Neutral Citation Number: [2018] EWHC 217 (Ch)

Case No: CH-2017-000098

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/02/2018

Before :

MR JUSTICE ZACAROLI

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Between :

(1) GEORGE ALEXANDER KHOURY	**Claimants**
(2) SUSAN HILARY KHOURY	
- and -	
TINA LORRAINE KENSELL	**Defendant**

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Martin Hutchings QC (instructed by **William Graham Ltd**) for the **Claimants**
Brie Stevens-Hoare QC, Lina Mattsson (instructed by **Leslie Trevor & Co**) for the **Respondent**

Hearing dates: 16 January 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE ZACAROLI

Mr Justice Zacaroli **:**

Introduction

1. For some years before 1996, Upper Tolhurst Farm in East Sussex had been in the ownership of the Mulleneux family. In 1996, three members of the family (the "Mulleneux Children") offered for sale, as a whole or in three lots, Upper Tolhurst Farmhouse (the "Farmhouse") and two adjoining properties, an oasthouse (the "Oasthouse") and a barn (the "Barn"). The Oasthouse and The Barn were offered for conversion into dwellings. At the same time, two additional lots (Lots 1A and 2A), comprising land adjacent to, respectively, the Farmhouse and the Oasthouse, were offered for sale by the parents of the Mulleneux Children.

2. The Claimants purchased the Oasthouse and Lot 2A, completion occurring on 25 October 1996. The Defendant purchased the Barn, completing on 29 November 1996. The Farmhouse and Lot 1A were sold to a Mr and Mrs Henderson, completion also taking place on 29 November 1996.

3. The transfer of the Barn from the Mulleneux Children to the Defendant contained various covenants, including (by clause 4.2.4) a covenant to "…comply at all times with all planning conditions and requirements of the Local Planning Authority or any other statutory or other competent authority relating to the Property."

4. The Claimants contend that the Defendant has failed to comply with that covenant. By a Claim Form issued in March 2012, and Amended Particulars of Claim dated 25 May 2015, they seek a declaration that the Defendant is in breach of covenant, and an order requiring the Defendant to demolish that part of the Barn that does not comply with planning permission.

5. The only basis advanced in the Amended Particulars of Claim for the contention that the Claimants were entitled to enforce the restrictive covenant in clause 4.2.4 of the transfer from the Mulleneux Children to the Defendant was that the sale of each of the Farmhouse, the Oasthouse and the Barn was effected pursuant to a building scheme.

6. On 28 October 2016 the Defendant issued an application under CPR Part 24 to strike out the claim for breach of covenant on the grounds that it had no real prospect of success. The application came before HHJ Simpkiss, sitting in the County Court in Brighton on 20 March 2017. In an extempore judgment he struck out the claim for breach of covenant, and gave directions in relation to the remainder of the claim (consisting of a claim in nuisance).

7. The Claimants appeal against that decision, pursuant to permission granted by Birss J on 11 October 2017. The skeleton argument filed by the Claimants in respect of the appeal confined the scope of the argument to the contention that the judge was wrong to find that there was no real prospect of the Claimants establishing the existence of a building scheme.

8. On 10 January 2018, shortly before the hearing of the appeal, the Claimants emailed to the Defendant draft amended grounds of appeal, draft re-amended particulars of claim and further documents to be included in the appeal bundle. The Claimants served a supplemental skeleton argument on 11 January 2018. By the draft amended grounds of appeal and the supplemental skeleton argument, the Claimants sought to argue (as their, now, primary ground of appeal) that the judge failed to appreciate that the Claimants were

entitled to enforce the restrictive covenant in clause 4.2.4 of the transfer between the Mulleneux Children and the Defendant by virtue of s.56 of the Law of Property Act 1925. The Claimants wish to argue that on the true construction of the conveyance to the Defendant, the words included in the definition of the Seller, "successors in title the owners from time to time of the Retained Land" includes them. It is not surprising that the judge had not appreciated this, given that it was neither pleaded nor argued before him. In reality this was not an additional ground of appeal, but an attempt to amend the claim so as to add an entirely new claim. In light of the fact that (i) I am exercising an appellate jurisdiction, (ii) the new claim potentially raised questions of fact (concerning the matrix of facts against which the transfer was to be construed); (iii) the Defendant had had no proper opportunity to investigate and respond to this new claim; and (iv) the appeal was listed for two hours, which was already a substantial underestimate, I refused to entertain an application to amend the grounds of appeal. The Claimants are free (irrespective of the outcome of the appeal on the basis of the claim as originally put) to apply to the County Court for permission to amend the claim (and the Defendant remains free to advance such objections as she may have to that application).

9. The Claimants nevertheless wished to rely on the new documents that were added to the appeal bundle in support of their appeal as originally framed. I deal with the application to adduce fresh evidence further below.

Building Schemes

10. Where a building scheme exists, restrictive covenants given by the purchasers on the sale of each plot are enforceable by the owner for the time being of any plot on the estate. The characteristics of a building scheme were identified in *Birdlip Limited v Hunter* [2016] EWCA Civ 603, per Lewison LJ at [2]:

> "(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."

11. At [21], Lewison LJ identified the two pre-requisites of a scheme of mutual covenants as:

> "(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 inure 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."

12. Whether these two components exist depends upon the intention of the parties, to be ascertained as a question of fact from all the circumstances: *Birdlip* at [24]. Lewison LJ pointed out (at [25]) that in the case of a scheme intended to last potentially for ever, the intention ought to be readily ascertainable "without having to undertake laborious research in dusty archives", and that in almost all cases 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. At [37] Lewison LJ noted that:

> "Thus far, the cases in which schemes of mutual covenant 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 the 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. One particular circumstance is where the common vendor intends to sell the whole of his land simultaneously (e.g. by auction), because in that kind of case there is no point in his taking restrictive covenants (which he will not be able to enforce) unless they were intended to be mutually enforceable by the purchasers: *Nottingham Patent Brick and Tile Co v Butler* (1885) 15 QBD 261, 269 (Wills J); (1886) 16 QBD 778 , 785 (Lord Esher MR)."

13. Where, however, a claimant sought to rely on extrinsic evidence in order to establish a scheme, it would require cogent evidence to do so: *Birdlip* at [42]. The mere fact that a series of conveyances contains similar covenants is not enough to lead to the inference that a scheme of mutual covenants exists: *Birdlip* at [39].

14. *Elliston v Reacher* [1908] 2 Ch 374, where a building scheme was found to exist, is an example of a case where there was a clearly expressed intention to impose mutual covenants, the only issue being whether the document in which that intention was expressed was admissible given that it had been engrossed, but not executed. Parker J set out the requirements for a building scheme, at p.384, as follows:

> "I pass, therefore, to the consideration of the question whether the plaintiffs can enforce these restrictive covenants. In my judgment, in order to bring the principles of Renals v. Cowlishaw and Spicer v. Martin into operation 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.
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> …
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> 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."

15. In *Nottingham Patent Brick and Tile Co v Butler* (1885) 15 QBD 261; (1886) 16 QBD 778 (CA), cited by Lewison LJ in *Birdlip* as an example of a case where a building scheme was found to exist on the basis of inferences to be drawn from the circumstances, there had been a sale of thirteen lots over a three-year period. The conditions of sale included restrictive covenants, including that no part of the land could be used as a brickyard, and an express condition that the purchaser of the property, or of each lot, shall enter into covenants with the vendors as the vendors considered necessary to ensure compliance with the conditions of sale. That was the context for Wills J's conclusion, at p.269, that:

> "It appears to me that, where land is put up to auction in lots, and two or more persons purchase according to conditions of sale containing restrictions of the character of those under consideration in the present case, it is very difficult to resist the inference that they were intended for the common benefit of such purchasers, especially where the vendor purposes (as in the present case) to sell the whole of his property. Where he retains none how can the covenants be for his benefit; and for what purpose can they be proposed except that each purchaser, expecting the benefit of them as against his neighbours, may be willing on that account to pay a higher price for his land than if he bought at the risk of whatever use his neighbour might choose to put his property to?"

The judgment of HHJ Simpkiss

16. The Judge noted that the claim was based on facts which were not seriously in dispute, so that the issue to be determined was whether there was a real prospect of the Claimants establishing the existence of a building scheme in law.

17. Having referred to *Elliston v Reacher* and *Birdlip*, including the passages set out above, the Judge concluded that *Birdlip* represents the current state of the law. Applying the principles laid down by Lewison LJ, he first concluded that there was no sufficiently defined area for the scheme, because the covenants assumed by the Defendant benefited an indefinite area, according to the conveyance, namely the land retained by the Mulleneuxs. He then concluded that the third of Lewison LJ's requirements (that each of the properties is burdened by covenants that were intended to be mutually enforceable as between the several owners) was not satisfied. He noted that there is nothing in the conveyances to suggest that any of the three properties were to benefit from the covenants. He also concluded that the requirement that the limits of the defined scheme be known to each purchaser was not met, and that there was no mutuality in circumstances where no obligation was imposed on the common owner to comply with restrictive covenants and that, while the fact that the covenants might also benefit land retained by the common owner was not fatal to a building scheme, that begged the question as to what land was part of the scheme.

The Appeal

18. This being an appeal against an order under CPR Part 24, the essential question is whether the Judge was wrong to conclude that the Claimants have no real prospect of establishing at trial that there was a building scheme involving them and the Defendant.

19. There is no dispute over the applicable principles. As the Judge noted, the case must be better than merely arguable, and the court should not allow a case to go forward simply because there is a possibility of some other evidence arising: *ICI Chemicals and Polymers Limited v TTE Training Limited* [2007] EWCA Civ 725.

20. The overall burden lies on the Defendant to establish that there are grounds to believe that the Claimants have no real prospect of success at trial, but where the Defendant produces credible evidence in support of the application, then the Claimants have an evidential burden of proving some real prospect. In this case, as the Judge noted, there was no real dispute as to the underlying facts, and the issue is the extent to which inferences can be drawn from those facts.

21. The only pleaded facts are: (1) prior to their sale, the Farmhouse, the Oasthouse and the Barn were in the common ownership of the Mulleneux Children; (2) the properties were marketed together pursuant to a single set of sales particulars; and (3) the transfers of each of the three properties imposed covenants in identical terms in favour of the vendors. These facts are not in dispute. From these facts it is pleaded that "in the premises" the three properties were subject to a scheme of development.

22. Prior to issuing the application, the Defendant sought confirmation from the Claimants as to the basis on which it was said that a building scheme existed, and the Claimants' solicitors indicated that they had already provided ample evidence to support the claim. The only additional facts identified in the evidence filed by the Claimants are the letters

exchanged between solicitors in October 1996 to which I refer below. Mr Hutchings QC, for the Claimants, (who did not appear below) contends that further investigations may uncover additional information to support an inference that the parties intended there to be mutually binding covenants. On a summary judgment application it is necessary to balance two considerations: first, the possibility that the evidence available at trial may be more extensive than that currently available and, second, it is not enough to justify refusing summary judgment that something may turn up at trial. Given that the Claimants themselves are necessary parties to the alleged building scheme, the evidence to support it is inherently likely to be within their knowledge. In light of the fact that there has already been extensive disclosure, and that the Claimants have been specifically requested (prior to the application being issued) to identify the materials they rely on for the purpose of establishing a building scheme, I do not consider that the possibility that further evidence may come to light at trial is a reason, in this case, to refuse summary judgment.

The defined area

23. The Judge's conclusion that the area which benefited from the covenants in the conveyance to the Defendant was not sufficiently defined was made on the basis of the evidence then before him. That evidence included, relevantly, the three conveyances and the sales particulars.

24. Each of the conveyances refers to the "Retained Land" and/or an "Adjoining Owner", in terms which indicate that these are intended beneficiaries of at least some of the covenants contained in them. Adjoining Owner is defined as "The owner from time to time of the Retained Land". Retained Land is defined as "The land comprised in the Deed of Gift excluding the Property [i.e. the property being conveyed under the particular conveyance] and including other land being the remainder of the land in the Conveyance and the Deed of Gift".

25. The Conveyance is defined as "A conveyance of the Property and other land made on 8th September 1970 between (1) the Honourable Hilda Beryl Courthope and the Honourable Eleanor Daphne Courthope and (2) Hugh Peter Mulleneux [the father of the Mulleneux Children]". The Deed of Gift is defined as "A Deed of Gift dated 1 August 1985 and made between Hugh Peter Mulleneux (1) and the Seller (2)".

26. Neither the Conveyance nor the Deed of Gift was in evidence before the judge.

27. There is no plan, whether attached to any conveyance or to the sales particulars, which identifies the scope of the Retained Land. The plan attached to the conveyance to the Defendant identifies only the extent of the land transferred by that conveyance, i.e. the Barn. The map annexed to the sales particulars identifies the three lots being sold by the Mulleneux Children and the two additional lots under separate ownership. There is, however, no identification of the Retained Land.

28. On the basis of the evidence before him, therefore, the judge's conclusion that there was no sufficiently defined area was plainly right.

29. The Claimants, however, seek to rely upon the Conveyance and the Deed of Gift, as fresh evidence on this appeal, which they submit would demonstrate that the area intended to be benefited by the covenants was sufficiently defined. The Defendant objects to this introduction of fresh evidence.

30. CPR Part 52.21(2) provides that "unless it otherwise orders, the appeal court will not receive … (b) evidence which was not before the lower court." In exercising its discretion the court is required to give effect to the overriding objective of doing justice, but pre-CPR cases, including *Ladd v Marshall* [1954] 1 WLR 1489, remain of powerful persuasive authority: *Sharab v Al-Saud* [2009] EWCA Civ 353, per David Richards LJ at [52].

31. Under the principles laid down in *Ladd v Marshall* it is necessary to consider (1) whether the evidence could not with reasonable diligence have been obtained for use at trial; (2) whether the evidence is likely to have an important influence on the result, though it need not be decisive; and (3) whether the evidence is such as is presumably to be believed.

32. Mr Hutchings QC frankly acknowledges that it is impossible to satisfy the first consideration in respect of the Deed of Gift and the Conveyance. Nevertheless, in my judgment that is not conclusive in the present case. Both documents were not only available to the Claimants at trial, but had been included in the list of documents disclosed by the Claimants to the Defendant, and thus equally available to the Defendant. While the onus lay on the Claimants to draw the court's attention to the documents if they considered them helpful to their case, the relevance of the documents to one of the key issues in the case (namely the extent of the Retained Land) is self-evident on the face of the conveyances. It would have been open to this court, given the reference to the documents in the definition of Retained Land, to ask to see the documents for itself, even if neither party had referred to them. There is no reason to doubt their authenticity. In these circumstances, I consider that it is consistent with the overriding objective of doing justice to have regard to the documents, particularly as it is only by doing so that the court can safely reach a conclusion as to the meaning of a key term in the conveyances.

33. The Conveyance transferred to Hugh Peter Mulleneux a large area of land identified, first, by reference to a series of ordinance survey map references in the first schedule and, second, by a shaded area on a map. It is apparent from the face of the document that the list of ordinance survey map references covers a significantly wider area than the shaded area on the map. This may be, as Mr Hutchings QC submits, because the map has been imperfectly copied. In any event, by clause 1 of the Conveyance, the definition of the property in the first schedule takes precedence over the map, which is provided "for identification only".

34. By the Deed of Gift, Hugh Peter Mulleneux conveyed land, again identified by reference to a list of ordinance survey map references as further identified on a plan, to the Mulleneux Children. Subject only to the fact that the outline on the map appears to be drawn slightly inside one of the boundaries of Lot 1 in the sales particulars, the map annexed to the Deed of Gift appears to cover the same ground as the three lots identified in the map attached to the sales particulars.

35. Mr Hutchings QC submits that the Deed of Gift and Conveyance demonstrate that the Farmhouse, the Oasthouse and the Barn constituted the whole of the property owned (as at 1996) by the Mulleneux Children, such that the area of land under common ownership being sold as part of the scheme necessarily extended to, and only to, those three properties. Moreover, the extent of the Retained Land is clearly ascertainable, being all that land within the confines of the Conveyance and the Deed of Gift.

36. If there was a clearly intended building scheme limited to the three properties formerly in the common ownership of the Mulleneux Children, then I would agree with the Claimants

that the scheme would not fail on the ground that the geographical scope of the land intended to be benefited was insufficiently defined.

37. In my judgment, however, the submission that the area of land intended to be benefited is sufficiently defined by the Conveyance and the Deed of Gift begs the question whether there was the necessary intention to impose a system of mutual covenants and, if so, between the owners of which land. As noted above, the judge's conclusion was reached not merely on the basis of the lack of definition of geographical area, but also on the basis of lack of intention to create a scheme at all. I turn, therefore, to address that question.

Intention that each purchaser would be bound by mutually enforceable covenants

38. There is no document, at the time of the sale by the Mulleneux Children, which discloses any express intention that the purchasers of the three plots would be bound by any mutual covenants. Nor was there anywhere an express reference to a building scheme. The only documents relating to the sale which the Claimants point to are: (1) the three conveyances; (2) the sales particulars and (3) some limited inter-solicitor correspondence.

39. The conveyance of the Oasthouse to the Claimants makes no reference to the sale of any other plot. The conveyance of the Barn to the Defendant is stated to be subject to a series of deeds, conveyances and transfers, including the transfer to the Claimants, but otherwise contains nothing to indicate that it is intended to be part of a scheme involving the sale of multiple plots. Neither of these conveyances refers to any mutual covenants. No plan is attached defining any area which could be the subject matter of a building scheme. The plan attached to the conveyance to the Defendant identifies only the Barn, i.e. the subject matter of that conveyance. The plan that was annexed to the conveyance to the Claimants is missing, but from the definition of "Property" in clause 1.7 it would appear that it similarly identified only the Oasthouse.

40. The sales particulars indicate that there are three lots being sold, together with further land in separate ownership (Lots 1A and 2A). A plan is attached indicating the extent of the three lots. There is no reference in the particulars to any covenants to be entered into by the purchasers of any of the lots, save only that in each case there is reference to the purchaser being required to maintain a stockproof fence between certain points on the accompanying plan.

41. The inter-solicitor correspondence relied on consists, first, of an exchange between the Claimants' solicitors and the Mulleneux Children's solicitors in October 1996:

    (1) In a letter to the Mulleneux Children's solicitors dated 2 October 1996, Berry & Berry (then acting for the Claimants) referred to a provision in the (then) draft conveyance between their clients which imposed a restriction "so that there would be a direct covenant with the adjoining owners to comply with these covenants on the land", and asked for a reassurance that the adjoining owners would also be bound. They sought a copy of the draft transfers of the Farmhouse and the Barn containing the same provision. The provision referred to was that which became clause 4.4: "Direct covenant. To obtain from any person taking an interest in the Property (while the provisions of clause 4 are still effective) a direct covenant with the Adjoining Owner to comply with the terms of the clause."

    (2) Cripps Harries Hall (for the Mulleneux Children) replied by letter dated 10 October 1996, confirming that all the draft transfers are in the same form, except adapted for

each property, enclosing copies of the drafts for the other lots and saying "please bear in mind that these have not yet been finally approved".

42. The Claimants also relied on a letter from Cripps Harris Hall to Wellers (solicitors for the Defendant) dated 23 October 1996, which provided a copy of the transfer for the Oasthouse and the land adjoining the Oasthouse (i.e. Lot 2A) "for your information".

43. In my judgment, the most that can be established from these exchanges of letters is that (1) the Claimants were told that the conveyances of each of the three plots being sold by the Mulleneux Children contained similar covenants and (2) the Defendant, by being provided with a copy of the conveyance of the Oasthouse, but not otherwise, was made aware that it contained similar covenants to those contained in the conveyance of the Barn. Nothing in these exchanges of letters evidences any intention to impose mutual covenants on the separate purchasers, save only that the Claimants (but not the Defendant) were specifically told that each conveyance was to contain a covenant in the form of what became clause 4.4. If anything, in my judgment, the fact that specific attention was addressed to that covenant – but no reference was made to there being any mutuality of covenants more generally – indicates the *absence* of a building scheme. The purpose of clause 4.4 is to bind in subsequent purchasers by express contract. This is necessary in relation to positive covenants whether or not there is a building scheme. On its face, however, it covers all of the covenants in clause 4.4, including restrictive covenants, for which purpose it would have been unnecessary if there were a building scheme.

44. The critical question, so far as the Defendant is concerned, is whether there is any evidence to suggest that (in the words of Lewison LJ) there was an acceptance by her of the benefit and burden of mutual covenants with the purchasers of the Oasthouse and the Farmhouse or (in the words of Parker J) that her purchase was "on the footing" of such mutual covenants. It is notable, in this respect, that what was sent to the Defendant's solicitors in this exchange of letters was a copy of the transfer of the Oasthouse and of Lot 2A (the latter not being part of any alleged scheme), and that these were sent only "for information". There was no attempt to explain to the Defendant the significance of the covenants contained in the transfer of the Oasthouse and, more importantly, no attempt to differentiate between the two transfers insofar as their relevance to the Defendant's purchase was concerned. Given that this was the *only* occasion on which the existence of covenants in any other conveyance was brought to the attention of the Defendant, the correspondence in my judgment provides no basis for concluding that the Defendant's purchase was to be on the footing of any mutual covenants.

45. In the absence of any evidence of the requisite intention to create mutually binding covenants in the conveyances, the sales particulars or the contemporaneous correspondence, the Claimants argue that the intention to impose a building scheme is nevertheless to be inferred from the nature of the covenants contained within the conveyances. It is said that a number of provisions of the conveyances made commercial sense only if they were intended to be mutually enforceable between the purchasers of the separate lots.

46. In considering this submission, I bear in mind, first, Lewison LJ's comment that cogent evidence is required to establish the existence of a building scheme from extrinsic evidence and, second, Parker J's statement of the second requirement of a building scheme, in *Elliston v Reacher*, of "a 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" (emphasis added).

47. Mr Hutchings QC points in particular to the following aspects of the conveyance to the Claimants:

    (1) Clauses 4.1.1 and 4.1.2, which impose obligations in relation to fences and boundaries between the Barn and the Oasthouse (but not between the Barn and any other part of the Retained Land);

    (2) Clause 4.1.3, which imposes a positive obligation to repair and resurface an access road which services only the Barn and Oasthouse, and is thus only for their benefit;

    (3) Clauses 4.2.1 to 4.2.4, containing covenants which by their nature it is said would benefit only the other two properties being sold in common ownership;

    (4) Various buyer's rights under Schedule 1, including the right to enter on the Retained Land, the right to passage of water and other services, and to lay Service Media over, the Retained Land, which it is said make commercial sense only in relation to the other two properties;

    (5) Various rights reserved to the Seller under Schedule 2, including in relation to the right of passage of water and other services over the Property, the right to enter the Property and the right of way for purposes connected with use of the Retained Land. Again it is said that these rights make commercial sense only in relation to the other two plots of land being sold by the Mulleneux Children.

48. Mr Hutchings QC makes similar points in relation to the conveyance to the Defendant. In addition, he makes the point that the definition of Retained Land in the conveyance to the Defendant includes the Oasthouse (given that it is part of the land contained within the Deed of Gift and Conveyance) notwithstanding that it had been sold to the Claimants. (The Claimants seek to contend, by the proposed amended claim, that the definition of Seller in the conveyance to the Defendant, is broad enough to encompass them as "owners from time to time of the Retained Land". For the reasons I have explained above, I do not need to deal on this appeal with this point.)

49. In my judgment, even taking a commercial view of the purpose of the covenants in the conveyances to the Claimants and to the Defendant, there is insufficient indication of an intention to impose mutual covenants on the purchasers of the three plots.

50. First, in the case of some of the covenants, the Retained Land is expressly identified as the beneficiary (see for example clause 4.2.1 of the conveyance to the Defendant), and the definition of Retained Land clearly extends beyond the three plots being sold, so as to encompass (1) the additional Lots 1A and 2A, and (2) further land contained within the Conveyance.

51. Second, I do not accept that, taking a commercial view of the covenants, I should infer that they cannot have been intended to benefit any land other than the other two plots being sold by the Mulleneux Children. A covenant not to use (for example) the Oasthouse for any trade or business has the potential to benefit not merely land immediately adjacent to the Oasthouse. A trade or business being conducted from the Oasthouse could have an effect on an area sufficiently large to encompass all the land within the Conveyance. Similarly, without knowing far more about the direction from which mains water, or other services, enters the area around Tolhurst Farm, it is

impossible to infer that the Buyer's rights to passage of water or services, and rights of access, can only in practice relate to the other two sold properties, or that the Seller's reciprocal rights cannot in practice benefit the Retained Land, as defined.

52. Third, even if it were clearly established that the Mulleneux Children sold, in 1996, all the land which they then owned, the fact is that the terms of the conveyances to each of the purchasers expressly identify other land as being retained and intended to benefit from covenants. There is no reason why the Defendant should not have been entitled to treat this at face value, as indicating that there was a commercial purpose in the covenants that extended beyond any benefit to the other plots set out in the sales particulars.

53. Moreover, the fact that other parts of the Retained Land were owned by either their father or their father and mother, from whom the Mulleneux Children may expect to inherit, provides a sound commercial rationale for the benefit of the covenants extending beyond the other two properties being sold. In any event, the mere fact that the land comprised in the Deed of Gift appears to equate to the three plots sold by the Mulleneux Children does not necessarily mean that the Mulleneux Children did not have any existing interest in any other part of the Retained Land. As pointed out by Ms Stevens-Hoare QC for the Defendant, the sellers of Lots 1A and 2A appear to have been the Mulleneux Children's father *and mother*, despite there being no evidence of any transfer of any part of the land contained within the Conveyance being transferred into the parents' joint names. This alone indicates that the Conveyance and the Deed of Gift do not enable a complete picture of the ownership of the land at Tolhurst Farm as at 1996 to be established. I also note that the Claimants' pleaded case is that the three properties formed "part of" a farm in the ownership of the Mulleneux Children.

54. Fourth, under paragraph 6 of the Second Schedule to the conveyance to the Claimants, the Seller expressly reserves the right to build or execute any works on and to use "any of the Retained Land as the Seller wishes". At the time of this conveyance, the Seller (i.e. the Mulleneux Children) still owned the Barn and the Farmhouse. It is an essential feature of a building scheme that, from, at the latest, the point of the first conveyance, the seller is bound to transfer the remaining land subject to substantially similar covenants. The express reservation by the Seller of a right to use the Barn and the Farmhouse as it wished is inconsistent with any intention that the Seller was bound by restrictive covenants relating to user of those properties, and accordingly inconsistent with the inference of mutual covenants necessary to found a building scheme.

55. Mr Hutchings QC correctly points out that the mere fact that covenants contained within a building scheme may also benefit other land of the seller is not fatal to the existence of a building scheme (in reliance on Parker J's fourth point in the passage of his judgment in *Elliston v Reacher* cited above). That is true, but where there is no express indication of any intention for mutual covenants between separate purchasers, the circumstance that covenants in the relevant conveyances are capable of benefiting both the land concurrently being sold and retained land of the vendor (and/or other third parties) renders it substantially more difficult to infer that there must have been a scheme of development. There is no indication given anywhere that the legal effect of the covenants is to be any different depending on whether they benefit one of the other two properties or some other part of the retained land (c.f. *Birdlip* at [41(iv)]).

56. In my judgment, even taking a commercial view of the terms of the covenants in the conveyances to the Claimants and the Defendant, the Claimants do not have a real prospect of establishing at trial that the purchasers of each of the Farmhouse, the

Oasthouse and the Barn accepted that the benefit of covenants they were entering into would inure to the owners of the other properties, and that they would correspondingly enjoy the benefit of covenants entered into by those other purchasers.

Conclusion

57. Accordingly, I dismiss this appeal.