

Neutral Citation Number: [2016] EWCA Civ 603

Case No: A3/2015/1184

**IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
HIS HONOUR JUDGE BEHRENS
HC13C01161 [2015] EWHC 808 (Ch)**

Royal Courts of Justice
Strand, London, WC2A 2LL

28/06/2016

B e f o r e :

**LORD JUSTICE LAWS
LORD JUSTICE LEWISON
and
LADY JUSTICE GLOSTER**

Between:

BIRDLIP LIMITED

Appellant

- and -

HUNTER & ANR

Respondents

**Martin Hutchings QC (instructed by IBB Solicitors) for the Appellant
Wayne Beglan (instructed by SJS Law) for the Respondents
Hearing dates: 16/06/2016**

Lord Justice Lewison:

1. The question raised by this appeal is whether Mr and Mrs Hunter are entitled to enforce restrictive covenants against Birdlip Ltd which has planning permission to build two houses on land that it owns in Gerrards Cross. The answer to that question turns on whether their respective properties are part of a scheme of development affected by mutually enforceable restrictive covenants.
2. The characteristics of such a scheme are that:
 - i) It applies to a defined area.
 - ii) Owners of properties within that area have purchased their properties from a common owner.
 - iii) Each of the properties is burdened by covenants which were intended to be mutually enforceable as between the several owners.

- iv) The limits of that defined area are known to each of the purchasers.
 - v) The common owner is himself bound by the scheme, which crystallises on the occasion of the first sale of a plot within the defined area, with the consequence that he is not entitled to dispose of plots within that area otherwise than on the terms of the scheme.
 - vi) The effect of the scheme will bind future purchasers of land falling within the area, potentially for ever.
3. The dispute in the present case is whether the Hunters have established the existence of such a scheme. HH Judge Behrens held that they had. Birdlip appeals with the permission of Tomlinson LJ.
4. The land with which we are concerned is all in Gerrards Cross and was developed in the early years of the last century, beginning in 1906. The common owners of the land were George Frederick Hampton, a local estate agent, and William Robert Moon, a solicitor in Lincoln's Inn Fields. Birdlip's predecessor in title acquired the land which it now owns as a result of two conveyances: one dated 3 May 1909 and the other dated 18 April 1910. Both the Hunters and Birdlip own parts of what had been the single plot purchased in 1910. The Hunters' property is now called Ashlea and Birdlip's property is now called Little Orchards. Accordingly, on the footing that the covenants had been validly annexed to the land described in the covenants, the Hunters cannot rely simply on the fact of annexation in order to enforce the covenants against Birdlip. They must establish a scheme.
5. The 1909 conveyance has been copied and transcribed; but the 1910 conveyance exists only in an abstract of title. Both those parcels of land had been conveyed to Messrs Hampton and Moon under a single conveyance in 1906.
6. The 1909 conveyance recited an agreement for sale in the most general terms and then conveyed the land described in the parcels clause. That description identified the land as being in Gerrards Cross with a frontage to Layters Way, and then described its boundaries. It referred also to a plan drawn on the conveyance. That plan shows roadways and a railway line but otherwise shows only the land conveyed. The 1909 conveyance also contained a schedule of obligations introduced by the following covenants:

“AND the Purchasers for themselves their respective heirs executors administrators and assigns hereby covenant with the Vendors their heirs and assigns and other the owner or owners for the time being of the adjoining and adjacent estate now or formerly belonging to the Vendors in the Parishes of Chalfont St Peter Gerrards Cross and Iver that the Purchasers their respective heirs and assigns will at all times hereinafter observe and perform the said stipulations and restrictions specified in the schedule hereto”

7. The 1910 conveyance also recited an agreement for sale in the most general terms and then conveyed the land described in the parcels clause. The land was described as being in Gerrards Cross on the north side of Bulstrode Way. Its boundaries were then described. It too referred to a plan, and said that the land formed part of the land which had been conveyed by the conveyance to Messrs Hunter and Moon of 1906. It, too, contained a schedule introduced by the following covenant (turned from the language of the abstract into what must have been the covenant):

“Covenant by the Purchaser with the intent to bind all persons in whom the hereditaments hereby conveyed should for the time being be vested ... with the Vendors and the survivor of them their and his assigns and other the owners or owner for the time being of the adjoining and adjacent estates now or formerly belonging to the Vendors in the Parishes of Chalfont St Peter Gerrards Cross and Iver that he the Purchasers their respective heirs and assigns will at all times

hereinafter observe and perform the said stipulations and restrictions specified in the schedule hereto so far as the same are applicable to the hereditaments hereby conveyed.”

8. The schedule of obligations in each of the two conveyances is similar but not identical. Some of the obligations are positive obligations and others are negative obligations. The positive obligations were:
 - i) A covenant to erect and for ever after maintain a close boarded fence “of a height and material to be approved by the Vendor’s Surveyor.”
 - ii) To contribute rateably to road maintenance until it became a public road repairable by the local authority.
 - iii) If footways became damaged by vehicles passing over them to restore the footway. In the case of the 1909 conveyance this obligation was triggered “upon being required by the owner of any lot or lots near or adjoining or by the Vendors.” In the case of the 1910 conveyance the obligation was triggered “upon being required by the Vendors or by the owners of any property near or adjoining”.
9. The negative obligations included:
 - i) A minimum prime cost for any building erected on the land. That cost was £500 in the case of the 1909 conveyance and £750 in the case of the 1910 conveyance.
 - ii) A restriction on the number of dwellings that could be erected on the land: one or two in the case of the 1909 conveyance and one in the case of the 1910 conveyance.
 - iii) Restrictions on the use of the land. This obligation included an obligation not to do anything which would be a damage or annoyance “to the Vendors their previous or future assigns or tenants or to the owners of any of the adjoining or adjacent property”.
 - iv) A prohibition on erecting buildings of the land “until the plans and elevations thereof shall have been submitted to and approved of in writing by the Vendor’s Surveyor whose fee for such approval shall be paid by the person by whom the plans are submitted.” In the 1910 conveyance (but not in the 1909 conveyance) this obligation has the added sentence: “Such approval is required only for the mutual benefit of all purchasers to prevent depreciation of the property by the erection of unsightly buildings e.g. the covering of roofs will be restricted to tiles or best quality green Westmoreland slates.”
10. Each of the conveyances also contained a power to vary the covenants. In the 1909 conveyance it was expressed as the reservation of a right for the Vendors “to vary these stipulations and restrictions in regard to the remainder of the properties in the neighbourhood”. In the 1910 conveyance it was expressed as a right “to vary these stipulations and restrictions so far as regards the other parts of their Estate.”
11. The judge was also shown some 18 other conveyances of land in the area which contained obligations similar (although not identical) to those contained in the 1909 and 1910 conveyances.
12. In addition the judge considered, and placed heavy reliance on, the contracts for sale of two plots, called lot 38 and lot 116, made in 1908 and 1914 respectively. Each of the agreements is contained in a large piece of paper, printed on both sides. The recto contains the conditions of sale, and the verso contains a plan.

13. Each agreement contains an agreement to convey the property “described in the Plan on the other side hereof as Lot [38/116] but subject ... to the stipulations, restrictions and covenants hereinafter mentioned.” The stipulations etc. are set out in the First Schedule to the conditions of sale. They are substantially the same as those contained in the 1909 and 1910 conveyances. The conditions of sale also contain an agreement by the purchaser as follows:

“...the Purchaser shall covenant for himself, his heirs, executors, administrators and assigns with the Vendors and the survivors and survivor of them, their and his assigns and other, the owner or owners for the time being of the adjoining and adjacent estate now or formerly belonging to the Vendors in the Parishes of Chalfont St Peter Gerard’s Cross and Iver, that the Purchaser, his heirs, and assigns will at all times hereafter observe and perform the said stipulations and restrictions, but the Vendors shall not be bound to enforce or effectuate the said stipulations or restrictions or the liabilities mentioned therein.”
14. The 1908 plan is entitled “Plan of Building Sites at Gerrards Cross, Bucks For Sale by Hampton & Sons”. To the left of the heading is a note which reads “THE ESTATE BOUNDARIES ARE EDGED IN RED, AND THE SITES AS AT PRESENT STAKED OUT FOR SALE ARE COLORED PINK”. The plan shows a relatively large area of land edged in red. It is bounded on the north-east by the railway; from west to east it extends from just west of Layters Way to Mill Lane – a distance of about a mile. Through the middle of the site running approximately east west is Bulstrode Way which continues into Marham Way at the intersection with Packhorse Lane. On the 1908 plan Marham Way ends at Marham Lane. The southern boundary of the area edged red is more difficult to describe save to note that it is to the south of Bulstrode Way and Marham Way.
15. Within the area edged red there are areas coloured pink with Lot numbers within them. There are approximately 57 such areas. Each area has a price within it. There are uncoloured areas with the word “Sold” in them. There are 14 such areas. There are a number of other areas. Five areas have the word “Reserved” within them. One area, to the east of Marham Lane, has the words “Suggested for residences with large grounds” within it. That area is not lotted out. Finally there is an area to the south of Marham Way, between Lots 17 and 18 with the words “Suggested Road” in it.
16. The 1914 plan has the same title and the same note about the estate boundaries as the 1908 plan. However, as the judge observed, there are important differences between the two. First and foremost, the 1914 plan shows only about half the land that was shown on the 1908 plan. West of Packhorse Lane it shows only Lots 27 and 27A (the latter not having been shown as a separate lot on the 1908 plan), one adjacent area marked “reserved” and a small section north of Bulstrode Lane shown in an inset. Equally importantly, what had been shown as lots 43 to 49 on the 1908 plan (and within the red estate boundary drawn on that plan) have been excluded from the estate boundaries drawn on the 1914 plan. In addition whereas the 1908 plan showed an estate boundary running to the north of lots which were themselves on the north side of Bulstrode Way, the estate boundary shown on the 1914 plan runs along the northern edge of Bulstrode Way, thereby apparently excluding those lots from the estate. The estate boundaries had also changed to the south west. On the 1908 plan part of the area north of the Vicarage (which was within the estate boundary but marked as “sold”) was excluded from the estate boundary marked on the 1914 plan, where it was shown simply as “Marham Lodge”.
17. The judge also noted other differences between the two plans. The area to the south of Marham Way and the west of Marham Lane had changed. The areas formerly marked “reserved” had been lotted out. The suggested road to the south – Quakers Way – had been built. The area to the east of Marham Lane was completely different from that shown in the 1908 plan. Marham Way had been extended to Mill Lane; and a new road – Vicarage Way – linked Marham Way to the south of Mill Lane. The whole area had been lotted out.

18. Having set out the law (to which I will return) the judge reasoned as follows. First, he inferred that when the first lot was sold in 1906 there was a plan in existence which defined the boundaries of the estate in the same way as the 1908 Plan. The actual plan would not have been the same because none of the lots marked as sold on the 1908 plan would have been sold. The purpose of that plan was not merely a sales plan. Second, when the 1909 and 1910 conveyances were made there would have been a plan attached to the agreements for sale. It might not have been identical to the 1908 Plan. Other lots would have been sold between 1908 and 1910. Furthermore the shape of some of the lots might have altered. However this was still near the beginning of the development and he inferred that it would still have contained the boundaries set out in the 1908 plan.
19. He then turned to consider the differences between the 1908 plan and the 1914 plan. What he said was this:

“[98] I turn to the 1914 Plan. I accept that the 1914 Plan is different from the 1908 Plan and that the differences are as identified above. There may be many reasons why the area to the north of The Vicarage was excluded from the “estate”. It may have been a mistake. The Vendor may have exercised his power to vary. This discrepancy does not however persuade me that the boundaries in the 1908 plan were not boundaries of the estate.

[99] More difficult is the area to the west of Packhorse Lane which does not show some 24 lots which are on the 1908 plan and the six or seven lots to the south of Bulstrode Way and west of Lot 42. I agree with Mr Hutchings QC that it is impossible to regard the omission of this number of lots as a mistake. However it is to be noted that the red line on the 1914 Plan is not continuous. It comes to an end on each side of Bulstrode Way opposite Lot 27. In my view the proper inference to be drawn is that none of the lots in this area which are not shown were for sale and the 1914 Plan did not purport to show the estate boundaries in this area. It does not persuade me that the 1908 Plan did not show the estate boundaries.”
20. He therefore held that there was a scheme of mutual covenants. The area over which the scheme extended was that shown on the 1908 plan.
21. There are two prerequisites of a scheme of mutual covenants namely: (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 enure 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: *Jamaica Mutual Life Assurance Society v Hillsborough Ltd* [1989] 1 WLR 1101, 1106G.
22. The reason for the court’s insistence on definition of the area to be affected by the scheme is not hard to find. In *Reid v Bickerstaff* [1909] 2 Ch 305, 319 Sir Herbert Cozens-Hardy MR said:

“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.”
23. This statement of principle has been approved and applied many times: *Jamaica Mutual Life Assurance Society v Hillsborough Ltd* at 1106; *Emile Elias & Co Ltd v Pine Groves Ltd* [1993] 1 WLR 305, 310; *Whitgift Homes Ltd v Stocks* [2001] EWCA Civ 1732 at [86].
24. Whether the two components identified in *Jamaica Mutual* exist has been said to be a question of fact, and has also been said to be a question of the intention of the parties. In *Nottingham Patent Brick and Tile Co v Butler* (1885) 15 QBD 261, 268 Wills J described it as a question of fact. In *Renals v Cowlishaw* (1878) 9 Ch D 125, 129 Hall V-C described it as a question of

intention. Likewise in *Baxter v Four Oaks Properties Ltd* [1965] Ch 816, 826 Cross J said that the question was whether the court was satisfied “that it was the intention of the parties” that the covenants should be mutually enforceable. When *Nottingham Patent Brick and Tile Co v Butler* went to the Court of Appeal ((1886) 16 QBD 778) Lord Esher MR saw the question as a combined one. He said at 784:

“...the question, whether it is intended that each of the purchasers shall be liable in respect of those restrictive covenants to each of the other purchasers, is a question of fact, to be determined by the intention of the vendor and of the purchasers, and that question must be determined upon the same rules of evidence as every other question of intention.”

25. One would have thought, a priori, that in the case of a scheme of mutual covenants designed to last potentially for ever, that that intention would be readily ascertainable without having to undertake laborious research in dusty archives searching for ephemera more than a century old. In almost all the cases to which we were referred where a scheme of mutual covenants was found to exist, the area of land to which the scheme applied was ascertainable from the terms of the conveyance or other transactional documents in question. Conversely where the conveyance or other transactional documents gave no indication of the land to which the scheme applied, no scheme was found.

26. Thus in *Renals v Cowlshaw* in the Court of Appeal (1879) 11 Ch D 866 James LJ said that there “must be something in the deed to define the property for the benefit of which [the covenants] were entered into.” Likewise in *Osborne v Bradley* [1903] 2 Ch 446, 454 Farwell J said:

“The whole theory of these interdependent covenants appears to me to point to an arrangement made once for all, either on a sale by auction, by conditions of sale stating the covenants and that other persons will enter into similar covenants, and a plan exhibited at the sale, or by a scheme entered into already by antecedent sales, the particulars of which are stated to the purchaser, and which are displayed upon a plan drawn upon the purchaser’s deed.”

27. In *Reid v Bickerstaff* at 320-1 one of the factors that weighed heavily with Sir Herbert Cozens-Hardy MR was that:

“No conveyance has been produced in which reference is made to covenants entered into by other purchasers with the exception of [four houses], as to which there was undoubtedly a scheme.”

28. In the same case Buckley LJ said at 323 that:

“the nature and particulars of the scheme [must] 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.”

29. In *Elliston v Reacher* [1908] 2 Ch 374, where a scheme was found to exist, the land conveyed was described as part of a larger estate called the Felixstowe Estate. The conveyance contained a covenant by the purchaser to comply with the covenants contained in an indenture of January 16, 1861 and expressed to be made between the several persons named in that indenture and the common vendor. A document dated 16 January 1861, which had been engrossed but not executed, contained a series of mutual covenants, together with a map showing the extent of the Felixstowe Estate. The main argument against the existence of the scheme was that the document was unexecuted, and so was not an indenture. It was in that context that Parker J said that the vendor’s object in imposing the restrictions must be “gathered from all the

circumstances of the case”. Nor surprisingly he held that the engrossment was clear evidence of the requisite intention. In the Court of Appeal ([1908] 2 Ch 665) Sir Herbert Cozens-Hardy MR said at 670 that he “never saw a case in which there was so clear a manifestation of an original intention to have a building scheme.” He described the unsuccessful argument for the appellant thus at 671-2:

“But we have had a very learned and interesting argument ... that although the conveyances, all of which so far as we know are in common form, all contain an express reference to this document, which they call a deed of covenant as to the occupation of the plots of land on the Felixstowe estate, the document is a mere waste bit of parchment containing a stamp for the benefit of the Government, and is not a deed, because it is not executed by any one. I entirely decline to accept that view, and I desire to accept to the full what Parker J has stated. If this document referred to in the conveyance can be identified, the mere fact that it was wrongly described as an indenture is, in my judgement, immaterial, and on this question of identity the nature and contents of the document are of the utmost importance. I therefore hold, without any doubt or difficulty, that these various lots were subject, as part of the building scheme, to the terms and conditions found annexed to the plan, and which are found in the engrossment.”

30. What was critical, then, was that the document containing the covenants (and the map) could be identified from the conveyance. In *Baxter*, for example, the conveyance contained a recital that it was intended that all persons who became purchasers of any land forming part of the Four Oaks Estate should enter into the same covenants. The extent of the Four Oaks Estate was shown on a map annexed to the conveyance. The unsuccessful argument was that since the estate had not been laid out in lots before the sale, a scheme of mutual covenants could not exist. Cross J found a “clearly proved intention that the purchasers were to have rights inter se to enforce the provisions of the common law.” Since the deed said so in terms, and the extent of the land was clear from the deed itself, that was hardly surprising.
31. If the conveyance expressly refers to a plan, but the plan has been lost, the court may well infer that the lost plan sufficiently identified the land to which the scheme of mutual covenants applied: *In re 6, 8, 10 and 12, Elm Avenue, New Milton* [1984] 1 WLR 1398.
32. The fact that there is no map or plan in the conveyance itself of the area to be affected is not necessarily fatal to the existence of a scheme of mutual covenants if the verbal description of the area to which it applies can be identified by extrinsic evidence. But this is no more than a reflection of the ordinary rules of evidence applicable to conveyances. As Lord Wrenbury pointed out in *Great Western Railway v Bristol Corporation* (1918) 87 LJ Ch 414:

“A contract for the sale of Blackacre is unmeaning until you know by evidence what the name Blackacre conveys.”
33. In *Re Dolphin's Conveyance* [1970] Ch 654 the conveyance contained a number of references to the Selly Hill Estate. Stamp J admitted evidence to identify the extent of the Selly Hill Estate. He said:

“I find, as a fact, that the references to the “Selly Hill Estate” in the several conveyances by the Dolphins and their nephew, Watts, are references to identified land: identified not in the sense that by looking at the conveyances you could, today, without researches, identify it, because the conveyances contained no plan or description of it, but identified in the sense that a reference in a document to Richmond Park would be a reference to an identified piece of land, notwithstanding the absence of a plan on the document delineating Richmond Park.”
34. Importantly, although Stamp J decided that case on the basis of a broad principle of equity, the way that he described it was as “the existence of the common interest and the common intention *actually expressed in the conveyances themselves*.” (Emphasis added)

35. On the other side of the line, *Emile Elias & Co Ltd v Pine Groves Ltd* is a very striking case. The land in question had been laid out in five lots. All five were sold over a period of three months in 1938. There were two plans in existence: one plan showed lots 1 to 4 (“the general plan”) and another plan showed an additional lot which later became lot 5. Lots 4 and 5 were the first to be sold. Annexed to the conveyance were the general plan and two further plans showing lots 4 and 5 respectively. Lot 1 was the next to be sold. The plan annexed to that conveyance was the general plan, and a further plan showing lot 1. Neither plan showed lot 5. Lot 3 was the next to be sold, and again the plans annexed to that conveyance did not show lot 5. The last lot to be sold was lot 2 and once again the plans annexed to that conveyance did not show lot 5. Each of the conveyances contained restrictive covenants, although in rather different terms. The covenants were given to “the vendor and its assigns”. The argument was that the conveyances created a scheme of mutual covenants. Lord Browne-Wilkinson, giving the advice of the Privy Council, said at 310:

“... it is not sufficient that the common vendor has himself defined the area. In order to create a valid building scheme, the purchasers of all the land within the area of the scheme must also know what that area is.”

36. It was argued that the existence of a scheme could be inferred from the surrounding circumstances. But the Board rejected that argument. Lord Browne-Wilkinson said:

“In this case there was one plan, the general plan, which was attached to all four 1938 conveyances, but this plan did not show lot 5. If therefore lot 5 falls to be treated as part of the designated scheme area, it has not been proved that in 1938 the purchasers of lot 1, 2 and 3 were aware of that fact. Mr. Fitzpatrick suggested that it could be inferred from the fact that all the purchasers were associated with the golf club and, by the time of the 1948 deed, were aware of lot 5, that they were so aware in 1938. Their Lordships feel unable to attach to any such inference sufficient probative force to reach an affirmative conclusion that all the purchasers of the lots in 1938 knew that lot 5 was included. If lot 5 was to be part of a scheme area giving rise to mutually enforceable obligations between all the lots, it would surely have been shown on the plan annexed to each of the conveyances.”

37. 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).
38. In *Tucker v Vowles* [1893] 1 Ch 195 it was held that if a vendor prepares a plan of a building estate showing lots with houses marked on them, and an intending purchaser is shown that plan, and his agreement with regard to a plot purchased by him happens to be on a printed form with written alterations, the purchaser is not entitled to assume that the whole estate is governed by a building scheme that each plot shall, without variation, be built on strictly in accordance with the indications on the plan, and shall of necessity be governed by the printed portions of the agreement.
39. 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: *Re Wembley Park Estate Co Ltd's Transfer* [1968] 1 Ch 491. Moreover the content of some covenants may themselves point against the existence of a scheme. In *Lund v Taylor* (1976) 31 P & CR 167, 177 Stamp LJ said:

“There are, we think, other difficulties in finding that the stipulations were intended by Tellings to be reciprocally enforceable. The learned judge in the court below took the view that the stipulations were of the sort designed to benefit other purchasers of plots and not the vendors or any land retained by them. But of the negative stipulations which are to be found in the known conveyances that directed against the erection of a building “except in conformity with plans approved by the vendors or their surveyors such approval not to be unnecessarily withheld” would, once the estate had all been sold off in parcels, become quite inappropriate. A similar difficulty arises in relation to the stipulation against cutting down or lopping trees “without the permission of the vendors such permission not to be unreasonably withheld” Both these stipulations appear, to us to be designed to apply during the development of the estate to enable the vendors to sell off the several plots to their better advantage.”

40. The existence of an express power to vary covenants has been said to be equivocal. Considered in isolation such a provision is equally consistent with the presence or absence of a scheme. If there are other clear pointers towards the existence of a scheme of mutual covenants, then the presence of such a stipulation is not a contra-indication. On the other hand if there are no such clear pointers, the inclusion of such a stipulation provides support for the conclusion that there is no scheme: *Whitgift Homes Ltd v Stocks* at [101].
41. Let me turn, then, to the conveyances in our case. The salient points seem to me to be these:
 - i) The verbal descriptions of the parcels conveyed simply defined them by reference to metes and bounds. There is no reference in the parcels clause to any estate of which the land is said to form part.
 - ii) The conveyance plans show no lots. They show only the property conveyed.
 - iii) There is no reference anywhere in the conveyances to any other plan.
 - iv) The covenants are expressed to be given, not for the benefit of the land now said to be subject to the scheme, but to a far wider area in three different parishes. There is no hint that the legal effect of the covenants is to be any different as between one part of that area and another. The extent of the land to which the covenants expressly refer cannot be identified. The only area of land belonging to Messrs Hampton and Moon which can be identified from the conveyances themselves is that which was contained in the original conveyance to them of 1906. But that is a far smaller area than the area said to be part of the scheme.
 - v) There is no express provision in the conveyances that the covenants are to be mutually enforceable as between purchasers of different parts of the land belonging to Messrs Hampton and Moon.
 - vi) Some of the covenants are positive covenants and are therefore very unlikely to have been intended to be enforceable by individual original purchasers, and could not have been enforceable against subsequent purchasers.
 - vii) The two covenants which require the Vendor’s consent are, as *Lund v Taylor* shows, pointers against the existence of a scheme of mutual covenants.
 - viii) Moreover, in the 1910 conveyance, but not in the 1909 conveyance, the requirement to obtain the approval of the Vendor’s Surveyor’s approval to building materials is said to be “for the mutual benefit of all purchasers”. But if *all* the covenants were intended to be for the mutual benefit of purchasers it is very difficult to see why that covenant alone was so described.

- ix) The covenants themselves include a number of different geographical descriptions: “any lot or lots near or adjoining”; “properties in the neighbourhood”; “adjoining or adjacent properties”; “other parts of their Estate”.
 - x) The stipulations include power for the Vendors to vary the covenants.
42. In the light of these considerations I would provisionally conclude that no scheme has been established. What, then, of the extrinsic evidence? I do not think that we were shown any case which binds us to hold that the existence of a scheme can be established purely on the basis of extrinsic evidence, now over a century old. That would, in my judgement, be a very unsatisfactory state of affairs given that the existence of enforceable restrictive covenants is potentially a perpetual interference with the right of successive property owners to do as they please with their own property. Assuming, however, that the existence of a scheme can be proved by such evidence alone it would, in my judgement, require cogent evidence to do so.
43. The judge found that the scheme was, in effect, created by the standard conditions of sale and the 1908 plan. But the main difficulty with that conclusion is the 1914 plan. The judge was plainly right that each plan formed part of the conditions of sale printed on the other side of the paper. But the only explicit function of the plan was to identify the lot to be sold. It had no other function within the express terms of the conditions of sale. It may well be a proper inference that purchasers who bought on the basis of the conditions of sale on the other side of the 1908 plan also saw the plan. It may even be a proper inference that the buyers under the 1909 and 1910 conveyances saw the 1908 plan. But there, in my judgement, the process of inference breaks down. As Lord Browne-Wilkinson explained what is necessary is that *all* the buyers of land affected by the scheme must know what that area is. A buyer who bought by reference to the 1914 plan (which depicts part of the land included within the 1908 plan) would have had no idea from the conditions of sale or the 1914 plan what else had been included in the area. Mr Beglan, for the Hunters, said that the 1914 plan was obviously incomplete, and that any purchaser would therefore have made further inquiries. But the argument that a purchaser would have made further enquiries assumes the answer to the very question that needs to be answered. Why would a purchaser make further inquiries unless there were intended to be a scheme of mutual covenants? If there was no such intention then there would have been no need to make further inquiries. The legend on the 1914 plan to the effect that it depicted the “Estate Boundaries” would, in itself, have discouraged a purchaser from making any further inquiries. The form of the 1914 plan is in my judgement a pointer towards the conclusion that no such scheme was intended.
44. The point goes further however. As noted, parts of the land within the red line delineating the Estate in 1908 were excluded from the delineation of the Estate on the 1914 plan. The judge’s thoughts about why that might have happened were in my opinion no more than speculation which went far beyond permissible inference. But even if his speculation about the making of mistakes were right, the fact remains that a purchaser who saw the 1914 plan would have been shown an estate whose boundaries differed from the estate shown on the 1908 plan. If there had been a scheme it would have crystallised in 1906, and although the Vendors may have had power to vary the covenants, they had no power to exclude land from the scheme completely. The existence of two conflicting plans is another strong pointer against the intention to create a scheme.
45. I would hold, therefore, that the evidence fell far short of what was required to prove the existence of a scheme of mutual covenants; and that the judge was wrong to hold otherwise. I would allow the appeal.
46. **Post script.** In the course of the hearing of the appeal we allowed an application by Birdlip to adduce fresh evidence. This evidence was the result of a train of inquiry prompted by the chance discovery by Birdlip’s solicitor of a highly relevant conveyance in the local archives. It

seemed to us that this material could not have been made available at trial with the use of *reasonable* diligence, and that had it been shown to the judge it would have played an important part in the way that he approached the evidence. In addition the trial had been conducted without live evidence, and the question for decision would, in practice, have affected a wide area so that it would have been unsatisfactory to have decided the appeal on the basis of part only of the available material. As it turns out, however, I have reached my conclusion without the need to rely on that further material, so I say no more about it.

Lady Justice Gloster:

47. I agree.

Lord Justice Laws:

48. I also agree.