UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2022] UKUT 325 (LC) UTLC Case Number: LC-2022-14

**Location: Royal Courts of Justice, Strand,
London WC2A 2LL**

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – ENTITLEMENT TO BENEFIT – requirements for a building scheme – the need for a defined area – intention for covenants to benefit the entire estate

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

BETWEEN:

PETER AND SUSAN LIVETT

Applicants

-and-

**MR AND MRS S HENNINGS (1)
MR AND MRS R MURDIN (2)**

Objectors

**Re: 2 Woodland Way,
Petts Wood,
Orpington,
Kent, BR5 1ND**

**Judge Elizabeth Cooke
Hearing: 30 November 2022
Decision Date: 7 December 2022**

Mr Kevin Leigh for the applicants
The objectors were not represented

The following cases are referred to in this decision:

Birdlip v Hunter [2016] EWCA Civ 603
Elliston v Reacher [1908] 2 Ch 374
Lund v Taylor (1976) 31P & CR 167
Reid v Bickerstaff [1909] 2 Ch 305

Introduction

1. Mr and Mrs Livett's property is in Petts Wood, and like the surrounding houses is subject to a covenant requiring them not to build more than one dwelling house on their land and not to cause a nuisance to their neighbours. They have planning permission to demolish their house and build two new ones, and to that end they have applied to the Tribunal to discharge or modify the restrictive covenants insofar as they prevent the planned development. Mr and Mrs Hennings and Mr and Mrs Murdin wish to oppose the application, and this is the Tribunal's decision on the preliminary issue as to whether they have the benefit of those covenants so that they are entitled to object.

2. The applicants were represented by Mr Kevin Leigh of counsel, and Mr Henning and Mr Murdin spoke for the objectors. I am grateful to them all for their arguments, and to the objectors for their helpful bundle and for their patience with my endeavours at the hearing to explain some of the relevant law. I understand entirely why it has been their sincere belief that there is a building scheme that enables them to enforce the covenants, and I hope that our discussions at the hearing together with this judgment may help them to understand why, for the applicants' property, that is not the case. I repeat what I said at the hearing: this judgment is not a decision about any other property.

Background: Basil Scruby and the development of Petts Wood.

3. I quote from Mr Murdin's skeleton argument:

> "Petts Wood East … was developed as a garden suburb in the late 1920s and early 1930s. …
>
> The scheme of development of Petts Wood East is set out in *A History of Pets Wood* by Peter Waymark …, which describes how Basil Scruby oversaw the development of a garden suburb for London commuters. [He] Obtained an option over the relevant land, drew up a plan for the new garden suburb, divided the building land up into lots, organised an initial auction of building lots and then sold further lots as the development progressed."

4. Mr Waymark's book describes Mr Scruby as a "risk-taker" who took an option on 400 acres, comprising the ancient Town Court and Ladywood estates, bought it in sections, and then sold the land in lots to builders. The whole area was bisected by the railway running north-west to south-east; Mr Scruby negotiated for and invested in the construction of a railway station which enabled him to create a rural suburb for commuters, only 13 miles and a 22-minute train ride from central London.

5. Petts Wood East, east of the railway line, was the first of the two areas to be developed. Mr Scruby designated land for a shopping centre and a recreation ground in Petts Wood East, and donated land for a church. Restrictive covenants imposed on the residential lots ensured a spacious development with plenty of trees, building lines were set back from the road, and as Mr Waymark puts it "the houses underlined the idea of '*rus in urbe*' by evoking the

idealised country cottage", many of them built in a mock Tudor style with dark beams on white walls, elaborate porches and gothic features.

6. The initial auction referred to above took place in 1928. 39 lots were sold; the rest of Petts Wood East was sold in sections over the next four or five years. Petts Wood West, according to Mr Waymark, was developed separately and building did not start until 1933. The applicants' and objectors' properties are all within Petts Wood East.

The restrictive covenants and the objectors' properties

7. The covenants that hamper the applicants' proposed development were imposed by a conveyance dated 22 October 1931. The sale was of the applicants' plot only, by Mr Scruby's company, Chislehurst and Orpington Estates Limited; the conveyance effected a sale to three individuals, Messrs Lupton, Seel and Sutcliffe, of a single address in Lancashire and described as "Builders", and a sub-sale to Elizabeth Margaretta Dennis. Title is now registered, and the burden of the covenants noted against the title, so there is no dispute that they burden the property in Mr and Mrs Livett's ownership.

8. Clause 2 of the conveyance says this:

> The subpurchaser to the intent and so as to bind (so far as practicable) the premises hereby assured into whosesoever hands the same may come and to benefit and protect the residue of the Estate of the Vendors in the Parishes of Chislehurst and Orpington as shown on the Estate Plan of the said Estate hereby covenants with the Vendors to observe and perform the stipulations specified in the Third Schedule hereto …"

9. The covenants that Mr and Mrs Livett want to have discharged or modified are in the Third Schedule. They are given, according to the clause set out above, for the benefit of the residue of the Vendors' Estate, which means the unsold land still in the Vendors' hands.

10. Mr and Mrs Hennings, the First Objectors, live at 7 Towncourt Crescent, which backs on to Woodland Way so that their property is behind the applicants'; their register of title indicates that their property was sold by Chislehurst and Orpington Estates Limited on 5 July 1929. Mr and Mrs Murdins' property, 3 Towncourt Crescent, was sold by the company on 3 December 1928. So by the time the applicants' restrictive covenants were created, the objectors' property no longer formed part of the "residue of the Estate of the Vendors", and so the covenants were not made with and were not expressed by clause 2 to be for the benefit of the objectors' predecessors in title.

11. Accordingly the objectors do not have standing to object to the discharge or modification of the covenants unless they can demonstrate that there is a building scheme. That is a technical term, a lawyers' term of art; a building scheme is created if certain conditions are satisfied, and its effect is that all the landowners within a defined area have the burden of similar covenants and are able to enforce the covenants against each other, regardless of the date at which each plot was sold by the original vendor.

The requirements for a building scheme

12. Essential to the objectors' case is that in the late 1920s and early 1930s everyone knew what Mr Scruby was doing, they knew he had an option on 400 acres, and they were aware of sales particulars that spoke of mutually enforceable covenants. We shall come back to the sales particulars later. My point here is that whatever everyone knew, or might have known, and whatever we can surmise from the historical evidence now available, the legal requirements for the creation of a building scheme are strict. The Tribunal is bound by well-established case law and by what the Court of Appeal has said very recently on the subject. However reasonable and predictable it might be for there to be a building scheme, unless the legal requirements are met in respect of the applicants' property the Tribunal is not able to find that there was a building scheme so far as this particular property is concerned.

13. The requirements of a building scheme were first expounded in *Elliston v Reacher* [1908] 2 Ch 374 at p.384; the latest authoritative statement of the doctrine is found in *Birdlip v Hunter* [2016] EWCA Civ 603. At paragraph 2 Lewison LJ said this:

> "2. The characteristics of such a scheme are that:
>
> i) It applies to a defined area.
>
> ii) Owners of properties within that area have purchased their properties from a common owner.
>
> iii) Each of the properties is burdened by covenants which were intended to be mutually enforceable as between the several owners.
>
> iv) The limits of that defined area are known to each of the purchasers.
>
> v) The common owner is himself bound by the scheme, which crystallises on the occasion of the first sale of a plot within the defined area, with the consequence that he is not entitled to dispose of plots within that area otherwise than on the terms of the scheme.
>
> vi) The effect of the scheme will bind future purchasers of land falling within the area, potentially for ever."

14. Point (vi) of that list describes the effect of a building scheme, whilst the first five points set out the conditions that have to be met for there to be one.

15. I can deal swiftly with point (ii) because it is not in dispute that the applicants' property and the objectors' properties were all formerly in the ownership of the Chislehurst and Orpington Estates Limited.

16. But the objectors' difficulties arise first from points (i) and (iv) – the scheme must apply to a defined area which is known to each of the purchasers – and from point (iii), the requirement for an intention that the covenants be mutually enforceable. I did not hear argument about point (v) and I think the original common owner's obligation to abide by the scheme could be inferred if the other conditions were met. So I address now the two issues that the objectors have to tackle, namely the defined area and the intention of mutual enforceability.

The defined area

In *Reid v Bickerstaff* [1909] 2 Ch 305 at 319 Cozens-Hardy MR (quoted by Russell LJ in *Lund v Taylor* (1976) 31P & CR 167 at 174) said that for a building scheme to exist 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 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. These 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. There must be notice to the various purchasers of what I may venture to call the local law imposed by the vendor upon a definite area." (emphasis added)

17. So the objectors must be able to identify the defined area to which their claimed building scheme applies, and to prove that the purchaser of 2 Woodland Way in 1931 knew what that area was.

18. The plan attached to the 1931 conveyance shows the plot conveyed and the three properties to the north-east of it only. It is said in cluse 1 of the conveyance that the plan "shall for the purpose of construing the stipulations and restrictions contained in the Third Schedule hereto be deemed to be an extract from the Estate Plan of the Vendors' Estate in the parishes of Chislehurst and Orpington". There is a reference in the First Schedule, which describes the property conveyed and rights conveyed with it, to roads laid out by the Vendor "and shown on the said Estate Plan", and in the Second Schedule to points on that plan which mark the route of a sewer. The Third Schedule, which contains the restrictive covenants, includes some references to the Estate Plan; it states at clause 9 that "the streets or roads … shown on the Estate Plan are not included in this sale", and at clause 10 it refers again to the "roadways shown on the Estate Plan".

19. So there was an Estate Plan to which the conveyance refers, but which plan it was is unknown. There are a number of candidates. There was a plan annexed to the auction particulars in 1928, which shows the lots to be auctioned. They do not include the applicants' property (which is agreed to have been part of lot 64 and not included in the auction); the area on which the applicants' property was later built is shown as woodland. A sales prospectus from 1932 shows lots numbered up to 64, all in Petts Wood East. Neither of these plans shows the boundary of the land owned by Chislehurst and Orpington Estates Limited. Nor is there any other evidence as to how much land the company owned in 1928, 1931 or 1932. Neither the 1928 plan nor the 1932 plan depicts any lots marked out in Petts Wood West, which is all still fields and woodland.

20. There is a plan of 1933 depicting the roads in both Petts Wood East and Petts Wood West; the plan is in black and white in the bundle and I do not know if a coloured version exists.

Mr Hennings and Mr Murdin showed me where the boundary of the Town Court and Ladywood Estates was indicated; but the line they say is the boundary is not indicated as a boundary either by a label or by being a thick line. The purpose of the plan seems to have been to show the position of the show houses, which are marked on it; and an area near the station is labelled "Estate Office for Full Particulars". Mr Hennings and Mr Murdin are confident that this was the Estate Plan referred to in the 1931 conveyance, but I do not know the source of that confidence. I have to say that up until the point when this plan was produced I had understood the objectors' case to be that the defined area was Petts Wood East, but in discussion around this plan they expressed the view that it was the whole of Mr Scruby's 400 acres.

21. It is accepted that Mr Scruby had an option over the whole 400 acres, but the Tribunal has been shown no evidence as to how much land Mr Scruby's company owned in 1931. It is impossible to say what the purchaser in 1931 would have supposed was the area to which the building scheme would apply: it might have been Petts Wood East, it might have been Petts Wood as a whole, it might even have been lot 64 alone.

22. In *Birdlip v Hunter* [2015] EWHC 808 (Ch) at first instance HHJ Behrens said this:

> "31. If the conveyance expressly refers to a plan, but the plan has been lost, the court may well infer that the lost plan sufficiently identified the land to which the scheme of mutual covenants applied…
>
> 32. The fact that there is no map or plan in the conveyance itself of the area to be affected is not necessarily fatal to the existence of a scheme of mutual covenants if the verbal description of the area to which it applies can be identified by extrinsic evidence. But this is no more than a reflection of the ordinary rules of evidence applicable to conveyances."

23. This is a case where the conveyance referred to a plan but it can no longer be identified and it is not possible to identify the area to which it referred. It is significant, to my mind, that the "Estate Plan" was referred to in general terms in the conveyance and not attached to it; given that Mr Scruby had an option over a large area and was actually buying the land in parcels and in stages it is inevitable that "the Estate of the Vendors" was something of a moving target. At any rate the requisite "defined area" is not identified in the conveyance nor identifiable from extrinsic evidence.

24. I refer again to *Birdlip* in the Court of Appeal, where Lewison LJ said this:

> "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 the 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."

25. In the present case the conveyance gives us no help, and there are no other "transactional documents" available. The careful research of the objectors has uncovered plans, nearly a century old, any of which might have been the ones referred to in the 1931 conveyance,. But even if someone with the local knowledge of Mr Murdin and Mr Hennings can trace the boundary of the option land along lines that appear on the 1933 plan, the boundary is not marked as such, nor is there anything to indicate what the Chislehurst and Orpington Estate Limited owned either in 1933 or at any other time. So even if the other conditions for a building scheme are met, there is no way to understand what was the defined area to which it applied.

The intention of mutual enforceability

26. The other condition that causes difficulty for the objectors is the requirement that "Each of the properties is burdened by covenants which were intended to be mutually enforceable as between the several owners" – point (iii) of Lewison LJ's formulation in *Birdlip* (paragraph 13 above). In *Elliston v Reacher* the same point is made in different words at p.384 of the report:

> "it must be proved…
>
> (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 bythe vendor; and
>
> (4) that both the plaintiff 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."

27. So the objectors need to prove that the covenants were given to benefit the whole of the estate, rather than simply for the land that the Vendor then retained.

28. Much of the objectors' argument was directed to showing that the whole of Petts Wood East is subject to restrictions to the same effect, by reference to the titles to the surrounding properties. The objectors' properties are each burdened with single dwellinghouse covenants and covenants not to cause a nuisance, not in the same words as those that bind the applicants' property but to the same effect. I have no difficulty in inferring that the vast majority, probably all, the houses in Petts Wood East, were burdened by covenants to the same effect; I have no evidence about properties in Petts Wood West. The imposition of similar covenants on all the properties in an area sold or developed by the same person or company is commonplace but that does not mean that there is a building scheme; for a building scheme, as well as a defined area, there must be an intention that the covenants be mutually enforceable. The difficulty for the objectors is seen in clause 2 of the 1931

conveyance which states that the covenants are given for the benefit of the Vendor and of the residue of its land.

29. Mr Hennings and Mr Murdin sought to rely upon the provision in clause 2 that the subpurchaser made her covenants with the intent to bind "the premises hereby assured into whosesoever hands the same may come". Mr Hennings in his skeleton arguments says that the words show that "The aim is not therefore not simply to benefit and protect the residue of the Vendors Estate". That is not correct; the point of these words is to ensure that the burden of the covenants sticks to the land of the covenantor, 2 Woodland Way, "into whosesoever hands" it may come (so that the applicants remain bound by them); these words say nothing about who has the benefit of the covenants. Clause 2 says nothing to indicate the presence of a building scheme.

30. Mr Hennings and Mr Murdin pointed to other provisions in the 1931 conveyance which, again, they said pointed to mutual enforceability. They referred to clause 3(a), whereby the sub-purchaser and her successors undertook to perform the covenants in the Second Schedule "with reference to the roads drains and sewers and otherwise in respect of the said Estate of the Vendor". That does not help them because the covenants with which the application is concerned are in the Third Schedule not the Second; and in any event these words say nothing about mutual enforceability.

31. The nearest the objectors can get to an expression of benefit for the whole of Petts Wood East (or indeed of Petts Wood East and West, depending upon the extent of the scheme) is in the terms of the second of the two covenants sought to be discharged or modified, in paragraph 3 of the Third Schedule :

> "No act or things shall be done or be permitted to be done on the property hereby assured or in or upon any building erected thereon which may be or grow to be an annoyance nuisance damage or disturbance to the Vendors or to the owner or tenant of any other plot or part of the Estate."

32. I agree that this is a covenant given for the protection of the whole "Estate". It cannot by itself constitute a building scheme because the idea of estate-wide benefit is expressed only in this single paragraph of the Third Schedule. The Schedule goes on to require the Vendor's approval laying out of roads (paragraph 3), for fences and gates (paragraph 6) and for the plans and specifications of any houses (paragraph 7) – all of which point to the enforceability of these covenants only by the Vendor itself (as Lewison LJ pointed out in *Birdlip* at paragraph 41(vii)).

33. Paragraph 15 of the Third Schedule says:

> "In the foregoing stipulations and restriction … "the Vendors" wherever this context so admits or requires means and includes the Vendors their successors and assigns the Owner or Owners for the time being of the unsold portion of the property of the Vendors."

34. Again this does not assist the objectors because it extends the expression "the Vendors" only to the company's successors in title for the parts of the estate then unsold. So it cannot include, for example, the objectors themselves. The wording is consistent with – and might be thought to be an insistence upon – the absence of a building scheme, by excluding the owners of the plots already sold.

35. So the conveyance is of no help. I am in the same position as was Lewison LJ in *Birdlip* when, having examined the conveyance, he said:

> "42. In the light of these considerations I would provisionally conclude that no scheme has been established. What, then, of the extrinsic evidence? I do not think that we were shown any case which binds us to hold that the existence of a scheme can be established purely on the basis of extrinsic evidence, now over a century old. That would, in my judgment, be a very unsatisfactory state of affairs given that the existence of enforceable restrictive covenants is potentially a perpetual interference with the right of successive property owners to do as they please with their own property. Assuming, however, that the existence of a scheme can be proved by such evidence alone it would, in my judgment, require cogent evidence to do so."

36. So I turn with caution to the extrinsic evidence, noting that it would have to be cogent to establish an intention that the covenants be enforceable across the estate (whatever that estate is).

37. The objectors say that the applicants' property, and their own, formed part of the Petts Wood estate and that the sales particulars for the auctions of lots within the estate as well as the conditions of later sales stipulated that the purchaser was to enter into covenants for the benefit of all the lots.

38. So I turn to the documents the objectors have produced.

39. The auction particulars for the 1928 auction include the "Conditions of Sale"; one would expect them to become the terms of the contract at the fall of the hammer, albeit with some changes because some clauses apply to specific lots, and then to be reflected in the terms of the conveyances that were drafted following those contracts. Condition 2 states:

> "The Estate has been laid out for building in accordance with a general scheme applicable to the whole Estate shown on the plan as to such parts thereof as are already lotted as lotted and as to the other parts thereof as the Vendors shall lot them and is offered for sale as a building estate subject to and with the benefit of the foregoing stipulations and restrictions."

40. Those "foregoing stipulations and restrictions" are set out in a separate schedule under that heading. It makes provision for building lines, fencing, cultivation of trees and so on. It requires that only private dwellinghouses be built except on specified lots – but it does not require one house per lot because the lots could be purchased and then divided into several house plots. However there are requirements for the minimum cubic capacity and minimum

value of the houses on each lot, which will have ensured the spacing and size that the vendor had in mind for the design of the overall estate. I agree that in light of Condition 2 the purchaser might have expected the contract and conveyance to contain provision for covenants to be given to benefit the whole estate, although Condition 2 itself appears to be a general description of what is going to happen rather than to be intended as a contractual term.

41. The purchaser's expectation might well be met by Condition 11, which says:

> "The Purchaser of each lot, plot or part of the Estate shall be bound to observe and perform for the benefit and protection of each of the other lots, plots or parts of the Estate … such of the stipulations and restrictions as are applicable to the lot, plot or part purchased. And the Conveyance of each lot, plot or part shall contain separate covenants by the Purchaser and the Vendor and every other Purchaser whose lot shall have been previously conveyed to observe and perform the said stipulations and restrictions …"

42. I accept that that indicates an intention for the "stipulations and restrictions" to benefit the whole estate rather than merely the unsold parts at any time.

43. That does not get the objectors home for the following two reasons.

44. First, where a contract states that the conveyance will contain covenants by the purchaser, the vendor, and the prior purchasers of other lots one then expects to see a conveyance containing such covenants by those several persons. None has been produced. The objectors' own properties were part of Lot 1 and were sold at the 1928 auction. The bundle contains an abstract and a copy of part of the conveyance 1929 conveyance of 7 Towncourt Crescent by the Chislehurst and Orpington Estates Limited; there are no such covenants in that conveyance. It contains only covenants by the purchaser with the vendor and its successors in title and they contain no statement to the effect that covenants are to be enforceable across the whole estate.

45. The contracts for the sale of the objectors' plots have not been produced. If this were a dispute about whether the objectors' properties or any others sold at the 1928 auction was or is part of a building scheme then the Tribunal might be in a position to decide whether the extrinsic evidence in the form of the sales particulars, and contracts if produced, could establish an intention to benefit the whole estate (however defined). But the second reason why the 1928 particulars do not assist the objectors is that the application relates only to 2 Woodland Way, for which neither sales particulars nor contract have been produced.

46. The applicants' property was not sold in the 1928 auction and it was already sold when the 1932 prospectus was produced. The 1931 conveyance related to a single property only. The bundle contains the conveyance of the house next door, 4 Woodland Way, which is to the same builder purchaser with a different sub-purchaser and on – so far as I can tell – the same terms as 2 Woodland Way. It may be that the extensive conditions used for the auction and other sales of large groups of lots were not the transactional documents used by Chislehurst and Orpington Estates Limited for the sale of a part of a lot that was big enough just for one

house. We shall never know. But at any rate the sales conditions of 1928 and 1932 cannot be relied upon as evidence of the terms upon which and the intentions with which 2 Woodland Way was purchased.

47. The objectors cannot come close to providing the cogent extrinsic evidence that would be needed to show that 2 Woodland Way was purchased with the intent that the sub-purchaser's covenants would be enforceable by all the properties on the estate (whatever that estate was).

Conclusion

48. The objectors have not been able to prove that there is a building scheme such that they have the benefit of the covenants sought to be discharged or modified in this application. There is no defined estate. And there is no evidence that the covenants "were intended to be mutually enforceable as between the several owners" as the point is put in *Birdlip* (paragraph 13 above), nor that the covenants "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" as it is put in *Eliiston v Reacher* (paragraph 26 above).

49. That does not mean that the covenants will automatically be discharged or modified. The Tribunal has to be satisfied that it has jurisdiction to do so, which will be the case if the conditions set out in section 84 of the Law of Property Act 1925 are satisfied, and has then to decide whether to exercise its discretion to do so. The Tribunal will now give directions to the applicants about the determination of their application.

Upper Tribunal Judge Elizabeth Cooke

7 December 2022

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.