Neutral Citation Number: [2021] EWHC 1811 (QB)

County Court Case No: E00SS423
Appeal Ref: QA-2021-000072

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM THE ORDER OF
HHJ PUGH DATED 5 MARCH 2021

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 July 2021

Before :

THE HONOURABLE MR JUSTICE MURRAY

- -

Between :

(1) STEPHEN WAYNE GIBSON
(2) KAREN GIBSON — **Respondents/ Claimants**

- and -

(1) PHILIP NEW
(2) DENISE NEW — **Appellants/ Defendants**

- -
- -

Mr Ted Loveday for the **Respondents/Claimants**
Mr Paul Wilmshurst for the **Appellants/Defendants**

Hearing date: 26 May 2021

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Approved Judgment

I direct that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE MURRAY

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down are deemed to be 10:30 am on 1 July 2021.

Mr Justice Murray :

1. This is an appeal from an order of HHJ Pugh dated 5 March 2021 (sealed on 15 March 2021) ("the Order") in which he made a declaration following a trial of a preliminary issue and made certain consequential orders. The appellants also appeal against the judge's award of costs to the respondents and that those costs were awarded on the indemnity basis.

2. The appellants appeal against the Order with the permission of Andrew Baker J, granted in his order dated 21 April 2021. Andrew Baker J gave permission to appeal on all of the Grounds of Appeal other than Ground 4.

Background

3. This is a longstanding dispute between neighbours concerning the boundary between their residential properties on Sunnymede Close, Thundersley, Benfleet, Essex SS7 3QT. The disputed boundary runs between the gardens of 24 and 25 Sunnymede Close.

4. The respondents, who were the claimants below, Mr Stephen Wayne Gibson and Mrs Karen Gibson, have lived at 25 Sunnymede Close for many years. The property has belonged to Mrs Gibson's family since 1976 and now belongs to Mrs Gibson, who has a 50 per cent share, and her three adult children, Mr Nicholas Roy Gibson, Mrs Kelly Jane Hatton, and Ms Jade Caroline Gibson ("the Gibson Children"). Mrs Gibson and the Gibson Children are on the register of title. The Gibson Children are not parties to these proceedings, however a recital to the Order records that they have consented to be bound by the boundary determined in this litigation.

5. The appellants, who were the defendants below, Mr Philip New and Mrs Denise New (formerly named in the proceedings as Ms Denise Bolton), have lived at 24 Sunnymede Close since 2006.

6. It is common ground that around April 2010 Mr New began erecting sections of garden fence between the properties. Around May 2012, Mr New replaced three fence panels towards the far end of the gardens. An older section of fence remains in place at the nearest end of the gardens, between the appellants' garage and their summerhouse. Between 2012 and 2015, the neighbours fell out badly over the new sections of fence.

7. Mr and Mrs Gibson and Mr and Mrs New attended two mediations arranged by the Mediation and Advice Project ("MAP") in relation to their dispute. At the second mediation on 30 September 2015 the parties concluded a settlement agreement. It is evidenced by a short, single-paged document ("the Settlement Agreement") that reads in its entirety as follows:

> "**Summary of Arrangements between: Karen and Steve Gibson and Phillip [sic] and Denise New**
>
> **Date of agreement: 30th September 2015**

> **The above parties participated in mediation on the above date in order to resolve their current dispute relating to Mr [and] Mrs Gibson's garden fence.**
>
> All parties have contributed to the process by having an open exchange of views around a number of topics that have concerned them, and have reached an initial agreement about how to improve the relationship between them.
>
> They all have expressed satisfaction that they have gone through the mediation process. They all agree that this is with a view to end their dispute permanently and would like to carry on with their lives.
>
> **All parties agree that:**
>
> Although they cannot change the past, they will draw a line under previous events and move forward as neighbours in good faith and act reasonably.
>
> **All parties agree:**
>
> 1. As both parties cannot agree on which Royal Institute of Chartered Surveyors (RICS) LAND SURVEYOR to use, BOTH parties suggested The Mediation and Advice Project (MAP) will impartially pick a Royal Institute of Chartered Surveyors (RICS) LAND SURVEYOR at random and a MAP administrator will pass the details of the Surveyor to each party to arrange an appointment.
>
> 2. That they will divide the total cost of the Surveyor equally between them.
>
> 3. The appointment will take place within 2 weeks at a mutually convenient time.
>
> 4. Both parties will accept the result of the RICS Surveyor and the dispute will come to an end."
>
> (use of bold, underlining and capital letters as in the original)

8. The Settlement Agreement was signed by the two accredited mediators who conducted the mediation. The Gibson Children did not attend the mediation. It is common ground that they are not parties to the Settlement Agreement.

9. There was a factual dispute between the parties as to whether the MAP had:

   i) identified W.G. Edwards Surveyors Ltd ("WGES") as a company of RICS surveyors that could provide a surveyor to resolve the boundary dispute, which was the position of Mr and Mrs Gibson; or

ii) specifically identified Mr Adrian Cowell FRICS, who is the Director and principal of WGES, which was the position of Mr and Mrs New in their response dated 12 March 2019 to a Request for Further Information from the Gibsons.

10. In this regard, I note that in Mr Gibson's witness statement dated 31 July 2019, prepared for the trial below, he refers to an email that he received from Ms Anne Cates, Mediation Co-ordinator at the MAP, on 9 October 2015 and which was exhibited to the witness statement. It reads as follows:

> "Dear Mr & Mrs Gibson
>
> I apologise for the delay in replying. It's been a very busy week.
>
> The name has been selected at random by me.
>
> WG Edwards tel 01277 810 820 – Confirmed by Land/Boundary Surveyors by RICS
>
> [Kind] Regards
>
> Anne Cates
>
> Mediation Co-ordinator"

11. WGES is a small company that describes itself as specialising "in professional property concerns with particular reference to boundary disputes and all types of commercial, industrial, residential and historical buildings". The company is based in Ingrave in Essex.

12. Following contact by the parties, WGES offered the services of Mr Malcolm Stephenson FRICS, a consultant to WGES, as a surveyor who could carry out the boundary survey.

13. Mr Stephenson spoke with the parties to arrange his visit. Mr and Mrs New confirmed their instructions by letter dated 12 October 2015, which Mr New sent to WGES as an email attachment on 14 October 2015. Mr and Mrs Gibson sent an undated letter to WGES on or about 20 October 2015 to similar effect. No objection was raised at that time by the News or the Gibsons to a surveyor from WGES carrying out the boundary survey, even though neither Mr Cowell nor Mr Stephenson is a land surveyor. Both are building surveyors and Fellows of the Royal Institution of Chartered Surveyors (RICS).

14. Mr Stephenson attended the properties on 2 November 2015. He produced his report on 18 November 2015 ("the Stephenson Report").

15. The News were not happy with the Stephenson Report. Mr New contacted Mr Stephenson by telephone and then sent him an email on 23 November 2015, in which he set out a number of observations regarding matters that he considered needed to be taken into account in determining the boundary, some or all of which were, by implication, inconsistent with the conclusions of the Stephenson Report.

Subsequently, the News were in contact with Mr Cowell to express dissatisfaction with the Stephenson Report.

16. Mr Cowell visited the site on 16 December 2015 with a view to finding a solution to the boundary dispute acceptable to both parties. He produced a report on 22 December 2015 ("the Cowell Report"), which reached a different determination of the boundary from that reached by Mr Stephenson. The News, however, were also dissatisfied with the Cowell Report, sending an email on 28 December 2015 to WGES saying that they would not be accepting the findings of either Mr Stephenson or Mr Cowell.

17. The boundary dispute therefore remained live between the Gibsons and the News after the Stephenson Report and the Cowell Report, notwithstanding the Settlement Agreement.

18. On 26 March 2018 the Gibsons sent a pre-action letter to Mr and Mrs New seeking their agreement that the parties were bound by the boundary determined by Mr Stephenson as set out in the Stephenson Report and their undertaking to remove their fence, summerhouse and shed within 14 days of the letter, failing which the Gibsons reserved their right to issue a claim in the County Court for a declaration as to the true boundary, together with an injunction, damages for trespass and costs.

19. The Gibsons received no response to their pre-action letter.

Procedural history

20. On 10 August 2018 the Gibsons issued their claim form initiating these proceedings, together with brief Particulars of Claim. There was some confusion as to whether the claim had been issued under Part 7 or under Part 8 of the CPR, resulting in a hearing on 6 November 2018 before DJ Humphreys in the County Court at Southend. The district judge directed that the claim should continue under Part 7 and that the News should file and serve their Defence by 4:00 pm on 4 December 2018.

21. On 4 December 2018, the News filed their Defence and Counterclaim. (As no issue arises on the Counterclaim, in the remainder of this judgment I will simply refer to their "Defence".) In their Defence, the News did not object to the Stephenson Report on the basis that Mr Stephenson was not a RICS chartered land surveyor or that the MAP had not appointed him as an individual chartered land surveyor but had simply referred the parties to WGES.

22. On 16 January 2018 the Gibsons filed their Reply and Defence to Counterclaim.

23. On 7 May 2019 the News wrote to the Gibsons raising various points and requesting consent to proposed amendments to their Defence, including an amendment to add the argument that the appointment of WGES under the Settlement Agreement was invalid because neither Mr Cowell nor Mr Stephenson was a land surveyor. On 10 May 2019 the Gibsons wrote to the News refusing consent to the proposed amendments on the basis that they had no real prospect of success, including:

> "… your new argument about the expression 'land surveyor' which is obviously unsustainable given that you consented to the instruction of W.G. Edwards at the time."

24. The News did not reply to this letter.

25. On 30 May 2019 there was a case management conference ("CMC") before DJ Ashworth. The News did not make an application to amend their Defence on that occasion (or subsequently). They did, however, apply for permission to rely on a letter and plan prepared by Mr Julian Mann FRICS as expert evidence.

26. At the CMC, DJ Ashworth made an order for the following issue to be tried as a preliminary issue:

> "Are the parties bound by (a) the written agreement dated 30 September 2015; (b) the report of Malcolm Stephenson; or (c) the report of Adrian Cowell?"

27. DJ Ashworth noted in her order of 30 May 2019 that on disposal of the preliminary issue, the court could give further directions for case management of any remaining issues in the proceedings. She then gave directions relating to the trial of the preliminary issue, including a listing with a time estimate of one day in a window from 23 September 2019 to 4 October 2019. Neither party was given permission to rely on expert evidence on the preliminary issue.

28. The trial was listed for 25 September 2019 but was vacated on 18 September 2019 to allow settlement discussions to take place.

29. On 15 October 2020 a second CMC was held before DDJ Strelitz, with further directions given for trial of the preliminary issue on a date to be advised after 12 November 2020, including that the trial be heard remotely, with a time estimate of two days. The directions given by DJ Ashworth in relation to trial bundles and skeleton arguments were ordered to continue to apply to the new trial date.

The preliminary issue trial before HHJ Pugh

30. The trial of the preliminary issue took place before HHJ Pugh on 2 February 2021. Although listed for two days, it was concluded within a day.

31. At the trial, the Gibsons were represented by Mr Ted Loveday, of counsel, who also represents them on this appeal, and the News were represented by Mr Paul Wilmshurst, of counsel, who also represents them on this appeal. In these proceedings, including this appeal, Mr Wilmshurst has acted as counsel through the Bar's Direct Access Scheme. Mr Loveday has acted as *pro bono* counsel, his involvement having been initially arranged through Advocate (formerly the Bar Pro Bono Unit) but continuing at latter stages, including during the appeal, through solicitors. This is relevant to the costs order made by the judge, as I shall discuss later.

32. Each of the appellants and the respondents gave evidence at the trial. Most of that evidence was unchallenged. Mr Wilmshurst felt that he was unfairly curtailed by the judge when asking some questions of Mr Gibson in cross-examination that were

intended to elicit whether Mr Gibson, who had been a builder by trade, understood the difference between a building surveyor and a land surveyor.

33. Towards the end of the trial, Mr Wilmshurst submitted to the judge that Mr Gibson's evidence that the Gibson Children had not consented to the Gibsons entering into the Settlement Agreement had come as a surprise to the News. HHJ Pugh invited the parties to make written submissions on the question of the validity of the Settlement Agreement under section 2(1) of the Law of Property (Miscellaneous Provision) Act 1989 ("the 1989 Act"). Mr Wilmshurst's submissions were lodged on 5 February 2021, and Mr Loveday's submissions were lodged on 8 February 2021.

34. On 9 February 2021, HHJ Pugh circulated a draft judgment on the preliminary issue.

35. On 11 February 2021 Mr Wilmshurst sent to the judge a lengthy email, copied to Mr Loveday, raising five areas of concern, and making a number of substantial criticisms of the draft judgment. He apologised for doing so, acknowledging that it was rarely appropriate to make substantive submissions on a reserved judgment circulated in draft, but he felt constrained, as a matter of professional obligation, to raise the points.

36. One of Mr Wilmshurst's five points relied on his cross-examination of Mr Gibson having been curtailed by the judge. He considered that the judge had made a finding of fact in the draft judgment on a matter on which he had not been permitted to cross-examine Mr Gibson. Mr Wilmshurst submitted that if the court considered, as a result of his submissions, that it was necessary to re-consider findings of fact that had already been made, then "the only realistic option is to declare a mistrial and for the case to be heard again by a different tribunal". He acknowledged that this was "an unusual, exceptional and regrettable course".

37. Mr Loveday responded on the same day by email, observing that it was "highly irregular that Mr Wilmshurst did not make these points during the trial", but suggesting that "it is now in everyone's interest to ensure the final judgment deals with them", as they would otherwise be raised by way of appeal. He asked for additional time to respond in detail to Mr Wilmshurst's submissions on the draft judgment. The judge confirmed later that day that he would not hand down his approved judgment until Mr Loveday had had a chance to respond.

38. On 12 February 2021 Mr Loveday lodged a three-page response to Mr Wilmshurst's five points, inviting the judge to make various amendments to the draft judgment to clarify points in light of certain of Mr Wilmshurst's criticisms.

39. On 16 February 2021 HHJ Pugh handed down his approved judgment on the preliminary issue ("the Judgment"). The Judgment reflected a number of changes from the draft judgment that had been circulated on 9 February 2021.

The Judgment

40. HHJ Pugh began the Judgment by setting out the background and the preliminary issue to be determined, namely, whether the parties were bound by (a) the Settlement Agreement, (b) the Stephenson Report, or (c) the Cowell Report.

41. At paragraphs 18 to 20 of the Judgment, the judge concluded that the Cowell Report did not bind the parties, disposing of clause (c) of the preliminary issue. The Gibsons had not agreed to a further determination by Mr Cowell after the Stephenson Report had been produced, and, in any event, even the News themselves did not acknowledge that they would be bound by Mr Cowell's determination. There is no appeal against this aspect of the judge's decision, which seems clearly to be right.

42. At paragraph 20 of the Judgment, the judge stated that the issue he had to decide was whether Mr Stephenson's determination of the boundary was in accordance with the Settlement Agreement. If yes, then the parties were bound by it. If no, then the parties were at liberty to argue their respective cases on where the boundary should lie at a further trial.

43. At paragraph 21 of the Judgment, the judge noted that the position of the Gibsons was that the dispute was compromised by the Stephenson Report, which bound both parties.

44. At paragraph 22 of the Judgment, the judge summarised the position of the News as raising four arguments against the conclusion that the Stephenson Report had compromised the dispute and bound the parties, namely, that:

    i) Mr Stephenson did not have jurisdiction under the Settlement Agreement to compromise the boundary dispute given that:

        a) he was not a land surveyor, as required by the Settlement Agreement; and

        b) the mediators had failed to appoint an individual surveyor, as required by the Settlement Agreement, but had instead appointed a company, namely, WGES;

    ii) Mr Stephenson did not come to a conclusion in the Stephenson Report in that the Stephenson Report did not enable the parties to establish where the boundary is;

    iii) Mr Stephenson answered the wrong question; and

    iv) the Settlement Agreement was, in effect, a contract for the disposition of an interest in land but failed to comply with the provisions of section 2 of the 1989 Act and, accordingly, was void.

45. In relation to the News' first argument, namely, that Mr Stephenson lacked jurisdiction, which the judge considered at paragraphs 23-37 of the Judgment, the judge began his analysis by reviewing three authorities cited by Mr Wilmshurst to support his proposition that the provision set out in the Settlement Agreement for a chartered land surveyor to be appointed should be strictly construed: *Equitable Trust Company of New York v Dawson Partners, Ltd* (1926) 27 Lloyd's Rep 49 (HL); *Kollerich & Cie, SA v The State Trading Corporation of India* [1980] 2 Lloyd's Rep 32 (CA); and *Hopkinson v Hickton* [2016] EWCA Civ 1057. The judge distinguished each case and concluded at paragraph 29 of the Judgment that none of those authorities was of particular assistance in construing the Settlement Agreement.

46. At paragraph 30 of the Judgment, the judge found that the failure of the News to plead their objection that Mr Stephenson was not a land surveyor in their Defence was sufficient to dispose of their first argument. The failure to plead the point in their Defence was "not merely procedural". He noted that the News had first raised the point in their response dated 12 March 2019 to a Request for Further Information under CPR Part 18. If it was to be relied upon as a defence, then the News should have applied to amend their Defence. Had they done so, "the amendment may then have given rise to potential issues of estoppel, waiver or acquiescence". The judge said that, although the failure to plead the defence was sufficient to dispose of the first argument, he would go on to consider the proper construction of the Settlement Agreement on this point.

47. At paragraph 31 the judge concluded that neither the News nor the Gibsons had paid any regard to the difference between a land surveyor and a building surveyor when entering into the Settlement Agreement. Both parties wanted a chartered surveyor, a member of RICS, but beyond that there was no discussion of the qualifications of the surveyor. He summarised the evidence supporting this conclusion. He noted Mrs New's evidence that she had suggested a RICS surveyor and that it was one of the mediators who had mentioned that a RICS land surveyor was needed. The judge concluded that the issue was not significant for the parties until, after these proceedings had begun, counsel had pointed out to the News that the Settlement Agreement required a land surveyor to be appointed.

48. Paragraph 32 of the Judgment reads:

> "32. I find that upon its true construction, the 30th December [sic] 2015 Agreement required to have identified a member of RICS who was suitably qualified to address the issue of the disputed boundary. RICS have confirmed that a chartered building surveyor is suitably qualified. I do not find that the reference in the agreement to a land surveyor means that in identifying a company of chartered building surveyors, there has been a material departure from the agreement."

It is clear from context that the reference to the "30th December 2015 Agreement" is a slip and that the judge intended to refer to the Settlement Agreement.

49. At paragraph 33 of the Judgment, the judge concluded that the fact that each of the parties instructed WGES is evidence that each was satisfied that WGES had been properly identified in accordance with the Settlement Agreement. RICS had confirmed that chartered building surveyors were suitably qualified to determine a boundary. The determination of boundaries was within the advertised scope of the business of WGES. It must have been obvious to the parties that "one of the two chartered surveyors employed by the company" (paragraph 36) would have to carry out the work.

50. At paragraph 37 of the Judgment, the judge concluded that once WGES "had been identified and instructed the parties acted in accordance with the agreement as construed in paragraph 32 above." He noted, in particular, that:

i) when Mr Stephenson was identified as the surveyor who would carry out the work, neither party queried his qualifications;

ii) both parties facilitated Mr Stephenson's preparation of the Stephenson Report by agreeing a suitable date and time for his site visit and permitting access to their respective properties;

iii) when the Stephenson Report was sent to the parties, Mr Stephenson's qualifications were clearly set out;

iv) although the News queried Mr Stephenson's methodology and conclusions, they did not challenge his qualifications or raise an objection to his being a chartered building surveyor rather than a chartered land surveyor; and

v) when the News sought a reconsideration of Mr Stephenson's determination, they asked another chartered building surveyor, Mr Cowell, to undertake it.

51. For these reasons, the judge rejected the News' first argument as to the jurisdiction of Mr Stephenson. Most of the permitted Grounds of Appeal relate to the judge's analysis of this question, namely, Grounds 1A, 1B, 1C and 2 of the Grounds of Appeal.

52. In relation to the News' second argument, namely, that Mr Stephenson did not reach a conclusion enabling the boundary to be identified, which the judge considered at paragraphs 38-41 of the Judgment, the judge concluded that Mr Stephenson clearly set out a methodology in the Stephenson Report that was capable of precisely identifying the boundary. There is no appeal against this aspect of the judge's decision.

53. The News' third argument was that Mr Stephenson answered the wrong question in that "he was identifying the boundary at the time the properties were constructed or the intention of where that boundary should have been, rather than identifying where the boundary was in 2015" as required by the Settlement Agreement (paragraph 42 of the Judgment). The judge found this point to be misconceived (paragraph 43) and to have no substance (paragraph 44). The Settlement Agreement only enabled the mediators to identify a surveyor. It was for the parties to instruct the surveyor. In any event, he concluded, the argument had no substance. It was clear from the Stephenson Report that it set out Mr Stephenson's identification of the boundary between the properties at that time. There is no appeal against this aspect of the judge's decision.

54. Finally, in relation to the News' fourth argument, namely, that the Settlement Agreement was void for failure to comply with section 2 of the 1989 Act, which the judge considered at paragraphs 45 to 55 of the Judgment, the judge noted that the first objection to the argument was that the News had admitted that they were bound by the Settlement Agreement in their Part 18 response dated 12 March 2019. In answer to the first question as to whether the News accepted that they were bound by the Settlement Agreement, they had made the following admission:

> "The Defendants accept that they are bound by an agreement made 30 September 2015 the terms of which are embodied in the document entitled 'Summary of Arrangement between:

> Karen and Steve Gibson and Philip and Denise New' and signed only by the two 'Accredited Mediator[s]'. …"

55. The judge also noted that, in answer to a further question, the News had, in the same Part 18 response, made the following further admission:

> "… We accept that it is the Settlement Agreement of 20 [sic] September 2015, not the letters written by us or the Claimants [to WGES], that would bind the parties. …"

56. At paragraphs 48-49 of the Judgment, the judge noted that no application had been made by the News to withdraw those admissions. He said that their failure to apply to withdraw the admissions was sufficient to dispose of the News' fourth argument. He also said that, as he did for the first argument, he would go on to consider the merits of the argument.

57. The judge noted that in cross-examination Mr Wilmshurst had asked Mr Gibson whether the Gibson Children were aware of the litigation and whether they supported it. He also noted that Mr Gibson had confirmed that they were aware of and did support the litigation. The judge proposed to record in a recital to his order that they consented to be bound by the outcome of the litigation and indicated that he would direct that the Gibsons serve a copy of the Judgment and his order on them.

58. At paragraph 52 of the Judgment, the judge noted that Mr Wilmshurst accepted that an agreement to define a previously unclear or uncertain boundary, even if that agreement may involve some conscious transfer of a trivial amount of land, was not subject to the formalities of the 1989 Act. The relevant authorities were *Neilson v Poole* (1969) 20 P&CR 909 (ChD) and *Joyce v Rigolli* [2004] EWCA Civ 79. The judge noted that such an agreement is commonly referred to as a "boundary agreement". Mr Wilmshurst had submitted to the judge that the Settlement Agreement was not such an agreement because it would have the effect of transferring land from one neighbour to the other. Mr Wilmshurst relied on *Nata Lee Ltd v Abid* [2014] EWCA Civ 1652, [2015] 2 P&CR 3 (CA).

59. At paragraph 53 of the Judgment, the judge distinguished *Nata Lee* from the present case. In *Nata Lee* the Court of Appeal held that the relevant agreement was to vary an existing boundary rather than simply to demarcate it. Also, the amount of land transferred was not, in context, trivial. This case, on the other hand, involved an agreement between the parties to demarcate an uncertain boundary. Neither party intended that the Settlement Agreement should effect a disposition of land.

60. At paragraph 54 of the Judgment, the judge rejected Mr Wilmshurst's submission that an expert determination of a boundary cannot constitute a boundary agreement outside the scope of section 2 of the 1989 Act. The Settlement Agreement involved an agreement that "this uncertain boundary would be where the expert determined it to be: there is no difference in principle". Accordingly, at paragraph 55, the judge concluded the Settlement Agreement was a boundary agreement that did not fall within the scope of section 2 of the 1989 Act.

61. Ground 3 of the Grounds of Appeal relates to the judge's rejection of the News' fourth argument.

62. After hand-down of the Judgment, counsel for each of the parties made detailed written submissions on consequentials and costs. Mr Loveday's submissions (7 pages) were dated 19 February 2021. Mr Wilmshurst's submissions (20 pages) were dated 26 February 2021. Mr Wilmshurst also sought permission to appeal on behalf of the News.

The Costs Judgment

63. On 5 March 2021, HHJ Pugh handed down his judgment on costs and consequential matters ("the Costs Judgment"). At paragraphs 2-4 of the Costs Judgment, he summarised the positions of the parties on costs and consequentials as follows:

    i) The Gibsons sought an order for costs, including an order for costs under section 194 of the Legal Services Act 2007 in respect of the *pro bono* part of their representation. They also sought an order that costs should be ordered on an indemnity basis.

    ii) The News considered that the costs should await the final resolution of the litigation and therefore that no costs order should be made. In any event, it was their position that no costs order should be made under section 194 of the Legal Services Act 2007. There were still a number of matters that would require judicial scrutiny and ultimately the Gibsons might fail to obtain any injunctive relief or anything other than nominal damages.

    iii) The News also sought permission to appeal and an adjournment of the proceedings in the County Court pending resolution of that appeal.

64. At paragraphs 5-6 of the Costs Judgment, the judge noted that:

    i) the relief sought by the Gibsons as claimants was limited to a declaration as to the true boundary, an injunction to restrain the defendants' trespass, and damages for trespass;

    ii) by their counterclaim, the News sought declarations that:

        a) Mr Stephenson's determination of the boundary as set out in the Stephenson Report was not binding;

        b) the boundary was the position of the existing fence-line; and

        c) a declaration that the court would refuse an injunction to demolish structures; and

    iii) the News' counterclaim included a generalised prayer for other relief.

65. In his analysis at paragraphs 6-8 of the Costs Judgment, the judge reached the following conclusions:

i) The Gibsons had succeeded on the principal issue between the parties at the trial of preliminary issue, namely, whether the Settlement Agreement reached at the mediation was binding.

ii) The News had raised issues of relief in their written submissions on consequentials that were not addressed in the pleadings, such as the need to address the position of the drain. How these additional issues should be addressed and whether addressing them would require amendments to the pleadings were matters for another day.

iii) There was no reason for the Gibsons to be deprived of an appropriate costs order in relation to the trial of the preliminary issue, at which they prevailed.

iv) In their written submissions, the News had referred to various offers and discussions between the parties since the mediation. There was, however, no offer from the News that simply accepted the boundary line as determined by Mr Stephenson.

v) There were, therefore, no compelling circumstances justifying departure from the general rule on costs under CPR r 44.2(2).

66. At paragraphs 9-11 of the Costs Judgment, the judge set out his reasons for ordering, under section 194 of the Legal Services Act 2007, that the News pay the costs that were provided free of charge to the Gibsons. In essence, the general rule on costs applied and that extended to costs provided to the Gibsons free of charge. It would be a matter for the Access to Justice Foundation ("the AJF") to decide whether to enforce the costs order or whether matters referred to in the News' submissions persuaded the AJF to take a different course.

67. At paragraphs 12-13 of the Costs Judgment, in relation to whether the costs should be ordered on an indemnity basis, the judge made the observations and reached the conclusions set out below:

i) the conduct of the News within the proceeding had been unreasonable in that:

a) they sought to resile from written admissions that they were bound by the Settlement Agreement;

b) they sought to pursue points that were then not pursued; and

c) they relied on arguments that were not pleaded;

ii) in his judgment, the News "latched onto any argument which they thought could assist their disinclination to accept the outcome of the mediation, no matter how weak or thin";

iii) the whole purpose of the "November 2015 mediation" (it is clear that this is a slip and that the judge intended to refer to the mediation in September 2015) had been to avoid court proceedings, but when the outcome of that mediation was not to their liking, they embarked on a course ultimately leading to the Gibsons having to issue proceedings;

iv) such behaviour was "contrary to the interests of justice"; and

v) "the courts should be seen to be ready to uphold properly negotiated settlements which are designed to avoid costly court proceedings".

68. For these reasons, the judge concluded that an order for costs on an indemnity basis was appropriate in this case (paragraph 13 of the Costs Judgment). He also concluded that there was no reason for the Gibsons to have to wait further to be paid costs actually incurred and would order a payment on account of £6,000 in respect of those costs within 14 days. He would not make an order for payment on account in respect of the Gibsons' *pro bono* costs, in light of his observation that it was a matter for the AJF whether they sought to enforce that costs order (paragraph 14). The judge also exercised his discretion to decline Mr Loveday's invitation to make an award of interest (paragraph 15).

69. The judge noted at paragraph 16 of the Costs Judgment that the News applied for permission to appeal on the basis that (i) he had taken into account unpleaded points; (ii) he had applied the wrong test to the construction of the Settlement Agreement; and (iii) he had wrongly concluded that it was not necessary for all legal owners to be party to a boundary agreement in order for it to be enforceable. He did not consider that any of these grounds had a real prospect of success and refused permission to appeal.

70. The judge declined Mr Wilmshurst's request to adjourn or stay the proceedings and his costs order.

The Order

71. Paragraph 1 of the Order reads as follows:

> "IT IS DECLARED THAT:
>
> 1. The parties are bound by the report of Malcolm Stephenson FRICS dated 18 November 2015 demarcating the boundary between the properties at 24 Sunnymede Close, Benfleet, Essex SS7 3QT and 25 Sunnymede Close, Benfleet, Essex SS7 3QT, a copy of which is annexed to this Order."

72. The remainder of the Order provides as follows:

i) all parties have permission to apply to the court for further directions for the purpose of giving effect to paragraph 1 of the Order (paragraph 2 of the Order);

ii) the defendants shall pay:

a) to the claimants, their costs; and

b) to the AJF, the costs of the claimants' *pro bono* representation,

in each case on the indemnity basis and subject to detailed assessment if not agreed, with £6,000 on account of the costs at (a) within 14 days of the date of the Order (paragraph 3);

iii) permission to appeal is refused (paragraph 4);

iv) a stay or adjournment pending appeal is refused (paragraph 5);

v) the parties must by 4 June 2021 make an application to the court for a CMC to be listed for directions in relation to the remaining issues within these proceedings, failing which the remaining issues set out in the Particulars of Claim and Counterclaim shall stand dismissed without further order (paragraph 6); and

vi) the claimants are to serve a copy of the Order on each of the Gibson Children and to provide a copy to the AJF (paragraph 7).

Post-trial procedural history

73. On 12 March 2021, the News filed their Appellant's Notice (sealed by the court on 31 March 2021), together with eight Grounds of Appeal, numbered 1A, 1B, 1C, 2, 3, 4, 5 and 6.

74. On 21 April 2021, as I have already noted, Andrew Baker J granted permission to appeal on all grounds, bar Ground 4. On 27 April 2021, the appeal was listed to be heard on 17 May 2021.

75. On 6 May 2021, the Gibsons filed a Respondent's Notice.

76. On 14 May 2021, at a hearing before Moulder J, an order, agreed by the parties subject to revisions approved by the court at the hearing, was made adjourning the hearing listed for 17 May 2021, to be re-listed with a time estimate of 2½ hours, plus 2-3 hours pre-reading time, on the first available day. A recital to the order noted the confirmation of the Gibsons that they would not pursue matters set out in paragraph 1 of Section 6 of the Respondent's Notice except to the extent that they were already properly in issue in the Appellant's Notice and Grounds of Appeal.

77. The appeal was re-listed for 26 May 2021 before me.

78. At the conclusion of the hearing of the appeal, I reserved judgment and approved an order, the terms of which had been agreed by the parties, that until further order of this court:

i) the parties were not required to make an application in the County Court for a CMC under paragraph 6 of the Order;

ii) no strike-out or dismissal would occur under paragraph 6 of the Order; and

iii) the Gibsons were not required to seek detailed assessment of costs under paragraphs 3(a) and (b) of the Order.

Grounds of appeal

79. The grounds of appeal for which Mr and Mrs New have permission to appeal are, in summary, as follows:

i) In relation to the construction of the Settlement Agreement, the decision of the judge was unjust by reason of serious procedural or other irregularities, namely, that:

a) Ground 1A: the judge determined the case in the respondents' favour on the basis of points of law that they had neither pleaded nor argued before him, without considering the resulting prejudice to the appellants;

b) Ground 1B: the judge made findings of fact related to matters on which he had prohibited cross-examination in sharply critical terms, which were contrary to the evidence of all the parties, including documentary sources at the time, or had not been put to the witnesses; and

c) Ground 1C: the judge debarred the appellants from relying on points that had been:

i) provided for by case management directions;

ii) appeared in the appellants' Part 18 response; and

iii) made in oral and written submissions that were not objected to at the trial itself and on the basis of which the judge had allowed the trial to proceed;

ii) Ground 2: the judge erred in law in construing the Settlement Agreement not to require that the boundary determination be carried out by a member of RICS who was a chartered land surveyor and only to require that the boundary determination be carried out by a member of RICS "who was suitably qualified to address the issue of the disputed boundary".

iii) Ground 3: the judge erred in law in concluding that the Settlement Agreement was enforceable as a boundary agreement notwithstanding that not all of the legal owners of the affected properties were parties to it or had consented to it.

iv) Ground 5: the decision of the judge was unjust by reason of a serious procedural irregularity, namely, that in the Order the judge made a declaration that the parties are bound by the Stephenson Report demarcating the boundary between 24 and 25 Sunnymede Close, wrongly determining the entire case in the respondents' favour, when the issue of remedies was not before the court by virtue of the case management decisions setting down a trial of the preliminary issue.

v) Ground 6: the decision of the judge was wrong in his exercise of his discretion as to costs by:

a) awarding costs to the appellants; and

b) awarding costs to the appellants on an indemnity basis.

80. Ground 4, for which Andrew Baker J refused permission on a review of the papers, was that the decision of the judge was unjust by reason of serious procedural or other irregularities, namely, that the judge radically re-drafted his judgment after very significant errors had been pointed out to him. Andrew Baker J was of the view that Ground 4 added nothing to Grounds 1A-C, 2, 3, and 5. He also observed that what mattered was whether the judgment handed down was wrong. The appellants could not, on appeal, be in a better position than if the judge had delivered an oral judgment in the terms of the judgment handed down, without having circulated a draft in advance. There was no renewed application for permission to appeal in relation to this ground of appeal.

Grounds 1A-C and 2: the land surveyor point and the appointment of WGES point

81. The common theme of Grounds 1A-C and 2 is that Mr Stephenson was not validly appointed pursuant to the Settlement Agreement and therefore the Stephenson Report has no binding effect. The principal argument with which these grounds are concerned in various ways is that Mr Stephenson's appointment was invalid because, although he is a member of RICS, he is not a chartered land surveyor ("the land surveyor point"). The News also argued that the MAP were required by the Settlement Agreement to appoint an individual surveyor to determine the boundary, whereas they appointed WGES, a company, instead ("the appointment of WGES point"). The two points are summarised at paragraph 23 of the Judgment.

Submissions

82. In relation to Ground 1A, Mr Wilmshurst submitted that the judge determined the construction of the Settlement Agreement relying on points that were neither pleaded nor made by the respondents in their submissions at trial. The most serious instance of this, according to Mr Wilmshurst, was the judge's construction of the words "(RICS) LAND SURVEYOR", which appear twice in capital letters in the Settlement Agreement, to mean "a member of RICS who was suitably qualified to address the issue of the disputed boundary" (paragraph 32 of the Judgment). The other instances were as follows:

i) the judge applied a test of "material breach" (paragraph 32);

ii) the judge took into account the subsequent conduct of the parties when deciding what they had agreed (paragraph 33);

iii) the judge construed the Settlement Agreement by reference to the subjective intentions of the parties at the time they entered into it (paragraphs 31 and 33); and

iv) the judge took into account findings about whether the parties realised that Mr Stephenson lack the necessary qualification (namely, that he was not a RICS chartered land surveyor) and when they so realised (paragraphs 33 and37).

83. In relation to Ground 1B, Mr Wilmshurst submitted that the judge stopped his cross-examination of Mr Gibson in the following terms (quotation from the appellants' skeleton argument, drawn from notes taken at the trial, the trial transcript not being available for the appeal hearing):

> "PW (to SG): To [16] of your W/S. How many years were you a builder?
>
> J: What relevance does that have?
>
> PW: A builder may be taken to know perfectly well the difference between a land and building surveyor.
>
> J: That is a matter for submission.
>
> PW: I have 4 points to make to SG.
>
> J: Well I hope they are more relevant."

84. The judge, Mr Wilmshurst submitted, prevented him from asking questions intended to establish what Mr Gibson had understood the Settlement Agreement to mean but then, unfairly, went on at paragraphs 31, 32 and 33 of the Judgment to make findings of fact about how the parties, including Mr Gibson, understood the Settlement Agreement.

85. Mr Wilmshurst also criticised the judge for not giving proper weight to the evidence of Mrs New, summarised at paragraph 31 of the Judgment, which was supported by the evidence of Mr New, that at the mediation Mrs New had suggested a "RICS surveyor" was needed and one of the mediators said in reply that it should be a "RICS land surveyor", to which she agreed. Those words then appeared in capital letters in the Settlement Agreement, but the judge sought "to re-draft the agreement to mean something else".

86. In relation to Ground 1C, Mr Wilmshurst submitted that the judge had unfairly debarred the appellants from relying on the objection that Mr Stephenson was not a chartered land surveyor and therefore was not appointed in accordance with the Settlement Agreement. The objection had been raised by the News in their Part 18 response. That response was a statement of case as defined in CPR r 2.3 and therefore part of their pleadings. At trial, the Gibsons raised matters in reply to this point that were not part of their pleaded case.

87. Mr Wilmshurst made various submissions about the course of proceedings before and at the trial that, in effect, amounted to a submission that, both pre-trial and at the trial, the parties (and, at trial, the judge) had proceeded on the basis that the land surveyor point was at issue. In a case summary prepared by counsel for the Gibsons (not Mr Loveday) for a directions hearing on 15 October 2020, the land surveyor point was included as a point at issue. The judge indicated at the trial that he would be considering the authorities cited by Mr Wilmshurst in relation to the land surveyor point. Accordingly, Mr Wilmshurst submitted, it was unfair for the judge to dispose of the issue in the Judgment by simply debarring the News from relying on it.

88. Although it is not made clear in Ground 1C of the Grounds of Appeal, Mr Wilmshurst's skeleton argument (in the heading immediately preceding paragraph 53) indicates that this procedural irregularity ground also applies to the judge's treatment of the argument that the lack of consent to the Settlement Agreement by the Gibson Children means that the Settlement Agreement was void for failure to comply with section 2 of the 1989 Act ("the 1989 Act point"). That is not made explicit in the Grounds of Appeal, and the point was not developed by Mr Wilmshurst in his submissions on Ground 1C. I deal with the judge's resolution of the 1989 Act point in relation to Ground 3 below.

89. In relation to Ground 2, Mr Wilmshurst submitted that at paragraphs 27 to 29 of the Judgment the judge simply misapplied the law as it stands in relation to an agreement providing for expert determination. He gave no good or clear reasons for distinguishing the cases of *Equitable Trust Company of New York*, *Kollerich* and *Hopkinson*. The principles set out in these cases, he submitted, are well-settled and orthodox. Mr Wilmshurst referred to an extract from *Kendall on Expert Determination* (5th edition) at 8.6-1 for the key principle:

> "The expert determination clause may lay down criteria for the expert's suitability. … The consequence of the purported appointee's qualifications not being in accordance with the clause is that the appointment is invalid."

90. Mr Wilmshurst submitted that there was no authority justifying the judge's departure from this principle. The qualification stipulated is that the expert be a "Royal Institute of Chartered Surveyors (RICS) LAND SURVEYOR". Mr Stephenson was not one. His appointment was therefore invalid. Mr Wilmshurst also noted that, in any event, the MAP had failed to pick an individual surveyor, as required by the Settlement Agreement but had simply given the parties the name of a company, WGES. For both these reasons, Mr Stephenson was not validly appointed under the Settlement Agreement as an expert suitably qualified to carry out the stipulated expert determination.

91. In response to Grounds 1A-C and 2, Mr Loveday dealt first in his submissions with the pleading point. He noted that the News failed to plead the land surveyor point in their Defence, then asked for the consent of the Gibsons to amend their Defence to add it, which was refused on the basis that it had no real prospect of success, and then failed to apply to amend their Defence at the case management hearing on 30 May 2019 or subsequently, including at trial. The News had every opportunity to make the land surveyor point part of their pleaded case but did not do so. There was no unfairness to them in the judge's refusing to consider the point, given that failure. The judge was right to conclude that the failure to plead the point was sufficient to dispose of the land surveyor point.

92. Mr Loveday referred to the following authorities:

i) in *Lombard North Central Plc v Automobile World (UK) Ltd* [2010] EWCA Civ 10, Rimer LJ said at [75]:

> "It is essential to the conduct of a fair trial that each side should know in advance what case the other is

> making, and thus what case it has to meet and prepare for. It is the function of the pleadings to provide that information."

ii) in the same case at [79], Rimer LJ also noted that there will be cases where it would be "unjust" for the court to refuse to decide an unpleaded point, but "such cases are likely to be rare";

iii) in *Sobrany v UAB Transtira* [2016] EWCA Civ 28 at [50] Lewison LJ said that whether to allow unpleaded points to be run is:

> "… a discretionary decision for the trial judge; and [an appellate judge's] disagreement with him on the facts is not enough for an appeal against his ruling to succeed.";

iv) in *Hawksworth v Chief Constable of Staffordshire* [2012] EWCA Civ 293, Tomlinson LJ, after setting out at [40] a passage in the judgment of Lawton LJ in *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* [1986] Ch 246 (CA) at 309F-310B concerning the importance of rigour and precision in pleading, made clear at [41] that if a party wants to raise a new point in their case, it is incumbent on them to apply to amend their pleading appropriately.

93. Mr Loveday submitted that had the News properly applied for and obtained permission to amend their Defence, then the Gibsons would have pleaded a response, as noted by the judge at paragraph 30 of his judgment. There was no such application, and therefore no pleaded response from the Gibsons. It would have been unjust for the judge to have allowed the land surveyor point to be considered in those circumstances. This was not one of those rare cases referred to by Rimer LJ in *Lombard North Central* where it would be unjust for the court to *refuse* to decide an unpleaded point.

94. Mr Loveday urged me to reject Mr Wilmshurst's submission that the Gibsons had, in effect, acknowledged the land surveyor point at the CMCs and addressed it in submissions at the trial and therefore an amendment to the Defence was unnecessary. At paragraph 25.3 and footnote 7 of the claimants' skeleton argument for the trial, the claimants squarely rejected the land surveyor point on the basis that it was not pleaded, setting out the history of the defendants' request by letter dated 10 May 2019 for the claimants' consent to an amendment to their Defence and their subsequent failure to apply to amend.

95. Mr Loveday submitted that, in any event, the judge's analysis of the land surveyor point on its merits was correct. The use of a land surveyor was not a condition precedent for a valid expert determination under the Settlement Agreement. All that mattered was that there was a decision by a jointly-instructed RICS surveyor whose identity was agreed between the parties, as indeed happened.

96. Mr Loveday submitted that the cases relied on by Mr Wilmshurst do not establish a general principle that the purported appointment of an expert who does not have the stipulated qualifications is invalid. It all depends on the construction of the relevant

agreement for expert determination: *Hopkinson* at [28]. He submitted that the judge's analysis on construction was sound, particularly bearing in mind:

i) the informal nature of the Settlement Agreement, which was not drafted by lawyers; and

ii) the "powerful and overriding policy of promoting the peaceful settlement of boundary disputes" (respondents' skeleton argument at paragraph 42).

97. In relation to the former point, Mr Loveday distinguished the cases of *Equitable Trust Company of New York*, *Kollerich* and *Hopkinson*, which related to professionally drafted contracts carefully negotiated between commercial parties. In relation to the latter point, Mr Loveday cited various cases, including *Neilson v Poole* (Megarry J) at 919 (quoted in *Yeates v Line* [2012] EWHC 3085 (Ch) at [23]):

> "I must, too, bear in mind that a boundary agreement is, in its nature, an act of peace, quieting strife and averting litigation, and so is to be favoured in the law."

98. Mr Loveday began his skeleton argument for the appeal with the following passage from the judgment of Mummery LJ in *Bradford v James* [2008] EWCA Civ 837 at [1] (which also opened his skeleton argument for the trial):

> "There are too many calamitous neighbour disputes in the courts. Greater use should be made of the services of local mediators, who have specialist legal and surveying skills and are experienced in alternative dispute resolution. An attempt at mediation should be made right at the beginning of the dispute and certainly well before things turn nasty and become expensive."

99. In relation to the other procedural unfairness points raised in Grounds 1A and 1B, Mr Loveday rejected them. The judge had properly construed the Settlement Agreement on the basis of settled principles. Mr Loveday accepted that the judge had curtailed each counsel from cross-examining witnesses on their subjective understanding of the Settlement Agreement. That was a proper approach given that the matters raised by Mr Wilmshurst in respect of Ground 1B were not part of the News' pleaded case.

100. Mr Loveday submitted that, in any event, Mr Wilmshurst made no meaningful complaint at the time about being stopped. Had he wished to complain about this on appeal, he should have asked the judge to make a formal ruling: see *Hawksworth* at [41]-[42]. It was too late to raise that complaint now. Mr Loveday submitted that, in reality, the judge was simply exercising robust trial management, and both counsel acquiesced because they wished to move on to their closing submissions.

Analysis and conclusions on Grounds 1A-C and 2

101. As a preliminary point, I note that the judge's conclusion at paragraphs 18-19 of the Judgment that the Cowell Report is not determinative of the boundary is clearly correct for the reasons he gives. Mr Wilmshurst did not seek to suggest otherwise.

102. Turning to Grounds 1A-C and 2, I deal first with the pleading point and then the alleged errors of the judge in his construction of the Settlement Agreement, including related points regarding alleged procedural irregularity by the judge.

103. Mr Wilmshurst does not, and cannot, deny that neither the land surveyor point nor the appointment of WGES point was pleaded by the News in their Defence. He does not deny the history, summarised by Mr Loveday, that the News, by letter dated 10 May 2019, requested consent from the Gibsons for an amendment to their Defence to add the land surveyor point, which was refused by the Gibsons on the grounds that it had no real prospect of success. There was no subsequent application by the News to amend their Defence at the CMC on 30 May 2019, at the CMC on 15 October 2020, at the trial, or at any other time.

104. In *Hawksworth* at [40], Tomlinson LJ highlighted the importance of rigour in pleading, by setting out the guidance given by Lawton LJ in *Rolled Steel Products* at 309F-310B. HHJ Pugh did not refer to *Hawksworth* or *Rolled Steel Products* in the Judgment, but the principles set out in the relevant passage from *Rolled Steel Products* are fundamental and well-known. The judge's dismissal of the land surveyor point on the basis that it was not properly pleaded was justified on the basis of those principles. Although the judge does not say so expressly in the Judgment, it follows from his reasoning that the appointment of WGES point must also be dismissed as it was not properly pleaded.

105. Mr Wilmshurst complains that Mr Loveday also made points that had not been properly pleaded, but he does not give any important or telling examples. Mr Loveday's skeleton argument for the trial clearly contested the land surveyor point on the basis that it had not been pleaded. To the extent that the judge nonetheless allowed evidence and entertained submissions relevant to it, Mr Loveday was obliged to engage with it, even if it meant making points that had not been pleaded.

106. In any event, not all pleading points are created equal. The land surveyor point was clearly an important, if not the most important, part of the News' case at trial, as it has been on this appeal. It was not part of the News' Defence. It was first mentioned in their Part 18 response. The Gibsons were entitled to prepare for trial on the basis that neither the land surveyor point nor the appointment of WGES point were ones that they would have to meet at trial on the merits. Had they been required to meet them, they would almost certainly have raised an argument along the lines of estoppel by convention, waiver, or acquiescence. Although arguments along those lines were apparently raised at the trial, the Gibsons had not pleaded them because there had been no occasion for them to do so.

107. Had the News applied to amend their Defence to add the land surveyor point and/or the appointment of WGES point, it seems to me likely that the application would have failed for lack of a real prospect of success on the basis of estoppel by convention or similar arguments. That, of course, is speculative, because no such application was made. This was, however, a matter entirely in the hands of the News.

108. There was no unfairness to the News in debarring them from relying on the land surveyor point, given their failure to plead it as part of their Defence, which they had ample opportunity to do and never did. By attempting to rely on the Part 18 response mentioning the points, the News sought to avoid the rigour of the judicial scrutiny that

would have been applied had the News properly sought an amendment to add the land surveyor point to their Defence in accordance with the relevant provisions of the CPR.

109. The fact that the judge permitted submissions to be made on the land surveyor point at trial did not, in any sense, estop the judge from ultimately deciding that it would be unfair for the News to rely on it, given that they had not pleaded it as part of their Defence and therefore the Gibsons had not expected to have to meet it at trial. The judge, in effect, heard submissions on the land surveyor point and the appointment of WGES point *de bene esse*, even if he did not make it explicit that he was doing so.

110. Mr Loveday referred to a passage from *Lombard North Central* at [79], as I have noted at [92(ii)] above. It is worth considering the full paragraph:

> "79. In saying this, I make clear that I am not suggesting that courts must adopt an inflexible approach to the question of whether or not a particular unpleaded issue may or may not be the subject of investigation at a trial. *There will be cases in which it will be obvious that it would be unjust for the court not to entertain and decide a non-pleaded issue: for example, when it is apparent that both sides have come to court ready to deal with it as an issue in the case despite its omission from the pleadings.* That, however, was not this case; and such cases are likely to be rare." (emphasis added)

111. Although Mr Wilmshurst does not rely on the passage that I have highlighted in the judgment of Rimer LJ in *Lombard North Central* at [79], it appears to be part of the thrust of his submissions that, the land surveyor point and the appointment of WGES point having been raised in the News' Part 18 response, the parties would have come to court ready to deal with them, despite their omission from the News' Defence. It is clear, however, from paragraph 30 of the Judgment that the judge did not consider that the Gibsons had come fully prepared to deal with those points. This was not, therefore, one of those rare cases referred to by Rimer LJ. It seems to me that the judge's conclusion on this point cannot be said to be wrong.

112. This is sufficient to dispose of Grounds 1A-C and 2 of the Grounds of Appeal. In relation to Mr Wilmshurst's reliance on *Equitable Trust Company of New York*, *Kollerich* and *Hopkinson*, I agree with Mr Loveday's submission, and the judge's conclusion at 29 of the Judgment, that these cases are easily distinguished on their facts. The key issue is the proper construction of the relevant agreement purporting to provide for expert determination. The Settlement Agreement was a quite different agreement, made in a quite different context, from the agreements in those other cases.

113. Because the parties had addressed the merits of the land surveyor point (at least to some extent, in the case of Mr Loveday, and under protest that the matter was not properly pleaded) and the appointment of WGES point, the judge went on to consider the construction of the Settlement Agreement at paragraphs 31-37 of the Judgment.

114. I agree with Mr Wilmshurst that there are difficulties with the judge's analysis of the proper construction of the Settlement Agreement. As a matter of construction, the

Settlement Agreement unambiguously requires that the expert appointed under it should be a chartered *land* surveyor. It could not be clearer. That is so, even bearing in mind the brief and informal nature of the Settlement Agreement, prepared, as it was, without the benefit of lawyers.

115. It is also clear that the Settlement Agreement requires the MAP to appoint ("impartially pick") an individual expert land surveyor rather than a company. Had the News, at the time of the purported appointment of WGES, insisted on the strict satisfaction of these conditions in the Settlement Agreement, they would have been acting within their contractual rights. However, by their conduct subsequent to entry into the Settlement Agreement, they agreed with the Gibsons an arrangement that varied from the strict terms of the Settlement Agreement. It is arguably not fair for them to have acted in the way that they did, apparently sanctioning the arrangement under which Mr Stephenson, a RICS chartered building surveyor and consultant to WGES, carried out the boundary determination required by the Settlement Agreement, and then rejecting it when it was not to their liking.

116. It is for this reason that an argument against the land surveyor point on the basis of estoppel by convention or similar arguments would, in my view, have been likely, if not highly likely, to succeed, either on an application to amend the Defence or at trial. This demonstrates the importance of rigour in pleading. The Gibsons were not given a proper opportunity to plead estoppel by convention, because neither the land surveyor point nor the appointment of WGES was ever properly pleaded by the News. Paragraph 37 of the judgment sets out points that would support estoppel by convention, although there the judge was pointing to matters that he said supported the "true construction" of the Settlement Agreement.

117. The judge's analysis of the construction of the Settlement Agreement was *obiter dicta*. He was right to reject the land surveyor point (and, by implication, the appointment of WGES point) on the basis that it (they) had not been properly pleaded. For the reasons I have given, there was no unfairness to the News in his reaching that conclusion. The various other points raised by Mr Wilmshurst regarding alleged procedural irregularities in the way the judge conducted the trial therefore fall away.

118. To give one example, Mr Wilmshurst's complaint that he was stopped when cross-examining Mr Gibson is only relevant to the judge's analysis of the construction of the Settlement Agreement, which I have agreed was questionable. I also agree with Mr Loveday that the fact that the judge stopped Mr Wilmshurst on the grounds of relevance while cross-examining Mr Gibson hardly amounts to a serious procedural irregularity. Based on Mr Wilmshurst's record of the relevant exchange, which I have set out at [83] above, it seems hard to understand why it was perceived as "sharply critical", although much can be conveyed by tone of voice that will not appear in a transcript. Mr Wilmshurst does not assert that he made a meaningful complaint at the time, nor does it appear that he sought a ruling from the judge.

119. For these reasons, the appeal is dismissed on Grounds 1A-C and 2.

Ground 3: enforceability of the boundary agreement

Submissions

120. In relation to Ground 3, Mr Wilmshurst submitted that the judge erred in law by concluding that the Settlement Agreement was a boundary agreement falling outside the scope of section 2 of the 1989 Act, for the following reasons:

i) it was an agreement for expert determination of the boundary between 24 and 25 Sunnymede Close, not an agreement as to where the boundary actually is; and

ii) the Settlement Agreement has the effect of transferring a non-trivial amount of land from the News to the Gibsons and therefore falls within the *Nata Lee* case, rather than cases concerning a trivial amount of land such as *Neilson v Poole* and *Joyce v Rigolli*, meaning that, in order to be enforceable, the Settlement Agreement had to comply with section 2 of the 1989 Act, which it failed to do.

121. Mr Wilmshurst submitted that, quite apart from section 2 of the 1989 Act, the Settlement Agreement was not signed by any of the parties (having been signed by the accredited mediators) and, in any event, was not consented to by the Gibson Children, who are co-owners of 25 Sunnymede Close, therefore the Settlement Agreement could not be effective to transfer property from the News to the Gibsons, which is the effect of the Settlement Agreement if it is enforceable. In relation to this point, Mr Wilmshurst referred to the judgment of Somervell LJ in *Leek and Moorlands Building Society v Clark* [1952] 2 QB 788 (CA) at 794-795:

> "Even if we are wrong in what we have said with regard to the right to determine within the period of the lease as distinct from a right to terminate a periodic tenancy, we would have thought it plain that one of two joint lessees cannot, in the absence of express words or authority, surrender the rights held jointly. If property or rights are held jointly, prima facie a transfer must be or under the authority of all interested."

122. Mr Wilmshurst had submitted in his post-trial written submissions to the judge on the 1989 Act point that, regardless of whether the Settlement Agreement is categorised as an agreement for expert determination or (wrongly, in his view) as a boundary agreement, the Settlement Agreement is "defective because it would be a legal act in relation to the property which had not been authorised in any way by all the legal owners". He submitted at this appeal that the judge failed properly to address this point in the Judgment.

123. Mr Loveday submitted that Ground 3 was misconceived. Mr Wilmshurst had failed to address the judge's ruling that, as a result of the News' written admissions in their Part 18 response, it was not open to them to challenge the fact that they were bound by the Settlement Agreement on the basis of section 2 of the 1989 Act. The judge had addressed this at paragraphs 45 to 48 of the Judgment.

124. Mr Loveday submitted that the judge was right to conclude that the News were foreclosed from relying on the 1989 Act by reason of their written admissions. As a result of those written admissions, the Gibsons had prepared for trial on the basis that the enforceability of the Settlement Agreement was not challenged. Their written admissions could only be withdrawn with the court's permission under CPR r 14.1(5). No application to withdraw the admissions had been made, and no permission to amend or withdraw the admissions had been given.

125. Mr Loveday said that the judge was right to conclude that the written admissions disposed of the 1989 Act point. There was no appeal against this aspect of the judge's decision.

126. Mr Loveday noted that the judge, in any event, had gone on to deal with the merits and had correctly concluded that the point failed. The judge had found that the Settlement Agreement was not a contract for the transfer of land (paragraph 53 of the Judgment). The Settlement Agreement was an agreement to determine an uncertain boundary. The fact that it was to be determined by an expert did not mean that it was not a boundary agreement. The key point was that the Settlement Agreement was not intended to convey land. Therefore, there was no need for it to comply with section 2 of the 1989 Act.

127. Mr Loveday submitted that *Leek and Moorlands Building Society* was of no assistance to the News for the same reason. The Settlement Agreement bound the parties, namely, the appellants and the respondents, as a matter of contract. The case was therefore irrelevant.

Analysis and conclusion on Ground 3

128. Mr Wilmshurst did not directly address the point concerning the written admissions, which as Mr Loveday correctly observed, was the principal basis on which the judge dismissed the 1989 Act point, in his written or oral submissions for the appeal. But I gather that his position was that the written admissions could not fairly be held against the News given that it was only when cross-examining Mr Gibson that it came to light that not all of the co-owners (namely, the Gibson Children) had consented to be bound by the Settlement Agreement. Mr Wilmshurst did not attempt to address the lack of permission under CPR r 14.1(5) to vary or withdraw the written admissions.

129. There is no appeal against the judge's conclusion on the News' written admissions, and that is sufficient to dispose of Ground 3. In any event, however, it cannot be said that the judge was wrong to conclude that the Settlement Agreement was a boundary agreement. It was open to the judge to conclude on the evidence that the parties, by entering into the Settlement Agreement, did not intend to convey any land but simply to demarcate an uncertain boundary. That makes it a boundary agreement in the sense referred to in *Neilson v Poole*, *Joyce v Rigolli*, *Yeates v Line* and other authorities. It did not matter that the determination was to be by expert. There is no reason in principle why a boundary agreement cannot provide for the determination of the boundary according to some agreed methodology, such as determination by an expert. Contrary to a submission made by Mr Wilmshurst in his written submissions to the judge on the 1989 Act point, this proposition does not amount to "making new law". It is common sense. The judge concluded that the Stephenson Report "did enable the

boundary to be ascertained definitively" (paragraph 41 of the Judgment). His conclusion in that regard is not challenged on this appeal.

130. For these reasons, the appeal on Ground 3 is dismissed.

131. Before moving to consider Ground 5, I note in passing that it is somewhat odd that DJ Ashworth, presumably with the agreement of the parties, included sub-clause (a) in the Preliminary Issue in light of the written admissions of the News that they were bound by the Settlement Agreement. But the fact that the parties so agreed does not diminish the significance of the News' written admissions, which they never applied to withdraw.

Ground 5: the remedy point

Submissions

132. Mr Wilmshurst submitted that the judge was wrong to make the "final declaration" that he did in paragraph 1 of the Order (set out at [71] above), which "wrongly determines the entire case in the Respondents' favour". It deprives the News of a trial on the balance of their pleadings.

133. Mr Wilmshurst submitted that the preliminary issue did not include the question of "demarcating the boundary". The judge should not have granted a declaration, which is a discretionary remedy only to be granted where it will resolve the dispute: *Rolls-Royce plc v Unite the Union* [2009] EWCA Civ 387. (Mr Wilmshurst did not include a pinpoint citation in his skeleton argument or give one at the hearing of the appeal, but I assume that he is relying, principally, on [120] (Aikens LJ).) He submitted that the judge's declaration renders both properties unsaleable unless and until the physical layout is altered to reflect the declaration made.

134. Mr Wilmshurst submits that the judge incorrectly summarised the issue that he had to decide at paragraph 20 of the Judgment. This may have led him into error. Paragraph 20 reads as follows:

> "20. So the issue I have to decide is whether Mr Stephenson's determination of the boundary was in accordance with the agreement. If it was, then both the claimants and defendants are bound by it. If it was not, then the parties will be at liberty to argue their respective cases on where the boundary should lie at a further trial."

135. Mr Wilmshurst submitted that, contrary to the submissions for the respondents, the declaration clearly must have an effect *in rem*, binding successors in title. He gave the following example: if a local authority wanted to make a compulsory purchase of one of the properties and needed to determine the boundary between the properties, it would have to have the boundary drawn in accordance with the Stephenson Report.

136. Mr Wilmshurst submitted that, accordingly, the grant of the declaration makes pointless the judge's direction in the Order for a further CMC to be listed. There is

little that another first-instance judge will be able to order given the "total mess" created by the declaration in paragraph 1 of the Order.

137. Mr Loveday submitted that Ground 5 is based on a fundamental mischaracterisation of paragraph 1 of the Order. It merely grants a declaration that the parties are "bound by" the Stephenson Report. This recognises the contractual rights and obligations flowing from the Settlement Agreement, entered into by the four parties to these proceedings. That was the preliminary issue agreed between the parties and decided in the Judgment.

138. Mr Loveday submitted that it flows from a proper characterisation of paragraph 1 of the Order that remedies still remain to be determined. The Order does not provide for specific performance. It does not bind non-parties to the Settlement Agreement. The Stephenson Report has no effect *in rem*. It does not bind successors in title. It does not direct or require the News to move any physical features on the boundary nor does it convey or vest any land.

139. Mr Loveday agreed with Mr Wilmshurst that as long the dispute between the parties regarding the boundary continues, the parties will be prevented from selling or mortgaging their properties. He submitted, however, that the Settlement Agreement was designed to prevent this result.

140. Mr Loveday submitted, contrary to the position taken by Mr Wilmshurst, that what the judge provided for in the remainder of the Order was eminently sensible, as it allowed for a period of reflection and negotiation, and the duty to seek directions for case management if there were anything outstanding for judicial determination.

Analysis and conclusion on Ground 5

141. I agree with Mr Loveday's submissions. Ground 5 appears to be based on a misconception. The judge found the Settlement Agreement to be a boundary agreement in the latter of the two senses of "boundary agreement" referred to be Megarry J in *Neilson v Poole* at 918:

> "Now a boundary agreement may constitute a contract to convey land. The parties may agree that in return for a concession by A in one place, straightening the line of division, B will make a concession in another place; and the agreement may thus be one for the conveyance of land. But there is another type of boundary agreement. This does no more than identify on the ground what the documents describe in words or delineate on plans. Nothing is transferred, at any rate consciously; the agreement is to identify and not to convey. In such a case, I do not see how the agreement can be said to constitute a contract to convey land.
>
> In general, I think that a boundary agreement will be presumed to fall into this latter category."

142. I note that in *Neilson v Poole* at 919, Megarry J acknowledges that there may be intermediate cases where "it is uncertain or doubtful whether a boundary agreement

will convey any land". But he made it clear that, in the more common case, a boundary agreement does not convey land, although, as he further notes at 919 that, in such a case, "each [party to the boundary agreement] *in time* will acquire a title by limitation to the land of the other which falls on his side of the agreed boundary" (emphasis added).

143. It is clear that the judge found the Settlement Agreement to be a boundary agreement that did not convey land: see paragraph 53 of the Judgment. This conclusion was open to him on the evidence before him, particularly having regard to the terms of the Settlement Agreement and the Stephenson Report.

144. I have set out the Settlement Agreement in full at [7] above. It is a short, informally drafted document. It is not explicit what the appointed surveyor will be required to do, but given the context of mediation, the reference to the boundary dispute, it is a reasonable and fair inference that the surveyor will be required to determine where the boundary is rather than, for example, to propose a new boundary.

145. The following excerpts from the Stephenson Report are consistent with this:

> "**Re: Boundary Matters – 24 Sunnymede Close, and 25 Sunnymede Close**
>
> With reference to the written instructions of Mr and Mrs Gibson of No. 25 and Phillip [sic] New and Denise Bolton of No 24 and my subsequent visit to the above property on Monday the 2nd November 2015 we confirm our findings in respect of the boundary between the properties with conclusions of observations made in the visit.
>
> The purpose of this report is to ascertain the extent and position of the boundary fence between Nos. 25 and 24.
>
> …
>
> From our inspection of the original deeds the t-shape indicates that the boundary is owned by No. 25 and the owner entitled to provide a new fence running in a straight line from the kerb and concrete post to the end of the garden. The precise position can be achieved by an offset of 1.080 metres from the front to the back or the inside line of the post from the front.
>
> I have also concluded that the boundary lines were not placed originally in the correct position and placed so as to cause the least inconvenience to the adjoining owners at the time the fence was erected.
>
> In order to ascertain the true extent of the boundary a straight line must be drawn with a line from the boundary wall of No. 25 to the end fence. Off sets can be taken from this at 2 metre intervals along the line to establish the precise straight line."

146. These excerpts show that the purpose of Mr Stephenson's determination was to identify or demarcate the true boundary. Under the heading "Consideration" on the second page of the Stephenson Report, Mr Stephenson sets out his reasons for concluding that plans of the properties provided by the parties do not provide unambiguous information as to the true course of the boundary. It is clear, therefore, that he has made inferences from the plans and from his inspection of the original deeds, as a result of which he found the boundary to be a straight line determined as set out in the above extract.

147. Against that background, the judge's conclusion that the Settlement Agreement, together with the Stephenson Report prepared pursuant to the Settlement Agreement, was a boundary agreement that does not provide for a conveyance of land is not wrong. It does not bind successors in title. Mr Wilmshurst's example of the local authority's compulsory purchase is based on a false premise. In light of the judge's conclusion at paragraph 53 of the Judgment, he is clearly correct to conclude at paragraph 55 that the Settlement Agreement fell outside the scope of section 2 of the 1989 Act.

148. I respectfully disagree with Mr Wilmshurst's submission that at paragraph 20 of the Judgment the judge incorrectly stated the issue that he had to decide at the preliminary issue trial. The Settlement Agreement provided for the appointment of a surveyor to determine the boundary between 24 and 25 Sunnymede Close. Mr Stephenson was appointed and prepared a report, the Stephenson Report, which set out a method for determining the boundary that identified it "definitively" (as the judge later found). The preliminary issue, restated, was whether the parties were bound by the Settlement Agreement and, pursuant to that, were bound by Mr Stephenson's determination of the boundary. That is a sensible reading of the preliminary issue and consistent, in my view, with the judge's summary at paragraph 20.

149. I do agree with Mr Wilmshurst in one respect. It seems to me that the judge did not have to make a declaration in his order. He could simply have handed down his judgment setting out his reasoning and conclusion in relation to the preliminary issue. See, for example, the approach of the Divisional Court, as discussed by Wall LJ in *Rolls Royce v Unite* at [41]. I am not, however, able to conclude that the judge was wrong to make the declaration or that his decision to do so was unjust due to a serious procedural or other irregularity.

150. I do not think, in any event, that this makes much difference to the practical outcome. I agree with Mr Loveday that the declaration simply establishes the contractual position as between the parties to the Settlement Agreement. It has no proprietary effect binding third parties, and the Gibsons and the News need to consider what, in practice, can now be sensibly and pragmatically be done to resolve this dispute, ideally without further recourse to the courts. If, however, further recourse to the courts is necessary, the question of remedies remains for resolution. As Mr Loveday suggested in his skeleton argument, this may require expert evidence.

151. In the Particulars of Claim at paragraph 7, the claimants seek a declaration as to the true boundary. The declaration at paragraph 1 of the Order is not that. It is, in effect, a declaration that the parties to the Settlement Agreement are bound by the Stephenson Report. Accordingly, the declaration at paragraph 1 of the Order is not part of the final relief sought by the Gibsons.

152. For these reasons, the appeal on Ground 5 is dismissed.

153. Mr Loveday indicated that the Gibsons would be open to consider any proposal that the News wish to make as to the clarification of the declaration. If the parties agree on an appropriate reformulation of the declaration in paragraph 1 in order to clarify its effect, I will consider making an order to vary the Order in that respect. To be clear, the purpose of such re-wording would simply be to clarify its effect. I have dismissed the appeal against the Order on all grounds relevant to paragraph 1 of the Order.

Ground 6: costs

154. I now turn to the appeal against the costs order.

Submissions

155. Mr Wilmshurst submitted that, notwithstanding the declaration in the Order, the ultimate outcome of this claim remains uncertain and therefore the appropriate order is to reserve costs until the court has decided on relief. The judge's conclusion that the fact that the Gibsons had obtained a declaration as to the boundary meant that they should have their costs was predicated on an analysis of the pleadings and the nature of the case that was "simply wrong". In any event, the court may ultimately decide to maintain the *status quo*, with no mandatory injunction.

156. Mr Wilmshurst criticised the judge's summary at paragraph 6 of the Costs Judgment, which he says failed to record the fact that paragraph 11 of the Defence maintained that a declaration of the true boundary should be refused. He maintained that it was wrong of the judge to criticise the News in the Costs Judgment for raising at the preliminary issue trial "issues of relief that are not addressed in the pleading, such as the position of the drain". He submitted that this would be a matter of evidence falling within the bounds of paragraph 11 of the Defence.

157. Finally, Mr Wilmshurst submitted that the judge's decision to award costs on an indemnity basis against the News was wrong. His reason for doing so, namely, that the News had argued against the outcome of a mediation, which was contrary to the interests of justice, was not a proper basis for an award of indemnity costs. It did not denote any kind of conduct in the litigation itself. Mr Wilmshurst relied on *RSPCA v Sharp* [2011] 1 WLR 980 (CA) at [50], where Lord Neuberger MR decided that Peter Smith J had been wrong to order indemnity costs in a case where all that the paying party had done wrong was to argue a point on the interpretation of a will that was wrong.

158. Mr Loveday submitted that the award of costs was a matter of discretion, and it could not be said that the judge had exercised his discretion unreasonably. The Gibsons had prevailed on the preliminary issue, and this was of value to them regardless of the ultimate outcome of the claim. It will clearly be of relevance to the next stage of the proceedings.

159. As to the question of costs on an indemnity basis, Mr Loveday referred the court to the 2021 edition of the White Book at paragraph 44.3.9, where it is noted that a party may be ordered to pay indemnity costs if they take steps that:

> "… are not only basis on a plainly hopeless case but are motivated by some ulterior commercial or personal purpose or otherwise for purely tactical reason unconnected with any real belief in their merit (*Arcadia Group Brands Ltd v Visa Inc* [2015] EWCA Civ 883; [2015] Bus. L.R. 1362, CA, per Sir Terence Etherton C, at para.83)."

160. Mr Loveday submitted that the judge had justified his award of costs on the indemnity basis by reference to his finding that the News had latched onto any arguments "no matter how weak or thin" out of their desire to wriggle out of the outcome of the mediation. The judge gave additional reasons at paragraphs 12-13 of the Costs Judgment, based on the behaviour of the News. It was open to the judge to conclude that this was contrary to the interests of justice, given his duty to give effect to the overriding objective and the consistent disapproval of the courts of parties refusing to settle their boundary disputes out of court.

Analysis and conclusion on Ground 6

161. In my view, the judge cannot be said to have exercised his discretion to award costs to the Gibsons or to award those costs on an indemnity basis outside the generous ambit within which reasonable disagreement is possible. The judge gave reasons, which were open to him, for considering that the conduct of the News took the situation "out of the norm" in a way that justified an order for indemnity costs. It is clear from the Costs Judgment that the judge did not award indemnity costs simply because the News took a point or two that were wrong.

162. Accordingly, the appeal on Ground 6 is dismissed.

Conclusion

163. The appeal is dismissed.