

Identifying a scheme

Building schemes Andrew Olins discusses a recent case concerning building schemes involving restrictive covenants over 100 years old

Developers will welcome the decision in *Birdlip Ltd v Hunter and another* [2016] EWCA Civ 603, where the Court of Appeal gave helpful guidance as to what matters should be considered when deciding whether a building scheme exists.

Birdlip, a developer, acquired a large plot in a residential estate. Against vociferous objections from the local residents' association, Birdlip obtained planning permission to build two new houses on its plot. The association later claimed that the plot was burdened by restrictive covenants imposed by a 1910 conveyance which were enforceable by all owners of plots within the estate under a building scheme. If correct, Birdlip would have been unable to implement its planning permission. It therefore asked the court to make a declaration as to whether a building scheme existed.

At trial there was no "live" evidence. There was simply nobody about who could give evidence as to what was in the mind of the "common vendor" when he laid out the estate and sold it off in plots between 1906 and 1914.

The case had to be decided on limited documentary evidence which

In determining whether the common vendor intended to create a building scheme, paramount consideration must be given to the original plot conveyances

the parties had uncovered by searching "dusty archives". This included various conveyances from the common vendor to original plot purchasers, and, importantly, two contracts for sale dated 1908 and 1914 which had been used by the common vendor in selling plots.

The various conveyances showed that the common vendor had imposed similar, but not identical, restrictive covenants on all plots. The two contracts for sale, which had the terms of sale printed on one side and an estate plan on the other, showed markedly different estate boundaries. Those on the 1908 contract plan omitted a significant part of a road which was included in the 1914 contract plan.

Characteristics of a building scheme

Reviewing the case authorities dating back to the 1870s, the Court of Appeal helpfully distilled six characteristics of a building scheme:

1. The scheme must apply to a defined area;

2. The original plot purchasers within that area must have purchased their plots from a common vendor;
3. Each of the plots within the area must be burdened by covenants which were intended to be mutually enforceable as between those plot purchasers;
4. The boundaries of the defined area of the scheme must be known to each original plot purchaser;
5. The common vendor must, himself, be bound by the scheme, which crystallises on the first plot sale within the defined area, with the consequence that he is not entitled to sell off plots within that area except on the terms of the scheme;
6. The effect of the scheme will bind future purchasers of plots within the defined area, potentially forever.

First hearing

At trial, the judge held that the association had established that a building scheme existed. He reasoned that when an estate is laid out in plots, this is good evidence of the common vendor wishing to impose restrictive covenants that are intended to be mutually enforceable between original plot purchasers.

Although none of the conveyances between 1906 and 1914 to original plot purchasers showed estate boundaries (they only had the dimensions of the actual plot being sold), nonetheless it could be properly inferred that, when the scheme crystallised on the first plot sale by the common vendor in 1906, the contract for sale used for that first sale showed an estate with the same boundaries as shown on the 1908 contract plan.

When Birdlip's plot was sold off in 1910, the contract plan showed an estate with the same boundaries as the 1908 contract plan. While, undoubtedly, the 1914 contract plan showed different estate boundaries, this could be explained away. It might be that the omission of part of a road was a "mistake".

Appeal

The Court of Appeal disapproved of the trial judge's reasoning that the characteristics of a building scheme had been established. It held that, in determining whether a

building scheme existed, primary consideration had to be given to the plot sale conveyances. In this case:

- The plot sale conveyances between 1906 and 1914 only had a plan of the actual plot being sold. There was no plan showing other plots or any estate boundaries;
- The plot sale conveyances stated that the restrictive covenants were being imposed for the benefit of (unidentifiable) "adjoining and adjacent estate now or formerly belonging to the [common] vendor in the parishes of Chalfont St Peter, Gerrards Cross and Ivor";
- There was no explicit indication in the plot sale conveyances that the restrictive covenants they imposed were to be mutually enforceable as between all original plot purchasers;
- The covenants in the plot sale conveyances imposed gave indications that no building scheme was intended as they included "positive" covenants which could not bind successors of title.

Although the Court of Appeal did not discount the possibility of a building scheme being established purely on extrinsic evidence (ie documents other than the original plot conveyances), in such a case the extrinsic evidence had to be "cogent". The intention to create a building scheme should "be readily ascertainable without having to undertake laborious research in dusty archives searching for ephemera more than a century old".

In this case it was fatal to the association that the common vendor had used two contract plans in selling plots which showed different estate boundaries. As

such, all original plot purchasers could not have known the "defined area" covered by the scheme.

The Court of Appeal has now made plain that, in determining whether the common vendor intended to create a building scheme, paramount consideration must be given to the original plot conveyances. And if, on their face, they do not reveal an intention on the part of the common vendor to create a building scheme (because, for example, they do not identify a defined area), only in an exceptional case will a building scheme be found to exist. In such a case, those arguing in favour of a building scheme will need to produce very strong extrinsic evidence, given that a scheme, if it is found to exist, will "perpetually interfere with the right of successive property owners to do as they please with their own property".

Andrew Olins is a partner in IBB Law and acted for Birdlip. He is also an associate professor in law at Brunel University