# Bath Rugby Judgment in the Court of Appeal

A perennial problem encountered when advising on restrictive covenants affecting freehold land ("covenants") is whether anyone can enforce them.

The judgment of the Court of Appeal in *Bath Rugby Ltd. v Greenwood & Ors.* [2021] EWCA Civ 1927 ("Bath Rugby") handed down on 21st December 2021 is of great assistance in dealing with this problem. The judgment is a very useful statement of the law. It is a "must read" for any real property lawyer advising on these covenants.

The Court reversed the decision of the trial judge (HHJ Paul Matthews sitting as a judge of the High Court) [2020] EWHC 2662 (Ch). He held that the Covenant was enforceable and that stymied Bath Rugby Ltd.'s proposals to re-develop its Ground. Bath Rugby Ltd. appealed and the main question amongst its 7 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 reason why the Court held that the benefit of the Covenant was not enforceable by the Defendants was because the Conveyance imposing the Covenant (made in 1922) 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. Whilst the Covenant was taken to protect the Vendor's 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. 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 Nicolson Residential (South) Ltd. v McAllister* [2004] 1 WLR 2409 ("Crest

*"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*

# Bath Rugby Judgment in the Court of Appeal

*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, as a matter of evidence, is a hard one. 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.

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) Law of Property Act 1925, applicable to covenants imposed after 31st 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?

(1) Whilst 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 whether there has been, or will be a breach of the covenant and is it valid and binding?

(2) Unless you are dealing with the rare cases of assignment, or a building, or development scheme, there must be evidence of the land intended to be benefited by the covenant when it was imposed and it is suggested that this land must be easily ascertainable now. That requires a careful approach to interpreting the words of annexation, detective work with Official Copies and further research into any accessible documents not filed at HMLR.

(3) 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.

(4) 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.

Andrew Francis
*Barrister*