



Neutral Citation Number: [2025] EWHC 2638 (KB)

Appeal Ref: KA-2024-BRS-000028

IN THE HIGH COURT OF JUSTICE
HIGH COURT APPEAL CENTRE BRISTOL
ON APPEAL FROM THE COUNTY COURT AT TAUNTON
(HIS HONOUR JUDGE BERKLEY)

Bristol Civil & Family Justice Centre
2 Redcliff Street, Bristol BS1 6GR

Date: 15 October 2025

Before :

THE HONOURABLE MR JUSTICE PEPPERALL

Between :

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

Claimants /
Appellants

- and -

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

Defendants /
Respondents

Charles Auld (instructed by **Taunton Solicitors**) for the **Appellants**
Charles Irvine (instructed by **Ashfords LLP**) for the **Respondents**

Hearing date: 24 June 2025

Approved Judgment

This judgment was handed down remotely at 2.30pm on 15 October 2025
by circulation to the parties by email and by release to the National Archives.

THE HONOURABLE MR JUSTICE PEPPERALL:

1. This appeal concerns a boundary dispute between Peter and Helen Crea, who own The Heathers in Nailsbourne, Taunton, and Philip and Christine Camp, who own the neighbouring property Sunnyside. The case was tried by His Honour Judge Berkley sitting in the County Court at Taunton. By his reserved judgment handed down on 1 August 2024, Judge Berkley found that the parties had entered into a binding agreement that they would accept the boundary as determined by their jointly instructed surveyor.
2. Mr and Mrs Crea now appeal with permission granted by Sheldon J. The central issue in their appeal is whether the trial judge was right to find that the parties were bound by the surveyor's report. Grounds 1-5 address that issue. Should those grounds succeed, the Creas argue by ground 6 that the judge should have determined that the true boundary ran along what was referred to in this dispute (by reference to a 1958 conveyance) as the "60-foot line".

BOUNDARY AGREEMENTS

3. Contracts for the disposition of an interest in land must be made in writing and signed by the parties: s.2 of the Law Reform (Miscellaneous Provisions) Act 1989. Thus, a boundary agreement that purports to convey land cannot be enforced unless it complies with the section. Very often, however, the purpose of a boundary agreement is not to convey land but to confirm the boundary line between two neighbouring properties. Such agreements are valid and enforceable even if they don't comply with the provisions of the section.
4. The seminal case in this field is the decision of Megarry J in Neilson v. Poole (1969) 20 P.&C.R. 909. The judge identified two types of boundary agreement at p.618:

"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."
5. In Neilson, Megarry J found that the agreed boundary coincided with the proper construction of conveyancing documents. He added, at p.619, that even if that had not been the case then the agreement would still not have been registrable under the Land Charges Act 1925 because it was not a "contract to convey" but rather a contract "merely to demarcate and confirm".
6. Neilson has been repeatedly approved by the Court of Appeal, most recently earlier this year in White v. Alder [2025] EWCA Civ 392, [2025] 2 P.&C.TR. DG11. Neilson directly concerned the 1925 Act, but in Joyce v. Rigolli [2004] EWCA Civ 79, [2004] 1 P.&C.R. DG22, Arden LJ held by parity of reasoning that an agreement fixing the boundary such that it might have

encroached on one party's land with the consequence that a small parcel of land was given up was nevertheless an agreement merely to demarcate the boundary. Since the parties' purpose had been to fix the boundary rather than to sell or dispose of land, it was not subject to s.2 of the 1989 Act.

7. In Neilson, Megarry J described a boundary agreement at p.919 as "in its nature, an act of peace, quieting strife and averting litigation, and so is to be favoured by the law". Endorsing this view in White, Asplin LJ added, at [59], that a boundary demarcation agreement was "an act of peace that should be encouraged" and that avoids the uncertainty and risk of litigation. Such an agreement does not undermine the formalities for the transfer of land because its purpose is not to effect such a transfer. Megarry J observed that many boundary agreements are of the "most informal nature". Indeed, the boundary agreements in both Neilson and Joyce had been entirely oral.
8. The primary issue in this case is not, however, whether a proven informal boundary agreement should be enforced but whether the parties entered into a binding agreement as to the demarcation of their boundary at all. While public policy rightly favours the enforcement of boundary agreements that avert ruinously expensive and disproportionate litigation and have the potential to restore good relations between neighbours, such policy cannot extend to finding such an agreement where it does not exist. Indeed, Norris J stressed this point in Bradley v. Heslin [2014] EWHC 3267 (Ch), at [51]:

"Third, although properly proved agreements or understandings are favoured by the law some caution must be exercised. Simple acts of neighbourliness should not ripen into legal rights vested in the beneficiary of the actor's kindness, or amount to an abandonment of some legal right already vested in the actor."
9. That said, sitting in the Court of Appeal in Stephenson v. Johnson, unreported, 12 July 2000, Bennett J rejected at [41]-[42] a submission that the law should not strive to find boundary agreements. In both that case and Burns v. Morton [2000] 1 W.L.R. 347, the Court of Appeal found there to have been implied agreements as to the true boundary.

THE PARTIES' PLEADED CASES

10. Mr and Mrs Crea commenced proceedings against the Camps seeking, among other relief, a declaration as to the true boundary between their neighbouring properties. Their case was put on two bases:
 - 10.1 First, they relied upon the existing physical features in the vicinity of the boundary. They particularly invited the court to infer that the bank on their land had been created when a ditch (which no longer exists) was dug. They argued that the court should therefore presume, in accordance with the so-called "bank and ditch rule", that the ditch was dug on the Creas' land such that the true boundary ran along the edge of where the ditch nearest to the Camps' land would have been, and that the excavated soil was piled up on the Creas' land to create the bank.
 - 10.2 Secondly, they relied on a conveyance of the Camps' land dated 10 May 1958 that stated that it had a frontage to the main road of "sixty feet or thereabouts".
11. While the Creas asserted that part of the Camps' bungalow and garage had been built on their land, they did not seek the removal of such buildings. Rather they invited the court to declare a

boundary line that adjusted the true boundary to allow such encroachments to remain but to order the payment of damages in lieu of the parts of their land that had been built upon.

12. By their Defence and Counterclaim, Mr and Mrs Camp pleaded that the boundary had been determined in accordance with a boundary agreement that the parties would accept the boundary as determined by their jointly instructed surveyor. They pleaded the agreement as follows:
 - 12.1 First, they relied on their letter offering to instruct a surveyor jointly with the Creas on the basis that they would agree beforehand to accept the result of his work. They proposed using Lewis Brown Chartered Surveyors. There are two copies of this letter before the court; one dated 9 December 2016 and the other dated 11 December. Nothing turns on that and I will simply refer to this as the letter of 9/11 December 2016.
 - 12.2 Secondly, they relied on the Creas' letter of 12 December 2016 by which they asserted that the Creas had accepted their offer.
 - 12.3 Thirdly, they pleaded that Lewis Brown was jointly instructed and that the firm thereafter prepared a report and plan dated 6 February 2017.
 - 12.4 At paragraph 10 of their Defence and Counterclaim, they pleaded:

“Accordingly, by reason of the correspondence between the parties in December 2016 ... and the joint instruction, the parties entered into a boundary agreement on the terms set out in the Lewis Brown Report ...”
13. The Camps pleaded that the Creas were therefore bound by the report and boundary as determined within it and further that they were estopped from denying the boundary as recorded in the agreement. In the alternative, they asserted that there was no evidence of any ditch between the two properties, denied the applicability of the bank and ditch presumption, asserted that the true boundary was largely represented on the ground by the present boundary structures, and denied that the 60-foot line was helpful given that in 1958 the westerly boundary had not been delineated and the measurement would have been taken in a westerly direction from the boundary with the Creas' land.
14. By their Reply and Defence to Counterclaim, Mr and Mrs Crea denied that there was any agreement or that they had represented that they would observe and agree any findings made by Lewis Brown. They pleaded that the Lewis Brown report was prepared in draft and that the work was never invoiced or paid for.

THE FACTS

15. The idea of instructing a surveyor was in fact first proposed by the Creas. By their letter dated 6 December 2016, Mr and Mrs Crea wrote:

“We remain committed to minimizing costs for all concerned and we propose resolving the situation as follows:

 1. We need a surveyor to examine our wall foundations to determine what remedial action needs to be taken. To do this he will need to enter your property. This could affect both of us as if remedial actions are required these could involve work close to both your garage and our wall. To minimize cost we propose that we jointly appoint a surveyor.
 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 ...”

16. Mr and Mrs Camp's letter of 9/11 December 2016 was written in reply to that letter. They wrote:

"Despite best efforts on our part we seem to be unable to even discuss an amicable low-cost solution to the definition of our boundary.

We are advised that the best way forward is to 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.

You have suggested that we share this cost, it is estimated at £700-£1,000 taking between 2 and 3 days depending on complexity.

We understand that Lewis Brown Chartered Surveyors at Wellington will provide this type of service and if you agree to the above we will contact them to arrange a date.

Would you confirm with any dates when you will be unavailable as soon as possible so that we may conclude this unfortunate dispute."

17. Mr and Mrs Crea responded further by their letter of 12 December 2016:

"Thank you for your letter received today. 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.

You have not however addressed the issue of appointing a joint surveyor to assess if any remedial action is needed on our wall foundations. This will need to be a different surveyor from that appointed to assess the boundary dispute. Do you wish to be jointly involved with this or shall we proceed with appointing a surveyor."

18. Mr Brown was duly instructed. Although no copy of the letter of instruction is before the court, Mr Brown confirmed his instructions by letter dated 12 January 2017. He explained his proposed methodology. Broadly, he would start by surveying the physical boundary between the two properties and accurately recording on a plan all physical features along the boundary at the date of his survey. He would then consider the historical maps and plans in the parties' title deeds in order to overlay these documents on to the physical features present along the boundary. By such process he said that he would be able to make "observations and comments" and that once the boundary had been "defined", he would prepare a "determined boundary plan (with dimensions) that will define the boundary between the two properties".

19. Mr Brown proceeded with the work and produced a report dated 6 February 2017. His report started by stating his joint instruction and then explained:

"2.2 I was asked to ascertain the location of the legal boundary between the two properties forming the eastern boundary of Sunnyside and the western boundary of The Heathers.

2.3 I am also required to prepare a Determined Boundary Report once the location has been agreed between the two parties."

20. As previously indicated, Mr Brown surveyed the site and considered the conveyancing and physical evidence. He concluded that the two end points of the boundary line were defined by the stone walls at points A and G of his plan. He observed, at paragraph 5.2 of his report:

“Between these two well-defined points there have been many changes and modifications to the physical boundary, so defining the definitive boundary becomes more difficult.”

21. He concluded:

“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.

6.4 There have been material changes on and adjacent to the boundary over the years that could be considered encroachments. Looking at the RED and DARK BLUE lines these could possibly include:

6.4.1 The block wall, when built in 1958/9 may well have encroached the boundary, however it is probable that this area now has a prescriptive easement (see 6.7 below).

6.4.2 The very eastern end of Sunnyside straddles the DARK BLUE line.

6.4.3 The western edge of The Heathers’ Garage straddles the RED line.

6.4.4 The Shed and Raised Beds in the Heathers straddle the RED line.

6.5 It would be ridiculous to suggest that either neighbour should demolish parts of permanent buildings or structures that have been in place for such a long time.

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.

6.18 The shape of the two lines are identical and have been taken from a relevant 1:2500 scale OS Map. The only difference between them is the northern boundary point, G or G1?

6.19 The boundary between Sunnyside and The Heathers should now be defined by the creation of a Determined Boundary Plan. This would fix Points A - G inclusively by dimensions and by descriptions.

6.20 I suggest that such a plan is prepared defining points A to G thus:

6.20.1 Point A - the southwestern corner of the stone wall.

6.20.2 Point B - the point at which the stone wall abuts the base of the dry-stone wall built into the bank.

6.20.3 Points B to C - To follow the bottom of the western side of the bank.

6.20.4 Points C to D to E - To follow the eastern edge of the block retaining wall.

6.20.5 Points E to F - To follow the centreline of the close boarded fence in its current location.

6.20.6 Point F - Defined by the end of the close boarded fence.

6.20.7Pointe (sic) F - G (via G1) defined by the corrugated metal fence in its current location to a point G1, measured as 0.90m from the western end of the stone wall.”

22. Mr Brown sent his report to the parties under cover of his email of 10 February 2017. He wrote:
- “Please find attached 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.”
23. Mr and Mrs Crea were unhappy with Mr Brown’s report. By an email dated 15 February 2017, they set out what the judge described as a detailed critique of his report. They alleged bias and asserted that they had not “signed up” to a binding agreement as to the boundary. They asserted that they had only expected Mr Brown to produce a definitive site plan at which stage the boundary could be assessed by “someone expert in boundary law” after which Mr Brown could produce the determined boundary plan. In view of that attack, Mr Brown felt that he had no choice other than to withdraw as the parties’ jointly instructed boundary expert.

THE JUDGMENT

24. By his judgment, Judge Berkley cited the general presumption identified by Megarry J in Neilson that a boundary agreement is “merely an agreement to demarcate or confirm, not to convey” land. He observed that a boundary agreement may provide for expert determination as in Gibson v. New [2021] EWHC 1811 (QB). He said that such agreements drafted by parties intending to avoid litigation may not deploy sophisticated drafting and that conduct apparently sanctioning the agreement may be relevant to the determination of the parties’ intent. He said that it would not be fair for a party to act in “apparent sanction” of a boundary agreement only later to reject an outcome that was not to their liking. Relying again on Gibson, he said that such conduct would give rise to an arguable estoppel.
25. The judge then considered the exchange of correspondence from December 2016. He observed that the Creas acted in accordance with the correspondence in sending emails to Mr Brown of Lewis Brown.
26. Judge Berkley assumed that Charles Auld, who appeared for the Creas at trial as he does in this appeal, was correct to argue that extrinsic evidence was admissible on the question of whether a contract was concluded. He therefore considered Mr Crea’s evidence. He noted that his witness statement had been “curiously silent” on the question of whether agreement had been reached. He briefly recounted the cross-examination as to whether he had accepted the offer made by the Camps and Mr Crea’s evidence (which the judge rejected) that he had expected the surveyor to prepare a draft report on which comments would be invited in accordance with the rules of the Royal Institute of Chartered Surveyors. He noted Mr Crea’s assertion that he had not been bound to accept Mr Brown’s report.
27. The judge then considered Mr Camp’s evidence that, to his mind, there was definitely an agreement to be bound by Mr Brown’s findings. He accepted Mr Camp’s assessment that Mr Crea was a man of strong opinions and noted Mr Auld’s own candid description of his client as a forceful and opinionated man who saw things as black or white with a very strong sense of right and wrong. He added that Mr Crea is very particular and has an eye for detail.

28. The judge then turned back to the December correspondence. He noted the Creas' reference to their commitment to minimising costs and seeking to resolve the dispute in their letter of 6 December. He inferred that they had some form of alternative dispute resolution in mind. He noted that the Camps' letter of 9/11 December likewise referred to the need to find a low-cost solution. He observed that Mr Crea's reply dated 12 December did not demur from the Camps' proposals and gave every indication of accepting them. The judge added:
- “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 that time, and every ounce of disagreement was being identified and communicated between them.”
29. The judge then concluded at paragraph 64 of his judgment that it was the clear intention of all parties to be bound by Mr Brown's decision and that the Creas' letter of 12 December accepted the Camps' offer in their 9/11 December letter. The judge found that it was irrelevant whether Mr Brown felt that there remained scope for not accepting his decision as to the boundary. He added, at paragraph 65:
- “... 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.”
30. The judge then noted that, although argued at trial, the Creas did not plead any alternative case that, even if there had been a binding agreement, Mr Brown had exceeded his remit or that the agreement went beyond a boundary agreement such that it was subject to s.2 of the 1989 Act. The judge rejected Mr Auld's argument that there was a lack of finality in Mr Brown's report and found that Mr Brown had concluded that the boundary should be demarcated as described at paragraph 6.20 of the report.
31. The judge therefore found that there was a binding boundary agreement. Although that finding was sufficient to dispose of the claim, the judge considered and rejected in the alternative Mr Auld's unpleaded arguments that the report was flawed. The judge did not consider it necessary to deal with the estoppel argument.

THE GROUNDS OF APPEAL

32. Mr and Mrs Crea have permission to argue six of their original seven grounds of appeal. The remaining grounds are as follows:
- 32.1 Ground 1: That the judge was wrong to find that the Creas' letter of 12 December 2016 accepted the Camps' offer and should have found that no agreement had been concluded.
- 32.2 Ground 2: That if there was an agreement, the judge was wrong to find that the agreement was that Mr Brown should conclusively define the boundary.
- 32.3 Ground 3: That if there was an agreement that Mr Brown should define the boundary, the judge should have found that he did not do so.
- 32.4 Ground 4: That in any event the judge was wrong to find that the line identified at paragraph 6.20 of the report could be in accordance with such agreement.

- 32.5 Ground 5: That the decision was unjust because there was a serious procedural irregularity in that the judge ignored the evidence given in Mr Crea's first witness statement.
- 32.6 Ground 6: That the judge was wrong to refuse to construe the 1939 and 1958 conveyances and should have held that the boundary ran along the 60-foot line.

GROUND 1 & 2

THE ARGUMENT

33. It is convenient to take these grounds together. Mr Auld argues these grounds solely by reference to the December correspondence. Relying on Chitty on Contracts, 35th Ed at para. 4-032, he submits that an acceptance is a final and unqualified expression of assent to the terms of an offer. He argues that the Creas' letter of 12 December did not agree to accept the result of Lewis Brown's work and expressly stated that the firm should be instructed to "assess" (and not "determine") the boundary. He criticises the judge for determining whether there was a binding agreement before deciding what the terms of the offer were. Further, he argues that if there was an agreement, it was not that Lewis Brown would conclusively define the boundary. He contends for the following analysis of the correspondence:
- 33.1 First, the Creas made an offer by their letter of 6 December to appoint a jointly instructed surveyor to assess the boundary.
- 33.2 Secondly, the Camps accepted that offer by their letter of 9/11 December and proposed new terms that the parties should appoint Lewis Brown as their joint surveyor and agree to accept the result.
- 33.3 Thirdly, the Creas responded by their letter of 12 December accepting the appointment of Lewis Brown but did not agree to the proposed additional term that they would agree in advance to the result.
34. Mr Auld argues that if the court can consider the terms of the instructions as set out at paragraphs 2.2-2.3 of Mr Brown's report then it is clear that he was simply to assess or ascertain the boundary and report back to the parties. Thus, he submits, it was only once the parties agreed the position that the surveyor would draw up a determined boundary plan which could be registered at HM Land Registry. Such construction is, Mr Auld submits, consistent with Mr Brown's understanding as reflected in his email of 10 February 2017.
35. Further, Mr Auld criticises the judge for taking into account his conclusion that Mr Crea would have made it abundantly clear if he had not intended to be bound by the surveyor's work and for considering the parties' subjective intentions.
36. Charles Irvine, who appears for Mr and Mrs Camp as he did at trial, responds that the question of whether a contract was formed is a mixed question of law and fact. He argues that the Creas' letter of 12 December was an unequivocal acceptance of his clients' offer. He argues that an acceptance does not need to mirror exactly the words of the offer and that the question for the court is whether the thrust of the Creas' letter was an acceptance of the offer. He argues that this is not a case of continuing negotiations and that Mr Brown's later understanding of the parties' agreement is irrelevant. Mr Irvine submits that the court is entitled to consider extrinsic evidence as to the facts known to the parties and that would include the judge's unassailable finding as Mr Crea's character.

37. Further, Mr Irvine argues that there was no basis for finding a term requiring the parties' further input after receipt of the report.

DISCUSSION

38. Issues as to whether the parties entered into a binding agreement and, if so, on what terms raise questions of fact and law. An appeal court will not interfere with a trial judge's findings of fact save where the findings are perverse. The appeal court is, however, in as good a position as the trial judge to determine the ultimate questions of law as to whether on the facts as found by the judge there was a binding agreement and, if so, upon what terms.
39. The alleged agreement in this case did not of itself fix the boundary but rather is said to have bound the parties to accept the expert determination of their boundary by a jointly instructed surveyor from Lewis Brown. In that there are parallels with Gibson. Notwithstanding the fact that the law looks on boundary agreements with favour, I do not consider that there is any special rule in favour of construing the parties' correspondence in this case as giving rise to a binding agreement to submit to expert determination of their boundary. Such question must be addressed on conventional contractual principles by reference to the parties' letters and any other admissible evidence.
40. By their letter of 6 December 2016, Mr and Mrs Crea identified the impasse that had been reached in their negotiations. They asserted confidence in their own position but then indicated that they remained committed to minimising costs for both families. It was against that comment that they then proposed a means by which the situation should be resolved. Such solution was in two parts: the appointment of a surveyor to determine the required remedial works to the foundations of their wall and separately a proposal that the surveyor also be asked jointly to "assess the disputed boundaries".
41. Such joint instruction would not of itself resolve the dispute unless the parties accepted the surveyor's conclusions. The letter of 6 December did not, however, go as far as to propose that the parties should agree in advance of seeing the report that they would be bound by its conclusions.
42. By their letter of 9/11 December 2016, Mr and Mrs Camp made no proposals in respect of appointing a jointly instructed expert to survey the alleged damage to the wall but focused instead on the dispute as to the true boundary line. They said that they sought to identify a low-cost solution to the definition of the boundary and proposed the instruction of an impartial boundary surveyor on terms that they agreed in advance to accept the result of the surveyor's work. To that end they proposed that both sides should be able to brief the surveyor and provide him with all known documents. They proposed that the cost be shared and that Lewis Brown should be appointed to provide this service.
43. Properly analysed, this was in my judgment an acceptance of the Creas' proposal that a jointly instructed expert should be appointed to assess the true boundary. While Mr Auld advanced a semantic argument seeking to distinguish between the Creas' proposal that an expert be instructed to "assess" the boundary and the Camps' suggestion that such instruction could be a low-cost solution to the "definition" of the boundary, I do not accept that there is merit in the distinction that he sought to draw. As well as accepting that element of the proposal, Mr and Mrs Camp proposed four further matters:

- 43.1 First, they proposed that the parties should agree beforehand that they would accept the result of the joint instruction.
- 43.2 Secondly, they proposed a methodology by which both sides could make representations to and provide relevant documents to the surveyor.
- 43.3 Thirdly, they formally proposed that they should agree to share the costs of the instruction. Such term was implicit in the Creas' earlier letter but had not been made explicit.
- 43.4 Fourthly, they proposed that their jointly instructed surveyor should be Lewis Brown.
44. The letter concluded by stating that Mr and Mrs Camp would contact Lewis Brown to arrange a date if the Creas agreed to these terms.
45. In my judgment, this was a counter-offer; namely a response to the Creas' original offer which, while accepting the kernel of the original offer in respect of the boundary, proposed some additional terms as to the proposed joint instruction and implicitly rejected the offer to agree a joint instruction for the purposes of surveying the alleged damage to the wall.
46. By their further letter of 12 December, Mr and Mrs Crea plainly agreed the joint instruction of Lewis Brown and asked the Camps to proceed with contacting the firm. They confirmed that they were sending their documents as suggested by the Camps. They did not press their original suggestion that the parties should also agree to the damage survey. The real question is therefore whether their letter accepted the Camps' counteroffer that the parties should agree beforehand to be bound by the surveyor's report, or whether the Creas' silence on that point indicates that such term was not accepted.
47. In addressing this question, I take into account the obvious and immediate factual matrix:
- 47.1 First, the Creas and the Camps were in dispute as to the true boundary between their properties. By December 2016, negotiations between them had failed to settle their dispute.
- 47.2 Secondly, absent agreement, their dispute could ultimately end up in litigation. The parties recognised (as they each observed in their December correspondence) that such litigation could be very expensive and expressed a desire to avoid such costs.
- 47.3 Thirdly, the parties recognised in their correspondence that the costs of litigation could be avoided by jointly instructing an independent surveyor to resolve the issue of their boundary.
48. Chitty defines an acceptance in contract law, at para. 4-032, as "a final and unqualified expression of assent, whether by words or by conduct, to the terms of an offer." Plainly a communication which attempts to vary the terms of the offer or which introduces a new term or only partially accepts the offer cannot amount to an acceptance and may instead constitute a counteroffer.
49. Chitty then states the following principle at paragraph 4-039:
- "On the other hand, statements that are not intended to vary the terms of the offer, or to add new terms, do not disqualify the acceptance, even where they do not precisely match the words of the offer."

50. That statement of principle in an earlier edition of Chitty was approved by the Court of Appeal in Midgulf International Ltd v. Groupe Chimique Tunisien [2010] EWCA Civ 66, [2010] 2 Lloyd's Rep. 543, at [45]. In Midgulf, a fax was sent by a commercial party purporting to confirm the purchase of 23,000 tonnes of sulphur "at the following conditions". The fax then set out the principal commercial conditions stipulated in the offer. The court held that the fax's failure to set out all of the conditions in the offer did not mean that it should be considered a counteroffer rather than an acceptance of GCT's offer. Toulson LJ added, again at [45]:

"As the judge acknowledged, the document did not invite a further discussion of terms, but appeared to treat a contract as having been concluded. In my view the most reasonable interpretation is that this was indeed its effect."

51. Applying these principles to this appeal, the Creas' letter did not purport to introduce any new term. While there was no express acceptance of the terms of the Camps' counteroffer, equally no qualification was expressed. In my judgment, the Creas' failure to address the term that the parties should be bound by the expert's determination of the boundary, whether by either expressly accepting or rejecting such term, is not of itself decisive. The issue is whether on an objective reading of this exchange of correspondence against the factual matrix already identified, the parties entered into a binding agreement on the terms of the Camps' counteroffer. In assessing that question, I take into account the fact that the Creas' letter did not invite further discussion of the terms and appeared to treat the parties' agreement as having been concluded. As in Midgulf, the most reasonable interpretation of that fact was that the parties had indeed entered into a binding agreement.

52. Taking all of these matters into account, in my judgment, the judge was right to find that the parties entered into an agreement that they would jointly instruct Lewis Brown on terms that they would be bound by the firm's conclusion as to the boundary between their properties. Such agreement was essentially an agreement to submit their dispute to expert determination.

53. Although the 1989 Act is not pleaded by way of defence to the counterclaim, I consider, for completeness, that the principal purpose of the agreement was to define the boundary and not to dispose of land. Accordingly, the agreement was not subject to the requirement of signed writing imposed by s.2 of the Act.

54. In reaching this conclusion, I reject the argument that something can be made of Mr Crea's failure to say in terms that he rejected the proposal that the parties should be bound by the expert's report. Although the judge weighed this in the scales, such arguments always cut both ways and the conventional approach to contractual construction is not to place weight on "why not say it" arguments. As Stuart-Smith LJ pithily put in European Film Bonds A/S v. Lotus Holdings LLC [2021] EWCA Civ 807, at [52]:

"The question for the court is what the contract entered into by the parties means, not whether it could have been better or differently expressed: see Lewison, The Interpretation of Contracts (7th Ed.), at [2.113]-[2.116]."

55. Further, although the parties both led and cross-examined evidence as to the parties' actual intentions, I consider that such evidence of subjective intention was inadmissible on the question of law as to whether upon a proper construction of their correspondence set against the factual matrix their objective intention was to be bound by Lewis Brown's work.

56. Like the judge, I conclude that Mr Brown's incomplete understanding of the true bargain that had already been concluded between the parties (as reflected in his recitation of his instructions and his subsequent suggestions that his findings were subject to the parties' approval) cannot have any bearing on the questions of whether the parties reached a concluded agreement and, if so, on what terms.
57. I therefore reject grounds 1 and 2.

GROUND 3 & 4

THE ARGUMENT

58. Again, it is convenient to take these grounds together. Mr Auld relies on Mr Brown's email sent on 20 June 2017 in which he wrote that he had never finalised his report because communications broke down and described his own report as essentially a draft that had neither been invoiced nor paid for.
59. Further, Mr Auld argues that Mr Brown did not define the boundary. Rather, he found it impossible to identify the true legal boundary and concluded that it was in one of two places. Yet he did not define either as the boundary line and simply suggested a pragmatic solution to create a new boundary on the ground. Absent a term of the agreement that, if he could not identify the true boundary, Mr Brown could simply do the best that he could, Mr Auld argues that the parties could not be bound.
60. Mr Irvine responds that there was nothing to indicate that the report was draft at the time of its preparation. Further, he submits that there was no pleaded case that Mr Brown failed to comply with his instructions, or that the boundary was newly created rather than newly determined.

DISCUSSION

61. Mr Brown's report was not marked as draft. Upon the expert's mistaken understanding of the parties' bargain, he appears to have thought that the report needed to be agreed before it bound the parties, but neither that misunderstanding nor the later dispute that arose once the Creas rejected the report and alleged that Mr Brown had been biased, are reasons to find that the report did not define the boundary. Equally the fact that he might have originally intended to redraw his findings as a definitive determined boundary plan did not prevent the report from providing a binding answer to the boundary.
62. The parties' agreed joint expert did not find it easy to identify the true boundary line. Mr Brown said in terms that it was not possible to determine the exact legal boundary and that he "believed" that the original boundary had been intended to be either the blue or the red line that he drew on his plan. Both parties had, however, erected buildings that straddled those lines and he considered it "ridiculous" to suggest that either should now be required to demolish buildings. Rather than simply concede defeat, he proposed a boundary line that agreed with his findings and which provided what he described as a "practical solution to an unanswerable question".

63. Mr Auld is right to submit that Mr Brown did not purport to determine the exact legal boundary but rather that he proposed a boundary line that was the best he could do in view of the limited evidence. Had the parties agreed only that Mr Brown should be instructed to identify the precise legal boundary, it might be that that would not suffice. Their agreement was, however, that Mr Brown should assess or define their boundary. Even though Mr Brown concluded that it was not possible to identify the true legal boundary, he did define a boundary line between their neighbouring properties. The parties having so agreed, I conclude that the judge was right to find that they were indeed bound by Mr Brown's assessment. I am fortified in that conclusion by consideration of the fact that the law favours the enforcement of boundary agreements.
64. Although Mr Brown had intended to prepare a determined boundary plan, the preparation of such plan was not a condition precedent to the parties' being bound by his assessment that the boundary lay along the line marked A, B, C, D, E, F, G1 and G.

GROUND 5

THE ARGUMENT

65. By his evidence in chief, Mr Crea confirmed the truth of his main witness statement in the proceedings but also his shorter statement made in March 2023 in opposition to the Camps' applications for summary judgment and to strike out the claim. Mr Auld argues that the judge overlooked this evidence since he observed at paragraph 29 of his judgment that he was not aware of the material or arguments that had been placed before the district judge on the summary judgment application. Further, since this material was not cross-examined, he argues that the judge ought to have accepted the evidence. When in argument I asked him what turned on the judge's failure to consider material that was largely inadmissible, Mr Auld responded that it was a moot point but that the statement set out part of the admissible factual matrix. He did not elaborate as to what evidence that was both admissible and relevant to the judge's findings was thereby overlooked.
66. Mr Irvine responds that the statement consisted of inadmissible evidence as to Mr Crea's subjective intentions, an unpleaded case about representations, a further unpleaded case that there was a term of any contract arising from the RICS guidance (on which in any event Mr Crea was cross-examined and the judge made findings of fact), and argument. Any failure to take such "evidence" into account was, he submits, immaterial.

DISCUSSION

67. Mr Crea's first witness statement dealt with the following areas:
- 67.1 Paragraph 1: The absence of evidence as to when the Camps' garage was built.
- 67.2 Paragraphs 2-3: The alleged extensions to the eastern side of the Camps' bungalow since 1985.
- 67.3 Paragraphs 5: Mr Crea's subjective intention in agreeing to instruct Mr Brown and his assertion that he "knew" from the RICS Guidance, and Mr Brown confirmed, that he and his wife would have an opportunity to consider Mr Brown's draft report before it was finalised.
- 67.4 Paragraphs 6-7: Mr Crea's observations on Mr Brown's acknowledgment of his instructions and his conclusion in his report that it was not possible to determine the exact legal boundary.

- 67.5 Paragraphs 8-12: Mr Crea's assertion that Mr Brown's report remained in draft, the questions that they raised on receipt of the draft and the payment for the report.
- 67.6 Paragraphs 13-23: The instruction of Shattock Associates and the correspondence between that firm and the Camps.
- 67.7 Paragraph 24: The instruction of Acorn Rural Property Consultants.
- 67.8 Paragraphs 25-29: Mr Crea's arguments as to whether there was a binding boundary agreement.
- 67.9 Paragraphs 30-34: Mr Crea's response to the argument that he and his wife had been guilty of "expert shopping".
- 67.10 Paragraph 35: Mr Crea's response to the argument that the Creas' Particulars of Claim were defective.
- 67.11 Paragraphs 36-37: Mr Crea's arguments as to the bank and ditch presumption.
- 67.12 Paragraphs 38-40: Pulling together the evidence and arguments in his statement, Mr Crea argued that the applications to strike out or enter summary judgment in favour of the Camps should be refused with costs.
68. While it is unfortunate that the judge appears to have overlooked the fact that this statement was put in evidence, much of it was argument which had no place in a witness statement. In so far as it contained evidence, I consider that such evidence was variously inadmissible evidence of the Creas' subjective intentions; admissible evidence that was irrelevant to the pleaded cases and, in particular, the questions of whether the parties entered into a binding agreement for expert determination and were bound by Mr Brown's report; or evidence that was in any event given again in Mr Crea's witness statement for trial or challenged by cross-examination and considered by the judge. If the judge did indeed overlook the March 2023 statement it did not, in my judgment, give rise to any material irregularity.
69. Accordingly, I reject ground 5.

GROUND 6

70. This ground does not arise in view of my conclusion that the parties were bound by Mr Brown's determination of the boundary.

OUTCOME

71. For these reasons, I therefore dismiss this appeal.