LP/18/2008

LANDS TRIBUNAL ACT 1949

RESTRICTIVE COVENANTS – application under section 84 of Law of Property Act 1925 as amended – whether a building scheme existed so as to entitle certain persons to object to the proposed modification or discharge

IN THE MATTER OF AN APPLICATION UNDER SECTION 84 OF THE LAW OF PROPERTY ACT 1925

BETWEEN **MRS AMANDA CLARKE** **Applicant**

and

THOMAS JEROME PETER MURPHY AND KATHERINE HELEN MURPHY (1)
GRANT TELFER AND DIANA TELFER (2)
FRANK WILLIAM LOMAX AND ANNE LOMAX (3)
RORIE DEVINE (4)
KEITH DAVIS (5) **Objectors**

Re: 4, One Tree Lane,
Beaconsfield,
Buckinghamshire,
HP9 SBU

Before: His Honour Judge Huskinson

Sitting at 43-45 Bedford Square, LondonWC1B 3AS
on 15 April 2009

Thomas Grant, instructed by Eversheds LLP, on behalf of the Objectors
Stephanie Tozer, instructed by Burges Salmon, on behalf of the Applicant

The following cases are referred to in this decision:

Re Jeff's Transfer [1966] 1 WLR 841
Eagling v Gardner [1970] 2 All ER 838
Small v Oliver & Saunders (Developments) Limited [2006] EWHC 1293
Baxter v Four Oaks Properties Limited [1965] 1 Ch 816
Jamaica Mutual Life Assurance Society v Hillsborough Limited [1989] 1 WLR 1101
Re Wembley Park Estate Co Limited's Transfer [1968] Ch 491
Reid v Bickerstaff [1909] 2 Ch 305
Elliston v Reacher [1908] 2 Ch 374
Re Dolphin's Conveyance [1970] Ch 654

DECISION

Introduction

1. This is a preliminary issue which has been ordered to be heard regarding the entitlement of the fourth and fifth Objectors (Mr Devine and Mr Davis) to object to the Applicant's application to the Lands Tribunal under section 84 of the Law of Property Act 1925 as amended for the discharge or modification of certain restrictive covenants which affect the Applicant's land at 4 One Tree Lane, Beaconsfield ("No.4 OTL").

2. The Applicant is the freehold owner of No.4 OTL and her registered title to that property shows that her property is burdened by certain restrictive covenants more particularly referred to below. She has applied to the Tribunal for modification or discharge of those covenants so as to permit a development to take place on No.4 OTL whereby the existing dwellinghouse would be demolished and three new dwellings erected. The Applicant has obtained outline planning permission for this proposed development.

3. The layout of the residential development at One Tree Lane is conveniently shown on page 59 of the bundle. It comprises an access road leading to a turning circle and to nine separate detached dwellinghouses each standing in its own garden. There exist also certain other dwellings fronting onto One Tree Lane but I am not concerned with them.

4. In summary the preliminary issue which is before the Lands Tribunal is whether there exists a building scheme in respect of the land surrounded in pink on the plan on page 59 (comprising Nos.1 to 9 One Tree Lane) such that there exists a local law of restrictive covenants which can be mutually enforced by each of the plot owners against each of the other plot owners.

5. The Applicant derives her title from a conveyance dated 30 August 1957 whereby No.4 OTL was conveyed to her predecessor by Goodyer and Co (Builders) Limited ("Goodyer"). This conveyance is not available, but it contained certain restrictive covenants which are registered in the charges register in respect of the registered title of the Applicant's property. The covenants are in the following terms:

> "1. Not to erect or permit to be erected any new building or any temporary or wooden building (other than a tool shed or greenhouse) or any addition to or alteration to the elevation of the existing building on the property hereby conveyed without first submitting plans and elevations thereof and a specification (if required) to the Vendor and obtaining the Vendor's written approval and (if required) paying its fee not exceeding Two guineas for such approval
>
> 2. Not to carry on or permit any trade business or profession on the property or do or permit anything thereon which may be or grow to be a nuisance or annoyance to the Vendor or the owners or occupiers of any adjoining or neighbouring properties

3. Not to use the property or permit the same to be used for any other purpose than a private dwellinghouse and garage for the use and occupation of one family only and not to divide the same into flats

4. Not to keep or permit to be kept any pigs or poultry on the property except domestic fowls in an adequately screened enclosure on the rear of the South Eastern side of the dwellinghouse

5. No gravel sand clay or earth shall be removed from the said land except for the purpose of building thereon and no bricks or tiles shall be made or clay or lime burnt on the property

6. No hut shed caravan or house on wheels or other chattel whether or not adapted used or intended for use as a sleeping apartment and no swing roundabouts or contrivance intended for public amusement shall be erected or placed upon the property without the consent in writing of the Vendor

7. Not to permit the part of the property shown coloured green on the said plan to become overgrown nor permit any weeds to grow thereon not to place or erect or permit to be placed or erected any fence erection or thing thereon nor grow any flowers or garden produce thereon.

8. At all times to maintain on the South Eastern side of the property marked "T" inwards on the said plan and within their boundary a good and sufficient oak post and wire fence not less than three feet nor more than four feet in height above ground level with adequate oak support and straining posts and to plant and maintain a live hedge planted during the planting season next ensuing from the date hereof within the boundary

9. To bear their share (as determined by the Surveyor for the time being of the Vendor in case of dispute) of the cost of maintenance repair operation and renewal to the satisfaction of such Surveyor of the combined drain serving the property and the adjoining plots number 2, 3 5 on the said plan and to keep the Vendor and its successors in title and assigns effectually indemnified in respect of the same."

6. On 10 April 2008 the Applicant applied to the Lands Tribunal for discharge or modification of these covenants so as to enable her proposed development to proceed. Objection to this application was made by all of the above mentioned Objectors, namely:

1. Mr and Mrs Murphy as owners of No.9 OTL.
2. Mr and Mrs Telfer as owners of No.6 OTL.
3. Mr and Mrs Lomas as owners of No.8 OTL.
4. Mr Devine as owner of No.3 OTL (in fact Mr Devine owns this property jointly with his wife – it may in due course be contended that Mrs Devine should be joined as an Objector but nothing at present turns on this point).
5. Mr Davis as owner of No.5 OTL.

It is accepted by the Applicant that the first, second and third mentioned Objectors have status to object to the proposed discharge and modification – it is accepted that they, as owners of their respective properties, are entitled to the benefit of the restrictive covenants burdening

No.4 OTL and thus are legitimately entitled to object to the Applicant's application. This is accepted because the first, second and third mentioned Objectors all, respectively, derive their title to their properties from conveyances made by Goodyer (as a common vendor) which postdate the conveyance by Goodyer to the predecessor in title of the Applicant. Accordingly it is accepted, having regard to the wording of the relevant covenants (which are set out later in this decision) that when the Applicant's predecessor in title took the original conveyance of No.4 OTL from Goodyer that predecessor covenanted for the benefit of all of the land then still vested in Goodyer (and for the benefit of each and every part thereof) such that those persons who subsequently bought a plot from Goodyer (such as the first three mentioned Objectors) bought property which enjoyed the benefit of the Applicant's restrictive covenants. However so far as concerns Mr Devine and Mr Davis they each, respectively, derive their title from a conveyance by Goodyer which predated the conveyance of 30 August 1957 to the Applicant's predecessor in title. It is common ground between the parties that, in view of the foregoing fact, the benefit of the Applicant's restrictive covenants cannot be enjoyed by way of annexation to the properties held by Mr Devine and Mr Davis, such that the only way in which Mr Devine and Mr Davis can enjoy the benefits of these restrictive covenants which burden the Applicant's property is if there has been created a building scheme of mutually enforceable restrictive covenants in respect of that area of land comprising Nos.1-9 One Tree Lane.

7. The trial bundle contains numerous photographs showing One Tree Lane and the houses therein and the relationship of each to the other. I asked whether the parties contended it was necessary for me to view the site for the purpose of deciding this preliminary issue. Both counsel accepted that it was not necessary to do so. Mr Grant submitted that the photographs showed that the buildings at Nos.1-9 OTL were all of a similar architectural type, namely a vernacular 1950s style, and that they had a rural quality and they were all of similar size and architectural features and were similarly positioned in their plot and similarly distanced from the access road. Mr Grant invited me to view the site if the foregoing was contested on behalf of the Applicant, but Ms Tozer did not seek to contest this (anyhow for the purposes of this preliminary issue) and did not invite a view. I proceed on the basis that the foregoing qualities of the development as contended for by Mr Grant are indeed made out.

8. No evidence was available to either party from Goodyer or from the original purchasers or from the original solicitors or estate agents who dealt with the conveyancing or sale of any of the properties in 1957/58. Bearing in mind that the sales were over half a century ago this is perhaps unsurprising. Oral evidence was however called by the Objectors from Dr Samuel Orr MBE who purchased No.3 OTL from a Mr Lester Goodall-Copestake in 1965 and who continued to own the property until 2006. Dr Orr gave evidence regarding the occasion of his purchase in 1965 and regarding certain conversations that he had had with Mr Goodall-Copestake, who was the original purchaser of No.3 OTL from Goodyer in 1957.

9. I propose first to consider the history of the development at One Tree Lane as it appears from the documents which are before me and then to consider the evidence given by Dr Orr.

History of development (as appearing from the documents)

10. I propose to refer to the area of land shown edge pink on page 59 which embraces the road and Nos.1-9 OTL as "the Estate".

11. In 1949 an area of land, which included the land which now comprises the Estate, was conveyed to the Urban District Council of Beaconsfield ("the Council") for use as allotments. By letters dated 9 August 1955 and 26 January 1956 the Ministry of Agriculture Fisheries and Food granted permission to the Council to sell for private housing 4.02 acres of this allotment land to Mrs K M Greaves.

12. By a conveyance dated 13 February 1956 the Council conveyed the Estate to Mrs Greaves. This conveyance cannot be found but a copy of the plan which was annexed to that conveyance and which shows the land conveyed is at page 154 of the bundle. By an agreement also dated 13 February 1956 made between the Council and Mrs Greaves (which agreement has survived and was referred to at the hearing as "the Sewering Agreement") it was recited that Mrs Greaves (who was referred to in the agreement as "the Developer") was the owner of the relevant land and

> ".... has agreed with the Council to develop the said land by the erection of 9 private dwelling houses thereon in accordance with a scheme of development made and approved by the Council ...."

The Sewering Agreement went on to oblige Mrs Greaves to carry out the street sewering lighting fencing and other works in accordance with certain plans etc and made provision for the ultimate adoption of the street as a highway repairable at public expense. There was a plan annexed to this Sewering Agreement which showed nine plots with a house positioned on each plot. The boundaries of each of the nine plots as shown on this plan are effectively the same as the boundaries of the plots as eventually separately sold off by Goodyer as Mrs Greaves' successor. There also exists a further agreement between Mrs Greaves and the Council dated 26 April 1956 (referred to at the hearing as "the Water Agreement") which related to the laying of water mains and the supply of water to the Estate. This document also had attached to it a plan being effectively the same plan as that attached to the Sewering Agreement.

13. By a conveyance dated 24 September 1956 Mrs Greaves conveyed the Estate to Goodyer, which was a company with which she was connected being the company secretary and her husband being a director. This conveyance of 24 September 1956 cannot be found, but it appears clear that Mrs Greaves conveyed to Goodyer the totality of the land which she had earlier purchased from the Council. Thus Mrs Greaves purchased an area of 4.02 acres and this is the same area of land as Goodyer is recorded as purchasing from Mrs Greaves (see the entry in the abstract of title at page 151). Goodyer, as its name Goodyer and Co (Builders) Ltd suggests, was a company concerned in building properties.

14. After purchasing the land from Mrs Greaves Goodyer developed the Estate (or continued such development as had already been started by Mrs Greaves) by building the presently still existing nine houses in accordance with Mrs Greaves' agreement with the Council. These are the houses being Nos.1 to 9 OTL. Goodyer sold off each of these nine houses in the following sequence, namely by conveyances of the following dates:

1. 19 January 1957: No.2 OTL
2. 12 June 1957: No.1 OTL
3. 19 June 1957: No.3 OTL
4. 29 August 1957: No.5 OTL
5. 30 August 1957: No.4 OTL (ie the Applicant's property)
6. 20 November 1957: No.7 OTL
7. 17 January 1958: No.9 OTL
8. 4 February 1958: No.6 OTL
9. 30 April 1958: No.9 OTL

Thus all nine property were sold between January 1957 and April 1958. Three of the original conveyances have been found, namely those in respect of Nos.3, 7 and 8 OTL. From the terms of these conveyances and from the price paid, as compared with the price which Mrs Greaves had paid for the entirety of the land which formed the Estate (£900) and as compared with the price that Goodyer had paid for the same land to Mrs Greaves some months later (£4,146) it is clear (and I so find) that at the date of each of the conveyances the house thereby conveyed had been completed or effectively completed.

15. The three original conveyances which have been found are in effectively the same form. Taking the conveyance of 19 June 1957 to Mr Goodall-Copestake as an example the following may be noted:

1. The parcels clause described the property conveyed in the following terms:

   > "ALL THAT piece or parcel of freehold land (formerly forming part of the Wilton Park Estate) situate on the South side of and having a frontage of forty five feet or thereabouts to the Service Road known as One Tree Lane leading from Wilton Road at Beaconsfield in the County of Buckingham as the same is for the purpose of identification only and not by way of limitation or enlargement more particularly delineated on the plan annexed hereto and thereon coloured pink and green TOGETHER with the dwellinghouse and garage and premises erected thereon or on some part thereof and known or intended to be known as "High Meadow" ALL which premises comprise Plot Number 3 of the Vendors One Tree Meadow Estate at Beaconsfield aforesaid ...."

2. The conveyance made express reference to the provisions of the Sewering Agreement and the Water Agreement (inter alia), these Agreements being referred to in the Second Schedule to the conveyance.

3. The important clause by which the purchaser (here Mr Goodall-Copestake) covenanted in terms of the restrictive covenants is in the following terms:

> "3. THE Purchaser for himself and his successors in title hereby covenants with the Vendor and its successors in title that the Purchaser and his successors in title with the intent and so as to bind (so far as practicable) the property hereby conveyed into whosesoever hands the same may come and to benefit and protect the remainder of the Vendor's One Tree Meadow Estate at Beaconsfield aforesaid or any part or parts thereof ...."

4. Clause 4 of the conveyance was in the following terms:

> "4. It is hereby declared that the Purchaser and his successors in title shall not by virtue of these presents acquire any right of light or air which would prejudice the free use and enjoyment of any remaining part of the Vendors One Tree Meadow Estate for building or other purposes and that any enjoyment of light or air had by the Purchaser or his successors in title from or over any part of the said Estate of the Vendor shall be deemed to be had by the consent of the Vendor."

5. The First Schedule contained the relevant restrictive covenants which were in the same terms as those which affect the Applicant's property and which have been set out above. All nine of the plots were made subject to covenants in the same terms.

16. No sales material such as estate agents particulars or brochures or advertisements exists regarding the original sales of the plot in 1957/58. Apart from copies of the three original conveyances for Nos.3, 7 and 8 OTL the only additional document from that time which has been placed before me is a copy of the enquiries before contract raised by Goodall-Copestake's solicitors of Goodyer's solicitors. These do not raise any queries regarding any restrictive covenants, but they do make clear that Mr Goodall-Copestake was expecting to purchase a fully completed house.

Dr Orr's evidence

17. Dr Orr confirmed the truth of his witness statement dated 18 November 2008. In this he described how he had purchased No.3 OTL from Mr Goodall-Copestake in 1965 and that he had not purchased through an estate agent but had dealt directly with Mr Goodall-Copestake. Paragraphs 6 and 7 of his witness statement are in the following terms:

> "During the course of our discussions, and before our solicitors had made contact with each other, Mr Goodall-Copestake made it clear to me that Number 3 and the other 8 houses in One Tree Lane (which I understood had all been built at the same time by the same builder) were subject to restrictive covenants that had been given by each of the original owners when they purchased each of their properties. He told me that the estate had been laid out by Goodyer and the houses sold at roughly the same time and that all the properties were subject to the same restrictions.

> I can recall Mr Goodall-Copestake confirming to me that the effect of the restrictive covenants was that no more than one house could be built on each plot at One Tree Lane and that none of the properties could be divided into two. He also said that there was an expectation that the front of each property in the cul-de-sac would remain open to the close. He said that each property in the estate was subject to the same restriction so that, as owner of Number 3, I would have the benefit of the covenants given by the owners of the other properties, just as the owners of the other properties had the benefit of the covenants that restricted the use of Number 3. I found this particularly appealing and the idea that the character of the Lane would never change contributed significantly to my decision to purchase Number 3."

18. Dr Orr produced and referred to a copy of the enquiries before contract which his solicitors had raised with Mr Goodall-Copestake's solicitors and in particular the reply to question 17 where, in answer to a question which enquired as to who has the benefit of the restrictive covenants, the following answer was given

> "We find it difficult to give you an answer to this. Presumably Goodyer & Co (BUILDERS) Ltd. Are still entitled to enforce the covenants and presumably a Building Scheme might have been applicable. The Solicitors who acted for Goodyer & Co. (Builders) Ltd. When our Client purchased were Messrs. Stewart Wallace & Co. and you might like to perhaps communicate with them on the matter."

Dr Orr accepted that this language was somewhat guarded, but he repeated that from the discussions he had with Mr Goodall-Copestake he was in no doubt that at the time Mr Goodall-Copestake had purchased No.3 OTL he was aware of the covenants that had been given by each of the owners of the properties on the Estate and of the reciprocal nature of the obligations that the covenants brought. Dr Orr said that Mr Goodall-Copestake placed great emphasis on the existence of the covenants and the fact that they had been given by each resident. Dr Orr stated that this appeared obviously to have been an important point to Mr Goodall-Copestake and it was an important point to him, Dr Orr.

19. In cross-examination Dr Orr accepted that he could not give details of the precise circumstances in which he had his conversations with Mr Goodall-Copestake, eg the date or the time of day or the nature of the weather on that occasion. As regards who was entitled to enforce the restrictions Dr Orr stated that it was his assumption that it was the present occupiers who could enforce rather than the original builders. It was put to him that he was not specifically told by Mr Goodall-Copestake that the benefit of the covenants would come directly to him and that he personally would be able to enforce these covenants (rather than someone else enforcing them on his behalf) to which he replied that he assumed that he would be able to enforce the covenants and he asked, rhetorically, who else could enforce them. He recalls discussing with his solicitors the fact that the property was subject to restrictive covenants, but he could not recall any discussion regarding who could enforce them. He stated that in due course he had put up an additional garage (he had at the date of purchase an intention one day to do this) and Dr Orr accepted that, having obtained permission from the Council to build the garage, he did not think it necessary to get permission from any other occupant. He confirmed that his was not the only house where an extension had been made

and he had not objected to any neighbour making an extension. He had thought the approval of the local planning authority was sufficient.

Objectors' submission

20. Mr Grant submitted that over the period when the nine houses were being sold (ie from January 1957 to April 1958) the circumstances on the ground were that the whole estate of nine houses were in the course of being built (the progress made on any particular house being to a greater or lesser extent of completion than for its neighbour) rather than the circumstances being that each house was built in sequence and individually such that no new house was started until the previous one had been completed. Ms Tozer accepted that it would have been clear on the ground during this period that there was to be a development of nine houses in accordance with the scheme that had been approved by the Council and she accepted that it was not necessary for me to decide how far each property had progressed at any particular time during this period. I agree and I proceed on this basis.

21. Mr Grant drew attention to the fact that there exist three out of the nine original conveyances, all three being in effectively identical terms (save for the parcel of land conveyed). There is also evidence from the Land Registry entries regarding all of the nine properties that they are all subject to restrictive covenants in the same terms. He invited me therefore to conclude that all nine properties were conveyed by a conveyance in effectively the same terms, save for the description of the parcel conveyed.

22. By way of preliminary submission Mr Grant referred to the analysis in *Re Jeff's Transfer* [1966] 1 WLR 841 where Stamp J described as Gilbertian a circumstance where a purchaser of a plot could only enforce restrictive covenants against owners who had purchased before him (those earlier purchasers being unable to enforce against him) and being unable to enforce against subsequent purchasers (where those subsequent purchasers would be entitled to enforce against him). He also referred to *Eagling v Gardner* [1970] 2 All ER 838 where Ungoed-Thomas J described such a situation as "a building scheme in Alice's in Wonderland". Mr Grant argued that the result contended for by Ms Tozer in the present case was precisely such a Gilbertian or Alice in Wonderland result and that that should be a result which the Tribunal should avoid if reasonably able to do so upon the analysis of the documents and facts.

23. Mr Grant referred to the well-known passage in *Elliston v Reacher* [1908] 2 Ch 374 where Parker J laid down a test which has over the years been considered to be an authoritative statement of the circumstances in which a building scheme (ie a scheme under which there is a mutually enforceable local law of restrictive covenants binding various plots) can properly be found:

> "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. If these four points be established, I think that the plaintiffs would in equity be entitled to enforce the restrictive covenants entered into by the defendants or their predecessors with the common vendor irrespective of the dates of the respective purchases. 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."

Mr Grant submitted that in the present case the Objectors were able to prove all four of these points without any need to rely on inference, but that if necessary points (3) and (4) could be inferred and also, and in any event, strict adherence to all four of these requirements is not necessary, see Preston & Newsom Restrictive Covenants (9 ed) at paragraphs 2-67 and following and see *Re Dolphin's Conveyance* [1970] Ch 654. Mr Grant then made submission regarding the satisfaction of each of Parker J's four requirements in turn.

24. As regards the first requirement it is obvious (and indeed common ground) that both the Objectors and the Applicant derive title under a common vendor namely Goodyer.

25. As regards the second requirement Mr Grant submitted that this was satisfied having regard to the following matters:

1. The Estate was laid out in nine plots and was known by all of the purchasers, prior to their respective purchase, to be so laid out and to be intended to be sold as nine plots. This was clear from each of the respective conveyances and the documents referred to therein, namely the Sewerage Agreement and the Water Agreement (inter alia) which clearly showed nine plots. Also each of the original conveyances had itself got a plan attached thereto showing the plots or some of them.

2. Further, the facts were such that the evidence of any purchaser's own eyes would have seen that on the ground the Estate was being developed in accordance with the plans referred to above.

3. The nature of the restrictive covenants themselves was entirely consistent with a building scheme and the fact that every one of the nine conveyances contained identical covenants shows that the original vendor (ie Goodyer) intended that all of the covenants should apply to all of the plots.

26. As regards Parker J's third requirement Mr Grant advanced the following submissions:

1. He referred to the uniformity in the wording of the covenants in all nine conveyances. He drew attention to paragraph 2-69 in Preston and Newsom indicating that:

> "uniformity in the covenants imposed on all lots may point to an intention that the covenants should be mutually enforceable"

Mr Grant also drew attention to the actual terms of the specific restrictions which he submitted pointed clearly in the direction of a set of restrictions which would benefit all the other properties on the Estate regardless of the arbitrary order in which they were sold off.

2. Mr Grant referred to the wording of the conveyances themselves and placed reliance on the use of the expression

> "the Vendor's One Tree Meadow Estate at Beaconsfield aforesaid"

which appears both in the parcels clause and in Clause 3, being the clause whereby the restrictive covenants are given. He submitted that this expression meant the whole of the Estate, ie all nine plots and the service road, and that when in Clause 3 the purchaser covenants in order to benefit and protect

> ".... the remainder of the Vendor's One Tree Meadow Estate at Beaconsfield aforesaid or any part or part thereof"

the words "the remainder of ...." meant all that part of the Estate except for the part which was being conveyed to the purchaser by that particular conveyance, rather than being a reference to such part of the Estate as might remain unsold in the Vendor's hands at the date of that particular conveyance. In support of this point he drew attention to the fact that the last conveyance is available, namely the conveyance of No.8 OTL dated 30 April 1958, at which date nothing of the Estate remained owned by Goodyer except for the roadway itself. This conveyance still uses the same phraseology, which would be remarkable if the intention was to benefit only Goodyer's retained roadway.

3. Mr Grant also drew attention to the fact that this was a small estate which was sold off over a short period of time by a vendor which was in the business of developing and selling properties – this was not a case where a

landowner sells off parts only of a much larger estate and does so over a substantial timescale.

4. Mr Grant submitted that it would be most unlikely that it was the intention of Goodyer solely to reserve the benefit of the covenants for such plots (if any) as Goodyer retained, bearing in mind that Goodyer would soon retain none of the plots.

27. As regards Parker J's fourth point Mr Grant advanced the following submissions:

1. It was scarcely surprising that no direct evidence was available, over 50 years later, from persons who were actually involved in the original sales and purchases or by way of sales literature etc relating to such sales.

2. He relied upon the passage in Parker J's judgment indicating that, where the first three points are established, the fourth point may readily be inferred, provided the purchasers had notice of the facts involved in the first three points (which he submitted must be the case here).

3. Mr Grant again referred to the language of the covenants whereby each purchaser knew he was covenanting for the benefit of the remainder of the Estate "or any part or parts thereof".

4. He submitted that the following points further support the establishment of Parker J's fourth requirement, namely the fact that the Estate was a small one and the houses on it were built, or in the course of building, and were in a uniform architectural style and location around a cul-de-sac. It would have been clear to each purchaser that there were to be eight other houses of similar type within the Estate and the nature of the covenants (which were uniform across each of the nine conveyances) were such that it must have been obvious to any purchaser that the covenants imposed were for the benefit of the other properties.

5. He further relied on the evidence of Dr Orr who was able to give hearsay evidence as to what Mr Goodall-Copestake, the original purchaser of No.3 from Goodyer, understood the position to have been when Mr Goodall-Copestake made his original purchase in 1957. He submitted that it could properly be inferred Mr Goodall-Copestake's knowledge and understanding was similar to that of the other original purchasers, and that this understanding was to the effect that each purchaser purchased his respective lot from the common vendor on 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 scheme and that the purchasers were aware of the reciprocal nature of the obligations.

28. Mr Grant also relied upon the fact that the Sewering Agreement expressly uses the words "scheme of development" and he submitted that this was a term of art and showed an intention, albeit in a document between Mrs Greaves and the Council rather than between Goodyer and the purchasers, that there should indeed be a building scheme in the nature of a local law.

29. As regards Clause 4 of the conveyance Mr Grant submitted that the provision ensuring that the purchaser was not to enjoy rights of light or air which prevented Goodyer from building on the other plots could not have the effect of indicating that Goodyer was free to exclude the other plots from the local law of restrictive covenants – and in any event it has been held in certain cases that a Clause granting the common vendor freedom to alter the restrictive covenants or not to impose them on certain plots is not of itself destructive of a building scheme.

30. Mr Grant submitted that *Re Jeff's Transfer* was a very different case (where there was an express exclusion of a building scheme) and that if anything this case assisted the Objectors. He relied strongly on the analysis in *Eagling v Gardner* and in particular adopted the reasoning of Ungeod-Thomas J at pages 845-6. As regards the decision relied upon by Ms Tozer of *Small v Oliver & Saunders (Developments) Limited* [2006] EWHC 1293 Mr Granted submitted that this case, which appears not to have been reported in any law reports, turned on complicated facts after a seven day trial and was a decision where the claimant who was asserting the building scheme was not legally represented. He submitted that all that this case shows is that on the facts and documents in that case no building scheme existed. He also drew attention to the fact that the relevant words of covenant in that case did not purport to annex the benefit not merely to the remainder of the Estate but also to "any part or parts thereof".

31. In summary Mr Grant indicated reliance upon 13 matters, which I can briefly record as the substance is already rehearsed above:

1. All the plots were fixed by 1956.
2. When the properties were released to the market the properties were in the process of being built or were nearing completion.
3. Every conveyance is in exactly the same terms.
4. The terms of the restrictive covenants are such as they can and do benefit all the other plots.
5. It would of benefit to all of the owners of the plots to have a mutually enforceable local law.
6. All the plots were sold off at effectively the same time.
7. The Estate was small, so there was no question of possible liability to very many persons.
8. The finding of a building scheme here avoids the Gilbertian or Alice in Wonderland result referred to in certain cases.
9. Anyone visiting the site as a potential purchaser would have seen that it was patently obvious the Estate was being sold off in plots.
10. The particular wording of the conveyance, especially the parcels' clause and Clause 3, is of significance.
11. The evidence of Dr Orr is relied upon.
12. The Sewering Agreement refers to a scheme of development.

13. The enquiries before contract are also of assistance.

Applicant's submissions

32. On behalf of the Applicant Ms Tozer advanced the following submissions.

33. By way of introduction she drew attention to the fact that building schemes are quite rare, see Francis on Restrictive Covenants (2nd edition) at page 57. She submitted that the absurdity argument (the reference to the Gilbertian or Alice in Wonderland situation) could apply in many cases, but nonetheless building schemes are recognised as being quite rare such that these Gilbertian etc results may ensue.

34. Ms Tozer accepted that on the facts of the present case it might have been sensible to create a building scheme, but the crucial consideration is whether sufficient evidence has been adduced to justify the finding of such a scheme.

35. As regards the alleged "absurdity" argument, the situation was not in fact as stark as the Objectors submitted. In the present case Goodyer, as vendor was going to retain the roadway (at least the subsoil thereof after adoption). Also paragraph 9 of the First Schedule to the conveyances imposed an obligation which contemplated that Goodyer, as vendor, would continue to have some role in the running of the estate after all the purchases had taken place. Thus it was not so absurd to suppose that the purchasers were leaving the enforcement of any covenants to Goodyer as the common vendor.

36. Ms Tozer drew attention to the cases which had been laid before the Tribunal where building schemes were found to have existed and she submitted that there were different features present in each of these:

1. As regards *Baxter v Four Oaks Properties Limited* [1965] 1 Ch 816 there was in effect an express provision that a building scheme was created see pages 818-9.
2. In *Re Dolphin's conveyance* there was a covenant by the Vendors that on a sale or lease of any other part of the Selly Hill Estate there should be imposed similar restrictions. Ms Tozer also relied upon the passage in this case at page 661

> "It is trite law that if you have conveyances of the several parts of an estate all containing the same or similar restrictive covenants with the vendor, that is not enough to impute an intention on the part of that vendor that the restrictions should be for the common benefit of the vendor and of the several purchasers inter se: for it is at least as likely that he imposed them for the benefit of himself and of the unsold part of the estate alone."

3. As regards *Eagling v Gardner* Ms Tozer referred to the factual evidence recorded at pages 841 and following including evidence of circumstances at the

time of the original sales by way of a brochure etc. Such evidence she submitted is missing in the present case.

37. Mr Tozer relied upon the passage cited in paragraph 36 above from *Re Dolphin's Conveyance* and also upon the decision of the Privy Council in *Jamaica Mutual Life Assurance Society v Hillsborough Limited* [1989] 1 WLR 1101 where their Lordships stated:

> "In *Re Wembley Park Estate Co Limited's Transfer* [1968] Ch 491 502-503, Goff J said that to imply 'a building scheme from no more than a common vendor and the existence of common covenants' would be going much too far. Their Lordships agree."

Ms Tozer drew attention to the other text in the *Jamaica* case at page 1108 and to the absence of evidence as to the circumstances surrounding the original sales and how the sales were advertised and what if any representations were made by the vendors to the purchasers etc. In that case their Lordships held that, in the absence of such extraneous evidence, the terms of the instruments of the transfer alone fell far short of what was required to establish community of interest or reciprocity of obligation between purchasers.

38. Ms Tozer referred to *Small v Oliver & Saunders (Developments) Ltd* and in particular to paragraphs 45 to 47:

> "45. But even that degree of uniformity is not enough by itself. The weakness in this aspect of Mr Small's case, and to my mind its only weakness, is that he has not been able to adduce any direct evidence that the several purchasers of properties on the estate were aware of the reciprocal nature of the obligations contained in the relevant covenants. In some of the authorities which I have been shown, advertising material had been unearthed, showing that the covenants were a selling point for the scheme: *Jamaica Mutual Life Assurance Society v Hillsborough Limited* [1989] 1 WLR 1101. Mr Small has produced nothing to that effect here. In some the plaintiff was himself a purchaser from the common vendor and could describe the availability of an estate plan on general display. That is not quite the case here, although I do accept that all the early purchasers would have seen the vendor's title plan of the estate, and later purchasers could all have asked for one. And it would have been a natural thing for them to have asked for it, seeing that the estate is named in all the transfers. Instead Mr Small relies essentially on the uniformity and ubiquity of the covenants, and invites me to infer that purchasers must have known not only of the existence of the covenants and of their application to the area of the scheme (which I accept) but also of their reciprocal nature.
>
> 46. I am tempted by that invitation. I accept that there is a strong suspicion, based on the near uniformity of the covenants and the near total coverage of the estate with those nearly uniform covenants, that the several purchasers over a period of more than ten years must in some instances have questioned the need for the covenants which they were invited to

give and, in such instances, that they are likely to have been informed of the intended reciprocity of the covenants and to have entered into those covenants accordingly. But to make that move from suspicion to inference seems ultimately to be a step too far. I would be disregarding the principle enunciated in the *Jamaica Mutual* case (above) that a building scheme will not be implied merely form a common vendor and the existence of common covenants. It seems to me that I also be contradicting part of the judgment of Buckley LJ in *Reid v Bickerstaff* [1909] 2 Ch 305, 323 which I have already cited at greater length in paragraph 32 above:-

> 'There can be no building scheme unless ... the nature and particulars of the scheme shall be sufficiently disclosed for the purchaser to have been informed that his restrictive covenants are imposed upon him for the benefit of other purchasers of plots within that defined estate with the reciprocal advantage that he shall as against such other purchasers be entitled to the benefit of such restrictive covenants as are in turn to be imposed upon them.'

47. Mr Small submitted strongly that reciprocity is the effect of a building scheme, not a pre-requisite, but in my view it is a fact which needs to be proved, and in this case has not been so proved. For this reason I reject Mr Small's claim for a building scheme comprising the whole of the residential development of the estate."

In the light of this decision Ms Tozer submitted that there cannot be a building scheme without evidence that there existed an intention of mutual enforceability in the minds of the Vendor and the original Purchasers, which would need to be established by clear evidence such as a brochure which expressly told purchasers that all purchasers would covenant in the same terms and that the covenants would be mutually enforceable.

39. In the light of the foregoing Ms Tozer submitted, in paragraph 11 of her skeleton, that it is necessary for the Objectors to show

1. that at the time of the first sale it was intended by both Goodyer (as vendor) and the original purchaser that like restrictions would be imposed when other plots were sold; and
2. that all original purchasers purchased on the footing that the restrictions form part of a local law, enforceable by all against all.

Ms Tozer submitted that the foregoing followed from the *Jamaica* case and the *Small* case. She further submitted that on the facts of the present case neither of these two requirements were satisfied.

40. Ms Tozer drew attention to the absence of any covenant upon Goodyer, as Vendor, obliging Goodyer to impose similar covenants in subsequent conveyances. She submitted that the proper construction of the wording in Clause 3 of the conveyances, where the benefit of the

covenant is expressed to be for "... the remainder of the Vendor's [Estate]" was that the "the remainder" meant so much of the Estate as was unsold (and therefore remaining in the Vendor's hands) at the date of the relevant conveyance.

41. Ms Tozer drew attention to Clause 4 of the conveyances, which provided that the Purchaser was not to obtain any rights of light or air which would prejudice the use and enjoyment of any remaining part of the Vendor's One Tree Meadow Estate. She submitted that this showed there was to be a measure of freedom for Goodyer as to how it dealt with that part of the Estate which remained in Goodyer's hands and that this weighed against there being a building scheme.

42. As regards Dr Orr's evidence Ms Tozer invited me to view him as giving evidence as to his personal understanding when he purchased No.3 OTL in 1965, but as not giving reliable evidence regarding the position in 1957 when Mr Goodall-Copestake or any other original purchaser purchased their respective plots. She also drew attention to Dr Orr's attitude when he wished to extend his property by building a second garage, namely that he thought that provided he obtained planning permission there would be no difficulty with any other occupant of the Estate.

43. As regards the Sewering Agreement Mr Tozer submitted that the use of the expression "scheme of development" in that Agreement could not assist the Objectors. This was a document between different parties in a different context (namely sewering) and merely showed that Mrs Greaves had a scheme, which had been approved by the Council, and that she intended to carry out a development in accordance with the relevant plan.

Conclusions

44. In my judgment a building scheme was created in the present case. My reasons for so concluding are substantially those advanced in argument by Mr Grant and are as follows.

45. While recognising that the judgement of Parker J in *Elliston v Reacher* does not purport to lay down an exhaustive description as to the circumstances in which a building scheme can be created, it is an appropriate starting point against which to examine the facts of the present case.

46. As regards the first requirement in *Elliston v Reacher* this is satisfied in that the Objectors and the Applicant derive title under a common vendor, namely Goodyer.

47. As regards the second requirement in *Elliston v Reacher* this also is satisfied. Goodyer, prior to selling any of the plots at One Tree Lane, laid out all of the Estate so as to show an access road and nine separate plots each with one dwelling upon it. This was clear in documents executed prior to the first sales. The conveyances to the purchasers referred to these earlier documents which contained these earlier plans showing the nine separate plots. It

is clear that Goodyer prepared a standard form conveyance for selling off the plots and that Goodyer intended to impose the same restrictive covenants on every plot and duly did so.

48. The crucial question in the present case is whether the third and fourth requirements in *Elliston v Reacher* are satisfied.

49. I remind myself of the observations of Stamp J in *Re Dolphin's Conveyance*, cited by Ms Tozer and set out in paragraph 36 above. I also remind myself of the passage cited by Ms Tozer from *Jamaica Mutual Life Assurance Society v Hillsborough Limited*, see paragraph 37 above. However in the present case there is in my judgment substantially more than merely a common vendor selling off pieces of land subject to common covenants. The additional matters are to be found in the conveyances themselves and in the factual circumstances as they existed in 1956 to 1958. The matters I find particularly significant are as follows:

1. The Estate was developed by a building company and constituted a small estate (just over four acres) involving a small number of properties namely nine.
2. The development was carried out over a short time frame, all the sales being accomplished within 16 months. Also it must have been obvious to any purchaser visiting the site (especially a purchaser who had seen the relevant documents to which his own prospective conveyance referred) that there was to be a development of nine plots all of which were to a greater or lesser extent in the course of construction at the same time. The prospective purchaser would thus have been aware that this small estate was being developed in accordance with a lotted plan, which had been prepared before the development had been commenced and had been agreed with the Council.
3. It appears clear that Goodyer had no intention to retain any property at the Estate, save perhaps for the subsoil of the roadway, and this fact would in my judgment have been clear to the original purchasers having regard to the facts on the ground and to the terms of their conveyances and the documents referred to therein.
4. The nature of the covenants in the First Schedule to the conveyances are such as plainly are intended to benefit the other plots on the Estate rather than Goodyer personally or any land retained by Goodyer (namely the subsoil of the roadway).
5. The restrictions imposed upon all nine plots are in identical terms.
6. The conveyances of each of the separate nine plots are in effect in identical terms, save of course for the parcels clause which describes the property conveyed.
7. Clause 3 of each conveyance, whereby the purchaser gives the restrictive covenants, states that the covenants are to benefit and protect

   > "... the remainder of the Vendor's One Tree Meadow Estate at Beaconsfield aforesaid or any part or parts thereof".

The expression "the Vendor's One Tree Meadow Estate at Beaconsfield aforesaid" is used in the parcels clause whereby Goodyer conveys Plot No.3 of this Estate. In my judgment the proper construction of the expression "the Vendor's One Tree Meadow Estate at Beaconsfield aforesaid" means the whole of the Estate, ie the nine plots and the roadway, and bears this meaning throughout all nine conveyances. The question is then is what is meant by "the remainder of" this Estate. In my judgment it means all of the Estate apart from the parcel conveyed. It does not mean such part of the Estate as Goodyer may happen to hold at the date of the relevant conveyance to that particular purchaser. The fact that Goodyer adopted a standard form conveyance for all of the conveyances, including the last conveyance (when Goodyer would have retained nothing save the roadway) supports this conclusion, as does the somewhat different phraseology in Clause 4 of the conveyance which provides that the purchaser is not to acquire any right of light or air which would prejudice the free use and enjoyment

> "... of any remaining part of the Vendor's One Tree Meadow Estate for building or other purposes".

The expression "any remaining part", and especially the use of the word "any", is more apt to indicate such part, if any, of the Estate as still remains in Goodyer's hands. It follows from the foregoing that each purchaser gave a covenant with the express intention of conferring the benefit thereof upon the Estate and any part or parts thereof, where the Estate means the whole of the Estate including the nine plots and the roadway. Thus I read the express wording of Clause 3 as indicating an intention by each of the nine purchasers separately that they are covenanting for the benefit of all of the other plots. I consider this an important point in the original conveyance itself to indicate that what was intended was a local law of covenants for the benefit of all of the plots on the Estate.

8. Further, it would have been contrary to Goodyer's own interest for Goodyer to sell off the plots in circumstances so as to give rise to what has been described as the Gilbertian result. It would have been quite the reverse of a good selling point for Goodyer if Goodyer, on selling to the first purchaser, had been obliged either itself (or through its solicitors when enquiries were raised) to indicate that this first purchaser would be bound by all of the restrictions in the First Schedule and that these could be enforced against this first purchaser by all the subsequent purchasers, but that this first purchaser will be unable to enforce any of the covenants against any subsequent purchaser and would have to rely on Goodyer to do so (Goodyer giving no covenant in the conveyance that it would do so).

I should add that I do not find persuasive Mr Grant's additional point which relied upon the use of the expression "scheme of development" in the sewering agreement. This was, as Ms Tozer submitted, an agreement between different parties upon a different topic and I cannot read the expression "scheme of development" as being used as a term of art and as proclaiming an intention to create a building scheme.

50. Having regard to the foregoing I conclude that, even leaving aside the evidence from Dr Orr (to which I turn in a moment) the situation is such that I can and must conclude that the third requirement in *Elliston v Reacher* is satisfied in that the restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold. So far as concerns the fourth requirement, namely that the original purchasers purchased their lots upon the footing that the restrictions were to enure for the benefit of the other lots included in the general scheme, I also conclude that this is proved, see in particular the wording of Clause 3 of each conveyance discussed in paragraph 49.7 above. Also it is to be noted that Parker J recognised that this fourth requirement may readily be inferred in circumstances where the first three requirements are established. Even leaving aside for the moment Dr Orr's evidence I conclude that the fourth requirement can readily be inferred to have been satisfied and I do reach this inference.

51. However the matter does not stop there, because there is the evidence of Dr Orr to consider. Dr Orr was an obviously honest witness who was trying to do the best he could to remember events of 44 years ago. Dr Orr said that the attractive and homogenous nature of the Estate was an important matter to him as was the existence of restrictive covenants which could have the effect of preserving that nature. I accept that evidence. These are matters he is likely to remember. During the course of his cross examination he on various occasions used the expression "my assumption" was to such and such effect when he was describing the position as he understood it to be from his discussion with Mr Goodall-Copestake. However I conclude that this turn of phrase was used by Dr Orr because, entirely understandably, he was unable to tell me that he recollected the precise words used by Mr Goodall-Copestake in 1965. There was nothing in Dr Orr's cross-examination or other oral evidence which led in any way to a retreat by him from his evidence in his witness statement, which he expressly adopted, to the effect that the position as he understood it from Mr Goodall-Copestake (who was an original purchaser from Goodyer) was that when Mr Goodall-Copestake purchased he was told by on behalf of Goodyer (the Vendor) that:

1. all the plots would be subject to the same restrictions;
2. he (ie Mr Goodall-Copestake) as owner of No.3 OTL would have the benefit of the covenants given by the purchasers of the other plots, just as those purchasers of the other plots would have the benefit of the covenants given by Mr Goodall-Copestake, such that the restrictive covenants were of a reciprocal nature;
3. the foregoing points were matters of importance to Mr Goodall-Copestake.

I remind myself that I received no first hand evidence from Mr Goodall-Copestake himself (there is no evidence as to whether he is still alive) and that Dr Orr's evidence is hearsay. However it is unsurprising that first hand evidence is not available bearing in mind the lapse of time since the original purchases in 1957/8. The points of hearsay evidence given by Dr Orr, ie evidence given by Dr Orr as to what Mr Goodall-Copestake told him about the circumstances in 1957, were points which were plainly of importance to any purchaser and thus likely to have been accurately remembered by Mr Goodall-Copestake and accurately relayed by him to Dr Orr and likely, in turn, to have been accurately remembered by Dr Orr. Also this hearsay evidence (ie evidence of Mr Goodall-Copestake's description of events in 1957) is in no way surprising, bearing in mind the facts regarding this development which I have described above.

Indeed it would have been surprising if the true position had been contrary to this hearsay evidence.

52. Accordingly I conclude that, quite apart from any question of inference, it has actually been proved through Dr Orr's evidence that the several original purchasers of the nine plots on the Estate were each aware of the reciprocal nature of the obligations contained in the relevant covenants, such that the requirement described in paragraphs 45 to 47 of *Small v Gardner* and at page 1106 of the *Jamaica Mutual Life* case has been proved, namely that there was an intention in the Vendor and the original purchasers that there should exist reciprocity of obligations between the purchasers of the different plots.

53. For all the foregoing reasons I find that a building scheme has been created. It follows that Mr Devine and Mr Davis are entitled to the benefit of the restrictive covenants given by the Applicant's predecessor in title in respect of No.4 OTL.

54. The foregoing is my decision on this preliminary issue save upon the question of costs, which it was agreed should be reserved for written submissions by the respective parties once my decision on the substance of the issue was known. This decision will not be treated as a final decision of the Lands Tribunal upon this preliminary issue until my decision upon costs has been issued. The parties are invited to make written submissions upon costs within 21 days of receipt of this decision, with copies being sent to the other party. Each party can put in further written submissions, by way of response to the other party's submissions on costs, within 14 days thereafter.

Dated 12 May 2009

His Honour Judge Huskinson