Cherry Picking

The Effect of Extrinsic Evidence on the Interpretation of Registered Documents

The principles which apply to the construction and interpretation of 'ordinary' contracts, are most famously set out in *Investors Compensation Scheme* and more recently explored in some other cases. Although *Wood v Capita* appears to indicate a continued trend in the authorities towards a stricter textual analysis, it remains the case that the context in which a contract was agreed, the 'factual matrix', is an important part of the Court's armoury in establishing meaning.

I'm going to talk briefly now about a slightly more esoteric corner of the interpretative art, one which is of particular relevance in the property field, and in particular about a decision which represented an important shift in contractual interpretation in our area of law, but which has gained surprisingly little traction in the few years since it was decided.

Cherry Tree Investments Ltd v Landmain Ltd [2012] EWCA Civ 716 is a decision of the Court of Appeal (Arden, Longmore and Lewison LJJ) from 2012, but although it has been cited a fair few times in relation to company law cases, it seems to have avoided much detailed discussion in the High Court in relation to property matters. I'm going to explain the facts of that case and the important conclusions reached in it, before going on to see how it has been applied in the (rare) cases where it has since been considered, and the potential implications for the future.

The case concerned a facility agreement for a bridging loan entered into between the Defendant, Landmain Ltd, then freehold owner of a property in London, and a lender, Dancastle Associates Ltd. Dancastle lent some £635,000 to Landmain , which was to be drawn down in full on the execution of the facility agreement, a deed, and repaid a year later. The facility agreement provided that the loan should be secured by a first legal charge on the property. Notably, clause 12.3 of the facility agreement also modified the ordinary, statutory,

power of sale implied by section 101 of the Law of Property Act 1925, and provided instead that the moneys secured by the charge should become immediately payable on execution of the agreement. A legal charge was executed the same day using the Land Registry's standard form. Panel 6 of the form provided that Landmain charged the property by way of legal mortgage as security for the payment of the sums detailed in Panel 9. The sidenote for Panel 9 instructed the form-filler to put in 'details of the sums to be paid (amount and dates) and so on.' Unfortunately, it was left blank. There was no express reference to the power of sale in the charge.

The charge was duly registered at HM Land Registry. The facility agreement was not. The lender served notice on Landmain on the basis that the whole sum tendered had become immediately due and payable, as provided in the facility agreement, and Landmain disputed that fact, arguing that no payment fell due until an event of default occurred, and none had. Nonetheless, Dancastle proceeded to sell the property to Cherry Tree at auction. Cherry Tree was unable to register its purchase because of Landmain's objections, and therefore brought proceedings seeking an order that it be registered. Landmain defended, relying on the modification of the statutory power of sale set out in the (unregistered) facility agreement. At first instance, HHJ Pelling QC, sitting as a Judge of the Chancery Division in Manchester, granted the application on the basis that the charge and the facility agreement, whilst not forming a single document, nonetheless fell to be considered together, so that the charge should be read as though it contained the operative clause, 12.3, because the parties to it obviously intended to modify the power of sale, and they would have understood that there was a mistake on the face of the charge in that it failed to record that modification clause. Landmain appealed.

As you know, the statutory power of sale in section 101 of the 1925 Act gives the mortgagee the power to sell the charged property only once the mortgage monies have become payable in accordance with the agreed terms. Section 101(3) then provides:

> *"The provisions of this Act relating to the foregoing powers, comprised either in this section, or in any other section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be, operate in the like manner and with all the like incidents,*

> *effects, and consequences, as if such variations or extensions were contained in this Act."* [My emphasis].

Cherry Tree therefore needed to be able to demonstrate that clause 12.3 of the facility agreement was effective to vary the statutory power of sale otherwise implied into the charge itself. The question therefore arose as to what effect the facility agreement, as extrinsic evidence, should have on the proper interpretation of the charge.

The important and novel point which makes this case stand out from the cases relating to the interpretation of 'ordinary' contracts, is that the charge was a registered document, and the facility agreement was not. The Court was therefore concerned with the question of how the fact of registration affects the approach to construction otherwise set out in *ICS* and its successor authorities.

It is of course well known that the purpose of the huge changes to land registration implemented by the Land Registration Act 2002 was to provide a conclusive system of registration. As Rimer LJ said in *Franks v Bedward* [2012] 1 WLR 2428 (as cited in *Cherry Tree* by Arden LJ):

> *"Subject to exceptions, the register is intended to provide a comprehensive and accurate reflection of the state of the title to registered land at any given time, so that it is possible to investigate title to land online with the minimum of additional enquiries and inspections."*

Section 58 of the Act confirms that aim, and section 66 entitles members of the public to inspect filed documents. Section 120 deals with the conclusiveness of those filed documents. It provides:

> *"(1) This section applies where:-*
>
> *(a) a disposition relates to land to which a registered estate relates, and*
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> *(b) an entry in the register relating to the registered estate refers to a document kept by the registrar which is not an original.*

(2) As between the original parties to the disposition, the document kept by the registrar is to be taken:-

(a) to be correct, and

(b) to contain all the material parts of the original document.

(3) No party to the disposition may require the production of the original document.

(4) No party to the disposition is to be affected by any provision of the original document which is not contained in the document kept by the registrar."

Notably, it is not immediately clear whether a copy document at the Registry is merely to be taken to be an accurate copy of the original, or whether the presumption that it 'contains all the material parts' is intended to provide that it should be treated as containing the entire agreement that it purports to contain. The *Cherry Tree* decisions leans towards the latter approach.

Arden LJ considered, dissenting, that in accordance with Lord Hoffman's fifth principle from *ICS*, the blank space at Panel 9 of the charge executed by Landmain demonstrated that 'something must have gone wrong with the language', and considered that the admissible background included the facility agreement, which demonstrated that there was a mistake in the language used in the charge. It was clear what the parties intended to agree – that was set out in clause 12.3 of the facility agreement – and accordingly it was open to the Court to apply a corrective approach to interpretation of the charge, pursuant to which it was to be read as though the power of sale appeared in it in the amended form.

Lewison LJ took the opposite view, stating that the policy of section 101(3) of the 1925 Act was to limit parties' investigations to the terms of the charge, and that the court should beware of a 'corrective interpretation' which subverted that policy. The altered power of sale in this case was not in fact contained in the mortgage deed, and he considered it a step too far to 'read' the deed as though it had been.

Lewison emphasised the importance of adopting an approach to interpretation which preserved a single meaning for a document throughout its life. He said, "A contract cannot mean one thing when it is made and another thing following court proceedings. Nor, in my

judgment, can it mean one thing to some people (eg the parties to it) and another thing to others who might be affected by it."

Lewison accepted that the background was an important part of determining the meaning of a document, and also accepted, following *KPMG LLP v Network Rail Infrastructure Ltd* [2007] Bus LR 1336, that the facility agreement was *admissible* as background to the interpretation of the charge. However, he considered, crucially, that the *weight* to be attached to background documents like the facility agreement was necessarily affected by the status of the charge as a registered and publicly available document. Because the register of title is intended to be conclusive, and because the facility letter was not itself held by the registrar and would therefore not be available to a person who applied under section 66 of the 2002 Act to be allowed to inspect the documents relating to the charge, it should be afforded very little weight as evidence of what the charge meant.

He found encouragement in taking this approach from cases decided in New Zealand and Australia, both of which have a fuller system of registration than ours – the Torrens system – which admits of far fewer overriding interests and alterations to the register than do we. In both of those jurisdictions, the Courts have found that 'ordinary' inter partes contracts should be construed differently from public documents which are expected to and can affect third party interests, in particular where, as here, those documents are kept in a publicly-accessible register.

In *Westfield Management Ltd v Perpetual Trustee Co Ltd* (2007) 81 ALJR 1887 the High Court of Australia considered the proper approach to interpretation of contracts registered under the Torrens system, finding:

> *"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."*

As I have already said above, the Torrens system is stricter than our own. Accordingly, said Lewison, under Torrens extrinsic documents are simply not admissible. Here, though, they

are, but the effect of the majority position in *Cherry Tree* is that they should be afforded little or no weight in the interpretation exercise, so that interpretation can remain stable over time, and while property passes through third party hands.

Lewison justified that approach by reference to a further Australian authority on the Torrens system, *Phoenix Commercial Enterprises Ltd v City of Canada Bay Council* [2010] NSWCA 64, where Campbell JA said:

> *"However, the way those principles come to be applied to a particular contract can be affected by aspects of the contract such as whether it is assignable, whether it will endure for a longer time rather than a shorter time, and whether the provision that is in question is one to which indefeasibility attaches by virtue of the contract being embodied in an instrument that is registered on a Torrens title register. All these are matters that would be taken into account by the reasonable person seeking to understand what the words of the document conveyed. That is because the reasonable person seeking to understand what the words convey would understand that the meaning of the words of the document does not change with time or with the identity of the person who happens to be seeking to understand the document. That reasonable person would therefore understand that the sort of background knowledge that is able to be used as an aid to construction, has to be background knowledge that is accessible to all the people who it is reasonably foreseeable might, in the future, need to construe the document."*

Notably, Lord Hoffman, in the context of a company's articles of association, said in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988:

> *"Because the articles are required to be registered, addressed to anyone who wishes to inspect them, the admissible background for the purposes of construction must be limited to what any reader would reasonably be supposed to know. It cannot include extrinsic facts which were known only to some of the people involved in the formation of the company."*

Ultimately, then, Lewison LJ concluded that although the facility agreement was admissible background for the purposes of interpreting the charge, it should be given very little weight because it had not been given to the registrar along with the charge itself and was therefore not available for third party inspection. Attributing to the average party contracting in relation to registered land a level of understanding of the niceties of the registration system and a degree of foresight which I regret to say I haven't found to be universal among my own clients, he found:

> *"130 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.*
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> *131 The arguments before the judge (and indeed the written arguments submitted for the purposes of this appeal) did not refer to these essential features of land registration or attach significance to the fact that the charge in this case was to be a registered charge. So the judge cannot be criticised for*

> *having approached his task as if this were an ordinary commercial contract with no potential repercussions for third parties."*

That, then, is the crux of the matter. The effect of the *Cherry Tree* decision is to draw a stark distinction between 'ordinary' contracts and registered, publicly-available contracts with potential repercussions for third parties. In relation to the latter, the field of extrinsic evidence which might be found relevant to the process of interpretation is massively narrowed. Lewison emphasized that that was an approach which had already been adopted in relation to planning permissions (see eg *Slough Estates Ltd v Slough Borough Council* [1971] AC 958), a company's memorandum and articles of association (see eg *Egyptian Salt and Soda Co Ltd v Port Said Salt Association* [1931] AC 677), and to the interpretation of an injunction or receivership order (*Masri v Consolidated Contractors (Oil and Gas) Company SAL* [2009] EWCA Civ 36).

Here, though, as Arden LJ pointed out, there were no third parties who could suffer any disadvantage as a result of the Court considering the (admissible) extra material. Landmain was a party to the document under consideration, and Cherry Tree was seeking to rely on it for the order it sought. Lewison's answer to that was that the claim should have been brought as a rectification claim rather than relying on interpretation to salvage the clause 12.3 agreement. That could have worked here. But it will be surprising to most practitioners to find that the Courts have so greatly restricted the effect of the *ICS* principles in the context of registered land.

Notably, indeed, it seems not all of us have rushed to embrace the new approach. There are very few decisions at all where *Cherry Tree* has been applied in a property context (there are several in relation to companies' articles of association, where this narrow approach is more established).

An early example is *Clayton v Candiva Enterprises Ltd*, a decision of Mr. Recorder Tim Kerr QC sitting at the Newcastle County Court in January 2013. The case involved a property sale of 17 Borough Road, Darlington. The registered title included both the (rather dilapidated) house, and a yard behind it, Clayton's Yard, named after the Claimant's family (a second house at Number 15 had been removed from Mr. Clayton's title and had its own title number). The yard contained a number of units let to tenants.

The parties entered into a contract of sale which recorded the property to be sold as Number 17, and stated that it was to be sold with vacant possession. The house was vacant, the yard not.

The parties also executed a TR1 (note, not a TP1) form, in which the transfer was said to relate to '15 and 17 Borough Road and land and buildings in Clayton's Yard, Darlington'. The form indicated an intention to transfer the whole registered title.

The parties exchanged contracts and completed on the same day. The TR1, but not the contract, was sent to the Registrar. Initially, Mr. Clayton continued to collect rents from the occupiers of the Yard, but once registered as the proprietor of the same, the Defendant asserted that he had purchased the Yard too and claimed the rents for himself. Mr. Clayton sought to recover his registered title to the Yard, which he asserted he had never intended to sell.

Counsel for Mr. Clayton sought to argue that a proper construction of the TR1 should take into account the existence of the contract of sale to which it was intended to give effect, that the two documents effectively formed part of the same transaction, and that the contract was part of the admissible background in interpreting the TR1 form. There was obviously an error on the face of the TR1 because it also purported to convey Number 15.

The Judge, however, invited the parties to make written submissions on the effect of the decision in *Cherry Tree*. Having done so, he found against Mr. Clayton on the question of construction, saying:

> *"89 After careful thought I have come to the conclusion that the defendant's construction of the contract documents is to be preferred. Although I have found that the verbal understanding of the parties in April 2010 was that No 17 only was to be the property sold, I have come to the conclusion that the indications in the documents, particularly the transfer deed, to the effect that the Yard was to be included, are too strong to be overridden by evidence (assuming, without deciding, its admissibility for this purpose) of that verbally reached understanding.*

> *90 In reaching that conclusion, I am strongly influenced by the reasoning of the majority of the Court of Appeal in the Cherry Tree case. That reasoning makes clear that the court should be very cautious before concluding that a contract for the sale of land is to be construed in terms which contradict the apparent effect of the title documents registered with the Land Registry. I do not accept that the transfer deed is not a reliable guide to what was agreed. It records what land was transferred by the vendor in consequence of what was agreed.*
> *91 The arguments are otherwise finely balanced and, but for the fact that the registration of title is a public document, I might have been inclined to accept the claimant's construction, which would give effect to the common understanding of the parties in their pre-contract discussions."*

Here, too, then, although the parties to the proceedings were also the original parties to both the contract and the deed, and there were no third parties who might be affected, the Court rejected an 'ordinary' approach to construction in favour of limiting the relevant background available to only those matters which a third party might find on inspecting the register. The failure to register the contract was fatal to Mr. Clayton's construction argument. In order to remain faithful to *ICS*, the Court did not find that the contract was inadmissible, but afforded it so little weight as to effectively rule it out of consideration.

Happily, Mr. Clayton had had the wisdom and foresight to instruct a member of Falcon Chambers in his dispute, so rectification had also been pleaded and his claim succeeded on that basis, putting him in a happier position than *Cherry Tree*. Clayton's Yard is still Clayton's yard. But his case is a stark example of how the restrictive approach adopted in the earlier case can have a dramatic effect on what we might otherwise consider a familiar task, the construction of a contract as between the parties to it.

More recently the High Court has dipped a toe into this brave new world in the leasehold context in *Murphy v Lambeth London Borough Council*, an unreported decision of Murray Rosen QC sitting as a Deputy High Court Judge in February 2016.

The case concerned the proper interpretation of a registered long lease. The Claimant was a property developer who sought a declaration that as the registered proprietor of the demised

flat he was entitled to both the ground floor and basement, and was in possession of both. The Defendant local authority claimed that on its proper construction the lease did not demise the basement, and applied to have the Register rectified to that effect.

The building had four storeys and the basement, and was divided into four flats. The basement had its own, locked, entrance, and was undeveloped, save that it contained the electricity meters for all four tenants. The Council retained the key to the lock and provided one to each tenant, including Mr. Murphy, who initially used the space as storage. The previous owner had obtained his long lease of the ground floor flat by exercising his right to buy under the Housing Act 1985. The landlord had duly served a notice on him pursuant to section 125 of that Act, which among other matters was required to describe the premises to be purchased. That notice had described the relevant property as the ground floor flat. The lease, however, contained a recital referring to the tenant's flat as including the basement, though the clause containing the operative demise and the plan did not mention the basement. The entry in the Register noted that both the ground floor flat and the basement were included in the title. The Claimant had purchased with the intention of developing the basement into a separate dwelling, and the local authority had agreed in principle that he could do so. After he had carried out some works, it had changed its mind. The dispute hinged on the proper interpretation of the lease.

The Court found that, because of *Cherry Tree*, the section 125 notice could not be determinative, because it was not reasonably accessible to a third party (though, notably, it was available to the Court here). The Judge considered carefully the question of what a third party might be able to obtain by reference to his strict legal entitlement to have documents, rather than by reference to what information he might reasonably be expected to have obtained had he undertaken basic enquiries (such as, for instance, asking the local authority for documents).

Ultimately, the Judge found for the Council in any event, because the operative demise in the lease did not include the basement. But this is, again, a salutary warning that extrinsic evidence has become virtually worthless for the purpose of construing registered documents, whilst remaining formally admissible.

In *British Malleable Iron Company Ltd v Revelan (IOM) Ltd* [2013] EWHC 2013, the Court considered the effect of *Cherry Tree* in relation to easements. The Claimant owned a private road giving the only vehicular access to the Defendant's industrial estate. The right of way had been granted in the context of a planning application for development of the estate. The Claimant asserted that the Defendant's use of the right of way was in excess of what had been granted. In construing the proper meaning of the deed of grant, the Court had regard to the terms of the planning permission because it was a public document. However, because of the decision in *Cherry Tree*, the Court left out of consideration the terms of an earlier deed and evidence which had been provided as to the history of the area.

Finally, in *Bryant Homes Southern Ltd v Stein Management Ltd* [2016] EWHC 2435 (Ch) Norris J was asked to consider the meaning and effect of a restrictive covenant linked to an overage agreement. The vendor transferred two parcels of land by a conveyance containing a restrictive covenant limiting their use to agricultural purposes. At the same time, the parties entered into a separate agreement in which the vendor agreed to release the covenant in the event that planning permission to develop the land was granted and an overage payment made. That agreement was not registered.

The vendor later sold off his retained land, and the new buyer sought to enforce the restrictive covenant to prevent use of the original land other than for agriculture. The owners argued that the benefit had not passed to the new buyer because the covenant was intended to secure payment of overage, not benefit the land, and therefore did not 'touch and concern' the retained land so as to pass its benefit to the buyer.

Norris J found in favour of the buyer. Applying *Cherry Tree*, he said that future owners would find the registered covenant in the register but be unable to discover the release mechanism. The two documents were to be treated as such and not as a single transaction. He acknowledged that covenants differ from mortgages (notably the policy in the 1925 Act which troubled Lewison LJ did not apply) but found that the parties had deliberately put the overage release provision elsewhere and that the Court should not give sufficient weight to the extrinsic agreement so as 'entirely to recast the nature of the obligation' as it was disclosed on the register.

Conclusions

What, then, do we learn? First, that for a third party coming to a registered contract *Cherry Tree* provides a powerful weapon to remove the threat of unknown documentation in the interpretative process.

Second, that contrary to the suggestion which has been current for a few years now that rectification is no longer a separate remedy but has been subsumed into 'corrective construction', it actually retains an important and distinct purpose. One cannot, as was attempted in *Cherry Tree* itself, 'interpret' an entire missing clause into a contract – only rectification can put a missing clause back in, even where it can properly be said that something has obviously gone wrong (though that wasn't actually the case in *Cherry Tree* – the missing figures at Panel 9 were not indicative of a missing power of sale, since the ordinary power of sale from section 101 of the 1925 Act would have been implied in any event). Rectification is also more palatable to the court than 'corrective construction' in relation to registered land because of the system of priorities. Whereas an interpretation of the meaning of a contract is necessarily fully retrospective (it is the ascertainment of what the contract always meant) the right to rectify is itself a property interest (a 'mere equity' within section 116 of the 2002 Act). If a document is rectified, the rectification takes effect subject to the carefully balanced system of priorities – it is not fully retrospective. Lewison LJ was concerned to protect the benefits of the land registration system, and this is an important one of them (see paragraphs 120 to 122 of his judgment).

Third, there must be a concern, contrary to the approach championed by Lewison LJ in his decision, that the effect of *Cherry Tree* is potentially to change, rather than to preserve, the meaning of a registered document throughout its useful life. Prior to registration, the principles of construction which apply will be the classic *ICS* principles, as discussed in the subsequent authorities described by Kester earlier. Afterwards, the weight of the available background evidence dramatically changes, as a registered document enters the rarefied process of construction in a virtual vacuum favoured in *Westfield* and in *Cherry Tree*. In my view, the better way to ensure consistency of interpretation is to allow the Court to have

regard to the best evidence available to it from time to time, and to have flexibility in what weight to attach to that evidence, rather than adopting the blunt 'admit but ignore' policy seen in action in *Clayton*, *Murphy*, and *Bryant Homes*.

Fourth, the Court's reliance on authorities from jurisdictions with a much stricter, 'Torrens' registration system has pushed our own jurisprudence towards a position where the register is more determinative than we ordinarily assume. Perhaps, then, this is merely an inevitable step towards the truly monumental shift which has been begun by the 2002 Act. Lewison LJ focussed in his analysis on the purpose of the system of land registration as explained by the Law Commission Report presenting the Bill, *Land Registration for the Twenty-First Century* (2001) (Law Com No 271) (HC 114), which stated:

> *"The fundamental objective of the Bill is that, under the system of electronic dealing with land that it seeks to create, the register should be a complete and accurate reflection of the state of the title of the land at any given time, so that it is possible to investigate title to land on line, with the absolute minimum of additional enquiries and inspections."*

As Lewison noted:

> *"106 The report called for a fundamental change in the perception of title. As explained in para 1.10: "It will be the fact of registration and registration alone that confers title." The report went on to explain in para 9.36:*
> *"The ability to obtain information from the registers of title and cautions is an essential feature of the system of conveyancing that the Bill seeks to create. Easy and open access to information held by the Registry are the keys to speedier conveyancing.""*

For those of us (perhaps including Arden LJ) who prefer the more fluid maxims of equity to efficient, strict, legal analyses, this is perhaps a sad development. But it is a reflection of the hope of those promoting land registration, and (one day!) e-conveyancing, that the register should ultimately be the *source* of title to land, and not merely reflect some deeper reality of land ownership which can be established outside it (see eg Martin Dixon, *"What Sort of Land*

Registration System?", Conveyancer and Property Lawyer, 2012). In future, then, practitioners will have to have a careful eye on what documents they choose to submit to the Registrar, and how they set out their client's agreements, dividing judiciously those matters which they wish to be publicly available and those which they wish to retain as private between clients. We must also, presumably, hope that our clients develop into the all-seeing founts of legal wisdom whom Lewison imagines them to be.

Fifth, whilst the result of the new approach has not led to any particularly surprising outcomes in the cases cited above, there are circumstances where this change of approach could have very great consequences. Easements are an obvious example. Extrinsic evidence is often crucial in construing the manner and extent of user permitted by an express grant of an easement. In, for instance, *Partridge v Lawrence* [2004] 1 P&CR 14, a registered plan indicating the width of a right of way was distorted and lacked a scale. The Court used the ordinary *ICS* approach and relied upon an original architect's plan which was the source of the registered plan to establish its actual extent. Presumably such evidence would be afforded little or no weight following *Cherry Tree*, however. The *British Malleable Iron* case is only the beginning of the Court's new approach in this area. Most importantly, although Lewison LJ specifically accepted that geographical features could continue to be relevant to the construction of registered documents, it is common for expressly granted easements to use language which does not limit them by reference to topography: see *West v Sharp* (2000) 79 P&CR 327 per Mummery LJ at 332. It will be interesting to see how this new approach develops in that context particularly.