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Above the local law

Amy Proferes provides an update on dispensing powers in building schemes

- An analysis of building schemes, enforcing covenants & dispensing powers.

Building schemes, or schemes of development, developed as a result of the difficulties involved in enforcing restrictive covenants when plots are sold out of a larger estate. There are four possibilities (see eg *Small v Oliver & Saunders (Developments) Ltd* [2006] EWHC 1293 (Ch) at [27], [2006] All ER (D) 376 (May)):

a) The benefit of the covenants may be annexed to the vendor's retained land, which decreases in size with each sale. Purchasers and their successors may only enforce covenants against earlier purchasers and their successors.

b) The covenants may be annexed to the entirety of the land unsold by the vendor, but not to parts of that land. The vendor alone may enforce the covenants against all the purchasers. If he disposes of the retained land he may expressly assign the benefit of the covenants to his transferee; if he does not do so, no one has the right to enforce.

c) The covenants may be purely personal to the vendor. They are not annexed to any land and are transferred only by express assignment.

d) If a scheme is established, each purchaser and his successors in title may enforce the covenants against every other purchaser and his successors, regardless of the order in which the properties were sold.

Criteria

The classic criteria for a scheme, as set out by Mr Justice Parker in *Elliston v Reacher* [1908] 2 Ch 374 (approved by the Court of Appeal in [1908] 2 Ch 665), are as follows:

- *Common vendor*: both parties (or their predecessors in title) derive title from a common vendor.
- *Sale in lots*: prior to sale, the vendor parcelled out the estate for sale in lots, subject to restrictions intended to be imposed on all the lots.
- *Common benefit*: the common vendor intended the restrictions to be for the benefit of all the lots intended to be sold, regardless of whether they might benefit any land which he retained.
- *Reciprocity*: the parties or their predecessors in title purchased their lots from the common vendor on the understanding that the restrictions were and would be for the benefit of the other lots.

The modern interpretation of these criteria has focused on the two factors emphasised by Cozens-Hardy MR in *Reid v Bickerstaff* [1909] 2

Ch 305: a defined area and defined obligations of which purchasers have notice, creating a "local law" over the estate: "It is my opinion there must be a defined area within which the scheme is operative. Reciprocity is the foundation of the idea of a scheme. A purchaser of one parcel cannot be subject to an implied obligation to purchasers of an undefined and unknown area. He must know both the extent of his burden and the extent of his benefit. Not only must the area be defined, but the obligations to be imposed within that area must be defined...there must be notice to the various purchasers of what I may venture to call the local law imposed by the vendors upon a definite area."

The intention to create mutual obligations is fundamental. The existence of a common vendor, even with common covenants, will not suffice to establish a scheme: *Jamaica Mutual Life Assurance Society v Hillsborough Ltd* [1989] 1 WLR 1101, *Whitgift Homes Ltd v Stocks* [2001] EWCA Civ 1732, [2001] All ER (D) 309 (Nov).

One factor which has often been considered when debating the existence of a scheme is whether the vendor retains a dispensing power to vary or waive restrictions. In *Birdlip Ltd v Hunter* [2015] EWHC 808 (Ch), [2015] All ER (D) 288 (Mar) the two indentures by which the property was originally conveyed included a reservation by the vendors of their right to vary the restrictions, either "in regard to the remainder of the properties in the neighbourhood" or "so far as regards the other parts of their Estate". Judge Behrens (sitting as a High Court judge) noted at [61-62] that: "There is a conflict of authority as to whether the effect of a power to vary the covenants is consistent or inconsistent with a scheme. Mr Hutchings QC helpfully took me to three cases where this has been discussed – *Re Wembley Park* [1968] Ch 491, 498D – 499B, [1968] 1 All ER 457, *Whitgift Homes v Pauline Stocks* [2001] EWCA 1732, para 101, [2001] All ER (D) 309 (Nov) and *Seymour Road v Robin Williams* [2010] EWHC 111 (Ch) para 25, [2010] All ER (D) 11 (Feb)... I agree that the existence of a power to vary is equivocal. I agree with the view of Andrew Francis expressed in footnote 91 of para 8.118 of the 4th Edition of his book – *Restrictive Covenants and Freehold Land – a Practitioner's Guide*. The existence of the power is just one matter to be looked at in the context of the whole in deciding whether a scheme exists."

A review of the authorities shows that the courts have consistently adopted this approach: dispensing powers are relevant, but equivocal. An early exception may be found in *Osborne v Bradley* [1903] 2 Ch 446, [1900-03] All ER Rep 541 where Mr Justice Farwell found that a dispensing power undermined the requirements for a scheme (at 453): "In order to arrive at the inference to be drawn from the circumstances, that a building scheme was intended by all the parties, I have to find that all the purchasers intended to contract one with another, as they purchased, to abide by the various stipulations or covenants which are made applicable to the whole estate; and also, in a case like this, where the vendor retained a number of plots, that he, the vendor, intended to enter into similar covenants. It is impossible for me to draw the latter inference because of the concluding clause in the conditions."

This is a compelling analysis. How could a purchaser have the requisite intention to abide by and benefit from restrictions applicable to the whole estate if, in theory, such restrictions might not apply to any of the lots subsequently sold? However, when the same question arose in *Elliston v Reacher* [1908] 2 Ch 665, [1908-10] All ER Rep 612 Farwell J clarified that, although he stood by his judgment in *Osborne v Bradley*, he had not meant to suggest that the inclusion of such a term was fatal to the existence of a scheme. It was simply one element to consider. A skeptical Cozens-Hardy MR agreed: "Then it is said that the whole scheme is inconsistent and cannot have been intended, because there was power in the vendor to deal with property undisposed of without reference to this deed. That is an argument that has not been brought forward for the first time here. So far as I am aware it is an argument that has never prevailed. I do not deny that the insertion of such a power is an element to be considered, but out of many building schemes which I have seen I think I am right in this remark, that it is altogether exceptional not to see some power reserved to the vendor to abstract certain property from the scheme."

In *Re Wembley Park* the claimant asserted that the right to sell free of any restrictions was "almost conclusive against a building scheme", while the defendant said it was evidence that a scheme existed. An unmoved Mr Justice Goff concluded that the point did little to assist either side. In *Eagling v Gardner* [1970] 21 P & CR 723 it was argued that a dispensing power was inserted *ex abundenti cautela* to make clear that no scheme was intended. Mr Justice Ungoed-Thomas accepted this, but also said that the power could have been included specifically because a scheme was intended and an explicit provision was required for the vendor to have a dispensing right. Again, the point did nothing to advance matters.

"The intention to create mutual obligations is fundamental"

The practical need for a dispensing power was emphasised in *Re 6, 8, 10 and 12 Elm Avenue, New Milton* [1984] 1 WLR 1398, [1984] 3 All ER 632 where Mr Justice Scott said: "The effect of the building scheme, if there is no such provision as I have referred to, is that the scheme becomes inflexible, not capable of being varied by the vendor, as soon as the first property in the scheme is sold. It is therefore very sensible for a vendor to take power to himself to vary, if he wishes in subsequent cases, the restrictions."

Sensible it may be, but does this sit comfortably with the notice to purchasers which is said to be necessary for a scheme? This interpretation further suggests that a scheme does not crystallise until the final plot is sold, defeating the purpose of purchasers being certain that they will be able to enforce restrictions up and down the timeline of sales.

In *Allen v Veranne* the defendants argued that the dispensing power contradicted the intention to form a local law. Browne-Wilkinson V-C disagreed: "...the final words are more difficult, in that the vendor is not only exempting himself from the restrictions under the local law but is reserving the right not to impose a local law at all on certain subsequent purchasers. That is certainly a feature which I have to take into account. But in my judgment it is perfectly possible to conceive of an intention to have a local law — a general scheme of stipulations which are to be mutually enforceable within the defined area — subject to the vendor having the right not to impose that local law on certain parts of the Estate. In fact the evidence here suggests that he did impose it on the whole Estate, but that cannot be the critical matter. I do not think that it is inconsistent with the existence of a scheme of development that the vendor retains his right to exempt part of the Estate from stipulations."

While it certainly is conceivable that this was the vendor's intention, the question is whether that intention should be evidence against a scheme. However in this case, as in *Elliston v Reacher*, the other factors overwhelmingly pointed to a scheme. To negative that scheme on the basis of a dispensing power would have been difficult.

In *Whitgift Homes v Stocks* the respondents submitted that the reason for including a power of exemption must be that, without it, the obligation would be in force, which was evidence of the existence of a scheme. Lord Justice Jonathan Parker disagreed: "...such a provision takes its flavour from the surrounding circumstances. As the Vice-Chancellor commented in *Allen v Veranne* (at p20C): 'It points both ways.' Considered in isolation, such a provision is to my mind more or less equally consistent with the existence of a scheme as with its absence. Thus, where the other factors in the case point clearly towards the existence of a scheme (as they did in *Allen v Veranne*), such a provision is not a contra-indication. In the instant case, however, the fact that the provision in question is included in Conveyances which contain no identification of the beneficiary of the covenants...seems to me to provide clear support for the conclusion that, as a matter of interpretation of those Conveyances, no scheme was intended."

Comment

For over a century advocates have been making compelling submissions as to the effect of a dispensing power, and the courts have resisted coming down on either side of the argument. *Birdlip v Hunter* confirms once again the equivocal nature of such a power. The combined weight of the authorities suggests that, although it is certainly a point which may be considered, there is likely to be little benefit in spending much time doing so. Rather like Bob Dylan's weatherman, you don't need a dispensing power to know which way the wind blows. NLJ

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