Claim No: J00TA230

IN THE COUNTY COURT AT TAUNTON

THE COUNTY COURT

BETWEEN:

(1) PETER ROBERT CREA
(2) HELEN ELIZABETH CREA

Claimants

-and-

(1) PHILIP GEORGE CAMP
(2) CHRISTINE ANNE CAMP

Defendants

JUDGMENT

Introduction

1. This is a boundary dispute between the Claimants who own "The Heathers", Nailsbourne, Taunton and the Defendants who own the neighbouring property "Sunnyside". Aside from the usual issues surrounding the legal position of the boundary and related allegations of trespass, the Defendants allege that there has been a binding boundary agreement by virtue of the parties' having jointly instructed a land surveyor to determine the same and/or that the Claimants are estopped from denying the same. The Claimants accept that a surveyor was jointly instructed but deny that they agreed to be bound by his determination. That is obviously an issue I shall have to resolve first.

2. There are also peripheral issues relating to nuisance, trespass and harassment. These are an almost inevitable by-product of a boundary dispute, and no serious harm has been caused. Although I am duty bound to deal with these issues which I shall do at the end of this judgment, I do not propose to dwell on them.

3. The Claimants were represented by Mr Charles Auld of Counsel; the Defendants by Mr Charles Irvine of Counsel. I am grateful to them both for their assistance, both in writing and orally.

4. Much of the background and much of the law is uncontroversial and so I have gratefully drawn on both Counsel's skeleton arguments to assist me in setting some of those aspects of the matter out. I have retained references to some of the page numbers in the trial bundle for ease of reference in case this matter goes further.

5. All of the land is now registered:

   a) ST77984 is the Heathers;
   b) ST115845 is a small strip of land lying immediately to the north of the Heathers which the Claimants acquired in 1994 (title being registered in 1995);
   c) ST40779 is Sunnyside.

6. In addition to the lay evidence, there were 4 expert witnesses:

   a) Mark Sanders is the Claimants' expert on the position of the boundary;
   b) Paul Fassam is the Defendants' expert on the position of the boundary;
   c) David Vestey is the Claimants' expert on remedial works required;
   d) Dennis Venn is the Defendants' expert on the required remedial works.

7. The boundary experts were asked at the PTR to plot an agreed A3 plan depicting each of the parties' contended for boundaries; Mr Sanders' "60' Line" (measuring 60' from the western boundary of Sunnyside) together with each of their best estimates as to where the foot of the bank might have originally been. They were unable to do this and produced two A-3 plans for reasons they have given. For the purposes of the narrative of this judgment, however, because the physical plotting is agreed, I may refer to both. They are at pages [15] (Mr Sanders) and [24] Mr Fassam.

Background

8. The Heathers was built in the 1991/1992 on land which had formed part of OS 459 which lies to the west of OS 457. The boundary which needs to be determined is the one between OS 457 (on which Sunnyside was built in the 1950s) and OS 459 on which The Heathers

was built in the 1990s ("the Boundary"). On (or very near) this boundary was a large earth bank ("the Bank") some of which still remains. The historical existence and ownership of the Bank is agreed; its ongoing existence over time, as well as its relevance, is not.

9. OS 457 and OS 459 have been in different ownerships for many years. In 1939 Nailsbourne Farm, which included OS 459, was put up for sale, and a useful plan is at [185]. Lot 13 was OS 459, and the adjoining OS 457 was then owned by a Mr Biffin (or Biffen). The actual sale was effected by a conveyance of 3rd May 1938 with OS 459 (and other land) being conveyed by a John Stancomb to a local farmer, Howard Stone (the grandfather of one of the Claimants' witnesses). The same conveyance records Mr Biffin's ownership of OS 457.

10. By 1958, OS 457 was owned by a Mrs Annie Fox who divided it into 3 plots. By a conveyance made 10th May 1958, Mrs Fox conveyed the eastern plot of OS 457 to Harold and Edith Harris and Sunnyside was then built on that eastern plot of OS 457. By a conveyance of 31st December 1958, Mrs Fox conveyed the western plot of OS 457 to Charles Keswick. Having sold off the eastern and western plots, it appears that Mrs Fox retained the middle plot of OS 457 and built her own bungalow on it.

11. Sunnyside is a bungalow that was originally built in the late 1950s. At some later date (it is presumed, due to its construction) a garage was added to the eastern end of the bungalow itself. This can be seen in the aerial photograph at [189] which also shows the hardstanding or gravel (this is disputed) on which is parked a caravan. This is the area on which the Defendants later built their detached garage. The Defendants bought Sunnyside in April 1992 and, in 1994, the Defendants converted the attached garage to an extension to the bungalow. There is a dispute as to whether the extension occupies the same footprint as the original attached garage. (there are photographs showing this work at [729] and [730]). The Defendants also built a free-standing garage on the south-east of their land (photographs from construction can be seen at [734] and [735]). The free-standing garage can be seen at the bottom right of the photograph on [736]. It is the Claimants' case that part of the Bank was dug away during the building of this garage.

12. The Heathers was built in 1991/1992 and the Claimants bought it in May 1993. In 1994 they bought the further small strip of land lying immediately to the north of the Heathers.

13. The Heathers was built with its own free-standing garage (which can also be seen on the middle right of the photograph on [736] – adjacent to the letter "S" in the right margin). In compliance with the planning permission, a section of the Bank on the Heathers side was dug away in order to construct that garage. The Defendants' case is that the fence which can be seen in that photograph was replaced by the Claimants in about 2011 in a position further west, encroaching onto the Defendants' land. The Claimants say this occurred in 2014 and deny any encroachment.

14. In addition to the Bank, there was also a similar earth bank along the northern boundary of Sunnyside (separating it from the field to the north). On 6/7 October 2016 Mr Camp (with assistance from Mr Crea) removed this bank using a small digger in order to improve his view to the Quantocks. The Claimants allege that on 7th October 2016, when Mr Crea was away from the site, Mr Camp also dug away a further section of the northern end of the Bank between the parties' properties. The Defendants claim that it was Mr Crea who had extended a section of a corrugated iron and stock-proof fencing into a position on their land contrary to an agreement they had had for that area to be a brick wall.

15. The dispute in this part of the Boundary was effectively the start of this dispute. It led to the Claimants inspecting the remainder of the Bank and discovering, they say, that the Defendants had been removing sections of it. It is said that the Defendants have continued to do so by removing more of the Bank behind their detached garage between 2016 and 2018.

16. Another important feature in the dispute is a large stone wall approximately 15 feet high in the south and south-west corner of the Heathers. Its provenance is as follows. The public road lies to the south of both Sunnyside and the Heathers. Between the road and the boundary is a narrow stream. The Heathers' plot was originally the garden to the large farmhouse to the east of the Heathers which was above the level of the stream. It is common ground that the stone wall is very old (at least 19th Century) and has not (save as referred

to below) been tampered with. It was the garden wall of the farm and it used to extend the length of the southern boundary between the farm's garden and the stream and, at its western end, turns north for a few feet. When The Heathers was built the stone wall was broken into to in order to provide the entrance into the property. The builders also extended the wall roughly northwards at each end of the entrance to provide an internal splay. This creates a U-shape towards the south-west corner of The Heathers plot: one limb of the U (the western limb) being the original north running section; the other being the newly formed splay.

17. I use the word "towards" advisedly, because this is a central area of dispute. The Defendants' position (and Mr Auld describes this as being a lynchpin of their case) is that the western limb of the U-shaped portion of the stone wall is a boundary feature as between what was the farm garden and what is now Sunnyside. Accordingly, the Defendants say, whilst the wall belongs to the Claimants, the Boundary at its southern end runs immediately along its western flank. Mr Auld says that, if that is wrong and the true boundary actually lies to the west of that wall, then the rest of the Defendants argument as to the true line of the boundary must also be wrong.

18. The Claimants say that the Defendants cannot be correct because of two particular facets of this case which, when taken together, make it clear that the true boundary lies further to the west of the Stone Wall than its face: the well-known "bank and ditch" presumption and also the documentary title to Sunnyside.

19. In January 2017 the parties agreed to instruct Robert Brown, MRICS of Lewis Brown Chartered Land Surveyors in an attempt to resolve their disputes. He visited the properties and, on 6th February 2017, he produced a report. It is this report which is said by the Defendants to have been binding, which is disputed by the Claimants. It is common ground, however, that this did not result in the matter concluding and each party went on to obtain further reports. Proceedings were then issued in July 2022.

The "Boundary Agreement" and/or Estoppel

The Law

20. I accept Mr Irvine's succinct exposition of the law from which Mr Auld did not detract.

21. Where a boundary is unclear parties are encouraged to amicably resolve the dispute between themselves thereby avoiding significant costs and use of court time. The general presumption, set out by Megarry J in *Neilson v Poole* [1969] 20 P.&C.R. 909 at 918, is that a boundary agreement "*is merely an agreement to demarcate or confirm, not to convey*". Therefore, a boundary agreement to clarify the position of an existing boundary is not a contract for the transfer of land.

22. The agreement is binding without the need to be written or registered and the usual contractual rules apply (see generally Emmet & Farrand on Title, paras. 17.012-17.013 and *Haycocks v Neville* [2007] EWCA Civ 78, para 25). Under a boundary determination agreement, the parties, if bound, are bound by their agreement to resolve the dispute and are consequently obliged to follow any agreement.

23. A boundary agreement may provide for determination *"according to some agreed methodology, such as determination by an expert"* (*Gibson v New* [2021] EWHC 1811, para. 129). It is implicit in Murray J's subsequent approval of the surveyor's conclusions in *Gibson* that the expert is entitled to make inferences based on inspection of the available materials when reaching their conclusion on the position of the boundary (*Gibson*, para. 146).

24. The Courts acknowledge that the documents underlying such agreements are drafted by parties intending to avoid litigation and may not deploy sophisticated drafting and construe them accordingly. Consideration is given to the context, any reference made to the boundary dispute in the agreement, and any reasonably fair inferences (*Gibson*, para. 144).

25. Conduct apparently sanctioning the agreement is also relevant to the determination of the parties' intent (*Gibson*, para. 115). It would not be fair for a party to act in apparent

sanction of an agreement to determine a boundary, only to later reject an outcome that was not to their liking (*Gibson*, para. 115). Such behaviour gives rise to an argument on the basis of estoppel which has been referred to as "*likely, or very likely to succeed*" (*Gibson*, para. 116).

26. In *Gibson*, the judge at first instance had held that where an agreement exists, the court will look to see if the boundary was determined in accordance with the 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*". Murray J did not dissent from this approach and it seems to me to be correct. Accordingly in *Gibson*, as a result of the judge at first instance having found that the surveyor had been instructed to determine the boundary and his report had done so "definitively", Murray J found that the parties were bound by the expert's determination (*Gibson*, paras. 42 and 148).

27. Finally, where a boundary agreement exists or may be said to exist, it should be upheld. As noted by Megarry J in *Neilson* at 920 "*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. I also bear in mind that many boundary agreements are of the most informal nature*".

28. The Defendants' alternate case on the Agreement is based on estoppel. Should the matter arise, the Court is asked to consider the formulation set out in <u>Taylor Fashions Ltd v. Liverpool Victoria Trustees Co Ltd</u> [1982] Q.B. 133 (at para151):

> *"Furthermore the more recent cases indicate, in my judgment, that the application of the <u>Ramsden v. Dyson</u>, L.R. 1 H.L. 129 principle — whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial — requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines*

of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour."

The Facts

29. The Defendants applied for summary judgment on this issue but failed. That decision does not, of course, bind me and I am not aware of the material or arguments before the District Judge. It is likely that it was argued that there might have been some oral evidence which could shed additional light on the issue over and above the documentary evidence. Given the potentially informal nature of a boundary agreement, indeed, because they are not transactional, they could be made orally, this was understandable. It does, however, suggest that the District Judge was not persuaded that the documentary evidence was sufficient on its own.

30. The following correspondence is relevant to this issue.

31. On 6 December 2016, the Claimants wrote to the Defendants a letter which largely dealt with structural concerns regarding the Defendants' alleged excavations. However, they also said towards the end of the letter: "*2. As a surveyor has to be involved to assess the wall we will also ask him to assess the disputed boundaries. We suggest this is done jointly*". On 9 or 11 December 2016 (there is an immaterial dispute about the date because there are two letters), the Defendants wrote to the Claimants suggesting that the parties resolve the boundary as follows: they should:

> "*jointly instruct a Boundary Surveyor (who must be impartial by law) and agree beforehand to accept their result. They would need to be briefed by both parties and provided with all known documents to avoid duplicate costs*". After identifying Lewis Brown Chartered Surveyors, they went on "*if you agree to the above we will contact them and arrange a date. Please confirm as soon as possible so that we may conclude this unfortunate dispute*".

32. The Claimants responded to the Defendants' proposal by letter of 12 December 2016 thus:

> "*we are content that a joint surveyor be appointed to assess the boundary and your suggestion of using Lewis Brown is acceptable. Please proceed and contact them. We will forward any relevant documentation to the surveyor without delay*".

33. The Claimants complied with the correspondence, sending four emails to Mr Brown of Lewis Brown with the subject line "*Boundary dispute between Crea, The Heathers and Camp, Sunnyside*", together containing a total of 32 attachments.

34. The Defendants sent the Claimants a letter dated 14 December 2016 in which they referred to their understanding that the dry-stone wall belonged to the Claimants and could not therefore be a party wall but went on, "*Our upcoming survey may however decide otherwise*".

35. On 12 January 2017, Mr Rob Brown of Lewis Brown sent, by email, a letter to the parties confirming acceptance of a joint instruction. He wrote, "*I now write to confirm my joint appointment to undertake a topographical survey and production of a report and determined boundary plan for the boundary between the two properties*". He proposed a "*course of action*" which included at points 3 and 4, as follows:

> "*3. ... A direct comparison between the alignment of the respective plans can then be carried out, from which I should be able to make observations and comments.*
>
> *4. Once defined, I will prepare a Determined Boundary Plan (with dimensions) that will define the boundary between the two properties*".

The letter included a quote which broke down the fee including the following items:

> "*4. Correlate historic plans with the current features on the ground and prepare a report: £350;*
>
> *5. Production of Determined Boundary Plan: £150*".

36. Mr Brown produced a report dated 6 February 2017 which he enclosed as an attachment to an email dated 10 February 2017 which read:

> "*Please find enclosed the Boundary Report in accordance with your instructions. Once you have had the opportunity to read the report, please confirm your acceptance or otherwise, of my conclusions. As soon as I receive confirmation of acceptance and payment of my fees in full I will prepare and issue the Determined Boundary Plan.*"

37. In the report itself, under the heading "*Client Instructions*" Mr Brown set out:

> "*2.2 I was asked to ascertain the location of the legal boundary between the two properties ...*
>
> *2.3 I am also required to prepare a Determined Boundary Report once the location has been agreed between the two parties*".

38. Mr Brown concluded that the western face of the U-Shaped wall marked the southern end of the boundary and produced two alternatives boundaries, the "*Red Line Boundary*" and the "*Dark Blue Line Boundary*" both of which started at point A, representing his southern tip of the boundary, but which followed slightly different paths going north to points he referred to as G and G1. Point G was marked at the south-western corner of a now-demolished barn (but whose southern cob wall still exists as The Heathers' northern boundary). The Red Line Boundary was Mr Brown's best reproduction of the boundary line that he could achieve from the conveyancing and title plans, and which he said largely followed the general shape of the physical boundary as it was in 2017. Point G1 was his "*best estimate*" of where the western edge of the bank would have met the northern boundary when the land was conveyed in 1903. Having observed that he felt that it would have been the intention for the vendors to have delineated the foot of the bank as the boundary, Mr Brown plotted the Dark Blue Line Boundary as following the same shape as the drystone wall and bank where it was still intact. He identified points B-F in between by reference to physical features on the ground.

39. Mr Brown concluded *inter alia* as follows:

> "*6.3 The exact legal boundary line between A and G cannot be accurately reproduced on the ground today because there have been so many changes to the physical feature(s) that define it, and there is nothing in writing that I am aware of that described it in detail.*
>
> ...
>
> *6.6 As it is not possible, with the evidence to hand, to determine the exact legal boundary, I believe the best solution is to create a new Determined Boundary that agrees with my findings, but provides a practical solution to an unanswerable question, G or G1. This solution is described in 6.20 below.*
>
> ...

6.17 With the information I have available to me, and subject to the mapping scales and tolerances, I believe that the original boundary was intended to be either the RED line or the DARK BLUE line. I cannot be certain which one.

...

6.20 I suggest that such a plan is prepared defining points A-G thus ..." and Mr Brown goes on to describe the route of his proposed boundary as it passes through the lettered points.

40. The Claimants were unhappy with Mr Brown's report. Having spoken with Mr Brown on the telephone on 10 February 2017, they wrote on 15 February 2017 with a detailed critique of what they considered to be its shortcomings. However, they were also quick to state that they did not consider that they had signed up to a binding agreement as to the boundary. The first bullet point in their "*Summary of Issues*" reads, "*We do not believe that we signed up to a determined boundary report being produced at this stage of the process*". They go on to accuse Mr Brown of being biased in favour of the Defendants and complain that there had been no further consultation with them, nor had Mr Brown taken up the offer of an attestation from Mr Stone. As regards the "*Instruction from Clients*" section of the report, the Claimants stated that they had only expected Mr Brown to produce a definitive site plan at this stage which could then be "*assessed by someone expert in boundary law*" so that Mr Brown could then go on to produce a "*Determined Boundary Plan*". The Claimants go on, over 10 closely typed pages of email, to criticise Mr Brown and his methodology.

41. As a result of these communications, Mr Brown wrote to withdraw from acting as "*joint Boundary Expert*" on the basis that his integrity had been called into question by being accused of being biased, to which he took, unsurprisingly, great exception. In his letter, he stated, *inter alia*, "*My role as the Boundary Surveyor is to advise you where I think the Boundary is, in the hope that the boundary can be agreed amicably, and without incurring expensive legal fees*".

42. Mr Irvine submitted that the letters of 9/11 December 2016 constituted an offer from the Defendants, and the Claimants' reply an acceptance of that offer. He pointed out that the Claimants had not rejected any part of the offer and therefore must have agreed with the whole. He pointed to Mr Crea's cross-examination in which he had said that he would have

accepted the report had it been as he had expected. At no point had the Claimants said that they would not accept the report, Mr Irvine submitted, and they had participated fully in the process without ever hinting at such a stance. Accordingly, Mr Irvine said, the parties entered into an agreement whereby they agreed to be bound by whatever result the jointly instructed boundary surveyor found. Alternatively, the Claimants were estopped from denying that the report was binding.

43. So far as the report itself was concerned, Mr Irvine submitted that it was not marked "draft" as alleged in the Defence and Counterclaim, nor was there any hint in it that it was a draft. The instructions were to "*ascertain*" the boundary. The reference to a subsequent agreement by the parties was, he submitted, a mere formality: the parties had already agreed to agree i.e. to be bound. The only wrinkle in the report was the position of G and G1 – addressed at ¶4.23 and was a difference of 90cm. The report went on to set out a definitive route for the boundary as described in ¶6.20 and plotted on the plan at [460] and this, submitted Mr Irvine, clearly resolved the dichotomy of possible legal boundaries he had identified. ¶6.6 clearly states that it was not possible, in Mr Brown's opinion, to determine the exact legal boundary but then concludes with a solution which agrees with his "*findings*". Mr Irvine submitted that *Gibson* was authority for the proposition that the appointed surveyor would use his skill and experience to determine the position of the boundary: that was the whole purpose of appointing him. Mr Irvine emphasised that ¶6.19 which introduces the resolution of the issue at ¶6.20 states that "*The boundary ... should now be defined by the creation of the Determined Boundary Plan*" (emphasis added).

44. Mr Irvine submitted that by applying the authority of *Gibson*, this was clearly an agreement to instruct Mr Brown to determine the boundary. The Claimants are trying cynically to avoid the result despite having gone along with the proposal because they don't like it. Their subjective intention is irrelevant: the court must assess the agreement objectively and take into account the policy as referred to in *Gibson* of upholding such agreements because of their beneficial effect on neighbour disputes.

45. For his part, Mr Auld was dismissive of the proposition of a concluded agreement for two reasons: first, there was no agreement; secondly that Mr Brown in any event had not in fact determined the boundary.

46. Dealing with the first of those lines of attack, Mr Auld submitted that the parties had not agreed to be bound. The correspondence chain began with the Claimants' proposal to have the boundary "*assessed*" at the same time as other surveyors were looking at the structural side of things. It was notable, he said, that the Claimants' response to the Defendant's letter of 9/11 December 2016 made reference to that word "*assess*", and thus the clear inference was that they were proceeding along the line of *their* proposal, not that of the Defendants, and thus there was no acceptance of any condition that the parties would be bound by Mr Brown's findings.

47. Mr Auld submitted that the Defendants had not pleaded that the contract was formed partly by conduct, but that nevertheless extrinsic evidence was admissible to assist in ascertaining whether a contract had been formed. He relied on *Chitty on Contracts* 35th Ed. ¶16-040, which refers to the ability to rely on extrinsic evidence in relation to the true nature of the agreement reached. It was clear, said Mr Auld, that the Claimants did not believe that they had agreed to be bound by Mr Brown's report: the documentary evidence (in the form of their email shows an immediate and consistent reaction when it had been suggested.

48. Mr Brown's report, submitted Mr Auld, was but the first stage in the process of settling the dispute. This is reflected, he said, in the covering email dated 10 February 2017 from Mr Brown enclosing the report set out above at ¶36.

49. Mr Auld also relied on ¶¶2.2 and 2.3 of the report itself (see above); ¶6.17 which makes it clear, he said, that Mr Brown could not be certain of the "*original*" (i.e. legal) boundary and the word he uses in concluding at ¶6.20 is "*suggest*" which indicates that it is not intended to be conclusive.

50. Further and in any event, Mr Auld submitted, even if the parties had agreed that Mr Brown should determine the boundary, there simply had been no such determination by him: he had explicitly stated in ¶6.17 that he had been unable to ascertain the legal boundary, and

was only able to make a suggestion, which he did at ¶6.20: "*I suggest that* ...". Furthermore, even his suggested solution was beyond his instructions: Point D lies to the east of both the Red Line and the Dark Blue Line on his plan, which means that he must have been deciding that the Defendants had acquired land between Point D by way of adverse possession, whichever line was correct, a question he was not instructed nor qualified to answer.

51. In order to adopt the line proposed by Mr Brown, submitted Mr Auld, one has to cherry-pick between the two suggested boundaries, meaning adverse possession would have to be imposed on both sides, which is not permissible.

52. As regards the Claimants' 10-page response, Mr Auld accepted that it was robust, but said that it was surprising that Mr Brown had not responded to the substantive points made by Mr and Mrs Crea, and that undermined the importance of the report, he said. This was a very different case to that of *Gibson.*

53. So far as estoppel was concerned, Mr Auld submitted that there was no representation made by the Claimants, and no detriment suffered by the Defendants: they had never paid for the report, only the data for the plan (which was used by Mr Sanders and accepted as accurate by Mr Fassam), and a submission that the detriment lay in the Defendants' involvement with the process was not pleaded and was in any event *de minimis*.

<u>Discussion and Conclusion on a Boundary Agreement</u>

<u>Agreement?</u>

54. I first have to decide whether the parties came to any sort of agreement prior to Mr Brown reporting and, if so, what was that agreement.

55. Assuming Mr Auld is correct that extrinsic evidence is permitted on the question of whether a contract was concluded, I shall set out below Mr Crea's evidence as given in court. His witness statement was curiously silent on the point of whether an agreement was reached to be bound by the findings of Mr Brown. He deals with the falling out with Mr Camp over the positioning of the replacement fence in his witness statement, but does not refer to the

subsequent sequence of correspondence upon which the Defendants rely in support of the agreement.

56. As regards the correspondence between 6 and 12 December 2016, Mr Irvine suggested to Mr Crea that there was no mention that he would not accept the outcome as determined by Mr Brown, to which Mr Crea stated that there was similarly no mention of him agreeing to it. It was put to him that his letter of 12 December was clearly an acceptance of the Defendants' offer, to which he replied, "*No – it's the acceptance of a joint surveyor and Mr Brown as that surveyor*", and he denied that the ordinary language of his letter was that he would accept the result. He accepted that he had sent 13 documents to Mr Brown and that had been in compliance with the 9/11 December letter from the Defendants, and that he had mentioned the Bank without having mentioned the ditch at that time. He later asserted that he was from agricultural stock and knew the hedge and ditch presumption well. He accepted that he had sent an additional document, and that he had not mentioned at that time that he was not proposing to accept the outcome. He replied to the effect that he knew this was a RICS surveyor and under their rules the first report would be a draft report, in respect of which comments would be invited. He did not state his source of his knowledge of the RICS rules for this type of process (he is not a surveyor himself), and no contemporaneous reference was made to them. He also did not appreciate (as at 6 December 2016) that there was a material distinction between a land surveyor and a building surveyor – this revealed by his suggestion that the same surveyor carry out a structural assessment as well as the boundary assessment. He was asked a little later as to which rules he was referring, and he said that he "*did not know precisely*". I find on the balance of probabilities that he has familiarised himself with the relevant rules since, and that he did not have an expectation, at least pursuant to any RICS rules, that the report would be an interim report.

57. Mr Crea was taken to a further photograph that he had supplied to Mr Brown and, upon being asked whether this was further information to input into the process, Mr Crea said that he "*would have accepted the report had it been as he had expected*" but "*I didn't <u>know</u> we weren't going to accept it. We were not <u>bound</u> to accept it.*"

58. He was taken through Mr Brown's letter of 12 January 2017, and accepted that it made reference to a report and a "*Defined Boundary Plan*". He was taken to his email of 22 January giving more detail about Mr Stone's evidence that he recalled there being a continuous bank and enclosing two further photographs. He accepted that there was nothing in the email limiting the scope of Mr Brown's report.

59. Turning to the report itself, Mr Irvine took Mr Crea through it and suggested that there was nothing in it to suggest it being a draft, to which Mr Crea said that Mr Brown had asked for comments. He did not identify where that invitation was to be found. As regards his 10-page response, Mr Crea stated that he had not been intending to question Mr Brown's integrity, rather the fact that he seemed to have accepted all of Mr Camp's "*verbal assertions*", and ignored "*facts*" supplied by Mr Crea. It was suggested that he just wanted someone to agree with him, to which Mr Crea said that what he had wanted was someone to carry out the report properly: they were detailed questions that he should have dealt with. If he had answered the questions instead of walking off, Mr Crea said that they (the Claimants) would have had confidence in him. He was asked about another expert he had instructed and dismissed, a Mr Michael Shepherd of Shattock Associates, and Mr Crea explained how he had also not listened to the facts and had produced contradictory accounts based on Mr Camp's assertions.

60. For his part, Mr Camp said that in his mind, there was definitely an agreement to be bound by Mr Brown's findings. He said that the words "*we are content*" in the Claimants' letter of 12 December 2016 in reply to theirs said "*quite a lot*". He said that there was nothing that said "*we are not prepared to be bound*" and that Mr Crea would have said as much if he had disagreed with anything that the Defendants had proposed.

61. He had contacted Mr Brown and had accepted the report, he said, and when he found that the Claimants had not, he considered them to be dishonourable, hence the reference to that word in his letter of 18 February 2017 which refers to a written <u>and</u> verbal agreement, which I assume refers to the discussions which led to the December correspondence.

62. Insofar as extrinsic evidence is permitted in this situation (and there was little detailed submission on the point), Mr Crea did not say anything in his witness statement about his intentions as regards the correspondence leading to the alleged agreement which, as I say, is curious. Mr Crea did not assert in cross-examination that he had ever raised an oral objection to being bound by Mr Brown's putative decision with either Mr Camp or Mr Brown, but was clear that neither had he intimated the opposite. There was not a great deal more in the oral evidence that takes the matter beyond the correspondence save that I accept Mr Camp's assessment of Mr Crea's nature in this regard. Mr Crea is clearly a man of strong opinions, and I Mr Camp said of Mr Crea that if he objects to things, he is likely to say so. Indeed, Mr Crea was candidly described by Mr Auld in his closing submissions as being "*forceful and opinionated who saw things as black or white ... but with a very strong sense of right and wrong*". I accept that assessment, too. He is also very particular, having an eye for detail.

63. I accept that Mr Crea used the word "*assess*" the boundary in his 12 December 2016 letter, which reflects the word he used in his 6 December letter. However, that 6 December letter is dealing largely with structural matters and a structural survey, but does contain the sentence "*We are committed to minimizing costs for all concerned and we propose <u>resolving the situation</u> as follows*" (my emphasis). The use of the word 'resolve' clearly suggests that the Creas had in mind some form of ADR which was taken up by the Camps in their reply. The 9/11 December letter from the Defendants begins by also referring to the need for a low-cost solution and is concerned entirely with the boundary (as pointed out by Mr Crea in his letter of 12 December) and sets out the conditions there mentioned. Mr Crea's reply does not demur from the suggestion made by the Defendants at all. In fact he gives every indication of accepting them. The use of the words "*Please proceed and contact them*" can only be a reference to proceeding with what the Defendants have proposed, particularly since the suggested way forward is conditional upon the Claimants "*agree[ing] to the above*". I have little doubt in my mind that, had Mr Crea not intended to be bound by the conditions in the 9/11 December letter, he would have made that abundantly clear in his

reply. The parties were at loggerheads at the time, and every ounce of disagreement was being identified and communicated between them.

64. The combination of these aspects of the correspondence, and the extrinsic evidence insofar as it goes, leads me to the clear conclusion that it was the intention of both parties to be bound by Mr Brown's decision.

65. In any event, standing back and looking at the chain of correspondence objectively, with the facts known to the parties at the time, *viz* a dispute over a boundary that both parties knew would be extremely expensive if it went to litigation, which expense both had signalled that they wanted to avoid, I find that the letter of 12 December 2016 was an acceptance of the Defendants' offer in the 9/11 December letter.

66. I accept Mr Irvine's submission that it was irrelevant whether Mr Brown felt that there was scope for acceptance or otherwise of his decision: the parties had agreed to agree with the report's conclusions. Mr Brown may or may not have known about that. The report was not expressed as being in draft, nor was it couched in terms of a preliminary view upon which further submissions could be made or documents submitted.

67. I deal with the nature of the agreement concurrently with examining whether it is binding on the parties.

Is the report binding on the parties?

68. The Defence to Counterclaim limits itself to (i) the fact of an agreement, which was denied, and (ii) a suggestion that Mr Brown's report was a "draft". The pleadings refer to a communication from Mr Brown dated 20 June 2017 to which I was not taken at trial and in respect of which no cross-examination was undertaken. There is no alternative pleaded case that Mr Brown went beyond his remit or that he did not abide by the parameters of the agreement; that he took irrelevant matters into account and/or failed to take relevant matters into account, what in another jurisdiction might be termed as "*ultra vires*". Furthermore, there is no pleaded case that the agreement was one which went beyond a boundary agreement and was thus caught by s2 of the Law of Property (Miscellaneous Provisions)

Act 1989, i.e. that it was intended as a dispositive or transactional agreement and thus needed to be in writing.

69. Taking first the pleaded allegation that the report was a "draft", the first (and arguably only) issue must be finality. Mr Brown refers to the likelihood that the OS maps suggest a physical feature dating back to at least 1904 and he uses that to form the "shape" of the boundary. The clear inference from ¶¶5.13-5.15 is that the Dark Blue Line was an attempt to plot the western edge of the bank using the same shape as the OS map line. Mr Brown is very candid in ¶6.3:

> "*The exact legal boundary line between A and G cannot be accurately reproduced on the ground today because there have been so many changes to the physical feature(s) that define it, and there is nothing in writing that I am aware of that describes it in detail*".

Mr Brown goes on to refer to the possible encroachments and possible legal consequences.

70. Mr Brown, again candidly, states at ¶6.6 that on the evidence available he found it impossible to determine the "*exact legal boundary*" and that the best solution was to create a "*new Determined Boundary that <u>agrees with my findings</u>, but finds a practical solution to an unanswered question, G or G1. This solution is described in 6.20 below*" (my emphasis). At 6.17, he opines that the "*original*" boundary was probably one of the two lines on the Overlay Plan (at [460]) "*subject to the mapping scales and tolerances*" but that he cannot be certain which of those were intended.

71. Mr Brown concludes at ¶6.19: "*The boundary ... <u>should now be defined</u> by the creation of a Determined Boundary Plan. This would fix points A-G inclusively by dimensions and descriptions*" (my emphasis). I accept that in ¶6.20 Mr Brown goes on to use the word "suggest", but that seems to me to relate to the way forward rather than importing any indecision or lack of finality evinced in the preceding paragraph.

72. I therefore reject Mr Auld's submission that there was a lack of finality in Mr Brown's report: he concluded that the boundary should be demarcated as described in ¶6.20 and the Overlay Plan.

73. I therefore find that there was a binding agreement between the parties as pleaded, and that ¶6.20 of Mr Brown's report together with the Overlay Plan at [460] is a binding demarcation of the boundary between The Heathers and Sunnyside. That finding is enough to dispose of the pleaded Defence to Counterclaim.

74. However, in case I am wrong on the limits to the Defence to Counterclaim, I will address Mr Auld's (unpleaded) submissions that the report is flawed for adhering to neither of the possible lines (the Dark Blue and the Red) that Mr Brown had identified as the probable originally intended boundary, and further that his conclusions (a) cannot therefore represent the legal boundary, necessarily leaving it for the Court to decide and (b) it impermissibly incorporates answers to unresolved questions of easements and adverse possession i.e. it went beyond the agreement.

75. It is true that, what I shall call the "Defined Boundary" (Mr Brown's solution described in ¶6.20), does not align with either of his Red or Dark Blue Lines. However, those lines must be put into context: Mr Brown also stated that it was impossible to ascertain the legal boundary on the evidence that he had available to him (and that was limited to that provided by the parties, as per their agreement). This renders the rest of his conclusions as what might be termed as "doing the best with what he had", a phrase well-known to litigation lawyers, i.e. he was trying to resolve an unknown as best as he could. Furthermore, his conclusions as to the Red and Dark Blue Lines were references to <u>intentions</u> back in 1904 and he was not able to say (because the physical features had changed so much since) whether those intentions had been successfully implemented at the time.

76. In order to deal with Mr Auld's submissions, it is thus necessary to ascertain (i) what it was the parties had asked Mr Brown to do and (ii) whether his ¶6.20 accords with their agreement so as to bind the parties. If that was to secure what is known as a "boundary agreement" (which is a term of art in law), then was what Mr Brown produced capable of being a boundary agreement, even though it was expert-defined rather than one delineated by the parties direct, and even though it might incorporate a transfer of land? The answers to these questions are bound up together and I shall address them compositely.

77. Mr Irvine relied heavily on *Gibson* in support of his case. *Gibson* was an appeal from HHJ Pugh to Murray J heard in 2021. In that case the parties had entered into mediation which had produced a written agreement which set out that they had benefitted from the mediation experience and 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*". It included a mechanism for choosing a surveyor and then provided that "*Both parties will accept the result of the RICS Surveyor and the dispute will come to an end*". Pausing there, it is notable that precise task of the surveyor was not defined in the written agreement. In the current case, even on Mr and Mrs Crea's case, Mr Brown's job was to "*assess the boundary*".

78. Returning to *Gibson*, there were immaterial (for these purposes) disputes about the appointment and qualifications of the surveyor, but a report was produced which the Defendants did not like. They (as here) telephoned the surveyor to raise the issues they felt had not been addressed, and followed that up with an email (as here). Further immaterial (for these purposes) issues arose around (i) a second report done by a different surveyor which neither party relied upon as it was clearly outside the agreement and (ii) some effective pleadings points. HHJ Pugh had found that the findings of the surveyor were binding on the parties.

79. Most of the Grounds of Appeal were in relation to those issues I have described as immaterial for these purposes. However, Ground 3 was based on s2 of the Law of Property (Miscellaneous Provisions) Act, the crux of which states:

> (1) *A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.*

80. HHJ Pugh had found that the agreement and the subsequent report amounted to a boundary agreement which, through earlier authority (to which I shall turn), was not struck down by that provision. Murray J summed up Counsel for the Appellant's arguments on this issue, thus (¶120):

"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."*

81. Murray J summarised Counsel for the Respondent's arguments on this aspect thus (¶126):

"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."

82. Having found that Ground 3 had been disposed of by virtue of an admission in written submissions, Murray J nevertheless went on to observe at ¶129,

"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."

83. This passage implicitly, if not explicitly, indicates an approval of HHJ Pugh's approach in his judgment (as well as Counsel's "concessions" noted therein), which he had set out earlier at ¶¶58-60:

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.

It is notable that Murray J repeatedly uses the expression "demarcate an uncertain boundary".

84. Whilst these citations relate specifically to s2 of the 1989 Act which is not directly engaged in this case, they are useful in assessing what is important in identifying what is a boundary agreement.

85. Murray J repeated HHJ Pugh's question that "can it be said that the relevant act by the surveyor (or the parties) was an act to demarcate an uncertain boundary?". He referred to boundary agreements as "originally defined in *Neilson v Poole* , *Joyce v Rigolli* and *Yeates v Line*" (*supra*).

86. In *Joyce v Rigolli*, the Court of Appeal first had to deal with the Judge's finding that he was unable to ascertain the precise legal boundary on the evidence before him. They dismissed that part of the appeal on the merits. Although it is no part of the court's job in this case to

make a finding on whether Mr Brown was correct in so concluding, it is interesting to note the similarity of the dilemma that the parties and the court there found itself in to Mr Brown's situation: one in which it was impossible to ascertain the legal boundary from the available evidence.

87. Dealing with the nature of a boundary agreement, Arden LJ (as she then was) cited (at ¶27) the well-known *dicta of Megarry J* in *Neilson*:

> *"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.*
>
> *...*
>
> *There may, of course, be cases in which it is uncertain or doubtful whether a boundary agreement will convey any land. Thus, the configuration of the boundary may suggest that land will be conveyed, without demonstrating this beyond doubt. In such a case I would hold the agreement not registrable. Clause C(iv) applies to a 'contract ... to convey,' and not to a contract which leaves it uncertain whether or not any land is to be conveyed. In short, in my judgment, a boundary agreement is presumed not to convey land; the presumption may be rebutted, but unless it is, the agreement is not registrable; and to point to circumstances of doubt or uncertainty is not to rebut the presumption."*

88. Arden LJ went on at ¶28 to endorse Meggar J's approach to policy:

> *28.. Megarry J then commenced his conclusion with a passage the opening sentence of which stresses the policy of the law in promoting boundary agreements. This is a passage which has been used as a steer by courts dealing with boundary agreements in many cases since Neilson v Poole . Megarry J held:—*
>
> > *"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. I also bear in mind that many boundary agreements are of the most informal nature, and that the penalty of failure to register an estate contract is that the agreement will be void against a purchaser. These more general conditions, I think, support me in the view that I have expressed. In my judgment, no boundary agreement should be held to be registrable unless it can be seen with reasonable clarity to be an agreement to convey ..."*

89. The question arises when dealing with a boundary agreement which seeks to have the boundary determined by a surveyor as opposed to the parties themselves, whose intention is relevant as to the dispositive or otherwise intent behind the agreement. In my judgment, the relevant intent must be that of the parties, not the surveyor, which will, if possible, be reflected in his or her instructions or the agreement itself.

90. What did the Claimants and the Defendants, when they agreed in December 2016, agree to; and did they have in mind that the purpose of their agreement was to convey land as and where appropriate? I have already identified that there is limited evidence to assess the scope of the agreement and the instructions. In *Gibson*, Murray J was faced with a similar situation. He said at ¶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.*

91. For the avoidance of doubt, I should refer to Mr Brown's use of the word "new" in his expression "*new Determined Boundary*" at ¶6.6 of his report. I take this to be as referring to the boundary being newly *determined* rather than Mr Brown *creating* a new boundary. He is using the language of the Land Registration Act and is referring to registering a determined boundary for the first time. This is emphasised by the lack of capitalisation of the word "new". Throughout the report Mr Brown expresses himself as trying to ascertain the boundary from the original conveyances.

92. In my judgment, what the parties agreed to, insofar as can be identified from the correspondence as reflected in the report, was for Mr Brown to "assess" the boundary and, as per the Defendants' letter of 9/11 December, be bound by his findings. There is no suggestion that they intended for Mr Brown to carry out a balancing exercise or provide for a tit-for-tat swap of the land, akin to the first of Megarry J's two categories of boundary agreements. Instead, Mr Brown was to assess the boundary to the best of his ability, which

is what he did on the evidence that was provided to him, given his finding that it was impossible to ascertain the legal boundary on that basis (as in *Rigolli* itself).

93. I do not find that Mr Brown went beyond that agreement. Whilst he undoubtedly discussed the possibility that there could be issues of easements and adverse possession, he was careful to point out that such issues were ones in respect of which he was not qualified. It is important, in my judgment, that he did not make reference to, still less rely on, any notion of adverse possession or easement when finding that the Defined Boundary to the north of the Sunnyside bungalow should run to the west of both his Red and Dark Blue Lines. That part of the Defined Boundary is considerably further to the west of the Red Line than Point D is to the east of his Red Line, which is a positioned mirrored in relation to the Dark Blue Line. This suggests to me that he was simply doing his best to "assess" where he thought the boundary should be. As Arden LJ pithily put in *Rigolli* at ¶29:

> *The parties' purpose was to fix the boundary at about the place where they thought it ought to have been.*

That, I find, was what the parties intended to ask Mr Brown to do when they agreed as they did in 2016, and that was what Mr Brown tried to, and did, achieve with his report.

94. Alternatively, to adopt the phraseology adopted by Murray J, I ask myself, was this an uncertain boundary, or was it a boundary that merely needed plotting? As has been identified by the conflicting reports of Mr Sanders and Mr Fassam, as well as the previously instructed experts, the boundary was clearly uncertain and needed demarcating. Mr Brown was asked to undertake that task, which he did.

95. Even if Mr Brown did rely on adverse possession to come to his conclusions, I am not convinced that that would in itself render the agreement either invalid as something other than a boundary agreement or a finding which exceeded the terms of the parties' agreement.

96. On the former point, such a finding does not involve an intention in the agreement appointing the surveyor to transfer land or make the purpose of the agreement: it is merely one of the possibilities arising from the exercise of the surveyor fixing the boundary where he thought it ought to be. Furthermore, (but this is rather theoretical) adverse possession

under the old litigation did not involve any transfer of land; and under the new regime it involves amending the register. I cannot believe that a boundary agreement would fall to be assessed as such based on these niceties, but it is true to say that neither involves a transfer of land.

97. On the latter point, if the parties were content that the surveyor should take account of all potentially relevant considerations, a finding based on the possibility of adverse possession would not take the matter outside that agreement. To my mind, the most important factor would be the acceptance by the parties in the agreement that the surveyor could take into account all factors that he or she felt was relevant. No such express term was found in the instant agreement, but in my judgment it is implicit in the generalised instruction given to Mr Brown. On the balance of probabilities, it seems to me that the parties would, had they been asked as at 12 December 2016, whether Mr Brown could take all matters into account that he considered relevant as an independent expert assessor of the boundary, they would have said 'yes'.

98. For the sake of completeness, I should add that I have considered whether Mr Brown's reference to the parties getting further advice on the question of easements or adverse possession affects my findings on finality, and I have concluded that they do not. This goes back to Mr Irvine's submission that he may have been unaware that the parties had agreed to agree the boundary in accordance with his findings.

<u>Conclusion on the Boundary Agreement</u>

99. Even taking into account the wider attack on the existence and effect of the boundary agreement as advanced so ably by Mr Auld, I repeat my findings above that the parties are bound by the report of Mr Brown and his findings in relation to the boundary at ¶6.20 of his report.

<u>Estoppel</u>

100. It is not necessary for me to decide this issue in light of the foregoing. I have considered whether I can go onto make a finding in case I am wrong on the boundary agreement. I

have given some thought to this but, as presently advised, I cannot envisage a scenario in which the boundary agreement is non-existent or is not binding but where the ingredients for an estoppel (promise; detrimental reliance; unconscionable conduct in withdrawal) continue to exist. The arguments over the boundary agreement are not in relation to consideration which is where an estoppel usually becomes relevant. Much would therefore depend on the reason for the boundary agreement failing. Without that reason being identified, I cannot go on to decide this issue in the alternative.

101. For the sake of completeness, however, I accept the submission made by Mr Auld that the Defendants did not pay for Mr Brown's report: the invoice they paid was one in respect of the data only in order for it to be given to Mr Fassam. In do not accept, however, that Mr Camp had attempted to mislead the court in this regard: I accept his evidence that he had been under a genuine misapprehension that he had paid for the report, and was taken by surprise when challenged about it in cross-examination. In terms of detriment, that would leave the participation of the Defendants in the process and I leave it for others to decide, depending on why the boundary agreement point failed, whether that was sufficient to establish an estoppel.

<u>Trespass and Harassment</u>

<u>Fences/Walls</u>

102. So far as trespass is concerned, Mr Brown's Defined Boundary is his best effort at defining where the boundary has always been, despite the fact that he refers to it as being a "new Determined Boundary" (see ¶6.6). As I have stated above, I take the word "new" to refer to the defined nature of the boundary rather than going behind the common intention of boundary agreements to declare where the boundary has been historically.

103. As such, there has been no actionable trespass in terms of the panel fencing and/or the block wall.

104. This was not an issue raised or dealt with at trial, and so I would be content to take short written submissions on the point if Counsel think it expedient.

Nuisance, trespass and/or harassment by behaviour

105. Such allegations are pleaded only in the Counterclaim, though I fully accept that Mr and Mrs Crea allege in their witness statements that they have been the victims of aggression by the Defendants, even though they don't claim damages therefore. I commend them for their proportionate approach.

106. As so often with neighbour disputes, both parties have, since relations deteriorated in autumn 2016, been perceiving each other's acts and omissions as being directed maliciously at each other. They have perceived various situations through the prism of the dispute and come to believe what they have said about each other. I don't consider either couple as deliberately trying to mislead the court.

107. Turning to the alleged acts as pleaded, these were pleaded as a 'non-exhaustive' list, but I shall deal with each as matters of fact. The numbered paragraphs are references are to the sub-paragraphs of ¶36 of the Defence and Counterclaim.

1. Mr Crea denied stopping any car visiting the Defendants save for one possible occasion when he was returning from a walk and he had thought it was his MP and wanted to say hello. He said the car was chauffer driven. That is a plausible explanation with a ring of truth about it. Mr Irvine submitted that this was important in the context of an injunction because the Defendants want to sell their house. I find it difficult to believe that the Claimants would do anything to prevent the Defendants from moving house (and vice versa) as it would be completely self-defeating. I found Mr Crea to be credible in this respect, and this allegation is not proved by the Defendants.

2. This was denied by Mr Crea. His denial is corroborated by the tone of the letter from the estate agent to Mr Crea which is not that of someone who had been shouted at the day before. I find this allegation not proved.

3. The hoe incident was witnessed by Mr Vestey, the Claimants' structural expert. His evidence was that Mr Crea had a hoe with him but for a valid purpose, namely

for pushing brambles. He could not recall Mr Crea holding the hoe horizontally as alleged by Mr Camp, but things did get "heated", he said. Asked if he had had to hold Mr Crea back, Mr Vestey said, I simply stepped in between them and told them to go in. He stated that it had been Mr Camp that had come out from within his property. After the incident, Mr Camp had allowed Mr Vestey onto Sunnyside immediately afterwards. Because Mr Vestey is largely independent, I find that Mr Camp is mistaken in his belief that Mr Crea raised the hoe to his throat. I accept, too, that the letter sent by the police afterwards is a generic letter sent to a subject of a complaint in neighbour disputes without any finding of fact and that it does not therefore advance the evidence. This claim also fails.

4. – 8. These are repeated allegations of Mr Crea staring at or into the Defendants' property, either from the roof of the Claimants' motorhome (parked adjacent to the boundary fence). Mr Crea describes these allegations as "absurd". He stated that the view across to the Quantock Hills is across the Defendants' garden and that he would look out on it when on top of his motorhome cleaning the roof which, he said, he did quite often. That, combined with the fact that he wears glasses which need constant adjusting might suggest that he was staring when he had no intent nor interest in doing so. He accepted on one occasion he had seen movement in the Defendants' garden about 20 metres away and that he had peered towards it, though not maliciously. Given the parties' poor relations and Mr Crea's rather direct approach, I can understand that seeing him looking in one's direction from an elevated position might be construed as malicious, but I do not find that it was on the balance of probabilities: I accept Mr Crea's explanation.

9. The incident in the hedge/brambles is in my judgment a classic example of neighbours in this position misconstruing each other's behaviour. Mr Crea accepts that he might have taken Mrs Camp by surprise when he appeared, but insisted that he maintained his composure and was not rude to Mrs Camp. In my judgment this is a case of 'six of one and a half dozen of the other'.

10. Mr Crea accepted taking two (and not the 20+ alleged) photographs of the Defendants' property but, he said for the purpose of the boundary dispute, and they were not photographs of Mr and Mrs Camp. He had supplied them to his solicitors. Thereafter he had erected CCTV but had asked his contractors to block out any of the camera angle that covered the Defendants' garden, he said. This was done after the Defendants complained, but that complaint came many months after the CCTV had been put up, and there had been plenty of opportunities for them to claim prior to that if they had had genuine concerns, he said. The Defendants could not possibly know how many photographs were taken, and I accept Mr Crea's evidence that he took two. I am not satisfied that the photographs were taken other than in the course of these proceedings, and they were not sufficient to amount to a course of behaviour to amount to harassment in any event. I accept that Mr Crea has instructed his installation contractors to black out the relevant parts of the CCTV scope of vision which includes the Defendants' garden. This claim also fails.

108. I therefore find that there has been no harassment or nuisance beyond the vicissitudes of life as referred to in *Clerk & Lindsell on Tort 24th Ed.* at 14-20 (as cited by Mr Auld), and no damages will be awarded in respect of that claim.

Conclusion on Issues

109. I therefore find for the Defendants on the Counterclaim as regards the boundary agreement but dismiss the balance of the Counterclaim. It follows that the claim is dismissed.

110. I conclude this section of the judgment to express my regret that the parties did not propose that the issue of the boundary agreement was not determined as a preliminary issue. The advantages to both parties were clear, whichever way that preliminary issue would have been resolved.

111. I will invite the parties to agree a way forward, failing which I will hear submissions from Counsel on the issue.

Counterfactual

112. In case I am wrong about the boundary agreement, I ought to, in summary, address one or two factual issues which may assist any appeal court in deciding what to do if an appeal is successful and/or narrow the issues on any re-trial.

113. Whilst I have come to my conclusions on the expert evidence and as to which expert's approach I prefer, I do not consider it appropriate at this stage to set out those conclusions. It would add significantly to (probably double) the length of this judgment due to the fundamentally different approaches the experts adopted, which judgment has already been delayed by a heavy workload, and is already lengthy given the limited number of issues it addresses. I do not consider that that would be a proportionate use of already stretched judicial resources to do so when I have reached the conclusions that I have on the boundary agreement.

114. If, on any appeal, the appeal court wishes to remit the matter to me to address the expert evidence in a judgment, whether before or after an appeal, I will of course be prepared to do so.

Mr Stone

115. Mr David Stone was the grandchild of the farmer who had purchased what was then Nailsbourne Farm in 1939, Howard Stone. He recalled the bank running the entire length of the north/south boundary between what was then the farm's garden/kitchen garden and Mr Biffin's land part of which became Sunnyside. His witness statement referred to there being a shallow ditch on the western side of the bank which he had suggested in his statement was 750cm wide. He had in 2017 sent an email to Mr Crea suggesting that, whilst he could recall the bank, he could not recall a ditch. He described in his live evidence (as set out in a 2018 email and his statement) that his wife had reminded him of the difficulties he had had pruning back the roses which were growing out from the farm garden. He had had to do this from the western side: these difficulties were caused by the fact that there was a ditch as well as a bank to negotiate to get to them. It meant that he had quite a

scramble to get up to them. He recalled having been "sent in" to prune the roses which was a job he did not relish as a result of these difficulties.

116. His statement described a hedge on top of the Bank which, in cross-examination he said was not continuous although the bank had been, and that had allowed him to see through to observe the ditch and other matters.

117. He produced an aerial photograph from the 1980s which he said showed the bank and a panel fence in the rear of Sunnyside which appeared to be running to the corner of the then attached garage. This accorded with his recollection, he said. He thought that the new extension was built on a greater footing than the original garage it replaced.

118. He referred to there being banks, hedges and ditches in the area which were similar to the one in question and, because the ditches were not intended as drainage ditches (they were created by removing soil to build up the bank), they would often not be maintained and could be ploughed in or just gradually cease to be ditches over time.

119. The measurement of 750cm width was put to him as being excessive, and he immediately responded that that was obviously a mistake: he had meant 75cm or a bit less, 18".

120. He differed from Mr Crea's memory of the timing of the conversation they had had regarding the boundary, stating that it had been after the Claimants had moved into The Heathers, not before.

121. Mr Stone gave reasons why he felt that Ms Stokes (a witness for the Defendants who lived across the lane and was a child at the relevant time of her evidence) might be wrong: she was wrong about the extent of the orchard and the angle from which she would have viewed the bank and ditch may have occluded the ditch.

122. I found Mr Stone to be a convincing and solid witness. His evidence about his wife reminding him of the difficulties he had had with the roses, and the way he described being "sent in" to see to them was naturally relayed and had the ring of truth about it. He was calm and straightforward in cross-examination and gave convincing explanations of how things were in the area and how things were done. The reference to 750cm in his witness

statement was clearly an error: it would be preposterous to maintain that there was a 7.5 metre ditch. However, he was not sufficiently certain of the positioning of the fence in relation to the corner of the Defendants' pre-converted garage to found a finding to that effect.

123. I prefer his evidence to that of Ms Stokes.

The Garage/Extension to Sunnyside

124. Mr Camp's evidence is that he built the extension on the same footprint as the garage. He said that he built up the extension from the original garage which can be seen by the gauge of the bricks which are imperial to the height of the old garage and metric above the garage line.

125. I saw this distinction when I had the original site visit and on a second when I attended after the trial on my own.

126. There are photographs of the construction of the extension in Mr Fassam's report [730 photographs D, E and F) as well as those referred to above, which provide strong evidence in support of Mr Camp's oral evidence (assuming, and no-one has suggested otherwise,) that the garage in that picture is the original garage). This is supported by the estate agent's particulars from the Defendants' purchase of Sunnyside which strongly suggest that the garage in situ when they made that purchase was the same as the one in photograph D of those referred to above.

127. Accordingly, on the balance of probabilities, I accept Mr Camp's evidence on that issue. The photographs are not sufficiently clear, however, to determine whether there was access around the side of the garage at that time.

Replacement Fence at points E-F

128. Mr Crea replaced this section of fencing in 2014 (which I accept in light of the invoice). Mr Crea states that so far as he is aware the new fence posts to the south of this section were placed in the same position as the fence he had had erected in 1994. He was not present when this occurred. He was, however, called by his fencer when he says Mr Camp (who he

says was "supervising" the works) insisted that the three posts at the northern end were directed further into The Heathers, and became aggressive engaging Mr Crea in a "chest-bump". As a result, Mr Crea says he capitulated in order to keep the peace.

129. Mr Camp states that he arrived on the scene after the fencer had started cementing in the southern posts, which he had done to the west of the old concrete foundations, leaving them in place. He says that he did not react in order to keep the peace. He is silent as to what happened to the northern three posts.

130. The shape of this section of the fence certainly 'bulges' towards Sunnyside before heading back towards The Heathers. This suggests an intervention as the fence was being erected. I note that the new posts were 4 inches square instead of 3 inches in order to make the fence stronger. This suggests that it was far easier for the fencer to start afresh with new foundations for the posts rather than digging out the old ones. Having heard Mr Crea and Mr Camp on the issue, and taking account of the shape of the fence and the lack of a positive assertion by Mr Crea in his witness statement, on the balance of probabilities I find that the 2014 fence did stray westward, and Mr Camp did insist that the final three posts were inserted further to the east than the line from the southern run would have suggested.

131. This, of course, says nothing about the position of the boundary itself.

Construction of the 1939 and 1958 Conveyances

132. Mr Auld has invited me to conclude on the construction of the 1939 and 1958 conveyances. These are pure matters of law which an appeal court could approach afresh without any findings from me if it found it necessary to do so. I am concerned not to go behind my decision not to give my assessment of the experts' opinions in this case which I have concluded is the appropriate course to take, subject to what I have said above regarding a direction to do so from an appeal court. I accordingly decline the invitation to construe the conveyances because a conclusion is not needed in light of my finding in relation to the boundary agreement.

Consequential Matters

133. I would be grateful if the parties could attempt to agree an order arising from this judgment, failing which I will ask my clerk to list a further short hearing to deal with outstanding matters.

HHJ Berkley

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