Neutral Citation Number: [2023] EWHC 199 (Ch)

Case No: CH-2022-BHM-000011

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
CHANCERY APPEALS (ChD)

Birmingham Civil Justice Centre
33 Bull Street
Birmingham B4 6DS

Date: 6 February 2023

Before :

MR JUSTICE ZACAROLI

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Between:

(1) PETER GOSLING **(2) STEVEN TRANTER** **(IN THEIR CAPACITY AS TRUSTEES OF THE TRUST OF DENNIS ANSTEY DECEASED**	**Claimants/ Respondents**
- and -	
(1) DANIEL BRADBURY **(2) VICKIE BRADBURY**	**Defendants/ Appellants**

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- -

Michael Paget instructed on direct access by the **Appellants**
Tony Watkin (instructed by **Higgs LLP**) for the **Respondents**

Hearing date: 31 January 2023

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JUDGMENT

Mr Justice Zacaroli :

1. This appeal concerns the claim by the respondents, the current owners of a property known as Rashwood Lodge, to the benefit of rights relating to the supply of electricity to operate a pump used to extract water from a borehole on the neighbouring property, Ford Farm. These rights are claimed as rights ancillary to an easement (the "water easement") reserved by a conveyance dated 22 June 1982 (the "1982 Conveyance"), which I describe in more detail below.

2. Prior to 1971, Rashwood Lodge and Ford Farm were under single ownership. Pursuant to a conveyance of Ford Farm dated 10 November 1971, the right to take water from the borehole on Ford Farm, via a pump located at the site of the borehole, was reserved to the owners of Rashwood Lodge, on terms that required the owner of Rashwood Lodge to pay 50% of the maintenance of all pipes and apparatus in respect of the pump and water supply.

3. A second conveyance, a week later, of Rashwood Lodge, included similar rights for the owner of Rashwood Lodge to take water from the borehole via the pump on Ford Farm. The owner of Rashwood Lodge was obliged to maintain the apparatus and pay 50% of any maintenance costs incurred by Ford Farm. It also made reference to the electricity supply and provided for the owner of Rashwood Lodge to pay 50% of any electricity charges incurred in respect of the use of the pump.

4. In 1975 Rashwood Lodge was purchased by Mr Derek Anstey. He purchased Ford Farm in 1978, at which point the easements created by the conveyances in 1971 were extinguished by operation of law.

5. By the 1982 Conveyance, Mr Anstey sold Ford Farm to a Mr Newell, the appellants' predecessor in title. The conveyance contained the water easement in the following terms:

> "the right to take water from the spring in Ordinance Survey Enclosure 7960 by means of the pump in that Enclosure and the pipes leading therefrom (insofar as such pipes are within the boundary of the property hereby conveyed) and the right to enter upon the property hereby conveyed for the purpose of inspecting cleansing and maintaining the said spring and of inspecting cleansing and maintaining and repairing any pipes and apparatus used in connection with the water supply to [Rashwood Lodge] the Vendors or other the persons exercising such rights making good all damage occasioned in the course of or by reason of such entry."

6. The respondents are the trustees of the will trust of Mr Anstey. The beneficiary of the will trust is Melanie Dawe. She is, and has been since 2008, in occupation of Rashwood Lodge. As indicated by the brief history of the conveyances outlined above, water from the borehole has long been used for the benefit of the land which is now Rashwood Lodge. Most recently, until the electricity supply was terminated, Ms Dawe used the water from the borehole for the purpose of feeding livestock and horses.

7. The appellants purchased Ford Farm in 2018. Disputes about the respondents' rights under the water easement arose soon after. In April 2019, the appellants cut off the supply of electricity to the pump. The claim form in this action was issued by the respondents on 3 May 2019. They sought a declaration that they were entitled to access to the water supply from the borehole and an injunction restraining the appellants from interfering with that supply.

8. In a judgment delivered on 6 November 2020, District Judge Shorthose found in favour of the respondents, and made the following declarations:

> "1. The Claimants' Land benefits from an easement ('the Easement') over the Defendants' Land in […the terms granted by the 1982 Conveyance, as quoted above]
>
> 2. The Easement is a priority interest within the meaning of the Land Registration Act 2002, s.29 and Schedule 3, and upon the Defendants purchasing the Defendants' Land they did so subject to the burden of the Easement.
>
> 3. The Easement includes ancillary rights to enjoy the passage of electricity across the Defendants' Land to supply the (or any replacement/s) water pump which supplies water pursuant to the terms of the Easement, to the Claimants' Land ('the Ancillary Rights').
>
> 4. The Ancillary Rights include:
>
> > (1) The right for the Claimants' and their successors in title to arrange for a supply of electricity from the utility supplier onto the Defendants' Land;
> >
> > (2) The right for the Claimants and their successors in title to make use of any in situ infrastructure and apparatus located on the Defendants' Land (including cables and meters) which supplied electricity to the water pump prior to it being turned off by the Defendants; and/or
> >
> > (3) The right for the Claimants and their successors in title to install such infrastructure and apparatus (including cables and meters) on and across the Defendants' Land to enable the Claimants' Land to obtain a supply of electricity from the utility provider to the Water Pump (or any replacement/s);
> >
> > (4) Rights of access for the Claimants and their successors in title, any beneficiaries, servants and agents onto and across the Defendants' Land for the purposes of installing, replacing, maintaining and checking (including checking meters) the infrastructure and apparatus.
>
> *For the avoidance of doubt all rights granted under the Easement and Ancillary Rights include the right for lawful occupiers of the Claimants' Land to enjoy those rights.*

> 5. The Claimants are entitled to register the Easement as an Easement which burdens the Defendants' Land together with the Ancillary Rights as declared by the Court.
>
> 6. The actions of the Defendants in turning off the electricity supply to the water pump on or before the 18 April 2019 was an unlawful interference with the Easement and Ancillary Rights."

The grounds of appeal

9. The appellants appeal with permission granted by me on 22 July 2022, on the following grounds:

    (1) The judge failed to conclude that the supply of electricity to the pump is necessary to the exercise or enjoyment of the water easement and it is not in any event necessary;

    (2) The judge was wrong to conclude that the water easement granted an ancillary right to the passage of electricity via Ford Farm to the pump because such a right is positive in nature;

    (3) The judge was wrong to hold that the water easement was a legal easement because it imparted no benefit to Rashwood Lodge;

    (4) The judge was wrong to conclude that the appellants had interfered with the respondents' rights under the water easement;

    (5) The judge was wrong to conclude that the water easement was a legal easement that bound the appellants as successors in title to Ford Farm, because it was made clear in correspondence between the vendor and purchaser at the time of the 1982 Conveyance that positive obligations were imposed by the water easement on the owner of Ford Farm.

Easements and ancillary rights

10. It is, in general, a requirement of an easement that it merely requires the owner of the servient landowner to suffer something to be done on his land, and does not impose any positive obligation on the servient landowner: *Rance v Elvin* (1985) 50 P & CR 9, per Browne-Wilkinson LJ at p.13.

11. A right to the uninterrupted passage of water that may come into pipes on the servient land clearly satisfies that requirement: *Rance v Elvin* at p. 15, where such a right was contrasted with the right to a *supply* of water (which would not satisfy that requirement, as it would impose an obligation on the owner of the servient land to pay for the water supplied). That case concerned water supplied to the servient land by an external water company, for which the owner of the servient land was – in the first instance – required to pay. As long as water reached the pipes running through the servient land, the owner of the dominant land was entitled to the uninterrupted passage of that water onto its own land. The servient landowner could stop paying for the water but, in that event, the owner of the dominant land could make its own arrangements with the water company.

12. In the present case, the water is supplied not by an external water company, but springs naturally from the borehole. So far as the water easement itself is concerned, however, this does not make a material difference. As long as water springs from the borehole, the water easement confers on the owner of Rashwood Lodge the right to the uninterrupted passage of the water via the pump and pipes situated on Ford Farm. The owner of Ford Farm is precluded from interfering with that right, but any work or cost associated with the continued supply of water from the borehole (for example the cost of electricity to power the pump, or maintenance work on the pump or pipes) is to be done or paid for by the owner of Rashwood Lodge.

13. The grant of an easement carries with it "…the grant of such ancillary rights as are reasonably necessary to its exercise or enjoyment. Where the use of a thing is granted, everything is granted by which the grantee may have and enjoy such use. The ancillary right arises because it is necessary for the enjoyment of the right expressly granted: Gale on Easements, 20th ed, at 1-92; *Pwllbach Colliery Company Limited v Woodman* [1915] AC 634, per Lord Parker of Waddington at p.646, giving the example of a right to draw water from a spring which necessarily involves the right of going to the spring for that purpose.

14. Any ancillary right must itself, however, be capable of subsisting as an easement. It must therefore satisfy the requirement of imposing only negative obligations on the owner of the servient land: *William Old International Limited v Arya* [2009] EWHC 599 (Ch), per HHJ Pelling QC at §31.

15. I will address the grounds of appeal in turn.

<u>Ground 1</u>

16. Mr Paget, who appears for the appellants submitted, first, that nowhere in the judgment does the judge find that the supply of electricity to the pump is necessary for the exercise or enjoyment of the water easement. Second, even if he did, he was wrong to do so because (a) the water springs from the borehole without the need of a pump and (b) the boundary with Rashwood Lodge is at the same height as the borehole so there is no need for a pump in order for the water to flow to it from the borehole.

17. As to Mr Paget's first point, while the judge did not expressly conclude that the supply of electricity to the pump is necessary for the enjoyment of the water easement, he identified necessity as the test at §51, noted (at §52) that the respondents' case was that there is a necessity here because the land at Rashwood Lodge is uphill from the borehole, so that the water can only be taken from the borehole and moved to Rashwood Lodge land by the use of a pump, and concluded (at §61) that the passage of electricity is an ancillary easement capable of existing as a legal easement. It is clear, from these passages, that the judge had the requirement of necessity well in mind and concluded that it was satisfied.

18. The short answer to Mr Paget's second point, as Mr Watkin for the respondents submitted, is that it is not in fact relevant to ask whether the use of a pump is necessary in order for the water from the borehole to reach the respondents' land, but only whether a supply of electricity is necessary in order to power the pump. That is because the express right granted by the water easement is to "take water [from the

borehole] by means of the pump". It is clear that it is essential, in order to take water by means of the pump in situ at the time of the 1982 Conveyance, namely a pump powered by electricity, that electricity is available to operate it.

19. Mr Paget suggested in oral submissions that it was not necessary for electricity to be supplied, because a different pump – for example one running on solar power or via a diesel powered generator – could be used. That cannot possibly be an answer: its logical conclusion would be that *no* specific power source could ever be necessary where another power source could be used.

20. In any event, even if it was relevant to ask whether it is necessary to use a pump at all, this was not a point taken below and it is not open to the appellants to raise it on appeal. It depends on establishing as a matter of fact that water can be obtained from the borehole, and moved to the boundary with Rashwood Lodge, without the aid of a pump of any kind. Since these points were not advanced at trial, they were not addressed in the judgment. The suggestion made by Mr Paget that the judge made reference to this at §29 of the judgment, where he referred to the appellants' case "that any water supply can still take place", is unsustainable.

21. I asked Mr Paget to identify where in the skeleton argument for trial or in the transcript of oral submissions at trial, this point was made. He pointed to a single passage in the skeleton argument in which it was said: "…a pump is needed because Rashwood Lodge Lodge [i.e. the building itself] is on higher ground". He also pointed to a single reference in the trial transcript, where the judge said, in the course of an exchange about something else, "…it is because the property is on a slope or an incline that you need a pump to get water up there."

22. Neither passage provides any support, in my judgment, for the proposition that the appellants had argued before the judge that a pump is *not* needed in order to get water out of the bore hole or to move it to the border with Rashwood Lodge.

23. Accordingly, the appellants are not entitled to take this point on appeal, unless they apply for permission to do so. No such application was made. Since, in any event, it requires new matters of fact to be established, and for new evidence to be adduced, it is not a case where the court should give such permission. It is true that Mr Paget could point to *some* references in the evidence available at trial to the fact that the borehole was an artesian well, producing water under pressure, and to some pictures and plans which indicated the respective levels of the land. These were not, however, adduced in support of the proposition that a pump is not necessary. Had they been, then the respondents would have been entitled to adduce their own evidence and there would have been a full investigation of the issue at trial.

24. Mr Paget referred me *de bene esse* to further pictures, plans and videos which he said provided greater orientation, but which were clearly designed to provide evidence in support of this argument as to necessity. He did not apply for permission to adduce this as new evidence on the appeal in accordance with the principles in *Ladd v Marshall*, because he accepted he could not satisfy the requisite test.

Ground 2

25. Mr Paget submitted that the ancillary right claimed by the respondents requires the appellants to arrange and maintain a supply of electricity. That, he submitted, is a positive obligation, which means that the ancillary rights claimed by the respondents could not subsist as an easement, and thus do not exist at all.

26. In my judgment, this submission is based on a mis-reading of the ancillary rights as found to exist by the judge, and fails to draw the distinction established by Browne-Wilkinson LJ in *Rance v Elvin* (above) between a right to the supply of a utility and the right to the uninterrupted passage of a utility.

27. In *Duffy v Lamb* (1997) 75 P & CR 364, at p.371, Millett LJ held that while there is a real distinction between water and electricity, it is one which has no material consequences. He concluded, with the agreement of Morritt and Ward LJJ, that a covenant which granted rights of passage of "water soil gas electricity and telephone communications" over the servient land imposed only negative obligations and thus created a valid legal easement. There was no positive obligation on the servient landowner to ensure that electricity reached his own land (in the same way as there was no positive obligation on the servient landowner in *Rance v Elvin* to ensure that water reached his own land). Instead, the right to an uninterrupted passage of electricity (or water) imposed a negative obligation on the servient landowner to take no positive step which prevented the passage of electricity *onto* the servient land as well its subsequent passage through the servient land to the dominant land: see per Millett LJ at p.371.

28. The ancillary right, as declared to exist in this case by the judge, is defined as the right to enjoy the passage of electricity across the appellants' land, including, the right for the *respondents* to arrange for the supply of electricity onto Ford Farm, the right to make use of infrastructure already in situ on Ford Farm, or to install their own infrastructure and apparatus, and associated rights of access. These impose no positive obligations on the appellants or their successors in title, but merely require them to suffer things to be done on Ford Farm. They do not, as Mr Paget contended, require the appellants to provide and maintain electric wiring and arrange a supply of electricity.

29. The right granted by an easement (such as that in *Duffy v Lamb* or *Rance v Elvin*) is inherently precarious, as the owner of the servient land could, without constituting an actionable interference, cease paying for the water or electricity supply. In *Rance v Elvin*, the servient landowner was unlikely to do so as he needed the water supply for his own purposes as well. That, however, is not a necessary requirement for the easement to exist. As Browne-Wilkinson LJ noted in *Rance v Elvin*, at p.15, if the owner of the servient land ceased paying for the water supply, the owner of the dominant land could make its own arrangements with the water company.

30. Mr Paget nevertheless submitted that in this case, if the electricity supply was terminated by the electricity company because the owners of Ford Farm ceased paying for it, then the continued supply of electricity would require positive action on the part of the appellants, for example because it would require the owners of Ford Farm to enter into new agreements with electricity suppliers. This is not a point dealt with in the judgment, and was not advanced before the judge. There is accordingly no evidence addressing it. As I explain below, the question as to what steps ought now

to be taken to restore an electricity supply to the pump was adjourned by the judge, and its resolution awaits the determination of this appeal.

Ground 3

31. It is a requirement of an easement that it accommodates the dominant land, as opposed to merely providing a personal benefit to the rightholder: *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57.

32. Mr Paget submitted that the judge was wrong to conclude that the water easement provided any benefit to Rashwood Lodge, because it was an established fact that the water contained levels of arsenic that made it unsafe for consumption by humans or animals.

33. As Mr Watkin submitted, this is not a point that it is open to the appellants to take on this appeal because, not only was it not taken below, it was abandoned. An application had been made in advance of trial to adduce expert evidence of reports as to the levels of arsenic in the water at various points, but this was later withdrawn. The judge noted, at §35 of the judgment, that it was not pursued at trial.

34. Mr Paget submitted that the evidence on which he sought to rely had been contained in Mr Bradbury's witness statement for trial, served after the application to adduce expert evidence had been withdrawn, and that this did not consist of expert evidence. In advance of the trial the respondents, however, raised an objection to Mr Bradbury's witness statement on the basis that it included purported expert evidence for which no permission had been granted. In an order of DJ Shorthose dated 10 August 2020, it was recited that the court had not granted permission to rely on expert evidence, but that it was not proportionate to redact the offending parts of the statement and that no witness could rely on any parts of a witness statement that sought to adduce expert evidence.

35. In my judgment, the evidence relied on now by Mr Paget does indeed constitute expert evidence. Although the 'safe' levels of arsenic in water may be governed by published regulations, the relevance of the tests so far carried out, the weight to be put upon them is a matter for expert evidence. In any event, in order to make good the point that the water at the borehole contains such quantities of arsenic that it does not provide *any* benefit to Rashwood Lodge, the appellants would need to adduce significantly more evidence, including expert evidence, than the extracts in the evidence below relied on by Mr Paget. The evidence would need specifically to address the levels of arsenic over a longer period than so far addressed, and the safety of such water for animals, as opposed to humans. It would also need to address the uses to which such water could be put other than as feed for animals, in order to understand whether the water easement could benefit Rashwood Lodge in other ways. Finally, the evidence would have to address the possible treatment of the water, and the uses to which it could be put following treatment. This reinforces the conclusion that this is not a point that can be taken for the first time on appeal.

36. I should add for completeness that I do not in any event accept the premise of Mr Paget's argument, that if the water is contaminated so that it currently cannot be used in any way on Rashwood Lodge the rights granted by the 1982 Conveyance have

ceased to exist as an easement capable of binding the land. He relied on two passages in the speech of Lord Briggs in *Regency Villas*, at §37:

> "In its report *Making Land Work: Easements, Covenants and Profits à Prendre* (2011) (Law Com No 327), para 2.25 the Law Commission advised: "the easement must accommodate, or accommodate and serve, the dominant land. The requirement is that the right must be of some practical importance to the benefited land, rather than just to the right-holder as an individual: it must be reasonably necessary for the better enjoyment of that land."

And at §38

> "In the present case, the Court of Appeal [2017] Ch 516, para 56 described this requirement as follows: "In our view, the requirement that an easement must be a right of utility and benefit is the crucial requirement. The essence of an easement is to give the dominant tenement a benefit or utility as such. Thus, an easement properly so called will improve the general utility of the dominant tenement. It may benefit the trade carried on upon the dominant tenement or the utility of living there."

37. It seems to me that the requirement being referred to in these passages relates to the *type* of right in question. Thus a right to the passage of water across neighbouring land is undoubtedly something which is capable of providing a benefit to the dominant land itself, and is not merely personal to the landowner. Lord Briggs, at §40, contrasted such a right with a right granted to owners of a house in Kennington giving them free access to the Oval cricket ground. Such a right would have nothing to do with the use of the property as a home. I do not need to decide this point, but I doubt that this requirement is intended to impose a further qualitative or quantitative requirement that the right granted in the particular circumstances is one which does in fact provide a benefit. Moreover, if (which is not disputed) there was a benefit to Rashwood Lodge when the water easement was granted in 1982, it is difficult to see why – assuming there are now unacceptable levels of arsenic in the water – the validly granted easement will have for that reason fallen away, particularly if the problem with arsenic in the water is temporary or can be got around.

Ground 4

38. Under this ground, the appellants contend that the judge was wrong to conclude that they had interfered with the respondents' rights. They contend that they had only turned off the electricity supply because they were obliged to do so on health and safety grounds.

39. This is a challenge to a finding of fact made by the judge in light of all the evidence at trial, including that of Mr Bradbury, who was cross-examined on his witness statement. The judge (at §34 to §37 of his judgment) rejected Mr Bradbury's evidence on this point.

40. As is well known, an appeal against a finding of fact faces a high hurdle, and Mr Paget did not in the event suggest that the judge erred in reaching this finding on the

basis of the evidence at trial. Instead, he submitted that, on the basis of evidence adduced *after* the trial, it is now plainly established that the appellants *were* required to turn off the electricity supply on health and safety grounds.

41. The evidence relied on is contained in a witness statement of Mr Bradbury served in accordance with the judge's order made on the hand-down of the judgment. Unbeknown to the respondents, between the end of the trial and the judge handing down judgment, the electrical infrastructure in the barn on the appellants' land, from which a spur fed electricity to the pump, had been removed by Western Power Distribution, it having been condemned for health and safety reasons. As a consequence of this, the determination of the appropriate remedies was adjourned for further hearing.

42. The judge's order dated 6 November 2020 recited that the appellants had disclosed during the hand-down hearing that the electricity companies had removed the meters on 13 or 14 October 2020, and provided for Mr Bradbury to file a witness statement explaining what had happened to the supply and meters. That was clearly intended to be limited to what had happened on 13-14 October 2020.

43. The witness statement subsequently served by Mr Bradbury contained evidence that went beyond the scope of that order, and addressed again the circumstances in which the supply was turned off by the appellants in April 2019. The respondents pointed out that that was a matter that had already been determined by the judge at trial, and they objected to its inclusion. There was then an unexpected delay of over 18 months between the hand down of judgment and the hearing to consider remedies. During this period, the respondents' attempts to investigate what had happened were (as recorded by the judge at the remedies hearing in May 2022) hampered by the refusal of the appellants to grant adequate access to the respondents. At the remedies hearing, therefore, the judge adjourned further the practical consequences of the order and declarations he then granted. He specifically gave liberty to restore the question whether the respondents were entitled to an order requiring the appellants to reinstate the dismantled electricity supply.

44. In light of this chronology of events, I reject Mr Paget's contention that it has now been established that the appellants turned off the electricity supply in April 2019 on health and safety grounds. Any further evidence to that effect contained in Mr Bradbury's witness statement filed post-judgment is not accepted by the respondents, remains untested and is a long way from establishing, contrary to the finding of the judge in his November 2020 judgment, that the appellants were required to turn off the supply of electricity to the pump on health and safety grounds.

45. As with the evidence potentially relating to the issue of necessity, no application was made to adduce this as new evidence on appeal, and such an application would in any event have faced the insurmountable problem that it could not satisfy the *Ladd v Marshall* principles.

46. Accordingly, I reject this ground of appeal. Much of the submissions made on behalf of the appellants related to the question whether the respondents should be required to install new electricity wires from the pump to their own land by the shortest route, as opposed to relying on the pre-existing infrastructure, and whether a refusal by the servient landowner to accept further supply of electricity, where that had the known

consequence of the electricity company removing apparatus on the servient land, would constitute an actionable interference (this question having been left open in *Duffy v Lamb*).

47. These, however, are not issues raised on this appeal. This appeal is against the order of the judge which declared that the easement and ancillary rights exist, and that the actions of the appellants in turning off the supply in April 2019 constituted wrongful interference with those rights. For the reasons I have explained above, its impact on the question of remedies could not be determined at the remedies hearing in May 2022, and has had to be adjourned to a further occasion.

48. I merely note the following. Although an easement does not impose positive obligations on the servient landowner, if the owner of the servient land is found to have wrongly interfered with a negative easement, it may be open to the Court to require it to take some positive action to undo that which it did via its wrongful interference. In particular, where the ancillary rights include the right to come on to the servient land to inspect the equipment and effect replacements and repairs, if the Court were to find that the dominant landowner had been denied that right, then it does not necessarily follow, from the fact that the infrastructure has been lawfully removed by the electricity companies on health and safety grounds, that the remedy cannot encompass positive action by the owner of the servient land to reverse the consequences of its failure to comply with the negative obligations in the easement. Whether that is so in this case is the issue which has yet to be determined.

Ground 5

49. Under this ground, the appellants challenge the validity of the water easement itself. They contend that on the true construction of the 1982 Conveyance, the water easement imposed a positive obligation on the owners of Ford Farm to supply and pay for electricity.

50. This contention is based solely on certain correspondence emanating from Mr Anstey in the period 1994 to 1996 in which it appears that his understanding of the position was that the owners of Ford Farm were obliged to supply and pay for electricity.

51. This appears to be another point being taken for the first time on appeal, it having been accepted by the appellants before the judge that the water easement itself imposed only negative obligations on the owners of the servient land.

52. In any event, the appeal on this ground must fail in light of the well-known rule that a contract is to be construed in light of the circumstances reasonably known to both parties at the time of its execution. The evidence of the subjective intentions of one of the parties is inadmissible, particularly so where that evidence is of their subjective understanding of the contract more than a decade later. Mr Anstey's understanding in 1994 to 1996 is therefore irrelevant.

Conclusion

53. For the above reasons, I dismiss this appeal.