

Legal Alert

August 2016

Restrictive covenants – no building scheme

Birdlip Limited v Hunter [2016] EWCA Civ 603

In this case, Mr and Mrs Hunter owned a house in Gerrards Cross next door to a house owned by Birdlip Limited. Both plots were subject to a restrictive covenant not to build more than two dwellings on the combined site.

Birdlip proposed to build two new houses on its plot. It obtained planning permission to do so, despite objections from the Hunters. The Hunters then tried to prevent the proposed scheme by enforcing the restrictive covenant that burdened Birdlip's plot.

The problem for the Hunters was that, under the usual rules governing restrictive covenants, they had no right to enforce the Birdlip covenant. Where two adjacent plots of land are subject to the same restriction, there's no general rule that says that the owner of one plot can enforce the restriction against the other. (The right to enforce the covenant belonged to whoever now owned neighbouring land that originally belonged to the original seller of both plots – but this was of no help to the Hunters.) In other words, in lawyer-speak, the Hunters were subject to the burden of the covenant, but were not entitled to its benefit.

The Hunters therefore turned for help to the law relating to "building schemes".

An original developer of a commercial or residential estate, who intends to sell off individual plots within the estate to separate buyers, may decide to set up a scheme of restrictive covenants that are intended to be enforceable by the owners of each of the units between themselves, to maintain the character and amenities of the estate. Such a building scheme creates a kind of local law, enforceable by the individual plot owners without the intervention of the original developer.

In the High Court, after extensive scrutiny of a number of historical documents transferring land in the area (described by Lord Justice Lewison in the Court of Appeal as "laborious research in dusty archives searching for ephemera more than a century old"), the judge decided that there was such a scheme. But the Court of Appeal disagreed.

For a building scheme to exist, you have to establish an area of land to which the scheme clearly relates and a common intention of both the original seller of the land and the various buyers that the covenants are to be mutually enforceable by all the buyers against one another (as opposed to by just the seller). The Hunters were unable to provide sufficient evidence to establish these criteria, said Lewison LJ.