Neutral Citation Number: [2021] EWCA Civ 1927

Case No: CA-2021-000406

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
PROPERTY, TRUSTS AND PROBATE LIST (ChD)
His Honour Judge Paul Matthews (sitting as a Judge of the High Court)
[2020] EWHC 2662 (Ch) and [2020] EWHC 2856 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 December 2021

Before :

LADY JUSTICE KING
LORD JUSTICE NEWEY
and
LORD JUSTICE NUGEE

- -

Between :

BATH RUGBY LTD	**Claimant/1st Appellant**
- and -	
(1) CAROLINE GREENWOOD **(2) DAVID ARTHUR GREENWOOD** **(3) EDWIN JOHN HORLICK** **(4) ERIC NEWBIGGIN** **(5) SAVIO ANIL DE SEQUERIA** **(6) PETER FRANCIS SHERWIN**	**Defendants**
(7) 77 GREAT PULTENEY STREET LTD **(8) GODFREY DOUGLAS WHITE**	**Defendants/ Respondents**
- and -	
BATH RECREATION LTD **(as Trustee of the Bath Recreation Ground Trust)**	**Intervener/2nd Appellant**

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- -

Tom Weekes QC (instructed by **Royds Withy King LLP**) for the **1st Appellant**
Martin Hutchings QC and Harriet Holmes (instructed by **Clarke Willmott LLP**) for the **2nd Appellant**
William Moffett (instructed by **Stone King LLP**) for the **Respondents**

Hearing date : 5 October 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by e-mail and release to BAILII. The date and time for hand-down is deemed to be at 10:30am on 21 December 2021

Lord Justice Nugee:

Introduction

1. This appeal concerns the question whether an area of land in Bath known as the Recreation Ground, commonly called **"the Rec"**, is still subject to a restrictive covenant imposed in a conveyance of the Rec dated 6 April 1922 (**"the 1922 conveyance"**). That turns on the question whether there is anyone who can now claim to be entitled to the benefit of the covenant, and that in turn depends on whether the effect of the 1922 conveyance was to annex the benefit of the covenant to identifiable land.

2. The claim was brought by Bath Rugby Ltd (**"Bath Rugby"**), which has a lease of part of the Rec and operates a well-known rugby club there. It wishes to replace its existing stadium with a new, larger stadium incorporating various retail and commercial outlets, with associated car parking. It accepts that if the covenant in the 1922 conveyance is still enforceable, it is possible that the proposed new development might breach the covenant, by which the original purchaser, for itself and its successors, covenanted that nothing should be thereafter "erected, placed, built or done" on the land "which may be or grow to be a nuisance, annoyance or disturbance or otherwise prejudicially affect the adjoining premises or the neighbourhood." Its position however is that there is no-one who can now claim to have the benefit of the covenant.

3. Bath Rugby therefore brought the claim, pursuant to s. 84(2) of the Law of Property Act 1925 (**"LPA 1925"**), for declarations in effect that the land was free from the covenant. It joined those local residents who had claimed the benefit of the covenant, and either opposed, or at any rate did not agree to, the relief sought. The claim was heard by HHJ Paul Matthews, sitting as a Judge of the High Court in Bristol, (**"the Judge"**) in September 2020. By the time of the hearing the only active opposition was from the 7th and 8th Defendants. The 8th Defendant, Mr Godfrey White, is the owner of a flat forming part of a house at 77 Great Pulteney Street which overlooks the Rec at the rear; he is also a shareholder in, and director, of the 7th Defendant, 77 Great Pulteney Street Ltd (**"77 GPS"**), which owns the freehold of the house.

4. In a clear and erudite judgment handed down on 13 October 2020 at [2020] EWHC 2662 (Ch) (**"the Judgment"** or **"Jmt"**), the Judge held that the effect of the 1922 conveyance was to annex the benefit of the covenant to land of the vendor and his tenants adjoining or near the Rec. That meant that Mr White and 77 GPS were each entitled to the benefit of the covenant and it was enforceable by them (among others). In a supplementary judgment dated 27 October 2020 at [2020] EWHC 2856 (Ch) the Judge dealt with consequential matters, deciding that Bath Rugby should pay the Defendants' costs on the indemnity basis, and refusing permission to appeal. These decisions were all given effect to by an Order dated 29 October 2020 making a declaration that the covenant was enforceable by Mr White and 77 GPS among others.

5. Bath Rugby now appeals both his substantive decision and the award of indemnity costs, with permission granted by Asplin LJ. It appeared by Mr Tom Weekes QC. Asplin LJ also allowed an application by Bath Recreation Ltd (**"Bath Recreation"**), which is the current freehold owner of the Rec, to intervene in the appeal, and granted it permission to appeal as well. It appeared by Mr Martin Hutchings QC, leading

Ms Harriet Holmes. Both appeals were opposed by Mr White and 77 GPS, who appeared by Mr William Moffett. I am grateful to all counsel for their arguments which covered a large number of points with commendable clarity and efficiency. As the Judge pointed out (Jmt at [6]), the decision in this case does not turn on whether development of Bath Rugby's new stadium would or would not be a breach of the covenant, or whether the covenant should be discharged or modified, or planning permission granted, far less on whether it would more generally be a good idea or not; but on a narrow point of law in what is admittedly a very technical area.

History of the Bathwick Estate

6. The Rec is a large open space on the east side of the River Avon in an area of Bath known as Bathwick, across the river from the historic centre of the city. It was formerly part of an estate known as the Bathwick Estate, and the Judge traced the history of the devolution of this estate, and its development, in the Judgment at [8] to [14]. It is not necessary to detail it all, but in summary William Pulteney, later Earl of Bath, bought the Manor of Bathwick in 1727, Bathwick then being a country village separated from the city by the (unbridged) River Avon. He saw the possibility of developing Bathwick into an affluent suburb of Bath, and started the process, but it was mainly developed in the latter half of the 18th century when the estate passed first in 1767 to trustees for Frances Johnstone, a cousin of William Pulteney, and then on her death in 1782 to trustees for her daughter Henrietta Laura Pulteney, later created Countess of Bath. Frances' husband, Sir William Johnstone Pulteney, was instrumental in developing the estate with Frances and then their daughter Henrietta, first by means of a bridge, Pulteney Bridge, built across the river to give access from the city, and then some time later by laying out streets and granting building leases. One such street was Great Pulteney Street (then called Pulteney Street), leading up from the bridge, and in 1788 a building lease of No 77 was granted by Henrietta for a term of 99 years.

7. The estate subsequently passed to another branch of the family and into the hands of the Earl of Darlington, later 1st Duke of Cleveland, and through him to his three sons in succession, the 2nd, 3rd and 4th Dukes of Cleveland, various other parts of the estate being developed during their ownership. The 4th (and last) Duke died in 1891 possessed of large estates in various parts of the country but childless, and under his will his Somerset estates, including the Bathwick Estate, were settled on his great-nephew Captain Francis Forester for life, with remainder in tail male.[1] On 19 July 1920 Captain Forester and his son Henry Forester executed a disentailing assurance of the Somerset estates and by an indenture of the same date they resettled them. The provisions of this resettlement (**"the 1920 resettlement"**) are elaborate but in effect the land was again settled on Captain Forester for life, with remainder to Henry Forester for life, with remainders over.

8. Both before and after the 1920 resettlement therefore Captain Forester had a life interest vested in possession. That meant he was tenant for life for the purposes of the

[1] The Judge commented (Jmt at [12]) that no copy of the 4th Duke's will was in evidence, but that the terms of the settlement were recited in the 1920 resettlement, which was in evidence; further details of the 4th Duke's will, and of the subsequent devolution of the estate, can in fact be found in a decision of Etherton J concerning a site at Wrington conveyed under the School Sites Act 1841: see *Bath and Wells Diocesan Board of Finance v Jenkinson* [2002] EWHC 2182 (Ch).

Settled Land Acts 1882 to 1890, and as such had a power of sale. In 1919 by his direction the Bathwick Estate was put up for sale as a single lot by auction. The auction catalogue, which was in evidence, described the subject matter of the sale as "The Bathwick Estate" producing about £15,390 per annum from rack rents, ground rents and fee farm rents, arising out of 500 houses, 60 shops, 50 detached residences, several leading hotels, 200 modern villas and cottage property, commercial and manufacturing premises, nursery gardens and recreation enclosures, woodland and a large area of building land, extending in all to about 600 acres. It referred to the estate as "The well-known Bathwick Estate", and to Pulteney Street as "that noted Boulevard, 100 feet wide backing onto and overlooking Henrietta Park on the North and the Bath and County Recreation Ground on the South." The catalogue contained a detailed list of each of the individual properties comprised in the sale, including 77 Pulteney Street, then let for a term of years to a Mrs Dutch, and the Bath & County Recreation Ground, described as then let to the Bath Recreation Company on a yearly tenancy. The auction particulars were accompanied by a detailed plan which shows the extent of the Estate put up for sale. At auction however the Estate failed to sell.

9. In 1921 Captain Forester tried again, this time putting up what was described as the first portion of the Bathwick Estate, comprising various freehold properties producing a gross rental of about £7,500 per annum, in 183 lots to be sold over 3 days. The plan accompanying the catalogue confirms that these lots only formed certain parts of the estate. Again the catalogue detailed individual properties, one of which was 77 Pulteney Street, still leased to Mrs Dutch. The Rec was not however included in the auction. The evidence was that the auction met with varying success: newspaper reports indicated that few lots changed hands on the first day, but better business was done on the second. There was also evidence that some lots sold outside the auction, mostly to tenants. 77 Pulteney Street was one of the lots that did not sell.

10. In 1922 Captain Forester sold and conveyed the Rec to a company, The Bath and County Recreation Ground Company Ltd (**"the Recreation Company"**), for the sum of £6,050. This is the 1922 conveyance, the details of which I give below.

11. The further history of the Bathwick Estate, so far as relevant, can be shortly stated. By an agreement dated 4 September 1924 (**"the 1924 agreement"**) Captain Forester agreed to sell a large number of properties (detailed in the schedule) at Bathwick and Wrington to an unlimited company formed for the purpose, the Bathwick Estate Company (**"the Estate Company"**), for the sum of £187,165. The 1924 agreement extended to all other lands (if any) at Bathwick and Wrington or elsewhere in Somerset of which he was tenant for life in possession under the 1920 resettlement, and referred to the property sold as being commonly known as "The Bathwick Estate". The consideration was satisfied by the allotment of 187,165 £1 shares in the Estate Company to the trustees of the 1920 resettlement, and an endorsement confirms that the shares were duly allotted to them on 29 October 1924. There is no evidence however that the 1924 agreement was ever completed by conveyance – a conveyance in 1931 of a strip of land to the Mayor, Aldermen and Citizens of the City of Bath (**"the Corporation"**) recited that no conveyance completing the 1924 agreement had then been executed. The schedule to the 1924 agreement included 77 Pulteney Street, still let to Mrs Dutch.

12. There was no evidence before the Court detailing the further dealings with the Bathwick Estate by the Estate Company, save that in February 1974 the Estate

Company resolved to go into members' voluntary liquidation and on 15 February 1974 it conveyed many properties, including 77 Pulteney Street, to the Corporation. The Estate Company was dissolved in 1975, its remaining assets being transferred out to various family trusts. In correspondence in 2013 between the solicitors then acting for Bath Rugby and Mrs Fiona Baird, a trustee of one of the family trusts, Mrs Baird confirmed that as far as she was concerned the trusts now retained very little property in and around Bath.

Dealings with The Rec

13. The evidence before the Judge was that the land that is now the Rec was shown in plans dating from 1793 and 1803 as the site of intended streets, but it was not in fact built on, and in 1845 the site was shown in another plan as open fields.

14. In *Bath and North East Somerset Council v Attorney General* [2002] EWHC 1623 (Ch) (**"the 2002 Judgment"**), which concerned the question whether a conveyance of the Rec in 1956 created a valid charitable trust, Hart J at [9] recorded that the Recreation Company was incorporated in 1894 to acquire a lease of the Rec, then simply a field, from Captain Forester, the object being to develop it in such a way as to render it suitable for cricket matches, lawn tennis tournaments, football matches and other sports. A lease was granted by Captain Forester in 1896, although not in fact to the Recreation Company, but to individuals, referred to by the Judge as trustees for the Bath Football Club (that is, the rugby club); Captain Forester was himself President of the club from 1898 to 1926. In 1908 a further lease for a term of 21 years was granted by Captain Forester, again to a number of individuals, at a yearly rent of £100. This lease was still in existence in 1922, and must be the basis for the Rec being shown in the auction particulars for the 1919 auction as let to the "Bath Recreation Company" on a yearly lease at a rack rent of £100, despite the fact that the lease was in fact a term of years, and not vested in the Recreation Company but in individuals; it appears that these were the directors of the Recreation Company.

15. The Rec was, as I have said, not included in the 1921 auction. Instead it was sold by Captain Forester to the Recreation Company, subject to the 1908 lease, for £6,050, the sale being completed by the 1922 conveyance on 6 April 1922. It appears that the intention was that the lease would then be surrendered to the Recreation Company.

16. I set out the terms of the 1922 conveyance below, but first summarise the remaining history of dealings with the Rec. Hart J referred in the 2002 Judgment (at [8(i)]) to the Recreation Company having in 1933 granted a lease for 50 years to the Bath Football Club of what was then known as the Bath Football Ground, on the western side of the Rec. In 1956 the Recreation Company sold the Rec, subject to the 1933 lease, to the Corporation, the sale being completed by a conveyance dated 1 February 1956 under which the Rec was conveyed to the Corporation on trust to manage, let or allow the use of the property for games and sports of all kinds and various other activities. It was this which Hart J held in the 2002 Judgment to have created a valid charitable trust. As a result of local authority reorganisation the land became vested first in Bath City Council, and then Bath and North East Somerset Council; in 2018 the 2nd Appellant, Bath Recreation (the current trustee of the charity, now known as the Bath Recreation Ground Trust) was registered as proprietor of the freehold in place of the latter council.

17. In 1995 Bath City Council granted a further lease, for a term of 75 years, of the western part of the Rec to the then trustees of the Bath Football Club. The lease was assigned to the 1st Appellant, Bath Rugby, in 2014.

18. The current position therefore is that the freehold of the Rec is held by Bath Recreation as trustee of the Bath Recreation Ground Trust, subject to a lease of the western part to Bath Rugby. Mr Hutchings told us that Bath Recreation runs a number of events on and from the Rec, such as the Bath Half Marathon, music festivals and other events, which he described as very popular but objected to by some local residents. Bath Recreation has joined in the appeal because the covenant in the 1922 conveyance is very widely expressed, and, if it is enforceable, Bath Recreation might be accused of breaching the covenant when carrying out such activities.

The 1922 Conveyance

19. The 1922 Conveyance is quite short, and it is simplest to set it out in full, as follows:

> "**This Indenture** made the Sixth day of April One thousand nine hundred and twenty two **Between** *Francis William Forester* of Saxelbye Park Melton Mowbray in the County of Leicester formerly a captain in Her late Majesty's Army (hereinafter called "the Vendor") of the first part *Brinsley John Hamilton FitzGerald* of 63 Duke Street Grosvenor Square in the County of London Esquire a Companion of the Most Honourable Order of the Bath and *Arthur Henry Brinsley FitzGerald* of Thorpe Satchville Melton Mowbray in the County of Leicester Esquire (hereinafter called "the Trustees") of the second part and *The Bath and County Recreation Ground Company Limited* whose registered Office is at 22 Milsom Street in the City of Bath (hereinafter called "the Purchasers") of the third part **Whereas** under an Indenture of Settlement (hereinafter called "the Settlement") dated the Nineteenth day of July One thousand nine hundred and twenty and made between the Vendor and Henry William Forester of the one part and the Trustees of the other part the Bathwick Estate in the County of Somerset of which the hereditaments hereinafter described form part was assured subject to certain family charges affecting part of the said estate (but which part did not include any of the said hereditaments hereinafter described) to uses under which the Vendor is tenant for life in possession thereof And by the Settlement the Trustees were appointed to be the Trustees thereof for the purposes of the Settled Land Acts 1882 to 1890 **And** *whereas* the joint power of appointment given by the Settlement to the said Francis William Forester and Henry William Forester has never been exercised so far as concerns the hereditaments hereinafter described **And** *whereas* the vendor as tenant for life in possession under the Settlement has agreed with the Purchasers for the sale to the Purchasers of the said hereditaments hereinafter described and the fee simple thereof in possession free from incumbrances at the price of Six thousand and fifty pounds **Now** *this Indenture* made in pursuance of the said agreement and in consideration of the sum of *Six thousand and fifty pounds* paid by the Purchasers by the direction of the Vendor to the Trustees as such Trustees as aforesaid (the receipt whereof the Trustees hereby acknowledge) **witnesseth** *and it is hereby agreed and declared* as follows that is to say:-

1. **The** Vendor in exercise of the power for this purpose conferred by the Settled Land Acts 1882 to 1890 and of every other power enabling him and as beneficial owner hereby conveys unto the Purchasers **All that** piece or parcel of ground situate in the City of Bath and containing an area of Sixteen acres two roods and eleven perches or thereabouts and known as *The Bath and County Recreation Ground* Together with the building erected thereon near the North Parade Road formerly used as a Skating Rink and now in the occupation of Aircraft Limited and the Pavilion near to the Pulteney Mews now in the occupation of the Purchasers as Lessees thereof under an Indenture of Lease dated the Twenty fifth day of March One thousand nine hundred and eight and made between the Vendor of [of] the one part and Charles Henry Simpson and others of the other part and *also* the two buildings formerly used as two Cottages adjoining and on the South side of Pulteney Mews now in the occupation of the Purchasers and The Bath and County Croquet Club respectively Except and reserving unto the Vendor and his successors in title and his and their heirs and assigns the free and uninterrupted passage and running of water and soil from the other buildings and land of the Vendor and his tenants adjoining or near to the said hereditaments hereinbefore described through the sewers drains and watercourses which are now or may hereafter be in or under the said premises **To hold** unto and to the use of the Purchasers their successors and assigns in fee simple discharged from all the limitations trusts powers and provisions of the said Settlement and from all estates interests and charges subsisting or to arise thereunder Subject to and with the benefit of an Indenture of Lease dated the Twenty fifth day of March One thousand nine hundred and eight and made between the Vendor of the one part and Charles Henry Simpson, James Edward Henshaw, Egbert Lewis, Alfred George Derwent Moger, William Morgan and William Frederick Cooling of the other part Whereby the said hereditaments hereinbefore described were demised for a term of Twenty one years from the Twenty fifth day of March One thousand nine hundred and eight at the yearly rent of One hundred pounds

2. **The** Purchasers for themselves their successors and assigns *hereby covenant* with the Vendor his successors in title and assigns and to the intent and so that this covenant shall run with and be binding on such portions of the hereditaments and premises hereby conveyed as are respectively affected thereby into whosesoever hands the same may come but so that the Purchasers shall not be personally liable in damages for any breach thereof after they shall have parted with the same hereditaments and premises that no workshops warehouses factories or other buildings for the purpose of any trade or business which may be or grow to be a nuisance annoyance or disturbance or otherwise prejudicially affect the adjoining premises or the neighbourhood shall at any time hereafter be erected upon the said hereditaments and premises except the part thereof now in the occupation of Aircraft Limited and that nothing shall be hereafter erected placed built or done upon the said hereditaments and premises including such part thereof as last aforesaid which may be or grow to be a nuisance and annoyance or disturbance or

otherwise prejudicially affect the adjoining premises or the neighbourhood **Provided** *always* that no factory chimney shall be erected on the portion of the said hereditaments now in the occupation of Aircraft Limited

3. **Provided** *always* that so far as regards the reversion or remainder expectant on the life estate of the Vendor in the premises hereby conveyed and the title thereto and further assurance thereof after his death the statutory covenant by him implied in these presents shall not extend to the acts or defaults of any person other than and besides himself and persons deriving title under him

4. **The** Vendor hereby acknowledges the right of the Purchasers to production of the documents mentioned in the Schedule hereto and delivery of copies thereof and hereby undertakes for the safe custody thereof

In witness whereof the Vendor and the Trustees have hereunto set their hands and seals and the Purchasers have caused their common seal to be hereunto affixed the day and year first before written ⁄

The Schedule above referred to

1920 July 19th *Disentailing Assurance* made between the Vendor of the first part and Henry William Forester of the second part and Edward Harrow Ryde of the third part

1920 July 19th *Resettlement* made between the Vendor and the said Henry William Forester of one part and Brinsley John Hamilton FitzGerald and Arthur Henry Brinsley FitzGerald of the other part"

20. There was no plan attached to the conveyance. Instead a separate plan, endorsed with a statement that it was a plan of the land intended to be conveyed by the 1922 conveyance, was drawn up and signed by Captain Forester. This showed the land conveyed coloured pink and green, the pink part being the main part (and the land which now forms the Rec), the green part being a small part to the south which was the site of the former skating rink occupied by Aircraft Ltd,[2] which it appears was sold on by the Recreation Company to Aircraft Ltd shortly afterwards. It seems, from answers given by the Recreation Company's solicitors to requisitions on title made by solicitors acting for the Recreation Company's mortgagee, that Captain Forester's solicitors, for some unexplained reason, refused to have a plan drawn on or referred to in the conveyance, it being their universal practice to give the purchaser an agreed plan signed by the vendor instead. The plan shows only a very small part of the Bathwick Estate, being limited to the streets in the immediate vicinity of the Rec, and contains no colouring or other indication of lands included in the 1920 resettlement, or intended to be benefited by the covenant in clause 2.

[2] Or possibly (the manuscript is not entirely clear) Artcraft Ltd, but the contemporaneous documents suggest it was Aircraft Ltd.

77 Great Pulteney Street

21. I have already referred above to most of the relevant dealings with 77 Great Pulteney Street, as follows. Pulteney Street (as it then was) was laid out in the 1780s, and a building lease of No 77 was granted by Henrietta Pulteney in 1788 for a term of 99 years (paragraph 6 above). At the time of the 1919 auction, the property was still held as part of the Bathwick Estate, subject to a lease for a term of years to a Mrs Dutch, and it was included in the proposed sale (paragraph 8 above). It was also included in the 1921 auction but again did not sell (paragraph 9 above). It was then included in the 1924 agreement under which the Bathwick Estate was sold to the Estate Company, still let to Mrs Dutch (paragraph 11 above). In February 1974 the Estate Company conveyed it, along with many other properties, to the Corporation (paragraph 12 above).

22. Little needs to be added to this. In 1983 Bath City Council sold the freehold to a Mrs Durston under the right to buy legislation. It is now vested in 77 GPS. The house was divided into three flats in 1995; Mr White bought Flat C in 1996 and is now the leasehold owner of Flat C, as well as (as already referred to) a shareholder in, and director of, 77 GPS (paragraph 3 above).

The issue

23. The issue raised on these facts is whether Mr White and 77 GPS are entitled to enforce the restrictive covenants in clause 2 of the 1922 conveyance against Bath Recreation and Bath Rugby. None of these were of course parties to the 1922 conveyance, under which the covenant was given by the Purchasers (the Recreation Company) as covenantor to the Vendor (Captain Forester) as covenantee. In such a case (that is where A seeks to enforce a restrictive covenant against B and neither A nor B were parties to the original covenant) it is usual and convenient to consider separately whether B is subject to the burden of the covenant and A is entitled to the benefit of it.

24. But in the present case, as is very commonly the case, there is no difficulty over the first question, namely the transmission of the burden. A covenant is a form of contractual promise, and at common law a person was not (generally) bound by a contract unless they were party to the contract: *Rhone v Stephens* [1994] 2 AC 310 at 316H per Lord Templeman. But under the principle in *Tulk v Moxhay* (1848) 2 Ph 774, a covenant will be enforced in equity against a purchaser of land (and other owners and occupiers) if (i) the covenant is restrictive in nature, (ii) it is made for the protection of land retained by the covenantee, (iii) it is intended to bind the land, and (iv) the purchaser has notice of the covenant (now provided by registration): *Megarry & Wade, The Law of Real Property* (9th edn, 2019) §§31-039ff. Here (i) there are in fact three limbs to the covenant in clause 2 of the 1922 conveyance, but they are all restrictive of the user of land; (ii) the covenant would appear by its nature to have been for the protection of the vendor's retained land; (iii) the terms of the covenant ("and to the intent and so that this covenant shall run with and be binding on such portions of the hereditaments and premises hereby conveyed as are respectively affected thereby into whosesoever hands the same may come") make it clear beyond doubt that the covenant was intended to bind the land; and (iv) the covenant was duly registered against the freehold and leasehold titles of Bath Recreation and Bath Rugby respectively. In those circumstances there was no dispute that the burden of the

covenant had duly passed to them: Jmt at [27].

25. The second question, whether Mr White and 77 GPS are entitled to the benefit of the covenant, is less clear-cut however. It is well established that there are three methods by which the benefit may have passed to a person who is not himself the original covenantee, namely (i) by annexation, (ii) by assignment, or (iii) under a building scheme (or scheme of development): *Megarry & Wade* (9th edn) §31-059. In the present case Mr White and 77 GPS relied solely on the first method, annexation. To obtain the declaration it sought, however, Bath Rugby also had to establish that neither of the other methods applied, so the Judge dealt with them briefly, concluding that there was no reasonable possibility of the benefit of the covenant having passed by assignment (Jmt at [101]-[103]), and that any suggestion of a building scheme was quite hopeless (Jmt at [104]-[107]). Both conclusions seem obviously right and neither has been challenged on this appeal.

26. The only substantive issue therefore is whether the benefit of the covenant has passed to Mr White and 77 GPS by annexation. This question turns solely on the effect of the 1922 conveyance. If this did not annex the benefit of the covenant, it is not suggested that anything that happened later will have done so. It is important to note at the outset that the covenant here was entered into before 1926: in relation to covenants entered into after the LPA 1925 came into force on 1 January 1926 the effect of s. 78(1) LPA 1925, as interpreted by this Court in *Federated Homes Ltd v Mill Lodge Properties Ltd* [1980] 1 WLR 594 (***"Federated Homes"***), is to make it much easier to establish annexation. But this does not affect the present case.

The Judgment

27. After setting out the facts with meticulous care, and dealing with the jurisdiction to make a declaration under s. 84(2) LPA 1925 and the procedure to be followed, the Judge considered the question of annexation at Jmt [36ff], identifying at [42] that the critical question is "whether there is manifested in the conveyancing documents, construed in the light of the surrounding circumstances, an intention to benefit certain land". He then considered the facts, placing emphasis in particular on the fact that the covenant was expressed to be made with "the Vendor his successors in title and assigns" which he regarded as far more potent in showing an intention to benefit particular land than "heirs and assigns" (at [50]), and concluding on this point that the wording of the covenant, in the context in which it was made, including the use of the phrase "successors in title", did indicate an intention to annex the benefit of the covenant to land of the covenantee (at [60]).

28. He then turned to the identification of the land intended to be benefited, saying at [61] that it was not enough to demonstrate an intention to benefit land; it was also necessary to identify the land intended to be benefited. In the course of this he considered, and rejected, a submission that in addition it was necessary for the land to be "easily ascertainable", concluding that, at least in relation to pre-1926 covenants, the test to apply was that it was sufficient for the conveyance to describe the land intended to be benefited in terms which enable it to be identified from other evidence, and that is not necessary to show further that the land to be benefited is "easily ascertainable": Jmt at [92].

29. Having identified that test, he then applied it to the facts, concluding that it was

satisfied, as follows (at [96]):

> "The covenant is one not to do certain things to the prejudice of "the adjoining land or the neighbourhood". In substance that means that the covenant is *for the benefit of* the land so described. 'Adjoining land' is clear enough. 'Neighbourhood' means the area nearby. Reading clause 2 together with clause 1, I am in no doubt that the phrase "the adjoining land or the neighbourhood" in both places where it appears in clause 2 is a reference back to the phrase "the other buildings and land of the vendor and his tenants adjoining or near to the said hereditaments hereinbefore described" in clause 1. Accordingly, in my judgment, the land for the benefit of which the covenant was imposed is sufficiently described in the deed itself. The formula used, that is, land of the vendor "adjoining or near" the land conveyed, is in substance the same as the formula successfully used in *Rogers v Hosegood*."

30. At [100] he said that the research done by the claimant's solicitors had shown that in 1922 the Bathwick Estate still contained a significant number of properties, mostly let, which would fall within the words "land of the vendor and his tenants adjoining or near" the Rec. He accepted that absolute precision as to the properties then still forming part of the Bathwick Estate was not possible on the evidence currently available and might never become possible in the future, but:

> "I decline to hold that, because there is some uncertainty at the fringe, the owners of those properties which can be demonstrated to have formed part of the Estate at the time of the 1922 Conveyance, and which can properly be said to be adjoining or near the Rec, cannot enforce the covenant the benefit of which was in my judgment annexed to their properties. If a person comes forward claiming that the benefit of the covenant has been annexed to his or her property, the burden will lie on that person to show that that is so."

He concluded that Mr White and 77 GPS had discharged that burden, and that because the properties in the Bathwick Estate that were sold in 1924 to the Estate Company were listed in the schedule to the 1924 agreement, there would be others who could show that their property remained in the Estate in 1922 and was adjoining or near to the Rec.

Grounds of Appeal

31. Bath Rugby put forward seven Grounds of Appeal. Grounds 1 to 6 are all directed at the Judge's conclusion that Mr White and 77 GPS are entitled to the benefit of the covenant, Ground 7 at the order to pay indemnity costs.

32. Bath Recreation also put forward seven Grounds of Appeal. Grounds 1 to 6, which are very largely, but not entirely, a repeat of those of Bath Rugby, are again directed at the Judge's substantive conclusion, and Ground 7 at the costs order.[3]

[3] It is not immediately obvious, at any rate to me, what interest Bath Recreation has in the question of costs, the costs order having been made against Bath Rugby, but it is not necessary to pursue this now, as in the event we did not hear any argument on the costs order, all parties recognising that the question of costs may be affected by the outcome of the substantive appeal in any event.

33. So far as the substantive question is concerned, the grounds can be summarised as follows:

    (1) The 1922 conveyance did not disclose an intention to annex the benefit of the covenant (Bath Rugby Ground 1, Bath Recreation Ground 1).

    (2) The 1922 conveyance did not identify the land intended to be benefited clearly or at all (Bath Rugby Ground 2, Bath Recreation Ground 2).

    (3) If, contrary to Grounds 1 and 2, the benefit was annexed at all, it was not annexed to each and every part of the land (Bath Rugby Ground 3).

    (4) As a matter of law it is a requirement of annexation that the land intended to be benefited be easily ascertainable, and the Judge was wrong to hold that this was not necessary (Bath Rugby Ground 4, Bath Recreation Ground 3).

    (5) The land intended to be benefited was not in fact easily ascertainable (Bath Rugby Ground 5, Bath Recreation Ground 4).

    (6) The Judge therefore erred in concluding that the benefit of the covenant is annexed to those properties forming part of the Bathwick Estate at the time of the conveyance which were adjoining or near to the Rec (Bath Rugby Ground 6, Bath Recreation Ground 5).

    (7) Even if the covenant was annexed, it cannot now be enforced as the relevant land was no longer owned by a single owner (Bath Recreation Ground 6).

34. To avoid confusion between the different numbering, I will refer to these as Ground (1), Ground (2) etc.

Annexation

35. The law in relation to the annexation of the benefit of a restrictive covenant has become, as all parties accepted and as the detailed arguments put forward on this appeal demonstrated, both technical and complex. But the basic idea is simple enough. It was expressed by Collins LJ giving the judgment of this Court in *Rogers v Hosegood* [1900] 2 Ch 388 at 407:

> "when the benefit of the covenant has been once clearly annexed to one piece of land, it passes by assignment of that land, and may be said to run with it … In such a case it runs … because the purchaser has bought something which inhered in or was annexed to the land bought."

When equity developed the principle of *Tulk v Moxhay* that a restrictive covenant could be enforced against successive owners of the burdened land, there was nothing new about this concept of annexation. As pointed out by Professor Wade in *Covenants – "A broad and reasonable view"* [1972] CLJ 157 at 164, the benefit of a covenant could run with the land at common law for many centuries before the burden of it could run in equity.

36. A good example can be seen in the traditional covenants for title given by a vendor when conveying land to a purchaser. These "undoubtedly run with the land" (per

Farwell J in *Rogers v Hosegood* at 396); at 394 Farwell J says of covenants that run with the land:

> "The accurate expression appears to me that the covenants are annexed to the land, and pass with it in much the same way as title deeds, which have been quaintly called the sinews of the land: Co Litt. 6 a. Thus the right to sue on such covenants passes to the heir and not to the executors…"

In other words, the benefit of such covenants was regarded, like the title deeds, as real property, going with the property conveyed to the purchaser and from him to subsequent owners. It is not difficult to see why this should be the case: title deeds are what enables a purchaser to prove his title, and the covenants for title give him a remedy if the vendor has impaired that title. It makes obvious sense that both should go with the land to successive owners.

37. Another example of noticeable antiquity can be found referred to by Clauson J in *re Ballard's Conveyance* [1937] 1 Ch 473 at 482 as follows:

> "the law in regard to annexation of a covenant to land as recognized as long ago as the year 42 Edw. III. (A.D. 1368) in the *Prior's* case (see *Spencer's* case (1585) 5 Co Rep 17 b)…"

The Prior's case was one where the prior of a convent had covenanted that he and his convent would sing all week in the chapel of a manor for the lords of the manor. According to the report in *Spencer's case* a successor in title to the manor was able to enforce the covenant:

> "for the covenant is to do a thing which is annexed to the chapel, which is within the manor, and so annexed to the manor, as it is there said."

A further example given by Professor Wade is that of a covenant to keep river banks in repair.

38. In such cases the principle of annexation is not difficult to understand. It is generally self-evident that such covenants benefit the covenantee as owner of the land concerned, or, in the traditional phrase, that they "touch and concern" the land; this requires that a covenant "must either affect the land as regards mode of occupation, or it must be such as per se, and not merely from collateral circumstances, affects the value of the land" (*Rogers v Hosegood* at 395 per Farwell J). It is, as Professor Wade points out, usually obvious which land such a covenant benefits in this sense: a covenant for title benefits the purchaser as purchaser of the land conveyed, a covenant to sing for the lord of the manor in the chapel of the manor benefits the lord of the manor as owner of the manor, a covenant to repair the banks of the river benefits the owners of the land that would otherwise be flooded.

39. But when equity started enforcing restrictive covenants under the principle of *Tulk v Moxhay*, the question whether the benefit of the covenant was annexed to land, and if so to what land, was far less straightforward. It is usually not difficult to see that a covenant by B with A to do something on A's land (or directly protecting A's land, or a covenant for title in respect of A's land) benefits A's land. But a covenant by B with A not to do something on B's own land does not by itself tell you anything about

whether this is made with A as owner of any land, or is intended to benefit any particular land belonging to A, and if so which.

40. Hence by the beginning of the last century it had been established that the question whether the benefit of a restrictive covenant given by B to A was annexed to A's land, and if so which land, was a question of intention. The leading cases on either side of the line were decisions of this Court, namely *Renals v Cowlishaw* (1879) 11 Ch D 866 and *Rogers v Hosegood*.

41. In *Renals v Cowlishaw* the vendors were trustees for sale of a mansion-house and property, known as the Mill Hill estate, and some adjoining pieces of land and sold two of the adjoining pieces in 1845. The conveyance contained a covenant by the purchaser with the vendors, their heirs, executors, administrators and assigns, including a restriction on building within a certain distance of a road "leading to the Mill Hill house and property belonging to the said trustees", but did not state that this covenant was for the protection of the residential property, or in reference to the other adjoining pieces of land, or make any statement or reference thereto. Hall V-C (at (1876) 9 Ch D 125) held that this was insufficient to enable a subsequent owner of the Mill Hill estate who did not have any express assignment of the benefit of the covenant to enforce the covenant, saying at 130:

> "in order to enable a purchaser as an assign (such purchaser not being an assign of all that the vendor retained when he executed the conveyance containing the covenants, and that conveyance not shewing that the benefit of the covenant was intended to enure for the time being of each portion of the estate of which the Plaintiff is assign) to claim the benefit of a restrictive covenant, this, at least, must appear, that the assign acquired his property with the benefit of the covenant, that is, it must appear that the benefit of the covenant was part of the subject-matter of the purchase."

42. That envisages three possible ways whereby a subsequent purchaser of the covenantee's land might acquire the benefit of it, namely (i) if he acquired the whole of the vendor's retained land; (ii) if the conveyance containing the covenant showed that it was intended to enure for each portion of that land; or (iii) if the purchaser bought his property together with the benefit of the covenant. On appeal his decision was upheld. James LJ, while entirely concurring with his judgment, said this (at (1879) 11 Ch D 868):

> "To enable an assign to take the benefit of restrictive covenants, there must be something in the deed to define the property for the benefit of which they were entered into. Supposing I were now framing the deed afresh I should not have the remotest idea how the covenant ought to be framed, as I cannot tell what the property was which the parties intended to be protected, and within what limits."

43. In *Rogers v Hosegood* the vendors were partners in Cubitt & Co, a well-known firm of builders who had laid out land in Palace Gate, Kensington in building plots suitable for large private houses. In 1869 they twice sold and conveyed plots to the Duke of Bedford subject to covenants restricting building to one private residence, and in 1873 sold another plot to Sir John Millais. The Duke in his conveyances covenanted with the vendors their heirs and assigns, the conveyances expressly stating that his

covenants were made "with intent that the covenants … might enure to the benefit of [the vendors], their heirs and assigns and others claiming under them to all or any of their lands adjoining or near to the said premises". That was held by Farwell J to be sufficient to annex the benefit of the covenant so as to enable the current owner of the plot purchased by Sir John Millais to sue on it. At 394-5, having said that covenants could only run with the land if (1) the covenantee had an interest in the land to which they refer and (2) they touched and concerned the land, he said:

> "But a covenant may have the two characteristics above mentioned and yet not run with the land; it is in each case a question of intention to be determined by the Court on the construction of the particular document, and with due regard to the nature of the covenant and the surrounding circumstances."

44. His decision was upheld by this Court. Collins LJ, giving the judgment of the Court, said at 403-4:

> "The real and only difficulty arises on the question – whether the benefit of the covenants has passed to the assigns of Sir John Millais as owners of the plot purchased by him on March 25, 1873, there being no evidence that he knew of these covenants when he bought. Here, again, the difficulty is narrowed because by express declaration on the face of the conveyances of 1869 the benefit of the two covenants in question was intended for all or any of the vendor's lands near to or adjoining the plot sold, and therefore for (among others) the plot of land acquired by Sir John Millais…"

He went on (at 406) to distinguish *Renals v Cowlishaw* on the basis that in the original conveyance there:

> "there was no expression, as there is in the present case, that the restriction was intended for the benefit of any part of the estate retained."

45. Those two cases therefore established two propositions: first, that the question whether the benefit of a restrictive covenant given by B to A is annexed to A's land is one of intention, to be determined on the construction of the particular document concerned; and second, that there must be something in the document to define which land the covenant was intended to benefit.

46. A good illustration of the application of these principles can be found in the decision of Sargant J in *Ives v Brown* [1919] 2 Ch 314, which was, at any rate so far as the authorities cited to us are concerned, the most recent decision at the time of the 1922 conveyance. The vendors owned a building estate in Bournemouth called the Branksome Estate. In 1883 they sold and conveyed a plot on the estate, the purchaser covenanting with the vendors their heirs and assigns not, among other things, to do anything which might be a nuisance, annoyance or disturbance to the vendors, or the persons deriving title under them or their tenants or the neighbourhood. Sargant J held that this was not effective to annex the benefit of the covenants to any land, saying at 322:

> "Now applying the test laid down in *Renals v Cowlishaw*, I cannot find that there is enough here, in the conveyance of April 14, 1883, to annex the

> benefits of the covenants in question to the whole of the Branksome Estate then remaining in the hands of the covenantees or to any particular portions thereof. Certainly there are no such definite words as were to be found in *Rogers v Hosegood*, and I cannot find such sufficient context in the other parts of the conveyance to serve the purpose. No doubt one can see plainly that the covenants were inserted because the covenantees were owners of adjoining property and with a view to benefiting them accordingly. But this was really equally obvious in *Renals v Cowlishaw*, and I cannot see that there is any greater reason in this case than in that for ascribing an intention to benefit the retained property and the owners thereof by virtue merely of their ownership… The case of *Rogers v Hosegood* is, of course, entirely distinguishable from the present, since there the benefit of the covenants was in terms annexed to lands which were the subject of a sufficient though somewhat general description."

He went on to point out that even if not annexed, the benefit of a covenant could be expressly assigned, and that it was precisely by being able to assign such a covenant that the vendor secures the advantageous realisation of his retained property.

47. Subsequent cases give further guidance as to how to draft a covenant in such a way as to ensure that it is annexed. In *re Union of London and Smith's Bank Ltd's Conveyance, Miles v Easter* [1933] 1 Ch 611, Bennett J at 623 referred to a covenant given to "the purchasers heirs and assigns or other the owners or owner for the time being of the land coloured pink or any part or parts thereof" as a clear indication of the intention to annex the benefit of the covenant to each and every part of the pink land; and in *Drake v Gray* [1936] 1 Ch 451, Greene LJ at 466 said:

> "There are two familiar methods of indicating in a covenant of this kind the land in respect of which the benefit is to enure. One is to describe the character in which the covenantee receives the covenant. This is the form which is adopted here, a covenant with so and so, owners or owner for the time being of whatever the land may be. Another method is to state by means of an appropriate declaration that the covenant is taken "for the benefit of" whatever the lands may be."

Neither of these methods was used in the 1922 conveyance, but these decisions of course post-date the conveyance and this guidance was therefore not available when it was drafted.

Ground (2) – identification of land to be benefited

48. With that introduction, I can now consider the grounds of appeal. Logically the first question is that raised by Ground (1), namely whether there can be found in the 1922 conveyance any intention to annex the benefit of the covenants in clause 2 at all. The Judge found such an intention in the fact that the covenant was not made, as in many of the reported cases, with the vendor, "his heirs and assigns", but was made with Captain Forester, "his successors in title and assigns" which he held to be far more potent, and to indicate an intention to annex (paragraph 27 above). I will say straightaway that I can see why the Judge took that view, although why the draftsman used "successors in title", and what the effect of using it was, turn out to be questions of some difficulty for the reasons I refer to below. I prefer however to start with the

question raised by Ground (2), namely whether the 1922 conveyance sufficiently identified the land intended to be benefited.

49. This requirement is clearly stated by James LJ in *Renals v Cowlishaw* (paragraph 42 above). It was repeated by this Court in *Miles v Easter* at 628 per Romer LJ giving the judgment of the Court:

> "a purchaser from the original covenantee of land retained by him when he executed the conveyance containing the covenant will be entitled to the benefit of the covenant if the conveyance shows that the covenant was intended to enure for the benefit of that particular land."

The requirement was accepted by the Judge, who said (Jmt at [61]) that it is not enough to demonstrate an intention to benefit land; it is also necessary to identify the land intended to be benefited. He went on (Jmt at [66]) to cite from the decision of Upjohn J in *Newton Abbott Co-operative Society Ltd v Williamson & Treadgold Ltd* [1952] Ch 286 at 289:

> "In this difficult branch of the law one thing in my judgment is clear, namely that in order to annex the benefit of a restrictive covenant to land, so that it runs with the land without express assignment on a subsequent assignment of the land, the land for the benefit of which it is taken must be clearly identified in the conveyance creating the covenant."

50. Mr Moffett sought to downplay this requirement. He submitted that the critical question was whether there was an intention to annex, and that identification of the relevant land went to that question, in the sense that if the land benefited is not identified, the Court may find that there was no intention to annex. He also submitted that the caselaw did not show the need for any particular form of wording, and indeed that the intention to benefit particular land can be implied.

51. I accept that there is no particular formula required. More care I think is needed with the proposition that the intention to benefit particular land can be implied. It is established that annexation may be implied rather than express: see *Crest Nicholson Residential (South) Ltd v McAllister* [2004] EWCA Civ 410 (***"Crest Nicholson"***) at [23] per Chadwick LJ, citing the following statement from the then current (6th) edition of *Megarry & Wade*:

> "If, on the construction of the instrument creating the restrictive covenant, both the land which is intended to be benefited and an intention to benefit that land, as distinct from benefiting the covenantee personally, can be clearly established, then the benefit of the covenant will be annexed to that land and run with it, notwithstanding the absence of express words of annexation."

That was taken verbatim from the judgment of HHJ Rubin in *Shropshire County Council v Edwards* (1982) 46 P&CR 270 at 277. As can be seen that statement was about the absence of express words of annexation, and said nothing about whether the intention to benefit particular land could be implied.

52. The question was considered by Morritt J in *J Sainsbury plc v Enfield LBC* [1989] 1

WLR 590. There land had been conveyed in 1894, the purchaser covenanting with the vendor (alone). The fact that the vendor retained other land was apparent from other parts of the conveyance, but the covenant was not expressed to be for the benefit of that land. The first issue was from what facts or documents might the intention that the covenants should enure for the benefit of the retained land be inferred or expressed. On that Morritt J summarised the rival submissions at 595H-596A as follows:

> "the plaintiffs contend that the intention must be manifested in the conveyance in which the covenant was contained when construed in the light of the surrounding circumstances, including any necessary implication in the conveyance from those surrounding circumstances. The defendants claim that such intention may be inferred from surrounding circumstances which fall short of those which would necessitate an implication in the conveyance itself."

Morritt J held that the authorities demonstrated that the plaintiffs' submission was correct (at 596F). I agree. The relevant conveyance can be construed in the light of surrounding circumstances, and, like any other instrument, its interpretation can depend not only on its express terms but on any necessary implication; but the exercise remains one of interpreting the document, not of inferring intentions from surrounding circumstances alone.

53. As I understood it, Mr Moffett accepted this. He said however that once the intention is found, extrinsic evidence can be used to identify the land benefited. That I accept, but it is a rather different point, as shown by *Rogers v Hosegood*, where the intention to benefit other land was clear from the conveyance itself, albeit expressed in quite general terms ("with intent that the covenants … might enure to the benefit of [the vendors] their heirs and assigns and others claiming under them to all or any of their lands adjoining or near to the said premises"). As Mr Moffett put it, what you need to find in the conveyance is conceptual certainty, not a complete identification of the precise parcels of land benefited.

54. So the question is whether there can be found in the 1922 conveyance, either expressly or by necessary implication, a sufficient indication of the lands intended to be benefited by the covenant in clause 2 as to meet this requirement for conceptual certainty. I repeat here for convenience the relevant wording of the covenant:

> "and that nothing shall be hereafter erected placed built or done upon the said hereditaments and premises including such part thereof as last aforesaid which may be or grow to be a nuisance and annoyance or disturbance or otherwise prejudicially affect the adjoining premises or the neighbourhood…"

55. The Judge dealt with this question in the Judgment at [96] which I have set out at paragraph 29 above, and which again I repeat here for convenience:

> "The covenant is one not to do certain things to the prejudice of "the adjoining land or the neighbourhood". In substance that means that the covenant is *for the benefit of* the land so described. 'Adjoining land' is clear enough. 'Neighbourhood' means the area nearby. Reading clause 2 together

> with clause 1, I am in no doubt that the phrase "the adjoining land or the neighbourhood" in both places where it appears in clause 2 is a reference back to the phrase "the other buildings and land of the vendor and his tenants adjoining or near to the said hereditaments hereinbefore described" in clause 1. Accordingly, in my judgment, the land for the benefit of which the covenant was imposed is sufficiently described in the deed itself. The formula used, that is, land of the vendor "adjoining or near" the land conveyed, is in substance the same as the formula successfully used in *Rogers v Hosegood*."

56. This part of the argument was advanced for the appellants by Mr Weekes. As he submitted, there are two steps in the Judge's reasoning. First, the Judge finds that the covenant is in substance for the benefit of the adjoining land or neighbourhood. Second, he interprets that as meaning the same thing as the phrase in clause 1 where the dominant tenements of the easements reserved under the Rec are "the other buildings and land of the vendor and his tenants adjoining or near to" the Rec. Mr Weekes submitted that the Judge erred in both steps.

57. I accept this submission which I am ultimately persuaded is well-founded for the reasons that Mr Weekes gave. As to the first step, it is no doubt right that the covenant was, in a general sense, taken for the benefit of the land described. But, as Sargant J said in *Ives v Brown* (paragraph 46 above), it is not enough to see that the vendor owns adjoining property and that the covenant is plainly inserted with a view to benefiting the vendor accordingly; what is needed is an intention that the covenant is taken for the protection of defined lands of the vendor so that it goes with the land to successive owners, rather than being kept in the hands of the vendor for him to exploit.

58. Here the covenant is against causing a nuisance or annoyance to "the neighbourhood". It is very common for covenants against nuisance to be framed in this way. Several examples can be found in the authorities that happen to be before us: see, for example, *Formby v Barker* [1903] 2 Ch 539 ("a public or private nuisance or any annoyance or inconvenience to the neighbourhood"), *Ives v Brown* ("a nuisance, annoyance or disturbance to [the vendors], or the persons deriving title under them or either of them, or their tenants, or the neighbourhood"), *Marquess of Zetland v Driver* [1939] 1 Ch 1 (***"Zetland v Driver"***) ("a public or private nuisance or prejudicial or detrimental to the vendor and the owners or occupiers of any adjoining property or to the neighbourhood"). The natural interpretation of that is that it is part of defining the scope or content of the covenant, so that a nuisance or annoyance to the neighbourhood is what constitutes a breach. That makes sense. "Neighbourhood" is an inherently imprecise term, but that does not matter where it is being used to refer to a breach, as the very nature of nuisance means that the impact of a nuisance will vary from case to case. Some nuisances only affect the immediately adjoining property, such as nuisance by encroachment of tree roots, but others, such as nuisance by noise or smells, affect a wider but necessarily imprecise area. The concept of a neighbourhood is therefore a perfectly adequate and understandable concept to use for the purpose of describing a breach of covenant by causing a nuisance or annoyance.

59. But it is not a conveyancing expression. "Neighbourhood" does not refer to any particular properties at all. It refers to a local area. It is a singularly inapt expression to use to identify properties to which the benefit of a covenant is intended to be

annexed. Mr Moffett said that many imprecise expressions had been held sufficient to annex the benefit of a covenant, as conveniently demonstrated by a list set out in *Francis, Restrictive Covenants and Freehold Land: A Practitioner's Guide* (5th edn, 2019) at §8.27. That includes expressions such as "[the vendors'] lands adjoining or near", "the Vendor's adjoining and neighbouring land", "the adjoining property of the vendor" "such parts of the [vendor's land at X] as shall for the time being remain unsold", "the [vendor] company's estate at X", "the Vendor's X Estate using that term in its broad and popular sense", and even in one case simply "the lands of the Vendor" (where it was clear from the rest of the conveyance what these lands were). That is true, and indeed the first example is of course taken from *Rogers v Hosegood* itself. But what is noticeable are that these are all descriptions of land. Some of them may give rise to evidential difficulties, especially if the question of the enforceability of the covenant arises years afterwards, and some of them might require a judgment to be made (is a property "near" or not?), but it seems to me that they all fulfil the criterion of conceptual certainty, however difficult it may later be to identify the precise parcels which are referred to.

60. Mr Moffett said that if "the vendor's adjoining and neighbouring land" was definite enough (as held by Buckley J in *Russell v Archdale* [1964] 1 Ch 38), then the same ought to be true of "the neighbourhood". But I do not think this quite answers the point for two reasons. First, as Newey LJ pointed out in argument, all the expressions listed in *Francis* refer to lands of the vendor. That is in principle a defined list of properties, and the only question is whether such lands answer the description of being neighbouring. In practice that may not be difficult to do, as it may be entirely obvious that the vendor's retained land in the area is sufficiently close. But it is not even theoretically possible to draw up a list of properties in a neighbourhood. Second, Mr Weekes was able to point to *re Selwyn's Conveyance* [1967] 1 Ch 674 where Goff J at 685 expressly drew a distinction between "neighbourhood" and "neighbouring land part of or lately part of the Selwyn estate", saying that prima facie the latter seemed to him to be ascertained or ascertainable. I agree for the reasons I have sought to give that there is a real distinction between the two.

61. As to the second step in the Judge's reasoning, Mr Moffett sought to uphold the Judge's conclusion. He said that the conveyance had to be read as a whole, that the drafter had identified in clause 1 a group of properties for the purpose of reserving easements of drainage under the Rec ("the other buildings and land of the Vendor and his tenants adjoining or near to" the Rec), and there was nothing surprising in the drafter intending to refer to the same group of properties as those who would be affected by nuisance. He said that the language in clause 2 echoed that of clause 1, and was intended to refer to those lands of Captain Forester and his tenants that were near enough to the Rec to be affected by nuisance; what the drafter was doing was using "the adjoining land or the neighbourhood" as a shorthand way of referring to the same properties.

62. I do not think this can be right. As King LJ pointed out, if the drafter wished to refer to the same properties, there is no obvious reason why he did not use the same words. And as Newey LJ pointed out, confining the benefit of the covenant in clause 2 to the same properties as were referred to in clause 1 would have an odd consequence: one would expect properties that enjoyed, or that might in the future enjoy, easements of drainage under the Rec to be those in the fairly immediate vicinity, but one might

have thought that a covenant against building a factory or committing a nuisance to the neighbourhood would be intended to be for the protection (in the general sense) of a much wider area. The value of undeveloped land some distance from the Rec might be affected by the prospect of the Rec being turned into an industrial site, and on the face of it a "neighbourhood" is apt to refer to a considerably larger area than the properties sufficiently near to the Rec to enjoy, actually or potentially, easements of drainage under it; indeed it could quite possibly extend to all or much of the 600 acres that made up the Bathwick Estate at the time of the 1919 auction.

63. In short I think it is asking too much of these words in clause 2 to make them do the work of not only identifying the scope of the covenant but also of identifying, at the level of conceptual certainty, the lands of the vendor to which the benefit of the covenant was intended to be annexed. But unless they can do that, there is no other basis for finding that the 1922 conveyance sufficiently identified such land as to enable a conclusion to be reached that there had been an annexation.

64. I would therefore allow the appeal on Ground (2).

Ground (7) (and/or Ground (3)) – annexation to Bathwick Estate

65. Mr Weekes and Mr Hutchings both made some submissions on the basis that if the benefit of the covenant was annexed at all, the better candidate for the land to which it was annexed was the Bathwick Estate. But this was not the basis of the Judge's decision; there was no respondent's notice suggesting this as an alternative basis for his decision; and Mr Moffett positively asserted that the covenant was not tied to any concept of the Bathwick Estate. I do not therefore think it is necessary to consider this alternative, although I will briefly say that if the covenant had been in terms made with "the vendor or other the owner or owners of the Bathwick Estate", then there would appear to be much to be said for the contention that once the Bathwick Estate had ceased to be a recognisable entity, there could be no-one who would satisfy that description and the covenant would become unenforceable. This is Ground (7) (and/or, to the extent it differs, Ground (3)).

66. Thus in *Site Developments (Ferndown) Ltd v Cuthbury Ltd* [2010] EWHC 10 (Ch) a covenant was made in 1926 with "the Vendor and his successors in title the owner or owners for the time being of the Canford Estate of which the land hereby transferred and conveyed forms part". Vos J held that it could only be enforced by the owner of an area of land which could properly be regarded as the Canford Estate and that it would be nothing short of absurd if covenants made in favour of the Canford Estate could be enforced by every transferee of land from the Estate (at [202], [204]). That seems to me to have much to commend it. But this is another area where there is a substantial body of authority, not all pointing in the same direction, and it is unnecessary to reach a concluded view.

Ground (1) – intention to annex

67. Nor is it necessary to reach any concluded view on Ground (1) which is that the Judge erred in his decision that the fact that the covenant was made with "the Vendor his successors in title and assigns" indicated an intention to annex. It became apparent in the course of argument that it was indeed quite difficult to be confident why these words had been used and what the effect of them was.

68. Mr Hutchings, who took the lead on this point for the appellants, pointed out that under the 1920 resettlement Captain Forester took a life interest, which at the time could subsist as a legal estate, and submitted that "successors in title" therefore referred to those who were successors to that life interest. My initial reaction was that although a life interest could no doubt be assigned in theory, the assignee would acquire an interest of very uncertain value as it would terminate on Captain Forester's death (being technically an interest *pur autre vie*), and it was rather doubtful if anyone would be interested in taking such an assignment in the real world. But Mr Hutchings, at the prompting of his junior Ms Holmes, showed us that there was evidence that Captain Forester had in fact mortgaged his life interest, which indicates that his life interest was regarded as perfectly acceptable security, presumably only if accompanied, as no doubt it was, by an appropriate policy on his life. I accept therefore that Mr Hutchings' suggested interpretation was not, as I had first thought, likely to be devoid of practical application.

69. But to interpret it that way would still seem to result in a surprisingly limited class of persons who would qualify as successors in title. In particular if Captain Forester had died, enjoyment of the estate would pass to his son Henry Forester who took the next interest under the 1920 resettlement. But he would not be an "assign" of Captain Forester, nor would he be a "successor in title" in accordance with Mr Hutchings's interpretation, as he would not succeed to his father's life interest, but by virtue of his own life interest. That would seem a strange result as one would expect Captain Forester to have wanted his son and other successive owners of the estate under the 1920 resettlement to have the right to enforce the covenant if the estate passed to them, nor do I think that this would have been so unlikely a prospect as not to occur to the drafter. The conveyance was obviously professionally drawn (and indeed there was evidence that it had been settled by counsel), and the terms of the conveyance show that the drafter was familiar with the 1920 resettlement. Indeed, the very fact that rather than use the expression "the vendor his heirs and assigns", which to judge from the decided cases was very common wording, the drafter chose the words "the Vendor his successors in title and assigns" suggests that the drafter was alive to the fact that Captain Forester would not, in relation to the Bathwick Estate, have any heirs at all as his interest, being a life interest, would come to an end on his death and could not be inherited.

70. I am therefore rather doubtful that Mr Hutchings' narrow interpretation can have been what was intended. In the alternative he sought to revive an interpretation that had been argued before, and rejected by, the Judge, namely that successors in title meant the persons subsequently entitled under the 1920 resettlement. That would deal with the particular problem identified, but again seems quite a narrow interpretation.

71. In those circumstances I think the Judge might well have been right that "successors in title" should be interpreted as extending to those who derived title under Captain Forester, including purchasers. We received limited argument on this aspect of the case and were not shown any authority on the meaning of the phrase. The technical position was that Captain Forester as tenant for life did not have the fee simple vested in him, but by s. 3 of the Settled Land Act 1882 had a power of sale which enabled him to convey a fee simple to a purchaser free from the rights under the settlement: see *Megarry & Wade* (5th edn, 1984) at 322. In one sense it could no doubt be said that such a purchaser was not strictly a successor in title to Captain Forester in that he

did not succeed to the latter's life interest, but such a purchaser would derive his fee simple title from the exercise by Captain Forester of his statutory power of sale, and it does not seem strained to me to regard such a person, deriving title from a conveyance made by Captain Forester, as his successor in title.

72. That however throws up another difficulty, which is successor in title to what? No doubt if Captain Forester had succeeded in his plan to sell the whole estate in one lot, the purchaser might qualify as his successor in title on this interpretation, but it does not follow that every purchaser of a part of the estate, however small, was intended to be included. If it was intended to include all such purchasers, then that raises the question who was meant by "assigns": there would on this view be no need to assign the benefit of the covenant to purchasers, and one would have thought little or no scope to assign it to anyone else.

73. The potential difficulties were not explored in any detail at the hearing, and since it is not necessary, I see no reason to reach any concluded view on a point which turns on the wording of this particular conveyance and is unlikely to recur. Whatever the true scope of the meaning of successors in title, this does not affect the fact that the 1922 conveyance does not indicate, clearly or at all, which lands were intended to be benefited by the covenant. That for the reasons I have already sought to give is in my judgment fatal to the suggestion that the benefit of the covenant was annexed by the conveyance.

Grounds (4) and (5) – easily ascertainable

74. It is also unnecessary to reach any conclusion on Grounds (4) and (5), but it may be helpful if I express my views. They can be taken together. It is not disputed that there are two decisions of this Court which state in terms that it is a requirement for annexation that the land benefited should be easily ascertainable. First, in *Zetland v Driver* Farwell J, giving the judgment of the Court, set out (at 8) the conditions for annexation, of which the third was:

> "the land which is intended to be benefited must be so defined as to be easily ascertainable, and the fact that the covenant is imposed for the benefit of that particular land should be stated in the conveyance and the persons or class of persons entitled to enforce it."

Second, in *Crest Nicholson* Chadwick LJ (with whom Arden and Auld LJJ agreed), having considered *Federated Homes*, said at [33]:

> "there is nothing in that case which suggests that it is no longer necessary that the land which is intended to be benefited should be so defined that it is easily ascertainable. In my view, that requirement, identified in [*Zetland v Driver*] remains a necessary condition for annexation."

75. The Judge pointed out that both these decisions concerned post-1925 covenants, which is true, and suggested that they did not decide anything about pre-1926 covenants. I do not find that persuasive: in neither case was it suggested that on this point the law had changed as a result of the LPA 1925, and Chadwick LJ in the latter case expressly refers to it *remaining* a necessary condition despite the effect of s. 78 LPA 1925 (as interpreted in *Federated Homes*).

76. The Judge also said that what was said about annexation in *Crest Nicholson* was technically *obiter* as the actual decision was on another point. Again that is true, but where the Court of Appeal has twice stated (and, in the latter case certainly, and in the former case probably, not in passing but after careful consideration) that it is a requirement of annexation that the land be easily ascertainable, I think one would normally expect such guidance to be followed even if technically *obiter*.

77. But the Judge made another point which is that in neither case is there any explanation of what the phrase actually means, and how it differs from another formulation used by Chadwick LJ in *Crest Nicholson* at [31] as follows:

> "it is sufficient for the conveyance to describe the land intended to be benefited in terms which enable it to be identified from other evidence."

That I think has rather more to be said for it; as the Judge said, unless this means the same thing, the two statements by Chadwick LJ are inconsistent.

78. What is more, it is noticeable that in *Zetland v Driver* the covenant was expressed to be "to benefit and protect such part or parts of the lands in the Borough Township or Parish of Redcar, in the North Riding of the County of York, now subject to the settlement (a) as shall for the time being remain unsold or (b) as shall be sold by the vendor or his successors in title with the express benefit of this covenant". In that case the Court held that this covenant was duly annexed, saying (at 8):

> "it is expressly stated in the conveyance to be for the benefit of the unsold part of the land comprised in the settlement and *such land is easily ascertainable*" (emphasis added).

It follows that whatever this requirement means in practice, the fact that one would have to enquire whether a particular parcel of land was comprised in a settlement at the date of the covenant was not regarded as failing the requirement. If therefore the covenant in the 1922 conveyance had been expressed to be for the benefit of the lands then comprised in the Bathwick Estate, or in the 1920 resettlement, it is difficult to imagine that this could be regarded as not equally easily ascertainable. And if, which was the basis the Judge was proceeding on, the benefit of the covenant was annexed to a subset of those properties, namely those adjoining or near to the Rec, that would in my view equally satisfy the requirement of easy ascertainability, even though it would require a judgment to be made as to which properties qualified as being near enough.

79. So although the Judge probably went too far in saying (as he did at Jmt [92]) that it was not necessary for the land to be easily ascertainable, in substance I think he was right to say that this did not differ significantly in practice from the test whether the conveyance sufficiently described the land intended to be benefited in terms which enabled it to be identified from other evidence (also at [92]).

80. Mr Hutchings submitted that the easy ascertainability test had to be satisfied both at the time of entering into the covenant and at the time when it was sought to enforce it. I do not find any support for that in the authorities, and do not think it can be right. The easy ascertainability test is a test for annexation. Whether the benefit of a covenant is annexed is a question of the parties' intention at the time, to be derived

from the construction of the instrument in which the covenant is contained. It is a general principle of English law that the meaning and effect of a legal document such as a contract or conveyance is fixed at the time it is entered into, and does not change thereafter.

81. It may of course subsequently become difficult or even impossible to identify the lands referred to in a conveyance, and that may affect the question whether a person claiming the benefit of the covenant can show that they are entitled to it. But that is a question of evidence and enforceability, and not something which in my judgment can affect the logically prior question whether the benefit of the covenant was duly annexed in the first place.

82. The point can be simply illustrated by an example put by Newey LJ in argument. Suppose a conveyance is entered into which contains a covenant expressed to be for the benefit of the lands listed in a schedule, the schedule identifying each parcel of land with complete clarity. But by the time the question of enforceability arises, only the first page of the schedule survives and the subsequent pages have been lost. In such a case there is no reason to doubt that the benefit of the covenant was duly annexed to the lands originally listed in the schedule, and the fact that it is no longer possible to draw up a definitive list of such land, and that someone who suspects their property was listed on the lost pages may be unable to prove it, cannot, it seems to me, affect the question of annexation. Nor in my view would it affect the ability of someone whose land was listed on the surviving first page to enforce the covenant. It is only fair to add that as I understood it Mr Hutchings was disposed to accept this.

83. But if that is right, the question whether it is now easy or not to identify precisely which lands comprised in the 1920 resettlement remained unsold at the date of the 1922 conveyance does not seem to me to be here or there. In fact, although the Judge accepted that absolute precision as to the properties then still forming part of the Bathwick Estate "is not possible on the evidence currently available, and may never become possible in the future" (Jmt at [100]), there was unusually good evidence as to what land remained in the settlement in 1922. The auction particulars for the 1919 auction listed the properties in the Bathwick Estate, property by property. So did the 1924 agreement for sale to the Estate Company. It seems to me a reasonable assumption that any property appearing on both lists was also in the Bathwick Estate at the time of the 1922 conveyance, as there is nothing to suggest that Captain Forester, who was making efforts to sell the Bathwick Estate, was in the habit of selling properties and buying them back. No doubt he might have sold other properties between the date of the 1922 conveyance (6 April 1922) and that of the 1924 agreement (4 September 1924) but I do not see that that matters.

84. I am not therefore persuaded by Grounds (4) and (5) and although it is not necessary to express a concluded view I do not think I would have allowed the appeal on those grounds.

Conclusion

85. For the reasons I have given however I would allow the appeal on Ground (2). The appellants ask for a declaration that the restrictive covenant contained in the 1922 conveyance is not binding on them, and if the other members of the Court agree, I would make such a declaration.

Postscript

86. We circulated our judgments in draft in the usual way on 15 December 2021. Mr Moffett responded with the sad news that his client, Mr White, had died since the hearing of the appeal. We have decided that this is no reason to hold up the hand-down of our judgments, although it will no doubt take a little time to deal with consequential matters.

Lord Justice Newey:

87. I agree that the appeal should be allowed on Ground (2) for the reasons that Nugee LJ has so well expressed.

88. The only point on which I wish to add anything relates to the requirement for the land which is intended to be benefited to be so defined that it is "easily ascertainable". As he explained in paragraph 92 of his judgment, Judge Matthews proceeded on the basis that "'it is sufficient for the conveyance to describe the land intended to be benefited in terms which enable it to be identified from other evidence', and it is not necessary to show further that the land to be benefited is 'easily ascertainable'". In paragraph 79 of his judgment, Nugee LJ says that he thinks Judge Matthews was right to say that the easy ascertainability requirement does not differ significantly in practice from the test whether the conveyance sufficiently described the land intended to be benefited in terms which enabled it to be identified from other evidence. I am much more doubtful about this.

89. In *Crest Nicholson*, Chadwick LJ, having expressed the view in paragraph 33 that it "remains a necessary condition for annexation" that "the land which is intended to be benefited should be so defined that it is easily ascertainable", said in paragraph 34:

> "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. A restrictive covenant imposed in an instrument made after 1925 is registrable as a land charge under class D(ii): section 10(1) of the Land Charges Act 1925 and, now, section 2(5) of the Land Charges Act 1972. If the title is registered, protection is effected by entering notice of the restrictive covenant on the register: section 50 of the Land Registration Act 1925 and, now, section 11 of the Land Registration Act 2002. Where practicable the notice shall be by reference to the instrument by which the covenant is imposed and a copy or abstract of that instrument shall be filed at the registry: section 50(1) of the Land Registration Act 1925 and section 3(5) of the Land Charges Act 1972. 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."

90. It is true that in paragraph 31 Chadwick LJ had said that it was "clear from Brightman LJ's reference in the *Federated Homes* case [1980] 1 WLR 594, 604C-G to *Rogers v Hosegood* [1900] 2 Ch 388 that it is sufficient for the conveyance to describe the land intended to be benefited in terms which enable it to be identified from other evidence", but he did so as he began to address the question whether the land to be benefited must be "described in the instrument itself (by express words or necessary implication, albeit that it may be necessary to have regard to evidence outside the document fully to identify that land) or whether it is enough that it can be shown, from evidence wholly outside the document, that the covenant does in fact touch and concern land of the covenantee which can be identified" (to quote from paragraph 30). What Chadwick LJ was doing, as I read his judgment, was affirming that it can be legitimate to have regard to extrinsic evidence. I do not myself see the reference to it being "sufficient for the conveyance to describe the land intended to be benefited in terms which enable it to be identified from other evidence" as detracting from the necessity for the land to be "so defined that is easily ascertainable", a requirement for which, as he said, Chadwick LJ saw "good reasons". Neither have I been persuaded that Judge Matthews was correct when he said in paragraph 85 of his judgment that Chadwick LJ's reference to it being "sufficient for the conveyance to describe the land intended to be benefited in terms which enable it to be identified from other evidence" was "inconsistent with the 'easily ascertainable test', *unless it means the same thing*".

Lady Justice King:

91. I also agree that the appeal should be allowed on Ground (2) for the reasons given by Nugee LJ.

92. In so far as it is necessary to express a view, I would say that for the reasons he outlines, I share the doubt expressed by Newey LJ as to whether the easy ascertainability requirement does not differ significantly in practice from the test whether the conveyance sufficiently described the land intended to be benefited in terms which enabled it to be identified from other evidence.