Bath Rugby win at home

Victory in the Court of Appeal: Andrew Francis tackles the enforceability of covenants

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IN BRIEF

▶ Following the Court of Appeal's decision in *Bath Rugby Ltd v Greenwood*, this article looks at the problem of deciding whether a covenant can be enforceable by anyone who claims the benefit of it and who is not the original covenantee.

To adapt the words of a onetime resident at Bath, it is a truth universally acknowledged by real property lawyers that in order to be of any practical value, a restrictive covenant affecting freehold land must have an enforcing party.

To decide whether a covenant achieves that status can be difficult. The trickiest part of the analysis of a covenant is not always its meaning, or whether it binds anyone, but whether anyone can enforce it. Over more than two centuries, the courts have devised rules about how the burden of a covenant may run and also working out how the right to enforce ('the benefit') of a covenant may be claimed; in each case, with the assistance of statutes for covenants imposed after 1925. In the absence of privity of contract, the problems of the enforceability of a covenant have been 'solved' by rules based on a somewhat fragile alliance between the common law, equity and statute. But in practice, the terms of this alliance can be hard to understand.

In some very rare cases, it is possible to enforce covenants by means of the existence of a chain of assignments of the benefit of the covenant. Infrequently, a 'building' or 'development' scheme might exist, whereby the covenants between the land owners are mutually enforceable. Such schemes were originally created in the late 18th and early 19th centuries to get round the problem of enforcement of *the burden* of a covenant against successors in title of the original covenantor. That problem was resolved in 1848 in *Tulk v Moxhay* (1848) 2 Ph 774 by a court of equity which said the burden did so run. But while the benefit of a covenant ran at common law and had done for centuries before *Tulk v Moxhay*, there was still a problem where a successor in title of the original covenantee had to show that *his land* had the benefit of the covenant. To do this he had to prove that the covenant ran with, or in some way was attached to ('annexed') his land. The concept of annexation was recognised by the 14th century. But it was only after *Tulk v Moxhay* (creating a wider class of those possibly liable) that the 'modern' jurisprudence developed, based on the need to show an intention that the benefit of the covenant ran with certain land. It is this which is considered and explained clearly by the Court of Appeal in its decision in *Bath Rugby Ltd v Greenwood and others* [2021] EWCA Civ 1927, [2022] All ER (D) 06 (Jan) . The judgment is a very useful statement of the law. It is a 'must read' for any real property lawyer advising on these covenants.

This article looks at the problem of deciding whether a covenant can be enforceable by anyone who claims the benefit of it and who is not the original covenantee. It will be assumed in it that the covenant:

a. is not personal to the original parties and is truly restrictive;
b. 'touches and concerns' the benefited land (ie affects its value and/or amenity);
c. is valid in terms of registration of the burden and does not infringe rules relating to competition law; and
d. is not unenforceable by acquiescence in breach, or obsolescence.

A helpful example

Mansfield Park Rugby Club (MPRC) owns the freehold title to a ground ('the ground') in Northanger and needs a new stadium. A covenant over the round was imposed by a onveyance of the ground by the vendor (Lord Dashwood) in 1922 which prevents anything from being done on the ground which may be 'a nuisance, annoyance, or disturbance, or otherwise prejudicially affect the adjoining premises (of the vendor) or the neighbourhood'; 'the covenant'. There are no express words in the 1922 conveyance defining what land Dashwood retained when the covenant was imposed, or any other words, or evidence (eg a plan) defining the land to which the benefit of the covenant might be attached. There is historic evidence to show that in 1922, Dashwood owned an 'estate' in Northanger and after 1922 sold off parts of that estate, but by the end of the 20th century very little of it remained unsold. Dashwood's successors (trustees) do not claim to enforce the covenant. One of the properties sold off after 1922 by the Dashwood's trustees is owned by Mr Willoughby. He has seen the

planning application for the development of the ground and claims the right to enforce the covenant, as he says that the proposed development will breach the covenant. MPRC has issued a claim for a declaration under s 84(2), Law of Property Act 1925 (LPA 1925) that Mr Willoughby is not entitled to enforce the covenant, from which its land is free.

Will MPRC win?

What was decided in *Bath Rugby*?

The example given above is a simplified version of the facts which formed the basis of the claim decided by the Court of Appeal in *Bath Rugby*.

The court reversed the decision of the trial judge (Judge Paul Matthews sitting as a judge of the High Court; [2020] EWHC 2662 (Ch), [2020] All ER (D) 60 (Oct)). He held that the covenant was enforceable and that stymied Bath Rugby Ltd's proposals to redevelop its ground. Bath Rugby Ltd appealed, and the main question amongst its seven grounds of appeal was whether the 1922 conveyance identified land intended to be benefited either clearly, or at all. The court held that it did not, and Bath Rugby Ltd won.

The reasoning in *Bath Rugby*

The reason why the court held that the benefit of the covenant was not enforceable by the defendants was because the 1922 conveyance did not identify the land intended to be benefited, and that was because there was no evidence in the 1922 conveyance from which one could find such intention. While the covenant was taken to protect the adjoining and neighbouring land, that was not enough to find an intention to benefit defined lands of the vendor so that the benefit passed to successive owners. When imposing a covenant, the vendor may want to keep the benefit in his hands and exploit its value rather than allow the benefit to pass into the hands of his successors as owners of the land he sells off later.

The court also considered how far the benefited land should be 'easily ascertainable' to satisfy the test of annexation. The court's primary finding meant that it was not necessary to express a conclusion on this issue. But Nugee LJ (paras [79]–[84]) considered that this requirement does not affect the logically prior question of whether the benefit of the covenant was annexed in the first place; see para [81]. By contrast, Newey and King LJJ were doubtful about that statement. They both cited the judgment of Chadwick LJ *in Crest Nicholson Residential (South) Ltd v McAllister* [2004] EWCA Civ 410 at para [34], where he said:

> 'There are, I think, good reasons for that requirement. A restrictive covenant affecting land will not be enforceable in equity against a purchaser who acquires a legal estate in that land for value without notice of the covenant… It is obviously desirable that a purchaser of land burdened with a restrictive covenant should be able not only to ascertain, by inspection of the entries on the relevant register, that the land is so burdened, but also to ascertain the land for which the benefit of the covenant was taken-so that he can identify who can enforce the covenant. That latter object is achieved if the land which is intended to be benefited is defined in the instrument so as to be easily ascertainable. To require a purchaser of land burdened with a restrictive covenant, but where the land for the benefit of which the covenant was taken is not described in the instrument, to make inquiries as to what (if any) land the original covenantee retained at the time of the conveyance and what (if any) of that retained land the covenant did, or might have, "touched and concerned" would be oppressive. It must be kept in mind that (as in the present case) the time at which the enforceability of the covenant becomes an issue may be long after the date of the instrument by which it was imposed.'

The writer's view is that, in practice, the need to identify the land intended to be benefited runs alongside the 'ascertainment' requirement. With respect to the view of Nugee LJ, the views expressed by Newey and King LJJ are to be preferred. In many cases, as most titles are now registered and where pre-registration title documents no longer exist, the task of proving not only what land was intended to be benefited when the covenant was imposed, but also ascertaining what that land was, is a hard one as a matter of evidence. The dispute in *Bath Rugby* was over a covenant imposed almost 100 years ago. That covenant might be seen as youthful compared with covenants under scrutiny which are often far older and where finding the necessary evidence of annexation can be even harder. However, the age of the covenant is no guide to deciding the question of annexation.

What did not have to be decided?

The primary finding meant that the court did not have to decide what might be said to be a logically prior question, framed as a ground of appeal—namely whether the 1922 conveyance disclosed an intention to annexe the benefit of the covenant *at all*. Here the 'old fashioned' conveyancers' language, 'The vendor his successors in title and assigns', had to be considered against the equally 'old fashioned' evidence that the vendor was the tenant for life under the Settled Land Acts 1882 to 1890, with the power of sale. But who were these 'successors in title' and 'assigns' in 1922? Did that include a wider class of persons who derived title under the vendor? The court found that whatever was the answer to this question and whatever 'successors in title and assigns' meant, those words did not indicate, clearly, or at all, what land was intended to be benefited by covenant.

Finally, it is to be noted that the Court of Appeal in *Bath Rugby* did not have to consider the effect of s 78(1), LPA 1925, applicable to covenants imposed after 31 December 1925. The terms of s 78(1) and the words 'the land intended to be benefited' in it were considered by the Court of Appeal in *Crest Nicholson*. It is clear from that decision and *Bath Rugby* that the law of annexation is the same for both pre and post-1926 covenants; see Nugee LJ at para [75].

What lessons can we take from *Bath Rugby*?

First, while not a case on these issues, *Bath Rugby* reminds us that even before considering whether X, or Y has the ability to enforce a covenant, you must ask: has there been a breach of the covenant, and is it valid and binding?

Second, unless you are dealing with the rare cases of assignment, or a building, or a development scheme, there must be evidence of the land intended to be benefited by the covenant when it was imposed and (*pace* Nugee LJ) that land must be easily ascertainable now. That requires a careful approach to interpreting the words of annexation, detective work with official copies (eg the order of sales) and further research into any accessible documents not filed at HM Land Registry.

Third, firing off objection letters when planning consent is either being sought, or has been granted, with threats of injunctions is a waste of time and money unless it is reasonably clear that you have the ability to show that you have the benefit of the covenant in issue.

Finally, modern drafting and plans reproduction ought to be able to define the benefited land with clarity for the benefit of its future owners. *Bath Rugby* is a lesson in how *not* to do it, and that can guide us now. NLJ

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