Interpreting property contracts: Some "special" principles

COMMENTARY BY JULIAN GREENHILL QC, 13 NOVEMBER 2019

1. When interpreting a property contract the applicable principles are essentially the same as those applied to any other contract. However, it is easy to overlook the fact that there remain some distinct principles of particular relevance or application to property contracts. This short paper identifies two examples.

Restriction on use of the factual matrix

2. In a property context there is a significant limitation imposed on the use of the factual matrix in interpreting a contract. In the particular case of a contract which transfers or creates an interest that is publicly registrable at the Land Registry the factual matrix has a much more limited role to play in interpreting the contract. This is important in a property context where many of the contracts with which one is concerned will fall into this category.

3. In such a case the true principle is said to be that factual background material is *still admissible*, but the weight to be given to that factual material in interpreting the contract will be reduced. The relevant test was formulated by the Court of Appeal in *Cherry Tree Investments v Landmain* [2013] Ch 305 as being:

> *'what weight would the reasonable person with all the background knowledge of the parties attribute to background material which did not appear on the face of [the document] itself?'*

4. There is a degree of judicial sleight of hand in this formulation: whether it be described as a matter of admissibility or weight, in substance the relevant background material is to be kept out of account.

5. *Cherry Tree* concerned a registered charge from which a power of sale had been erroneously omitted. The power of sale appeared in the facility agreement but not in the registered charge itself. Lewison LJ at [130] answered the question posed above as follows:

> *'The reasonable reader's background knowledge would, of course, include the knowledge that the charge would be registered in a publicly accessible register upon which third parties might be expected to rely. In other words a publicly registered document is addressed to anyone who wishes to inspect it. His knowledge would include the knowledge that in so far as documents or copy documents were retained by the registrar they were to be taken as containing all material terms, and that a person inspecting the register could not call for originals. The reasonable reader would also understand that the parties had a choice about what they put into the public domain and what they kept private. He would conclude that matters which the parties chose to keep private should not influence the parts of the bargain that they chose to make public. 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.'*

6. The principle identified in *Cherry Tree* is simply one aspect of a wider principle relating to various types of public document. For example, it has been applied to a planning permission (*Secretary of State for*

Communities & Local Government v Bleaklow Industries Limited [2009] EWCA Civ 206), and a company's memorandum and articles of association (*Cosmetic Warriors Ltd v Gerrie* [2015] EWHC 3718 (Ch)).

7. The principle will apply in relation to any contract or instrument which transfers or creates a right required to be registered under the Land Registration Act 2002. So it will apply to a transfer of a freehold or leasehold estate; the grant of a registrable lease (*Ahmad v Secret Garden (Cheshire) Ltd* [2013] EWCA Civ 1005; *Network Rail Infrastructure v Freemont* [2013] EWHC 1733 (Ch); *Murphy v Lambeth LBC* [2016] 2 WLUK 516), the grant of a legal charge (*Cherry Tree* itself), a deed of easement (*British Malleable Iron Co v Revelan (IOM) Ltd* [2013] 3 EGLR 23) and a restrictive covenant (*Bryant Homes Southern v Stein Management* [2016] EWHC 2435 (Ch)).

8. The principle is applicable even where the dispute is between the original parties to the contract rather than successors in title to one or both of them. In *British Malleable Iron Co v Revelan* the Judge applied the *Cherry Tree* principle to limit the weight given to factual matrix material in a dispute between the original parties over the scope of the rights granted by a deed of grant of a right of way. This is a logical consequence of that fact that, as was pointed out by Lewison LJ in the *Cherry Tree* case itself, the contract cannot mean one thing to the original parties and another thing to others who might be affected by it. See *Cherry Tree* at [99].

9. The effect of the principle is to prevent weight being given to private documents collateral to the contract in question, such as the facility letter in *Cherry Tree*, even though they were known or reasonably available to the original parties. Instead the admissible background is limited to that which any reader of the registered document would reasonably be supposed to know about: *Cosmetic Warriors Ltd v Gerrie* [2015] EWHC 3718 (Ch) at [27]. *In Bryant Homes Southern v Stein Management* [2016] EWHC 2435 (Ch) the *Cherry Tree* principle prevented what was on its face a restrictive covenant from being held to be a mere money payment obligation by reason of the terms of a private side agreement.

10. However, the principle will not prevent weight being given to other publicly available documents which are relevant to the interpretation of the contract in question, eg. a planning permission (*British Malleable Iron Co v Revelan* at [17]). In *Elwood v Goodman* [2014] Ch 442 the Court of Appeal had to construe a positive covenant in a transfer to contribute to the cost of maintenance of a road. Patten LJ saw no difficulty in giving weight to the terms of an earlier registered transfer of the neighbouring land on which the road was situated.

11. It remains unclear to what extent a previous registered grant which was superseded by the grant in question should be excluded by the *Cherry Tree* principle. In *Network Rail Infrastructure v Freemont* [2013] EWHC 1733 (Ch) Nicholas Strauss QC sitting as a Deputy Judge in the Chancery Division considered that, in construing the extent of the property demised under a lease in 1990, regard could be had to a previous 1964 lease which was expressly referred to in the 1990 Lease. He concluded it was clearly relevant background material to which weight could be given notwithstanding the *Cherry Tree* principle.

12. Conversely, however, in *British Malleable Iron Co v Revelan (IOM) Ltd* [2013] 3 EGLR 23 HHJ Cooke rejected an attempt to rely on a previous deed of grant of easement. He said at [17]:

> *'... It is said that the previous deed had no restriction as to use of the site, and that the introduction of a reference to "industrial units" must have shown an intention to be more restrictive. In my view, this is the sort of material that Cherry Tree rules out of consideration as affecting the meaning of the present deed, since a person inspecting the register would be entitled to assume that the previous deed had been superseded, and would not expect to investigate the history of the area to form a view as to what the registered document meant.'*

13. It is unclear from the judgment in *British Malleable Iron Co v Revelan*, but the judge's reluctance in that case to rely on the previous 1971 deed of grant may lie in the fact that it was not referred to in the 2009 deed of grant which the Court was construing.

14. Nor does the *Cherry Tree* prevent reliance on background facts which are "unchanging" and otherwise reasonably available to third parties, the most obvious being the physical features of the land in question eg. its boundary features, the nature, size and configuration of the buildings on it, or the area over which a right is to be exercised: see *Cherry Tree* at [130]. (Though it should be noted that, as experience shows, over time such physical features can change, often dramatically eg if a property is redeveloped. A successor in title may in practice have little or no access to the original physical features after such changes have been effected.)

15. The principle derived from *Cherry Tree* only applies to limit the scope of extrinsic evidence relied on in aid to interpreting a document. It does not limit the scope of admissible evidence in relation to a question which is not one of interpretation. An example arose in *Birdlip v Hunter* [2015] EWHC 808 (Ch) at first instance where the Court had to decide whether certain restrictive covenants were enforceable by reason of there being a scheme of development, the key issue being whether, as a matter of fact, there was an intention at the time of crystallisation of the scheme that the covenants were to be for the common benefit of purchasers. The covenants were imposed by indentures that were referred to in the land register for the relevant titles, but HHJ Behrens sitting in the High Court rejected an invitation to apply the *Cherry Tree* approach so as to give very limited weight to historic agreements for sale and other historic evidence. See [63]-[64].

16. Further, the *Cherry Tree* principle is a rule of evidence concerning the weight to be given to otherwise admissible evidence. It does not alter the principles of interpretation themselves so that eg. if a registered document exhibits a clear mistake without reference to extrinsic factual matrix material, it can still be corrected by construction applying the principle in *Chartbrook v Persimmon*: see *ICM Computer Group v Stribley* [2013] Pens LR 409.

Admissibility of evidence of subsequent acts

17. It is a well-established principle of the English law of contractual interpretation that the subsequent acts of the parties following the execution of the contract are inadmissible in aid to interpreting the contract: *LG Schuler AG v Wickman Machine Tool Sales* [1974] AC 235 per Lord Wilberforce. Nonetheless there are exceptions to that principle.

18. One such exception renders admissible the subsequent acts of the parties to a conveyance of land for the purpose of clarifying the boundaries of the land conveyed by it. Carnwath LJ in *Ali v Lane* [2007] 1 P&CR 26 at [36] – [37] concluded that:

> *'In the context of a conveyance of land, where the information contained in the conveyance is unclear or ambiguous, it is permissible to have regard to extraneous evidence, including evidence of subsequent conduct, subject always to that evidence being of probative value in determining what the parties intended.'*

19. There are two conditions for the admissibility of evidence of subsequent acts in such a case. First, the conveyance itself must be "unclear or ambiguous" on the point at issue. For a case which failed to satisfy that criterion see *Prashar v Tunbridge Wells BC* [2012] EWHC 1734 (Ch).

20. Second it is necessary for the subsequent conduct in question to be of true probative value. In *Ali v Lane* the issue concerned the precise location of a boundary established by a conveyance of 1947. Evidence of the boundaries of other nearby parcels conveyed in the months following the conveyance was considered probative, but evidence of the physical features on the land 30 years later (a building erected in the 1970s) was held to be of no relevance.

21. The principle has been applied repeatedly by the Court of Appeal in recent years, most recently in *Norman v Sparling* [2015] 1 P&CR 6. In that case the boundary of land conveyed by a deed of gift were impossible to interpret accurately where measurements were given with no reference point, the scale of the plan was "woefully too small" and the boundary lines marked were too wide. The CA held that the judge had been right to conclude on the evidence that the top of a bank constructed by one party following the deed of gift was intended by the parties to mark the true boundary.

22. The precise scope of this exception to the general principle remains unclear. For example, is evidence of subsequent conduct admissible to evidence the scope and extent of an easement? The interpretation of the limits of a proprietary right such as an easement, especially the identification of the physical extent of the right is arguably analogous to the boundary of land conveyed and so should fall within the exception. There are very few cases addressing this point. In *Wood v Waddington* [2014] EWHC 1358 (Ch) Morgan J doubted the application of the *Ali v Lane* exception in deciding whether certain rights of way existed at all. Even so, it does not follow that it would be inapplicable in construing the scope and extent of an express easement. Logic would suggest the exception ought to be applicable in such a case.

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