

Construing conveyancing documents – a major change in the Court’s approach

The recent Court of Appeal decision in *Cherry Tree Investments Limited v Landmain Limited* [2012] EWCA Civ 736 concerns the construction of a defective charge. The case arose from a failure to complete panel 9 in Land Registry form CH1 and concerned the attempt to make good the defect by construction rather than a claim for rectification. What is of much wider significance is the view of the majority in the Court as regards the correct approach to adopt on the construction of documents registered at H.M. Land Registry. This is a point which has not been previously considered in this country even though there have been opportunities. In contrast it is a point which has been considered by the Courts in Australia and reference to these had been included in the *Interpretation of Contracts* by Lewison LJ a member of this court. The dicta in this decision on the principles of construction will have a great impact when construing easements entered on registers at HM Land Registry.

1. Facts of Cherry Tree decision – a property was sold by a mortgagee purportedly in exercise of an extended statutory power of sale which it was claimed arose immediately on execution. There was a registered charge in form CH1 but panel 9 had not been completed at all so that not only was the amount secured not mentioned but no additional provisions were set out. There was, therefore, nothing in the charge extending the implied statutory power of sale. This was crucial to the matter as in clause 12.3 of the facility agreement it was provided that the security shall be immediately enforceable and the power of sale in section 101 LPA 1925 shall arise on the execution of the agreement.

2. Mortgagor’s objection - the mortgagor objected to the registration of the purchaser on the ground that the implied statutory power of sale can only be effectively varied or extended by the charge and not by a separate agreement and that had not happened in this case. In consequence it was argued that the implied statutory power of sale could only be exercised on proof that the security monies had fallen due rather than the power arising immediately on execution and there was a dispute as to whether or not monies were then due. This meant in turn that the purchaser could not rely on section 104(2) LPA 1925 to avoid investigating whether the statutory power of sale had been properly exercised. If successful the purchaser would not be registered as proprietor.

3. Purchaser’s arguments - to overcome this problem the purchaser argued that either the charge should be corrected as a matter of construction by adding clause 12.3 of the facility agreement relying on that agreement as relevant extrinsic evidence or the charge and the agreement constituted a single document. The purchaser succeeded on the first argument and failed on the second at first instance but no argument was put to the judge as to the proper approach when construing documents registered at HM Land Registry.

4. Decision - The Court was unanimous that the charge and agreement could not be treated as a single document. The real interest is in the parts of the judgments relating to construction of the charge. There was a division. Lady Justice Arden held that the facility

agreement was extrinsic evidence which could be relied on as no third parties could be adversely affected and agreed with the trial judge that there was a mistake in the charge which should be corrected by construction by reading the charge as containing a power of sale arising on execution. She was in the minority. Lord Justices Lewison and Longmore both held that the charge should not be corrected by construction because the charge was registered at H.M. Land Registry.

5. Purchaser's solutions – the decision meant that the purchaser could not be registered as proprietor but the purchaser had not pleaded that the charge should be rectified. The reason for this might have been concern over issues of priority. The majority considered that the insertion of a whole clause mistakenly omitted required a rectification order and could not be dealt with as a matter of construction. Such a claim for rectification was still open to the purchaser. In any event the mortgagor accepted that the purchaser was subrogated to the mortgagee's charge.

6. Application of construction principles to public documents on public register – this is the really interesting point in the judgments of the majority.

6.1 ICS principles - Lord Hoffman's principles as to the correct approach to adopt to construction as set out in Investors Compensation Scheme Limited v West Bromwich Building Society are firmly entrenched. The starting point is that the function of the court is to ascertain the meaning conveyed by the document to a reasonable person "having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract." Lord Hoffman then went on to state that save for previous negotiations and the requirement that the material be reasonably available to the parties the background "includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man." On the basis of these principles the facility agreement would comprise part of the background and be taken into account.

6.2 Lewison LJ's approach - he considered that he was bound by the decision in KPMG LLP v Network Rail Infrastructure Limited [2007] EWCA Civ 363 to accept that the facility agreement was admissible as extrinsic evidence and thereby constituted part of the background material. This was notwithstanding that in that case no argument was addressed to the court as to the significance of the registration of the lease at HM Land Registry. However, that was not the end of the matter as he stated admissibility was not the sole criterion as there still remained the question as to what influence it should have. In that respect he considered that there is a distinction to be drawn between the use of background material in the interpretation of "ordinary" commercial contracts and "negotiable and registrable contracts or public documents".

In his judgment "the reasonable reader's background knowledge" of the defective charge would include knowledge that:

- (i) the charge would be registered in a publicly accessible register upon which third parties would be expected to rely;

- (ii) In so far as documents or copies were retained by the registrar they were to be taken as containing all material terms and the person inspecting had no right to call for the originals;

- (iii) The parties had a choice as what information was kept private and what was placed in public domain.

This meant that little weight should be applied to background material which did not appear on the register. Longmore LJ agreed that “public and negotiable documents are different from ordinary contracts” and that evidence of background has a more limited part to play.

6.3 Torrens system – Lewison LJ referred to some of the Australian authorities concerned with the construction of conveyancing documents intended to be registered under the Australian Torrens system. With that system the registration is the title whilst even after the LRA 2002 Lewison LJ acknowledged this country does not have “a fully fledged Torrens system.” However, he considered that the general approach of the High Court of Australia “ought to apply to our system of land registration.”

That approach was spelt out in *Westfield Management Limited v Perpetual Trustee Co. Ltd.* [2007] HCA 45 when the High Court of Australia held that the rules of evidence assisting the construction of contracts did not apply to the construction of registered easements. It was stated at para. 39 that the “third party who inspects the Register cannot be expected, consistently with the scheme of the Torrens system, to look further for extrinsic material which might establish facts or circumstances existing at the time of the creation of the registered dealing and placing the third party (or any court later seized of a dispute) in the situation of the grantee.” This has resulted in Australia in such material not been admissible.

The application of this approach will have a significant effect on how the construction of documents registered at HM Land Registry is now approached by the courts. In the Australian cases much evidence which otherwise would be admissible on an issue of construction will not be admissible because the document is registered. In this country currently it is not a question of admissibility but of the weight to be attached to such evidence. In the *Cherry Tree* case it caused little weight to be attached to the earlier facility letter because it was available only to the parties to the charge and not available to persons who inspected the register. It will have a very significant impact with regard to the construction of easements.

7. Easements – background material has always been important when determining the extent or permissible use of an easement. What will be the effect of the new approach when the easement is noted on a register at HM Land Registry or granted by a conveyancing document mentioned on the register? For example, in *Partridge v Lawrence* [2004] 1 P&CR 14 the width of an easement was expressed to be no greater and no less than on the attached plan but unfortunately that was a distorted copy with no scale appearing on it. The Court applying the first ICS principle looked at the original architects plan to ascertain the intended width. Is this extrinsic evidence which will now carry little weight because it is not available on an inspection? Similarly in *Thomas v Allen* [2004] SC 393 the court looked at two earlier grants to determine whether a later grant of an easement included the verges to the track. Is such an approach now in appropriate?

It is interesting to consider how the Westfield approach has been applied in Australia. Following the Westfield case it was held

7.1 in *Sertari Property v Nirimba Developments Property* [2007] NSWCA 324 that the Court was limited when construing a grant of an easement to considering the material in the register, the registered instrument, the deposited plans and the physical characteristics of the dominant and servient tenements. The court excluded a town planners' report and the planning permission from the admissible background.

7.2 A licence issued by an Environment Protection Authority permitting the disposal of effluent from a village was held to be inadmissible in *Neighbourhood Association DP v Moffat* [2008] NSWSC 54 even though it would have made clear the purpose of a bare grant. However, the Court still reached the same result using the limited permitted material.

7.3 Evidence as to the history of the development of the relevant lands and the intention of the grantors and grantees was held to be inadmissible in *Berryman v Sonnenschein* [2008] NSWSC 213. Direct evidence of the actual intention of all or any of the parties is also inadmissible in this country (*Young v Brooks* [2008] EWCA Civ 816).

7.4 registered leases albeit consensual documents are subject to the same principles of construction as easements limiting background knowledge to that which "is accessible to all the people who it is reasonably foreseeable might, in the future, need to construe the document" (*Campbell JA in Phoenix Commercial Enterprises v City of Canada Bay Council* [2010] NSWCA 64 at para. 151).

The physical features of the relevant land will still be admissible and taken fully into account. This was justified by Lewison LJ on the basis that they are capable of being seen by anyone contemplating dealing with the land. However, other background material such as user at the time of grant, earlier documents not mentioned on the register or information as to the intended purpose of the transaction will no longer have the influence that they previously did.

8 Conclusions

8.1 The Cherry Tree decision will have a wide impact on the Court's approach to the construction of conveyancing documents and clearly draws a distinction between conveyancing documents and "ordinary" contracts.

8.2 With conveyancing documents weight will be given only to background which is available to any person inspecting the register and not just the parties.

8.3 The Australian approach which Lewison LJ felt should apply to our system of land registration limits the evidence to the material set out in paragraph 7.1 above albeit that such material will still be admissible in this country in contrast to the position in Australia.

8.4 One area which will be particularly affected is easements. However, physical features will still be relevant and weighty material when construing an easement.

8.5 Earlier conveyancing documents will not be taken into account unless mentioned on the register.

8.6 Other surrounding material unless available to a person inspecting the register will no longer be influential on an issue of construction.

8.7 The working out of the practical consequences of this change in approach is likely to require further decisions.

8.8 Correction by construction will not be appropriate when attempting to insert an omitted clause. There is still a significant role for rectification by the courts.