RE: THE DEED OF MUTUAL COVENANTS RELATING TO THE PAINSHAW FIELD, BATT HOUSE AND BIRCHES NOOK ESTATE, STOCKSFIELD, NORTHUMBERLAND

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OPINION

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INTRODUCTION

1. I have been asked to advise the Committee of the Painshaw Field, Batt House and Birches Nook Estate, Stocksfield ("the Estate") upon the meaning and effect of certain provisions in the Deed of Mutual Covenants executed on 30 May 1895 ("the Deed") and governing relations between the owners of individual titles on the Estate.

2. I understand that this opinion is intended for general publication. It represents my considered views upon the various matters addressed. In certain respects mentioned below the legal effect of the Deed has already been considered by the Courts and the decisions of the judges concerned constitute binding and authoritative statements of the relevant law as determined by them. My views (which do not constitute such statements) are given conscientiously but without assumption of any legal duty of care towards any individual owner or any other person reading this opinion save for the members of the Committee, to whom alone it is provided. Any individual owner or other person concerned to be advised as to the meaning or effect of the Deed in any particular context should not rely upon this opinion and should instead obtain independent legal advice of their own.

3. One important reason for this is that my opinion is given "in a vacuum" i.e. outside the context of any defined legal dispute in which specific arguments are being advanced in an adversarial fashion with a view to them being ultimately tested before, and adjudicated upon by, a court. My opinion is given without the benefit of such arguments, the potential ingenuity and persuasiveness of which is unknown. I am approaching the matter as one of general principle.

4. For that reason, and also for the sake of brevity and clarity, I have confined myself largely to setting out the conclusions which I have reached without rehearsing in full detail my underlying reasoning in the manner which one

would if seeking to demonstrate why the views expressed should prevail over contrary views, which, together with their justification, would in an adversarial context be known.

OVERVIEW OF THE DEED

5. The Deed was made between 53 individuals described as "the Mutual Covenantors" who between them had agreed to purchase in total 215.674 acres within the Estate and is recited to have been made:

> ".. In order that each may the more surely and advantageously enjoy all the benefits contemplated from the ownership of his share of the said land and in order to clearly define the extent of such ownership as between the said parties themselves ...".

6. The Deed is expressed to be made by each of the Mutual Covenantors:

> ".. for himself[1] his heirs and assigns and so as to bind their said land in the hands of whomsoever it shall come.."

7. The Deed goes on to make provision for a miscellany of matters relating to the layout and management of the Estate. Some provisions have become exhausted in the course of the initial development of the Estate, others endure indefinitely.

8. The provision of the Deed of major continuing application and significance is clause 14, concerning the power of the Mutual Covenantors to appoint the Committee and the powers of the Committee. The relevant part of clause 14 is in these terms:

> "14.- A majority of the Mutual Covenantors may at any duly convened meeting fix the position of building lines on any part of the estate and no dwelling house, coal house, hen house, cow byre, stable, piggery, greenhouse or any other building whatever shall be built, erected or set up upon the land lying between the said building line and the road or roads abutting upon each lot and such majority may appoint a Committee of not less than nine members chosen from the Mutual Covenantors whose duty it shall be to inspect plans of dwelling houses and other buildings proposed to be erected and no dwelling house or other building shall be erected unless the plans thereof have first been submitted to and approved by a majority of such committee. The position of the said building

[1] albeit the original Mutual Covenantors in fact included two ladies, Alice Florence Rudge and Hannah Weighell

> lines shall be drawn subject to any modification therein that may be determined upon by a majority of votes at any duly convened meeting which shall be held before the thirty first day of December one thousand eight hundred and ninety five. Only self contained dwellinghouses shall be erected upon the estate and no house shall be built in flats nor occupied by more than one family at one and the same time."

THE MATTERS UPON WHICH MY OPINION IS SOUGHT

9. These are:

   (1) whether the provisions of the Deed continue to bind each and every owner of property within the Estate;

   (2) the power of the Committee to control extensions to existing buildings;

   (3) the proper procedure for the appointment of the Committee.

THE BINDING NATURE OF THE DEED

10. The Deed constitutes an express contract between the 53 original Mutual Covenantors. I have already observed that it is expressed to have been made by each on behalf of:

> "heirs and assigns and so as to bind their said land in the hands of whomsoever it shall come..".

The expression "the Mutual Covenantors" is further defined within the Deed:

> ".. which expression when not inconsistent with the context shall be deemed to include the heirs and assigns of each of the Mutual Covenantors."

11. The Deed also recites that the original Mutual Covenantors had agreed to purchase in various shares the land comprising the Estate. The procedure is revealed in the pages of "Four Valuable Farms" by Robert Browell, a history of the Estate published in 1995 on the occasion of its centenary. The chronology of relevant events is as follows:

   (1) 17 May 1895: purchase of the Estate "definitely effected";[2]

[2] pp. 9 and 10

(2) 30 May 1895: approval of the terms of the Deed;[3]

(3) 5 September 1895: allotment of land by private auction;[4]

(4) 17 December 1895: Estate conveyed to Joseph Whiteside Wakenshaw in fee simple as trustee for the Mutual Covenantors;[5]

(5) 2 June 1896: Indenture supplemental to the Deed whereby Joseph Whiteside Wakenshaw was put on trust to convey the allotted land to the allottees subject to but with the benefit of the covenants in the Deed;[6]

(6) thereafter: individual conveyances pursuant to the Indenture.

12. English law permits both the benefit and the burden of covenants relating to land to pass to successors in title of the people actually making the covenants, according to an elaborate and refined set of rules now to be found in a combination of several Acts of Parliament and hundreds, if not thousands, of decided cases. The Deed is a very carefully and skilfully drafted code, evidently made with informed regard to those rules as they existed at the time.

13. It suffices for present purposes to state as follows:

(1) the references to "heirs and assigns" of the original Mutual Covenantors and to the intention "to bind their said land in the hands of whomsoever it shall come" were in 1895 and remain now a clear indication of the intention that the benefit of the covenants should be annexed to the land and their burden should run with the land;

(2) further, the execution of the Deed (and the subsequent Indenture) by all persons acquiring land pursuant to the process of allotment and the conveyances to those persons in accordance with the terms of those documents satisfies all the requirements of a "building scheme"

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[3] p.11

[4] P.17

[5] See also paragraph 2 of the statement of claim in the case of *Lakeman v Moat* - to be found at p.85 of "Four Valuable Farms";

[6] See also paragraph 3 of the statement of claim *(above)*

or "scheme of development"[7] so as to achieve the result that all subsequent owners become automatically both able to enforce and bound by the terms of the scheme. Those requirements are (in the language of contentious claims to enforce the covenants):

(a) both claimant and defendant derive title from a common vendor[8];

(b) prior to sale by the common vendor, the Estate was disposed of in lots subject to restrictions intended to apply to all lots[9];

(c) the common vendor intended the restrictions to be for the benefit of all lots intended to be sold[10];

(d) both claimant and defendant derive title from the common vendor on terms that the restrictions to which their purchases were made were to enure for the benefit of the other lots within the scheme[11].

These requirements are all manifestly satisfied on the above facts.

14. As a result, the regulation of the Estate has worked successfully for over a century and met with the manifest admiration and approval of the High Court Judge Sir Peter Millett[12] in the case of ***Price v Bouch***[13] in the Chancery Division in 1987, which concerned an unsuccessful challenge to the powers and autonomy of the Committee:

> " for 90 years the stipulations in the deed of mutual covenant have formed a private, local law, democratically administered by a committee elected by a majority of the owners of land

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7 as classically expounded in ***Elliston v Reacher*** **[1908] 2 Ch 374**

8 Joseph Whiteside Wakenshaw

9 the Deed was followed by the process of allotment described above

10 Joseph Whiteside Wakenshaw held the fee simple of the Estate on express trust for the Mutual Covenantors and under the duty imposed by the Indenture of 2 June 1896

11 this follows from the Deed itself and the subsequent indentures

12 who later became Lord Millett, a judge of the Judicial Committee of the House of Lords

13 **(1987) 53 P & CR 257**

comprised in the estate ...".[14]

15. In particular, the binding nature of the Deed has endured notwithstanding subsequent sub-division of original lots, so as to bind every part of every sub-divided plot. Such sub-division was not prohibited and was positively anticipated[15]. The only way in which the intended democratic system of control could thereafter satisfactorily and fairly operate is on the basis that every title derived from the original 53 titles carried with it, alongside the burden of observance of the covenants in the Deed, the benefits of those covenants including the status of Mutual Covenantor and in particular the right of a single vote upon matters so to be decided by the provisions of the Deed.[16]

16. I am not aware of there ever having been any serious challenge to this proposition - there was plainly none in ***Price v Bouch***, where Mr. Justice Millett recorded the concession by the plaintiff that the then Committee had been lawfully appointed and commented:

> "It must, I think, follow from that concession that the present plot-owners who elect them are the mutual covenantors within the meaning of the deed and may exercise the powers conferred on them by that deed."

17. The expression "the Mutual Covenantors" thus embraces the owners of every one of the now 300-odd titles comprising the Estate.

THE POWERS OF THE COMMITTEE

18. The powers of the Committee once appointed are entirely derived from clause 14 of the Deed. That imposes upon the members of the Committee a duty:

> "to inspect plans of dwelling houses and other buildings proposed to be erected ..."

and gives this practical effect by the provision, binding upon each current

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[14] similar judicial approval has been expressed over the efforts of the similarly-constituted Committee of the Darras Hall Estate in ***Colvin v Watson*** **[2001] PLSCS 130**

[15] some of the original Mutual Covenantors were, and were known at the time to be, speculative builders and developers

[16] It is particularly to be noted that the original allotments each carried a single vote, and did so regardless of the size of the allotment (which varied between 1 and 20 acres). The principle is "one owner, one vote".

owner that:

> ".. no dwelling house or other building shall be erected unless the plans thereof have first been submitted to and approved by a majority of such committee".

19. Thus once such plans are submitted, each member of the Committee must:

    (1) inspect them;

    (2) decide whether to approve them or not.

20. The great latitude of discretion bestowed upon each Committee member in discharging these duties, and the ultimate limits upon that discretion, are set out in the judgment in ***Price v Bouch***. They were also the subject of earlier judicial consideration in the case of ***Lakeman v Moat*** which was decided in the Chancery Division of the High Court by Mr. Justice Neville in 1911.

21. In ***Lakeman v Moat*** the judge observed that save in respect of the original building lines (which were to be determined by a general meeting of the Mutual Covenantors) the Mutual Covenantors:

> "..appear to me to have delegated all other questions relating to the development of the estate to a Committee which must be assumed to fairly represent the views of the covenantors who elected them."

22. In ***Price v Bouch*** Mr. Justice Millett summarised his view of the position as follows:

> "... that the object of clause 14 was to enable the committee to preserve the character and amenity of the estate by withholding or granting approval, or by imposing proper conditions on the grant of an approval, and that they might properly take into consideration any matter, such as the precise location of any proposed new building, which might affect the character or amenity of the estate."

23. The only limits upon the resulting discretion are that the Committee:

    (1) must inspect and consider any application submitted to them;

    (2) must reach a decision themselves and not delegate it to others;

    (3) must act honestly and in good faith and not for some improper or ulterior purpose;

(4) must not take into account irrelevant considerations or fail to take into account relevant considerations;

(5) must not act perversely or irrationally.[17]

Extensions to Existing Buildings

24. I have been asked specifically to consider whether the need to obtain the approval of the Committee for the erection of "dwelling houses and other buildings" extends to proposals for the extension of existing buildings. In my view it plainly does.

25. The trigger for the need for approval is a proposal for the "erection" of a "dwelling house or other building". In construing those words in the context of the Deed, it is important to bear in mind the purpose, as stated above, for which the Committee has been invested with the very broad discretion described i.e. the preservation of the character or amenity of the Estate as a whole through the medium of the Committee as the corporate expression of the preferences of the owners as a whole. There is thus no reason why the requirement for approval should be construed in as limited a fashion as possible on the supposed basis that it is an intrusion into a "right" that would otherwise exist to do as one pleased. Such an approach would, to my mind, be a perverse reversal of the correct approach. The Mutual Covenantors all contracted at the outset on an equal footing, none knowing which might on any future occasion be the applicant for approval and which the objector or Committee member charged with deciding the matter. Such postulated "right" never existed - the benefits of ownership of a plot were always constrained by the correlative burdens within the Deed.

26. The wishes of the Mutual Covenantors would be thwarted not furthered, and the powers of the Committee severely emasculated, were the words "dwelling house or other building" to be held not to include an extension to an existing dwelling house. There is no obvious reason as a matter of English why they should be so construed. A promise not to build a dwelling house must surely be broken by building part of one - otherwise no part-built structure could ever be the subject of an injunction; the corollary is that a subsequent extension, no matter how far removed in time from the original construction, still represents simply part of the original dwelling house, and one for which

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[17] see ***Price v Bouch*** **(1987) 53 P & CR 257** @ 261 *per* Millett J.; see also ***Colvin v Watson*** **[2001] PLSCS 130**, a decision of Blackburne J., Vice-Chancellor of the County Palatine of Lancaster, concerning the not dissimilar terms of the trust deed governing the owners of the Darras Hall Estate

no approval has ever been given. Alternatively, if an extension is not part of the original "dwelling house" then it must surely be an "other building". It cannot be said not to be a "building" at all. One "builds" an extension. A "building" does not have to be detached. I cannot see why it should matter that it is intended that once built it should form part of a single dwelling house in combination with an existing building already put to that use.

27. There are numerous other instances in which the meaning of the word "building" has been given a wide and purposive meaning by the courts in very similar contexts. By way of example:

(1) bay windows added at a later date have been held to be "buildings" within the meaning of covenants not to "erect any building"[18] nor to "build"[19] beyond a defined building line;

(2) a trellis erected so as to project 12 feet above a boundary wall was held to offend against a covenant "not to erect or build ... any other building whatsoever"[20], on the basis that it was a "permanent and substantial" erection[21].

28. I consider that any additional structure which increases either the height of any part of an existing dwelling house or the area of its footprint or its volume[22] is prohibited by clause 14 of the Deed unless the approval of the Committee has been sought and obtained.[23] So to state is not intended to define the limits of the need for approval, merely to identify some elements within its scope.

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18 ***Lord Manners v Johnson*** **(1875) 1 Ch D 673**

19 ***Western v MacDermott*** **(1866) LR 1 Eq 499**, affd. **(1866) 2 Ch App 72**

20 besides a permitted dwelling house

21 ***Wood v Cooper*** **[1894] 3 Ch 671**

22 e.g. by the enlargement of its roof in a manner which increases neither the overall height of the building nor its footprint

23 nor do these parameters necessarily represent the limit of the restraints imposed by clause 14; those cannot be comprehensively stated in the abstract and would in difficult cases require testing in court

THE PROPER PROCEDURE FOR THE ELECTION OF THE COMMITTEE

29. The question has been raised whether members of the Committee may be elected by a majority of those Mutual Covenantors present at a meeting (whether personally or by proxy as permitted by clause 3, see below) or whether instead they must be elected by a majority in number of *all* the Mutual Covenantors in existence at the date of the election.

30. Doubt over the matter arises from the fact that the Deed is somewhat inconsistent from clause to clause in the exact phraseology used to describe the majority required for various purposes.

31. The power to elect a Committee is given by clause 14:

> "A majority of the Mutual Covenantors may at any duly convened meeting fix the position of building lines .... and such majority may appoint a Committee of not less than nine members chosen from the Mutual Covenantors."

32. The convening of a meeting is addressed in clause 3:

> "3.- Where it is thought desirable to obtain the consideration or wishes of the Mutual Covenantors on any subject affecting the enjoyment or ownership of the said land or in connection therewith or to appoint or discharge a Secretary, a Treasurer and other Officers, a meeting shall be called of which not less than two clear days notice in writing shall be given at the request of any two or more of the Mutual Covenantors by their Secretary or if there shall at the time be no Secretary or he shall refuse or neglect to act on the request within seven days of its being made to him a meeting may be called by any two or more of the Mutual Covenantors and at every meeting nine votes shall form a quorum. At such meetings each of the Mutual Covenantors shall have one vote and no more except where hereinafter it is otherwise stated. Any vote may be given by proxy properly appointed in writing if notice of the appointment of such proxy be presented to the Secretary or Chairman of the meeting before the time fixed for its commencement or during the meeting."

33. After full consideration of the various viewpoints that have been expressed upon this subject, I find myself ultimately and firmly persuaded that the correct interpretation is that members of the Committee may validly be elected by a simple majority of those Mutual Covenantors present (either in person or by proxy) at a quorate and properly convened meeting. The principal reasons are:

(1) the impracticality of the requirement for an overall majority of all Mutual Covenantors - the operation of clause 14 could be fundamentally undermined by mere inactivity on the part of a majority the Mutual Covenantors, which cannot have been intended; the whole notion of the convening of meetings, with a defined quorum and provision for voting by proxy, created in perfectly general terms by clause 3, is to my mind fundamentally to the contrary;

(2) the internal inconsistency within clause 14 which would result from the alternative interpretation *viz.* that whilst building lines could expressly and unambiguously have been modified by "a majority of votes at any duly convened meeting" they could only (if the alternative interpretation were correct) have been set in the first place by an overall majority of all Mutual Covenantors; this would be absurd and cannot have been intended;

(3) in ***Knowles v Zoological Society of London*** **[1959] 1 WLR 824**, in a persuasively similar context, the requisite "majority of fellows entitled to vote" was held to mean a majority of fellows who were present or represented at the meeting in question.

34. The matter is currently academic: the current Committee was elected by an overall majority of all Mutual Covenantors. If ever the matter were to become controversial and of practical importance, it could readily be tested by a suitably-constructed application to the Court for a determination of the meaning of the Deed.

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