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1 of 1 DOCUMENT: New South Wales Law Reports/[1975] 2 NSWLR/RE MACK AND THE CONVEYANCING ACT - [1975] 2 NSWLR 623 - 20 October 1975

12 Pages

RE MACK AND THE CONVEYANCING ACT

Equity Division: Wootten J.
July 18; Oct. 20, 1975.

Torrens System -- Restrictive covenants -- Building scheme -- Two vendors -- Some lots not restricted -- Principles applicable -- Conveyancing Act, 1919, s. 88 (1).

By deposited plan No. 16,724 certain land, partly owned by one vendor and partly owned by another vendor, was subdivided into one hundred and fifteen lots. Shortly afterwards the second vendor transferred twenty-eight lots to the first vendor. Later the first vendor transferred four lots to a company and the same day the second vendor transferred eighty-four lots to the same company, bringing the total number of lots owned by that company to eighty-eight.

Some years later the first company transferred lots 28 and 29 to a purchaser, subject to a covenant that only one residence should be erected on any one lot. This covenant contained a statement that the land to which the benefit of the covenant was intended to be appurtenant was "the whole of the land comprised in D.P. No. 16,724 other than the land (thereby) transferred". At this date the company had already disposed of forty-nine of the eighty-eight lots which it had owned.

These eighty-eight lots did not form a single identifiable block, but were scattered throughout the subdivision. After the transfer of lots 28 and 29, the company transferred eight lots without taking any covenant. The first vendor, at the direction of another company to which he had contracted to sell the relevant lots, transferred twenty-three lots to purchasers, and in each case took a similar covenant. One other lot was transferred without any covenant, but no further details in relation to this lot were available.

A successor in title to the first purchaser of lots 28 and 29, being a succeeding purchaser of lot 28, subdivided that lot into two parts and sold one, upon which a residence was erected. He then sought a declaration that the covenant was not enforceable against the other part, on the ground (1) that the instrument in which the covenant was contained did not clearly indicate the land to which the benefit of the easement or restriction was appurtenant, as required by s. 88 (1) (a) of the *Conveyancing Act*, 1919; and (2) that the covenant was unenforceable, because the covenantee did not, at the time when the covenant was taken, or at any other time, own the whole of the land for the benefit of which it purported to take the covenant.

Notice of the application was, by direction of the Court, served on the present registered proprietors of the lots in D.P. 16,724, and some forty-eight of them, whilst not appearing, lodged with the applicant's solicitor statements registering their dis approval of the application on various grounds connected with the amenity of the neighbourhood, and relying on their rights, if any, under the covenant.

Held: (1) Since a vendor cannot take a covenant for the benefit of land which he does not own, unless the covenant is given (and taken) as part of a building scheme, the covenant in the present case could be enforced against the applicant by the present proprietors of the other lots only on the basis of such a scheme; and the onus was on the applicant to negative the existence of such a scheme.

Sutton v. Shoppee [1963] S.R. (N.S.W.) 853; 80 W.N. 1550; *Re Redmond and the Conveyancing Act* (1965) 82 W.N. (Pt. 1) (N.S.W.) 427 and *Re Louis and the Conveyan cing Act* [1971] 1 N.S.W.L.R. 164, referred to.

(2) Since the reciprocal rights which are found in a common building scheme are based, not on contract, but on the equities arising from the community of interest of the lotholders, such a scheme may be created by the collaboration of two or more

land-holders, each owning part of the subject land, and each taking a common form of covenant on the transfer of the lots which he owns.

Re Dolphin's Conveyance [1970] 1 Ch. 654, at p. 663, applied.

(3) Since it is the intention existing when a building scheme is established which is relevant, it is not necessary for the validity of the scheme that the vendor (or vendors) should impose the same, or any, restrictions on all the lots sold under the scheme, so long as the covenant is unenforceable against only a small proportion of the lots.

Nottingham Patent Brick & Tile Co. v. Butler (1885) 15 Q.B.D. 261; affirmed (1886) 16 Q.B.D. 778; *Collins v. Castle* (1887) 36 Ch. D. 243; *Elliston v. Reacher* [1908] 2 Ch. 665, at p. 672; *Sutton v. Shoppee* [1963] S.R. (N.S.W.) 853; 80 W.N. 1550; *Re Dennerstein* [1963] V.R. 668 and *Re Louis and the Conveyancing Act* [1971] 1 N.S.W.L.R. 164, at p. 183, referred to.

(4) For these reasons the applicant had failed to negative a building scheme and was bound by the covenant.

CASES CITED.

The following cases are cited in the judgment:
Barry and the Conveyancing Act, Re (1961) 79 W.N. (N.S.W.) 759.
Baxter v. Four Oaks Properties Ltd. [1965] Ch. 816.
Cobbold v. Abraham [1933] V.L.R. 385.
Collins v. Castle (1887) 36 Ch. D. 243.
Dennerstein, Re [1963] V.R. 688.
Dolphin's Conveyance, Re [1970] Ch. 654.

Elliston v. Reacher [1908] 2 Ch. 374; affirmed [1908] 2 Ch. 665.
Gaskin v. Balls (1879) 13 Ch. D. 324.
Gemmell Holdings Pty. Ltd. and the Conveyancing Act, Re [1970] 1 N.S.W.R. 370.
Keates v. Lyon (1869) 4 Ch. App. 218.
Kerridge v. Foley (1964) 82 W.N. (Pt. 1) (N.S.W.) 293.
Langdale Pty. Ltd. v. Sollas [1959] V.R. 634.
Lawrence v. South County Freeholds Ltd. [1939] Ch. 656.
Louis and the Conveyancing Act, Re [1971] 1 N.S.W.L.R. 164.
Mackenzie v. Childers (1889) 43 Ch. D. 265.
Martyn, Re (1965) 65 S.R. (N.S.W.) 387; 82 W.N. (Pt. 2) 241.
Naish and the Conveyancing Act, Re (1960) 77 W.N. (N.S.W.) 892.
New South Wales Aged Pensioners Hostel and the Conveyancing Act, Re [1967] 1 N.S.W.R. 332.
Nottingham Patent Brick & Tile Co. v. Butler (1885) 15 Q.B.D. 261; affirmed (1886) 16 Q.B.D. 778.
Osborne v. Bradley [1903] 2 Ch. 446.
Pinewood Estate, Farnborough, Re [1958] Ch. 280.
Pirie v. Registrar-General (N.S.W.) (1962) 109 C.L.R. 619.
Redmond and the Conveyancing Act, Re (1965) 82 W.N. (Pt. 1) (N.S.W.) 427.
Renals v. Cowlishaw (1878) 9 Ch. D. 125; affirmed (1879) 11 Ch. D. 866.
Ridley v. Lee [1935] Ch. 591.
Spicer v. Martin (1888) 14 App. Cas. 12.
Sutton v. Shoppee [1963] S.R. (N.S.W.) 853; 80 W.N. 1550.
Texaco Antilles Ltd. v. Kernochan [1973] A.C. 609.
Tucker v. Vowles [1893] 1 Ch. 195.
Western v. Macdermot (1865) L.R. 1 Eq. 499; affirmed (1866) 2 Ch. App. 72.
Whatman v. Gibson (1838) 9 Sim. 196; 59 E.R. 333.
Wilson and the Conveyancing Act, 1919-1943, Re (1949) 49 S.R. (N.S.W.) 276; 66 W.N. 147.

No additional cases were cited in argument.

SUMMONS.

The plaintiff sought a declaration that the restrictions arising under a covenant to which land of which he was the registered proprietor was subject did not run with the land, were unenforceable against the proprietor or proprietors for the time being of the land and were now unenforceable by any person. All other interested parties were served.

H.J. Mater, for the plaintiff (applicant).

There was no appearance for any other party.

Cur. adv. vult.

Oct. 20.

WOOTTEN J. The plaintiff is the registered proprietor of a block of land at Epping which is the whole of the land in certificate of title vol. 12,298, fol. 28. The certificate of title states that he is registered proprietor, subject to such exceptions, encumbrances and interests as are shown in the second schedule to the certificate, and one of these is "covenant created by transfer No. C936,062". That was a transfer of lots 28 and 29 in deposited plan No. 16,724, and the land presently owned by the plaintiff is part of lot 28, which he subdivided into two lots in 1973 by deposited plan No. 565,950. He has sold the other lot in this subdivision, and a house is built on it. The covenant referred to provides, inter alia, that only one residence shall be erected upon each lot of the land transferred, i.e. on lots 28 and 29 in deposited plan No. 16,724. As one residence has already been erected on the other of the two lots into which lot 28 has been subdivided, the covenant forbids the erection of a residence on the land now retained by the plaintiff. In the present proceeding he seeks declarations that the restrictions arising under the covenant do not now run with the land which he owns, that they are unenforceable against the proprietor or proprietors for the time being of the land, and that they are now unenforceable by any person.

By direction of the Court the plaintiff served notice of the application on the present registered proprietors of the various lots of land in deposited plan No. 16,724. Although there was no appearance by any of them before me, the proprietors of approximately forty-eight of the lots lodged with the plaintiff's solicitor a statement registering their disapproval of the application on various grounds affecting the amenity of the neighbourhood. They stated that, when purchasing, they were fully aware of the benefit of the covenant and would be extremely disappointed if it is found to be unenforceable. Although I have not had the benefit of any argument from these objectors, their statement makes it clear that the application is, in substance, a contested one, and imposes on me a particular burden to scrutinize the case made by the plaintiff.

The plaintiff relies on two grounds: (1) that the instrument in which the covenant is contained does not "clearly" indicate "the land to which the benefit of the easement or restriction is appurtenant", as required by s. 88 (1) (a) of the *Conveyancing Act*, 1919; (2) that the covenant is unenforceable because the covenantee, Australian Securities Ltd., did not at the time own the whole of the land for the benefit of which it purported to take the covenant.

The instrument containing the covenant contains a statement that the land to which the benefit of the covenant is intended to be appurtenant is "the

whole of the land comprised in Deposited Plan No. 16,724 other than the land hereby transferred". That plan effected a subdivision into one hundred and fifteen lots of land known as Station Hall Estate, which was the whole of the land in certificate of title, vol. 3,534, fol. 199, owned by Thomas Joseph Dwyer, and part of the land in certificate of title, vol. 2,875, fol. 206, owned by Alfred Forrester Wooster. On 6th August, 1930, Wooster transfer red twenty-eight of the one hundred and fifteen lots to Dwyer, and on 25th February, 1932, transferred eighty-four of the one hundred and fifteen lots to Australian Securities Ltd. On the same date Thomas Joseph Dwyer transferred four lots to the same company. It appears, therefore, that, when the company, on 6th August, 1940, transferred lots 28 and 29 to Thomas Arthur Hobbs by transfer No. C936,062, and took the covenant expressed as intended to be appurtenant to the whole of the land comprised in deposited plan No. 16,724, it was not and had never been the owner of the whole of that land. It had never owned more than eighty-eight of the one hundred and fifteen lots. It is on this fact that the plaintiff primarily relied.

The covenant clearly states the land to which the benefit of the restriction is intended to be appurtenant, and the only question is whether the benefit is in law so appurtenant, i.e. whether the restriction is validly created. There is ample authority that a vendor of land in respect of which he takes a restrictive covenant cannot, by the covenant, annex the restriction to land which he does not own, unless the covenant is given as part of a building scheme or development scheme: *Re Barry and the Conveyancing Act* [(1)]; *Sutton v. Shoppee* [(2)]; *Kerridge v. Foley* [(3)]; *Re Redmond and the Convey ancing Act* [(4)]; *Re New South Wales Aged Pensioners Hostel and the Convey ancing Act* [(5)]; *Re Louis and the Conveyancing Act* [(6)], to name only authori ties in this State. In the present case, the vendor purported to annex the benefit of the covenant to the whole of the land comprised in deposited plan No. 16,724, other than the land transferred. Apart from the difficulty that the evidence shows that the vendor, Australian Securities Ltd., did not ever own twenty-seven of the lots in the deposited plan, a matter to which I shall return later, there is evidence that, of the eighty-eight lots which it did own, it had already disposed of forty-nine prior to the transfer which contained the restriction now under challenge. It is, therefore, clear that the restriction can be enforced by the present proprietors of the other lots only on the basis that it is part of a building scheme or development scheme.

The onus is on the person who seeks a declaration that a restriction is unenforceable to negative the existence of a common building or development scheme, if such a scheme would support the restriction: *Sutton v. Shoppee* [(7)]; *Re Redmond* [(8)]. To negative the existence of a common building scheme in this case the plaintiff relied on the facts that (a) twenty-seven of the blocks in the subdivision had not been owned by Australian Securities Ltd.; (b) the eighty-eight lots which it did own on 25th February, 1932, did not together form an identifiable section of the land in the deposited plan, but were scatter

(1) (1961) 79 W.N. (N.S.W.) 759.

(2) [1963] S.R. (N.S.W.) 853; 80 W.N. 1550.

(3) (1964) 82 W.N. (Pt. 1) (N.S.W.) 293.

(4) (1965) 82 W.N. (Pt. 1) (N.S.W.) 427.

(5) [1967] 1 N.S.W.R. 332.

(6) [1971] 1 N.S.W.L.R. 164.

(7) [1963] S.R. (N.S.W.) 853, at pp. 863, 870, 871; 80 W.N. 1550, at pp. 1558, 1563.

(8) (1965) 82 W.N. (Pt. 1) (N.S.W.) 427, at p. 434.

ed over it; (c) subsequent to the date of transfer which created the restriction in respect of the plaintiff's land, the vendor company transferred eight lots in the subdivision without taking covenants in the respective transfers.

The possibility occurred to me that there might have been a common building scheme for the whole of the subdivision, implemented by agreement between several vendors, and the fact that the vendor company did not own all the land in the subdivision, or a compact part of it, did not, therefore, necessarily negative the existence of a common building scheme. I, accordingly, invited the plaintiff to furnish evidence as to whether other lots in the subdivision, which had not been acquired by Australian Securities Ltd., were subject to a similar covenant. Although I only requested that a sample be taken, the plaintiff's legal representatives undertook an extensive inquiry, for which I express my gratitude. At the time the relevant searches were made the records with respect to twelve of the one hundred and fifteen lots were not readily available, and there is no evidence before me as to whether or not they contained any covenants. All twelve were in the eighty-eight transferred to Australian Securities Ltd.

Of the one hundred and three lots as to which information is available, ninety-four contained covenants in similar form to that involved in the present case. Seventy-one of these are with Australian Securities Ltd., and twenty-three with Epping Estates Ltd. In respect of nine lots, there are no such covenants. These include the eight transferred by Australian Securities Ltd. subsequent to the creation of the restriction attacked in the present case, and one as to which I have no information. It does not appear that Epping Estates Ltd. was ever the registered proprietor of any lots. However, it must have bought the twenty-three lots, in respect of which covenants were given to it, from Thomas Joseph Dwyer as, in each case, the transfer was expressed to be from Thomas Joseph Dwyer by the direction of Epping Estates Ltd., or Epping Estates Ltd. (In liq.).

There are some minor discrepancies in the evidence, but as best I can judge the position revealed may be summarized in this way:

Transferor	*Covenants in favour of*	*No. of lots*
Australian Securities Ltd.	Australian Securities Ltd.	68

Transferor	*Covenants in favour of*	*No. of lots*
Not known (but formerly held by Dwyer on transfer from Wooster--Lots 40, 41, 33)	Australian Securities Ltd.	3
Dwyer on direction of Epping Estates Ltd., or Epping Estates Ltd. (In Liquidation).	Epping Estates Ltd.	23
Australian Securities Ltd. (Lots 5, 11, 13, 17, 49, 74, 80, 81, 86, 98, 109, 110)	Covenant position not known	12
Australian Securities Ltd. (Lots 1, 4, 25, 33, 57, 68, 105, 106)	No covenant	8
Not known, but must have originally been owned by Dwyer or Wooster (Lot 97)	No covenant	1

115

I have no information before me as to what relationship, if any, there was between Australian Securities Ltd., Epping Estates Ltd., Dwyer and Wooster, but the terms of the transfer of the eighty-eight lots from Wooster to Australian Securities Ltd. suggest some complex relationship, particularly when it is remembered that Wooster and Dwyer jointly carried out the subdivision in the first place. In consideration of £2,728.11.0 paid to him by Dwyer "and in further consideration of the sum of £2,026.19.0 paid to the said Thomas Joseph Dwyer by Epping Estates Limited (In Liquidation) and in further consideration of the sum of £2026.19.0 paid to the said Epping Estates Limited (In Liquidation) by Australian Securities Limited", Wooster trans ferred the eighty-eight lots to Australian Securities Ltd. "at the request and by the direction of the said Thomas Joseph Dwyer and Epping Estates Limited (In Liquidation)". Whatever the legal relationship between them, there is strong reason to suspect, in view of the similar form of the covenants taken in favour of Australian Securities Ltd. in seventy-one cases and Epping Estates Ltd. in twenty-three cases, that the two companies, and possibly Wooster and/or Dwyer, were acting in collaboration to establish a building scheme for the subdivision.

Two questions now arise: (1) Can a common building scheme be created for an area by the collaboration of two or more owners, each of whom owns part of the area, and who each take a common form of covenant on the disposal of the lots in the area? (2) If so, is the fact that nine lots were nevertheless disposed of without such a covenant, or any relevant covenant, fatal to the validity of the building scheme and the enforceability of the covenants? If I were to answer the first question in the negative a third question would arise. (3) If regard cannot be had to the covenants taken by Epping Estates Ltd. because it was a different vendor, can the building

scheme survive so as to make the covenants taken in respect of the seventy-one properties by Australian Securities Ltd. mutually enforceable, notwith standing that these seventy-one properties are scattered through the sub division, and at times separated by the twenty-three properties with covenants taken by Epping Estates Ltd. and the nine with no covenants?

In *Elliston v. Reacher* [9], Parker J. said: "In my judgment, in order to bring the principles of *Renals v. Cowlishaw* [10] and *Spicer v. Martin* [11] 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

(9) [1908] 2 Ch. 374, at p. 384.

(10) (1878) 9 Ch. D. 125.

(11) (1888) 14 App. Cas. 12.

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 re spective purchases."

This statement has frequently been used to state the law as if no valid building scheme could exist unless the four matters mentioned by Parker J. [12] were established; e.g. *Halsbury's Laws of England*, 3rd ed., vol. 14, p. 565; Helmore, *The Law of Real Property*, 2nd ed., pp. 214 and 215 and Second Supplement to Second Edition by R.A. Woodman, p. 91; Voumard, *The Sale of Land*, 2nd ed., p. 592; per Kitto J. in *Pirie v. Registrar-General* [13]; per Simonds J. in *Lawrence v. South County Freeholds Ltd.* [14]; per Adam J. in *Langdale Pty. Ltd. v. Sollas* [15]; per Hudson J. in *Re Dennerstein* [16]; per Lowe J. in *Cobbold v. Abraham* [17].

If the statement of Parker J. [18] does authoritatively lay down four inflexible requirements to be mechanically applied in determining whether a building scheme exists, then the plaintiff has succeeded in negativing the

existence of a building scheme. While the evidence is consistent with the existence of the other conditions laid down by Parker J., it does negative the existence of a common vendor, in as much as the origin of the restrictive covenants is traced to two vendors, Australian Securities Ltd. and Epping Estates Ltd.

Parker J. [19] was not legislating, and if this requirement does exist it must be either because it rests on a rational foundation or because it is imposed, despite its irrationality, by some inescapable authority. I can see no rational foundation for saying that a building or development scheme can only be established by a single vendor and not by two or more acting in collaboration. In this very case it appears that the estate was created, and the subdivision into residential lots carried out, by two owners, Dwyer and Wooster, each of whom owned part of the land included. I can see no reason why they should not have been able, without bringing the land into a common owner ship, to collaborate in creating a common building scheme for the whole estate, and why the courts should not support the legitimate expectations of those who bought lots on the faith of the restrictions in terms imposed on purchasers.

If the legal basis of a building scheme depended on contract, and there was no deed to which the two vendors and their purchasers were parties, the absence of any contractual relationship between the purchasers from one vendor and the purchasers from the other might well be a difficulty, although the ingenuity of the courts in implying contracts where justice requires is not to be underrated. However, few building schemes would survive strict analysis in terms of contract law. In *Elliston v. Reacher* [20] itself Parker J.

(12) [1908] 2 Ch. 374, at p. 384.

(13) (1962) 109 C.L.R. 619, at p. 629.

(14) [1939] Ch. 656, at p. 682.

(15) [1959] V.R. 634.

(16) [1963] V.R. 688.

(17) [1933] V.L.R. 385.

(18) [1908] 2 Ch. 374, at p. 384.

(19) [1908] 2 Ch. 374, at p. 384.

(20) [1908] 2 Ch. 374.

expressed the opinion that the implication of mutual contract is not always a perfectly satisfactory explanation of the equities arising in a building scheme, and concluded [21]: "It is, I think, enough to say, using Lord McNaghten's words in *Spicer v. Martin* [22] that where the four points I have mentioned are established, the community of interest imports in equity the reciprocity of obligation which is in fact contemplated by each at the

time of his own purchase."

It is now accepted that this is the nature of the equity which makes the covenants in a building scheme reciprocally enforceable as between the owners for the time being of the lots in the scheme--"an equity which is created by circumstances and is independent of contractual obligation": per Simonds J. in *Lawrence v. South County Freeholds Ltd.* (23). Cf. *New South Wales Aged Pensioners' Hostel and Conveyancing Act* (24); *Ridley v. Lee* (25); *Re Martyn* (26). The result has been described as the creation of a common law or local law for the area: *Baxter v. Four Oaks Properties Ltd.* (27); *Texaco Antilles Ltd. v. Kernochan* (28).

This being the basis of the equity, there is no ground of reason or justice for requiring that there be a common vendor, unless indeed that term be understood in an artificial sense to include several vendors sharing a common intention. The "community of interest" between the purchasers is as real in the one case as the other. No doubt in cases where there is only one vendor it may be easier to infer the intention to take the covenants for the benefit of all of the land in a scheme, but that is no reason for refusing to give effect to the common intention of several vendors to establish reciprocal benefits and obligations throughout an estate where such intention is established. In the present case the laying out of a single estate on the lands of two owners who joined in the subdivision provides a foundation on which it would not be surprising to find a common building scheme established.

I have already referred to the rule that a vendor cannot generally annex the benefit of a covenant to land which he does not own, but the case of a building or development scheme is an exception to that rule. It is well estab lished that in such cases the vendor can annex the benefit of the covenant to land of which he has already disposed. But the reason for this is not that such land was formerly his, but that the land is part of a building scheme in which there is a mutual interest amongst the purchasers in increasing the value of their land, and in the vendor, in so far as he can obtain a higher price for the land he sells: *Nottingham Patent Brick & Tile Co. v. Butler* (29); *Osborne v. Bradley* (30). This consideration extends to other land included in the same scheme, but owned by another vendor. It may often be the case that, up to a point, the larger the area covered by the scheme, the greater the benefit to purchasers and vendors. The existence of several vendors does not prevent satisfaction of the requirement that there should be a defined area for the scheme, as stipulated in *Osborne v. Bradley* (31).

(21) [1908] 2 Ch. 374, at p. 385.

(22) (1888) 14 App. Cas. 12.

(23) [1939] Ch. 656, at p. 682.

(24) [1967] 1 N.S.W.R. 332, at p. 334.

(25) [1935] Ch. 591, at p. 604.

(26) (1965) 65 S.R. (N.S.W.) 387; 82 W.N. (Pt. 2) 241.

(27) [1965] Ch. 816, at p. 826.

(28) [1973] A.C. 609, at p. 624.

(29) (1885) 15 Q.B.D. 261, at p. 269.

(30) [1903] 2 Ch. 446, at p. 450.

(31) [1903] 2 Ch. 446.

Turning to the question of authority, it is to be noted that no question of more than one vendor arose in *Elliston v. Reacher* (32), so that the remarks of Parker J. (33) on this point were strictly obiter. The same may be said of the Court of Appeal decision in the same case (34) which approved the judg ment of Parker J. (35), but without argument on, reference to, or need to consider this point. Nor did the point arise in either of the cases cited by Parker J. (36) and in neither of them was the requirement of a common vendor stated. In *Renals v. Cowlishaw* (37) Hall V.C. formulated the law as follows: "From the cases of *Mann v. Stephens* (38); *Western v. MacDermott* (39) and *Coles v. Sims* (40) it may, I think, be considered as determined that any one who has acquired land, being one of several lots laid out for sale as building plots, where the Court is satisfied that it was the intention that each one of the several purchasers should be bound by and should, as against the others, have the benefit of the covenants entered into by each of the purchasers, is entitled to the benefit of the covenant; and that this right, that is, the benefit of the covenant, enures to the assign of the first purchaser, in other words, runs with the land of such purchaser."

The passage, which includes no requirement of a common vendor, in turn formed the basis of the judgment of the House of Lords in the other case cited by Parker J. (41), *Spicer v. Martin* (42).

In *Lawrence v. South County Freeholds Ltd.* (43), Simonds J. said that the first hint of the modern doctrine of the building scheme is to be found in the judgment of Lord Romilly M.R. in *Western v. Macdermot* (44), although in *Re Pinewood Estate, Farnborough* (45), Wynn-Parry J. suggested that *Whatman v. Gibson* (46) was to be supported on the basis of the doctrine. Simonds J. (47) went on to say that, by the time of *Western v. MacDermott* (48) "the device was well known of securing the same result" as the doctrine "by means of deeds of mutual covenants whereby the vendor and the pur chaser of every lot were brought into immediate contractual relation with each other, or alternatively by means of vesting the restrictive covenants in the vendor or in third parties as trustees for all persons from time to time entitled to the several lots ...": see also, per Cross J. in *Baxter v. Four Oaks Properties Ltd.* (49). There is nothing in this earlier history which supplies any indication as to the origin of the requirement of a common vendor, as several vendors and their purchasers could all have been parties to a single

deed, and the beneficiaries of a trust could have included purchasers from several vendors. The issue did not arise and was not mentioned in *Whatman v. Gibson* (50) or *Western v. Macdermot* (51), nor in other cases prior to *Elliston v. Reacher* (52); see *Keates v. Lyon* (53); *Renals v. Cowlishaw* (54);

(32) [1908] 2 Ch. 374.

(33) [1908] 2 Ch. 374, at p. 384.

(34) [1908] 2 Ch. 665, at p. 673.

(35) [1908] 2 Ch. 374.

(36) [1908] 2 Ch. 374, at p. 384.

(37) (1878) 9 Ch. D. 125, at p. 129.

(38) (1846) 15 Sim. 377; 60 E.R. 665.

(39) (1866) 2 Ch. App. 72.

(40) (1854) 5 De G.M. & G. 1; 43 E.R. 768.

(41) [1908] 2 Ch. 374, at p. 384.

(42) (1888) 14 App. Cas. 12.

(43) [1939] Ch. 656, at p. 675.

(44) (1865) L.R. 1 Eq. 499.

(45) [1958] Ch. 280, at pp. 286, 287.

(46) (1838) 9 Sim. 196; 59 E.R. 333.

(47) [1939] Ch. 656, at p. 675.

(48) (1865) L.R. 1 Eq. 499.

(49) [1965] Ch. 816.

(50) (1838) 9 Sim. 196; 59 E.R. 333.

(51) (1865) L.R. 1 Eq. 499.

(52) [1908] 2 Ch. 374.

(53) (1869) 4 Ch. App. 218.

(54) (1878) 9 Ch. D. 125.

Gaskin v. Balls (55); *Nottingham Patent Brick and Tile Co. v. Butler* (56), *Collins v. Castle* (57); *Spicer v. Martin* (58); *Mackenzie v. Childers* (59); *Tucker v. Vowles* (60); *Osborne v. Bradley* (61). The idea of the "common vendor" may have come from the judgment of Wills J. in *Nottingham Patent Brick and Tile Co. v. Butler* (62), which received strong approval when it went on appeal to the Court of Appeal. His Honour (63) used the phrase

"common vendor", and said [64]: "The principle which appears to me to be deducible from the cases is that where the same vendor selling to several persons plots of land, parts of a larger property, exacts from each of them covenants imposing restrictions on the use of the plots sold without putting himself under any corresponding obligation, it is a question of fact whether the restrictions are merely matters of agreement between the vendor himself and his vendees, imposed for his own benefit and protection, or are meant by him and understood by the buyers to be for the common advantage of the several purchasers."

However, his Honour was merely dealing with the problem which arose before him, and in that case, as in the earlier cases to which he referred, there was in fact a common vendor. There is nothing to suggest that he was stating this as an essential requisite. Indeed later in his judgment he said [65] that "it is in all cases a question of intention at the time when the partition of land took place, to be gathered, as every other question of fact, from any circumstances which can throw light upon what the intention was: *Renals v. Cowlishaw* [66]. One circumstance which has always been held to be cogent evidence of an intention that the covenants shall be for the common benefit of the purchasers is that the several lots have been laid out for sale as building lots, ... or, as it has been sometimes said, that there has been 'a building scheme'".

Thus his Honour was treating, as merely one cogent way of proving the necessary intention, a circumstance which Parker J. [67] was to convert into the second of the four matters "which must be proved".

Between *Elliston v. Reacher* [68] in 1908 and *Baxter v. Four Oaks Properties Ltd.* [69] in 1965, Preston and Newsom, *Restrictive Covenants Affecting Freehold Land*, 5th ed., pp. 47-48, note eight reported cases in England in which alleged schemes were not upheld, as against two which were upheld. They comment: "This catalogue of failures shows how fragile in practice the concept of a scheme has become since the supposedly final definition of the circumstances in which a scheme can be inferred."

In only one of these ten cases did the requirement of a common vendor become material, but then it was a question not of several vendors, but of no vendor at all. In *Re Pinewood Estate, Farnborough* [70] there had been a valid building scheme and a common vendor had sold the whole of the land involved. The original purchasers then by deed, to which the original

(55) (1879) 13 Ch. D. 324.

(56) (1885) 15 Q.B.D. 261.

(57) (1887) 36 Ch. D. 243.

(58) (1888) 14 App. Cas. 12.

(59) (1889) 43 Ch. D. 265.

(60) [1893] 1 Ch. 195.

(61) [1903] 2 Ch. 446.

(62) (1885) 15 Q.B.D. 261.

(63) (1885) 15 Q.B.D. 261, at p. 269.

(64) (1885) 15 Q.B.D. 261, at p. 268.

(65) (1885) 15 Q.B.D. 261, at p. 269.

(66) (1878) 9 Ch. D. 125.

(67) [1908] 2 Ch. 374, at p. 384.

(68) [1908] 2 Ch. 374.

(69) [1965] Ch. 816.

(70) [1958] Ch. 280.

vendor was not a party, agreed to release each other from the restrictions in the scheme, and to substitute others as between themselves. However, the benefits of the covenants were not annexed to the land by any proper words of annexation, and the present owners could not show a complete chain of assignments of the benefit of the covenants. Wynn-Parry J. (71) held that this was not an *Elliston v. Reacher* (72) type of case, and the covenants were, therefore, not enforceable by present owners. Clearly this was not a building scheme in the traditional sense at all, but only a set of covenants entered into, after the whole of the land was sold, by various owners as between them selves. It is not a decision as to the position where there is in substance a building scheme, but one administered by two vendors in collaboration. Even so, it would have seemed within the legitimate scope of the judicial function to have upheld the scheme, as this would have meant the extension of the existing principle underlying the building scheme cases to a new category, rather than the laying down of a novel principle. There is no reason to see less basis for the arising of equities from an attempt by people, who desire to go on living on land, to improve its environmental quality, than from an endeavour by a vendor and his purchasers, who see themselves as future vendors, to enhance its market price. Nor is there any reason to treat less seriously the autonomous law-making of a co-operative group than the imposition of a local law by an authoritarian vendor. In a footnote, Preston and Newsom, *op. cit.*, p. 41, comment: "But query whether *Re Pine wood Estate, Farnborough* (73) would now be held correctly decided on this point. The parties to the deed of mutual covenant surely evinced the neces sary intention of mutuality as required by *Spicer v. Martin* (74) and *Renals v. Cowlishaw* (75). This requirement of a common vendor, in its full rigour, seems to call for review, since the appeal to broader principle in *Baxter's* case (76) and *Dolphin's* case (77)."

In *Baxter's* case (78) the second of the requirements laid down in *Elliston*

v. Reacher [79] had not been fulfilled, as the common vendor had not laid out the estate in lots prior to selling the land. Cross J. said [80]:

"It is, however, to be observed that *Elliston v. Reacher* [81] was not a case in which there was direct evidence afforded by the execution of a deed of mutual covenant that the parties in fact intended a building scheme. The question was whether one could properly infer that intention in all the circumstances. In such a case, no doubt the fact that the common vendor did not divide his estate into lots before beginning to sell it is an argu ment against there having been intention on his part and on the part of the various purchasers that there should be a building scheme, because it is, perhaps, prima facie unlikely that a purchaser of a plot intends to enter into obligations to an unknown number of subsequent purchasers. But I cannot believe that Parker J. [82] was intending to lay down that the fact that the common vendor did not bind himself to sell off the defined area to which the common law was to apply in lots of any particular size but pro

(71) [1958] Ch. 280, at p. 286.

(72) [1908] 2 Ch. 374.

(73) [1958] Ch. 280.

(74) (1888) 14 App. Cas. 12.

(75) (1878) 9 Ch. D. 125.

(76) [1965] Ch. 816.

(77) [1970] Ch. 654.

(78) [1965] Ch. 816.

(79) [1908] 2 Ch. 374, at p. 384.

(80) [1965] Ch. 816, at p. 828.

(81) [1908] 2 Ch. 374.

(82) [1908] 2 Ch. 374, at p. 384.

posed to sell off parcels of various sizes according to the requirement of the various purchasers must, as a matter of law, preclude the court from giving effect to a clearly proved intention that the purchasers were to have rights inter se to enforce the provisions of the common law."

In *Re Dolphin's Conveyance* [83] Stamp J. was confronted with an attack on a scheme based both on the lack of a common vendor (there having been two vendors) and on the failure to lay out the estate in lots. As the second vendor was a successor in title to the first, Stamp J. could have accommodated the case to the first of the *Elliston v. Reacher* [84] requirements by saying, as Preston and Newsom do, op. cit., p. 41, that if there was a common vendor who created a valid scheme, it does not matter that he has died before the sales were all completed, so that the persons with whom the covenants binding

part of the area were actually made were his successors in title. However, his Honour elected to meet the objection head on, and said [85]: "To hold that only where you find the necessary concomitants of a building scheme or a deed of mutual covenant can you give effect to the common intention found in the conveyances themselves, would, in my judgment, be to ignore the wider principle on which the building scheme cases are founded and to fly in the face of other authority of which the clearest and most recent is *Baxter v. Four Oaks Properties* [86]. The building scheme cases stem, as I understand the law, from the wider rule that if there be found the common intention and the common interest referred to by Cross J. in *Baxter v. Four Oaks Properties Ltd.* [87] the court will give effect to it, and are but an extension and example of that rule."

He upheld the scheme, saying that the equity arose, not by the effect of an implication derived from the existence of the four points specified in *Elliston v. Reacher* [88], or by the implication derived from the existence of a deed of mutual covenant, but by the existence of the common interest and the common intention actually expressed in the conveyances themselves.

There is not a large number of reported cases on building schemes in Australia, and I have cited most of them elsewhere in this judgment. Others are *Re Wilson and the Conveyancing Act, 1919-1943* [89]; *Re Naish Pty. Ltd. and the Conveyancing Act* [90] and *Re Gemmell Holdings Pty. Ltd. and the Conveyancing Act* [91]. The only case in which I have found any special reference to the requirement of a common vendor is *Sutton v. Shoppee* [92], but in the event nothing turned on the matter.

I respectfully agree with and adopt the analysis of Stamp J. in *Dolphin's* case [93] and the discarding of the narrow and restrictive approach to building schemes which grew up after *Elliston v. Reacher* [94], and which seems to be justifiable neither by authority nor by policy. On the latter aspect there is a good comment in Preston and Newsom, op. cit., p. 48: "But the concept of the scheme corresponds with something real: there is a demand for

(83) [1970] Ch. 654.

(84) [1908] 2 Ch. 374.

(85) [1970] Ch. 654, at p. 663.

(86) [1965] Ch. 816.

(87) [1965] Ch. 816, at p. 825.

(88) [1908] 2 Ch. 374.

(89) (1949) 49 S.R. (N.S.W.) 276; 66 W.N. 147.

(90) (1960) 77 W.N. (N.S.W.) 892.

(91) [1970] 1 N.S.W.R. 370.

(92) [1963] S.R. (N.S.W.) 853; 80 W.N. 1550.

(93) [1970] Ch. 654, at p. 663.

(94) [1908] 2 Ch. 374.

the creation and mutual enforcement of a local law, appropriate to the circumstances of an area, between, and for the mutual benefit of, the persons living or working in that area, so that one or more anti-social households or businesses, which are prepared to disregard the standards accepted in the area, shall not be permitted to succeed in undermining those standards. The fresh appeal to principle which is to be found in the judgment of Cross J. in *Baxter's* case ([95] and Stamp J. in *Dolphin's* case [96] is therefore greatly to be welcomed. It should give new life to the concept of a scheme at a period when schemes are more necessary than ever. The standards maintained by planning authorities are not at all necessarily satisfactory. Thus the Lands Tribunal (Mr. Stuart Daniel, Q.C.) recently referred to the good results of vigilant insistence on restrictive covenants on an estate at Wimbledon, which had preserved 'the character and amenity of the estate to a standard which planning control would lamentably have failed to achieve': *Re Hoursby's Application* [97]."

Any fear that the use of land might be restricted unduly by schemes which have in the course of time become obsolete, unreasonable or futile is now adequately met by s. 89 of the *Conveyancing Act*, which gives the Court wide power to modify, or wholly or partially to extinguish, such restrictions.

I, therefore, hold that the existence of two vendors in this case does not negative the possibility of a valid building scheme. Nor is the scheme nega tived by the fact that some nine of the one hundred and fifteen lots are shown to have been sold without the restrictions. It has never been held necessary, for the existence of a valid building scheme, that the vendor should be bound to impose the same, or any, restrictions on all lots which he sells: *Collins v. Castle* [98]; *Elliston v. Reacher* [99], per Cozens-Hardy M.R. in the Court of Appeal. The fact that some lots are in the event sold without the restrictions does not negative the existence of, or destroy, a building scheme: *Sutton v. Shoppee* [100]; *Re Dennerstein* [101]. The intention which is material is that existing when the scheme was established: *Nottingham Patent Brick and Tile Co. v. Butler* [102]. There is some authority that the unenforceability of the restriction in relation to a large proportion of the lots will destroy the required mutuality: *New South Wales Aged Pensioners' Hostel and the Conveyancing Act* [103], but it is clear that this is not the case if only a small proportion are affected by the unenforceability: *Re Louis* [104]. Only a small proportion are free of the restriction in this case.

I, therefore, refuse the declaration asked by the plaintiff.

Order accordingly.

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O.M.L. DAVIES,
Barrister.

(95) [1965] Ch. 816.

(96) [1970] 1 Ch. 654.

(97) (1968) 20 P.C.R. 495.

(98) (1887) 36 Ch. D. 243.

(99) [1908] 2 Ch. 665, at p. 672.

(100) [1963] S.R. (N.S.W.) 853; 80 W.N. 1550.

(101) [1963] V.R. 688.

(102) (1885) 15 Q.B.D. 261.

(103) [1967] 1 N.S.W.R. 332.

(104) [1971] 1 N.S.W.L.R. 164, at p. 183.

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