BOUNDARY DISPUTES AND THE CONSTRUCTION OF TITLE DOCUMENTS

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When extrinsic evidence is admissible in construction of ambiguous documents, an overview of 3 recent decisions

Three recent appeal court cases have highlighted the degree to which the Courts will consider extrinsic evidence in the construction of property conveyance documents. In cases of uncertainty the Court will attempt to construe the whole agreement according to the canonical principles outlined in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896. In the case of a defective parcels clause or a generally ambiguous conveyance, admissible extrinsic evidence has been held to include the conduct of the parties subsequent to the conveyance, and an objective assessment of the circumstances surrounding the conveyance, including an appreciation of the topography. The final case to be discussed (*Cherry Tree Investments Ltd v Landmain Ltd* [2012] EWCA Civ 736) is not so much an indication that the high water of constructive interpretation has been reached, rather than a reminder of the limits of the doctrine in relation to the registration requirements for title documents and charges.

1. Extrinsic evidence is often necessarily considered when arriving at a meaningful interpretation of title documents. Of course the admissibility of extrinsic evidence still falls to be determined by the Court, subject generally to Lord Hoffman's third principle in ICS, viz:

> *(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.*

2. Generally a conveyance of land will contain a written description accompanied by a plan. If the plan is described as being "for the purposes of identification only" then the written parcels clause will prevail. If the property is "more particularly described in the plan" then the plan will generally be seen a providing the definitive description of the plot. Where the parcels clause is ineffective then the court may have recourse to the plan even though it is "for the purposes of identification only".

***Cameron v Boggiano and Robertson* [2012] EWCA Civ 157**

3. In the recent case of Cameron *v Boggiano and Robertson* [2012] EWCA Civ 157 two neighbours had purchased property at different times from a common vendor. The claimant sought a declaration that his land at No. 7 Choumert Mews extended right up to the rear wall of the Defendant's property, No. 60 Choumert Road. The Defendants denied that this was the case and claimed that the respective parcels were divided by a 4' gravel strip running parallel to and between the rear wall of No. 60 and an ACO drain line.

4. The Claimant was the first in time to purchase his property and the sale documents for that transaction logically fell to be construed when the boundary between the two neighbouring plots was to be ascertained. The plan accompanying the contract and TR1 for the sale of No. 7 was derived from the OS map and was described as inherently unclear, based on a small scale OS map over which boundary lines were thick and the colouring 'slapdash'. This was referred to as Plan A.

5. In addition to plan A, a further plan (Plan 'C') had been available to the Claimant and vendor at the time of the first sale. This was a plan of the service runs which was marked up in greater detail than Plan A to show that No. 7 would only run up to the drain at the edge of the gravel strip.

6. Notwithstanding the concerns over the quality of the plan the Judge at first instance decided that Plan 'A' was the only plan material to construction of the boundary. Viewed objectively it was held to be sufficiently clear to permit construction of a boundary which corresponded with the Claimant's pleaded case.

7. The Defendants pleaded a very late amended counterclaim in rectification based on mutual mistake, upon which they succeeded. Thus, the Claimant, having won on the construction point, was denied the fruits of his victory by the subsequent rectification point.[1]

The Appeal and Cross Appeal

The Claimant appealed the rectification point and the Defendants cross-appealed on the construction point.

8. Allowing the Defendants' cross appeal on the construction point (and dismissing the rectification appeal) Mummery LJ conceded that the contract, TP1 and Plan A for the sale of No. 7 were indeed objectively capable of having the effect maintained by the Claimant, and that the subjective intention of the parties to that sale was not a legitimate part of the construction of the title documents. Ordinarily therefore, where the transfer and the transfer plan were clear and unambiguous a mismatch between the plan and the topographical features on the ground was not sufficient of itself to depart from the title documents.

9. Where however the title and plan were insufficiently clear to establish the position of the boundary then it was permissible to rely on extrinsic evidence by way of the local topography (cf *Pennock v Hodgson* [2010] EWCA Civ 873). Where such ambiguity exists then it cannot be a breach of the exclusionary principle to look at the features on the ground at the time of the relevant conveyance.

10. In the instant case (and although Plan A was not qualified by the expression "for identification only") Plan A was so ambiguous that it fell to be 'contextualised' in order to give effect to its meaning. At paragraph 65 of his Judgment, Mummery LJ stated:

> *"It* [Plan A]*…is not to be construed in a vacuum. In more mundane terms this means that the reasonable layman would go to the property with the plan in his hand to see what he is buying. The reasonable layman is not a qualified surveyor or a lawyer. If the plan is not, on its own, sufficiently clear to the reasonable layman to fix the boundaries of the property in question, topographical features may be used to clarify and construe it."*

11. It was determined that Plan A was of such poor quality that recourse could legitimately be made to an examination of the features on the ground at the time of the conveyance. The practical effect on the construction of the conveyance of No. 7 was that the boundary was to be construed as passing along the line of the drain, and not as contended up to the rear wall of No. 60.

12. The case is further authority for the proposition that where a transfer plan is intended to be definitive, but is still ambiguous, then the local topography can be employed in construing the parcel boundary.

***Owen Ernest Wood & Ors V Hudson Industrial Services Ltd* [2012] EWCA Civ 599**

13. Whilst it is settled law that a parcels clause in a deed will prevail over a plan attached 'for the purposes of identification only', if the verbal description is insufficient, the court will have recourse to the plan. If the plan is also of no help in identifying the area, then the court can

[1] The Defendant ultimately succeeded in showing that there had been a mistake and that the common vendor had not intended to transfer the gravel strip. Furthermore it was held that Plan C was available to the Claimant and the Vendor prior to sale and that the vendor had only intended to sell land to the Claimant up to the line of the drain. Furthermore the Judge at first instance had been satisfied that the Claimant understood that his proposed purchase extended only as far as the drain line, and not over the gravel strip. Critically the Judge at first instance was satisfied that Plan C, although not prepared as the title map, had been available to the parties and represented an outward expression of accord with respect to the Claimant's and the Vendor's understanding of what was being sold.

again refer to the surrounding circumstances, and ask objectively what the reasonable lay person thought was the area described.

14. In *Owen Ernest Wood & Ors V Hudson Industrial Services Ltd* [2012] EWCA Civ 599, a further judgment delivered by Mummery LJ this year, the Court of Appeal looked at the question of whether extrinsic evidence of the parties' discussions might become admissible in the construction of a parcels clause.

15. This case concerned the construction of a Deed of Gift dated April 1995. The Appellants had been the owners of farm land and a dairy business which they gradually parcelled and sold by smaller plots after retirement. By deed of gift, they transferred a small parcel of land ('one acre or thereabouts') to their son David. Unfortunately there was a mismatch between the area of unregistered land described in the parcels clause in the Deed and the area of unregistered land delineated and edged red on a plan annexed to the Deed 'for the purpose of identification only'.

16. Hudson Industrial Services Ltd subsequently bought that land from the son and sought registration of its title to the 3¼ acres of unregistered land described by the deed plan. The appellants resisted the application for registration on the basis that the land conveyed to Hudson could only have been the farm yard from where the son operated a machinery business, and that was the 1 acre or thereabouts intended to pass under the deed.

17. At first instance the judge made a declaration that, as a matter of construction, the Deed of gift had conveyed 3¼ acres from the parents to the son. The judge gave effect to the area of red edging shown on the annexed plan rather than to the verbal description of the area in the parcels clause. He did this on the basis that it was not possible to tell from the clause in the Deed where, within the area of the land delineated and edged red on the plan, the "one acre or thereabouts" was located.

18. The appellants had relied at first instance on the records and attendance notes of solicitors dealing between the parents and their son, and on the evidence of witnesses who had been privy to discussion with the son about the use of the yard for his business. In making his judgment the Judge excluded that evidence, relying on the general exclusionary principle in Prenn v Simmonds [1971] 1 WLR 1381 (see also ICS supra) that evidence of previous negotiations between the parties is excluded from the process of construing the document.

The Appeal

19. On appeal, Mummery LJ confirmed that extrinsic evidence of the parties' prior negotiation was indeed inadmissible. However, he pointed to the fact that what had passed between the witnesses as a preliminary to the original transfer was admissible as evidence of the surrounding circumstances known to the parties (*Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 per Lord Hoffman at paragraph 42[2]). It followed that the evidence was admissible to identify the plot of land in the parcels clause as the yard.

20. On the balance of probabilities Mummery LJ was satisfied that that extrinsic evidence pointed to the yard alone as being the area described in the parcels clause. Those circumstances were (a) the physical separation of the yard from other land included in the plan; (b) the yard area being 1.09 acres; (c) the absence of any other plausible candidate of similar area; (d) the yard was used for David's business and had been the subject of a planning application by David for a larger workshop.

21. However the Court of Appeal also drew a line this year in exactly how far it is prepared to yield in construction cases in the absence of any claim in rectification.

[2] "[42] *The rule excludes evidence of what was said or done during the course of negotiating the agreement for the purpose of drawing inferences about what the contract meant. It does not exclude the use of such evidence for other purposes: for example, to establish that a fact which may be relevant as background was known to the parties, or to support a claim for rectification or estoppel. These are not exceptions to the rule. They operate outside it."*

Cherry Tree Investments Ltd v Landmain Ltd [2012] EWCA Civ 736

22. On 31 May 2012 the Court of Appeal handed down judgment in *Cherry Tree Investments Ltd v Landmain Ltd* [2012] EWCA Civ 736. Under Lord Hoffmann's fifth principle in *Investors' Compensation Scheme Ltd v West Bromwich BS* [1998] 1 WLR 896, a court may conclude from the face of a contract that the parties have made a mistake (e.g. by including or omitting words in the document), to interpret the relevant document so that it has the meaning which the parties had intended it to have.

23. *Cherry Tree* is a case which considers the scope of that principle in the context of mortgages and charges over real property. It may also sound a note of caution that the scope of construction of terms has not overtaken or subsumed the role of rectification. In the light of the previous case law discussed, Cherry Tree is a timely reminder that there is indeed a difference.

Facts

24. Landmain Limited ("Landmain") owned No. 2 Battersea Rise, London (the property). Landmain had obtained a £635,000 loan from Dancastle Associates Limited ("Dancastle") secured by a charge on the property.

25. The statutory power of sale under s. 101 of the Law of Property Act 1925 applies to a mortgage created by a deed, and a mortgage is defined by the 1925 Act to include a legal charge. Section 101 of the 1925 Act provides that in the case of such a mortgage or charge the mortgagee has certain powers by implication of law. They need not be set out in the mortgage itself. These powers include a power of sale. This power of sale is exercisable only once the mortgage monies have become due in accordance with the terms agreed for repayment.

26. Section 101(3) of the 1925 Act provides that the mortgage deed may vary or extend the statutory power of sale. It may also exclude the whole or part of s 101 (s 101(4)). It is s 101(3) which is relevant for the purposes of this case because it states in terms that any variation of the statutory power of sale should be in the body of the mortgage deed itself and not by some separate agreement.

27. The original charge was recorded and registered in Land Registry form CH1. This document omitted both the details of the amount secured under the charge and critically the provision that the lender was entitled to exercise a power of sale at a time other than a time "when the mortgage money has become due" despite its inclusion in the facility agreement.

28. There was a dispute about payment and Dancastle alleged a default which Landmain denied. The facility agreement provided at clause 12.3 that Dancastle's power of sale arose on execution of the charge.

> *"The security constituted by the Legal Charge of the Property shall be immediately enforceable and the power of sale and other powers given by section 101 of the Law of Property Act 1925 (as varied or extended by the Legal Charge) shall, as between the [Dancastle] and [Landmain] arise on the execution of the Legal Charge and be exercisable at any time after that execution, but [Dancastle] shall not exercise the power of sale until the security constituted by the Legal Charge has become enforceable as above."*

29. Predictably Dancastle served notice on Landmain in December 2010 notifying Landmain that the sums due under the loan were immediately payable and effectively calling in the security.

30. In reliance upon the term at clause 12.3 of the facility agreement Dancastle purported to sell the Property to Cherry Tree Investments Limited ("Cherry Tree") at auction in January 2011. Subsequently Cherry Tree attempted to become the registered proprietor of the Property, but it was unable to do so because Landmain had raised objections.

31. If the mortgage was construed on the basis that clause 12.3 of the facility agreement was incorporated into the mortgage, then Cherry Tree's application would succeed. If, on the other

hand, clause 12.3 was not to be treated as incorporated into the charge, then Landmain would succeed.

32. *Cherry Tree* commenced proceedings seeking a declaration of its entitlement to be registered as the proprietor, and applied for summary judgment. At first instance, HHJ Pelling QC found in favour of Cherry Tree. Landmain appealed.

The Appeal

33. In a majority decision by Longmore and Lewison LJJ (Arden LJ dissenting) the appeal was allowed. Corrective interpretation could not be used to correct the "error" in the charge, namely the failure to include an extension of the statutory power of sale within the charge itself despite the fact the facility agreement, by clause 12.3, expressly purported to extend the said power. Subject to any application to amend the claim to include a claim based on rectification, Cherry Tree's claim would fail.

34. Cherry Tree had sought to argue that as a matter of interpretation clause 12.3 had to be implied into the charge under Lord Hoffman's 5th principle in *Investors Compensation Scheme v West Bromwich BS* [1998] 1 WLR 896.

> *(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had."*

35. Lewison LJ took the view that, in construing the charge, the question the Court sought to answer was what the **registered** charge meant. Whilst the court could have regard to the existence of the facility agreement, as part of the relevant background, the real issue was the extent to which the existence and contents of the facility agreement were material considerations in construing the charge.

36. As the Charge was intended to be a public document, a copy of it would be retained by the Land Registry. Under s. 66(1)(b) of the Land Registration Act 2002, any person may inspect a document retained by the Land Registry and which is referred to in the Register of Title of any given property; that would plainly include the charge. However, the facility agreement, which actually contained the extended statutory power of sale, was not such a document and so therefore would not be accessible to a third party. As Lewison LJ said at para 130 of the Judgment:

> *There is, in my judgment, a real difference between allowing the physical features of the land in question to influence the interpretation of a transfer or conveyance (which we do) and allowing the terms of collateral documents to do the same (which we should not). Land is (almost) invariably registered with general boundaries only, so the register is not conclusive about the precise boundaries of what is transferred. Moreover, physical features are, after all, capable of being seen by anyone contemplating dealing with the land and who takes the trouble to inspect. But a third party contemplating dealing with the land has no access to collateral documents.*

37. It was further noted that s. 120(1)(b) of the LRA 2002 required that, under a disposition which relates to land, the document(s) kept by the registrar "is to be taken to...contain all the material parts of the original document". Lewison LJ took the view that using corrective interpretation as a tool to construe the charge in CherryTree's favour, as though it contained the extended power of sale in clause 12.3 of the facility agreement would offend s.120 (1) (b).

38. The Court also relied on additional reasons for rejecting corrective interpretation as an appropriate tool for incorporating clause 12.3 into the charge. Lewison LJ was of the view that using corrective interpretation to interpret the charge as though it contained clause 12.3, the effect would be that the charge would be treated as thought it had always contained the clause. A

court's interpretation of a contract is always retrospective (*Craddock Brothers Ltd v Hunt* [1923] 2 Ch 136, 151) and the effect in this case would be to circumvent the carefully calibrated priority system enacted by the Land Registration Act 2002. Thus, if by interpretation the missing clause were inserted, then the "interpreted" charge will rank in priority from the date of its original registration. Had someone inspected the register between the time of the original registration and the date when the court "interpreted" the charge, he would not discover the existence of the missing clause, and had he taken a second charge on the strength of the register his charge would be postponed to the registered charge as "interpreted". By contrast a rectification would likely take effect subject to any new priority.

39. Lewison LJ also drew an important distinction between interpretation in the context of what he described as "ordinary commercial contracts" on the one hand, and contracts which will be subject to some form of public registration thus rendering them public documents. In the case of the former, corrective interpretation was a valuable aid to construction; the same was not true in the case of the latter. Members of the public, entitled to rely on a public document, ought not to be subject to the risk of its apparent meaning being altered by the introduction of extrinsic evidence (*Opua Ferries Ltd v Fullers Bay of Islands Ltd* [2003] UKPC 19 [2003] 3 NZLR 740.)

40. Perhaps the final word in this case belongs to Lord Justice Lewison who states at paragraph 132 of his judgment:

> *Even the staunchest advocates of the court's ability to consider extrinsic evidence stop short at saying that by the process of interpretation the court can insert whole clauses that the parties have mistakenly failed to include. In his well-known article My kingdom for a horse: the meaning of words (2005) LQR 577 Lord Nicholls of Birkenhead wrote:*
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> > *"The flexible approach, I add, would not render the remedy of rectification redundant. If by oversight parties omit an agreed clause from their contract, interpretation would not provide a remedy. The words included in the contract could not be interpreted to include the meaning intended to be conveyed by the clause which, accidentally, had been omitted.*

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September 2012