recourse to the courts. There being no support in the Strasbourg jurisprudence for the contrary position, the Supreme Court effectively dismissed the appeal on the basis of this first principles approach.

The second reason was that, even if wrong as to the above, it was not possible to read the underlying legislation in such a way as to allow for such a proportionality exercise to be conducted by the court. The only other option open to the court was to issue a declaration of incompatibility to Parliament in relation to the legislation. It appears from what is said at [45] that the tenant did not advance any argument seeking this. Nonetheless, at [45] and [70], the court concluded that the balance struck by Parliament in the legislation was compatible with the parties' respective rights under the ECHR.

The third reason was that, even if wrong as to both of the above, the circumstances of the particular tenant were not unfortunate or exceptional enough to make it likely that any proportionality exercise would have resulted in her being given more than the six weeks' time provided for under the existing legislative provisions for exceptional hardship.

In this respect it is notable that: (a) Miss McDonald suffered from a severe medically diagnosed personality disorder such that she had been unable to work for the last 17 years, and had previously been evicted from two public sector tenancies; (b) there was medical evidence as to the difficulties that she would have in finding alternative housing, the likelihood that she would become homeless, and the impact that this would have on her condition; (c) Miss McDonald's parents had bought the house for her in light of her condition and the claim was being brought by receivers appointed by their lender; and (d) the court accepted that the rent was always up to date, and that the arrears on the mortgage that the receivers sought to enforce were insubstantial.

If, *pace* Lord Denning MR in *Re Vandervell (No. 2)* [1974] Ch. 269, at 322B-C, hard cases used to make bad law, then it would appear that they do not any more.

Jamie Holmes

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