



Neutral Citation Number: [2025] EWCA Civ 392

Case No: CA 2023 002203

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT CHELMSFORD
His Honour Judge Duddridge
Claim No. G01CM878

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 April 2025

Before:

LADY JUSTICE ASPLIN
LORD JUSTICE ZACAROLI
and
SIR LAUNCELOT HENDERSON

Between:

DARREN WHITE

- and -
MICHAEL and SHEILA ALDER

Appellant/
Defendant

Respondents/
Claimants

Paul Wilmshurst (by Direct Access) for the Appellant
Brynmor Adams and Tanita Cross (instructed by Stephensons Solicitors LLP) for the
Respondents

Hearing date: 26 March 2025

Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties
or their representatives by e-mail and by release to the National Archives.

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Lady Justice Asplin:

The issue

1. This appeal is concerned with whether a boundary agreement binds successors in title and whether, if it is capable of doing so, it only binds them if they have knowledge of the agreement.

Background

2. The Appellant, Mr White, and the Respondents, Professor and Mrs Alder are neighbours. Mr White is the registered freehold proprietor of “Willow Cottage” Fuller Street, Fairstead, Chelmsford and the Alders are the registered freehold proprietors of the property next door, “The Old Stores”. They purchased their respective properties at about the same time. The Alders purchased The Old Stores on 2 November 2005 and Mr White purchased Willow Cottage on 11 November 2005.
3. On or about 18 October 2005 and no later than 22 October 2005, Mr White’s predecessors in title, the Hobsons, and the Alders’ predecessors in title, the Joneses, had orally agreed the location of the boundary between their respective properties. They also agreed that The Old Stores’ owner owned the physical boundary features. The agreement was later recorded in writing in the form of some text and a plan (the “Boundary Agreement”).
4. In or about April or May 2016, Mr White, or others on his behalf, demolished a part of the boundary wall between the two properties and began to construct an extension to Willow Cottage. It was alleged that the wall and foundations of the extension and the temporary scaffolding for its construction trespassed on land forming part of The Old Stores. It was also alleged that on various dates in 2019, Mr White committed or caused to be committed further acts of trespass. The Alders commenced proceedings in September 2020 seeking damages not exceeding £15,000 plus interest, an injunction requiring Mr White to remove goods trespassing on The Old Stores, a further injunction restraining Mr White from further trespassing on The Old Stores and declarations as to the position of the boundary between The Old Stores and Willow Cottage and that the boundary features belong to the Alders.
5. The matter was heard by District Judge Mills. Given the time available, it was agreed that the district judge would deal only with the preliminary issues as to the existence and effect of the Boundary Agreement.

The Decisions below

6. In a judgment handed down on 29 July 2022, the district judge found that the Hobsons and the Joneses had reached the Boundary Agreement before the sale of Willow Cottage and The Old Stores to Mr White and the Alders respectively; the Boundary Agreement was an agreement to clarify an uncertain boundary and not a contract to convey land; and the Boundary Agreement bound Mr White and the Alders as successors in title. The district judge came to this latter conclusion having considered *Neilson v Poole* (1969) 20 P&CR 909, *Joyce v Rigolli* [2004] All ER (D) 203 (Feb), *Haycocks & Anr v Neville & Anr* [2007] EWCA Civ 78 and *Gibson v New* [2021] EWHC 1811 (QB).

7. In particular, in relation to *Gibson v New*, the district judge held as follows:

“60. Drawing all of this together

a. the High Court decision in *Neilson* which formed part of the ratio in that case, was that boundary agreements are binding on successors. The decision has been repeatedly and resoundingly endorsed by the Court of Appeal, albeit by way of *obiter dicta*. Nevertheless, the strength of the endorsements arguably makes the view of the Court of Appeal very clear.

b. The decision in *Gibson* which (it is argued) reaches the contrary conclusion to that of in (sic) *Neilson* is also a decision of the High Court, but one in which the comments made were by way of an *obiter dictum*. The binding nature of the agreement as between the parties was the key and dispositive point to the relevant ground of appeal. The case was dealing with a very specific issue. It never posits itself as being a revisiting of long-established principle.

61. I do not consider that *Gibson* changes the general position articulated in *Neilson* and endorsed repeatedly and forcefully in the Court of Appeal. Accordingly, the boundary demarcation agreement is binding on successors and is binding in this case.”

8. Mr White appealed. The appeal was heard by HHJ Duddridge. In a judgment dated 20 October 2023, the judge refused permission to appeal on four grounds relating to the district judge’s findings as to the existence of the Boundary Agreement and granted permission to appeal but dismissed the appeal in relation to the fifth ground which was concerned with the effect of the Boundary Agreement.
9. The judge held that the district judge had been right to find that *Gibson v New* did not change the position in relation to whether a boundary agreement binds successors in title, that he had been required to follow *Neilson v Poole* and that accordingly, the Boundary Agreement was binding on successors in title to the parties to that agreement [67]. He had dealt with the issue of precedent in the following way:

“64. The passages in the judgment of Murray J. relied on by Mr Wilmshurst appear in a section dealing with Ground 5 of the appeal before him, which was to the effect that it was a serious procedural irregularity for the trial judge to have made a declaration which had unfairly determined the whole proceedings in the respondents’ favour, when the question of remedies was not before him. There was no discussion, or even recognition, in the analysis Murray J. carried out that *Neilson v Poole* in fact decided that a boundary agreement that merely demarcates a boundary does bind successors in title and, as Mr Adams submitted, it is clear that Murray J. thought that he was following *Neilson v Poole*, not departing from it. It does not appear from his judgment that Murray J. heard any argument directed specifically to the question whether or not boundary

agreements in general bind successors in title or whether he should follow *Neilson v Poole* in that respect. Of course, it was not necessary for such arguments to be made or considered precisely because neither party in that case was a successor in title. What appears to have happened is that counsel had made a passing submission that the declaration and/or the Settlement Agreement or expert report did not have any effect *in rem* or bind successors in title, as part of his argument resisting that Ground of Appeal, which Murray J. said he agreed with as part of his analysis of the appeal against the declaration.

65. In an email sent to me after I circulated a draft of this judgment, Mr Wilmhurst reminded me that he had submitted to me that all of the relevant authorities were provided to Murray J. before he handed down judgment. He also stated that Murray J. had heard extensive argument on the successors in title issue, including further written submissions that Mr Wilmhurst had made after Murray J. circulated his draft judgment. As Mr Wilmhurst represented the appellants in *Gibson v New*, I accept that he will know what materials and arguments were advanced before Murray J. However, even if that was the case, it is clear that Murray J. did not give the issue full consideration. His judgment contains no reasons for departing from *Neilson v Poole* or analysis as to whether it is correct and, as I have stated above, he thought he was following that authority.

66. In my judgment, therefore, the dicta of Murray J. relied on by Mr Wilmhurst were not part of the ratio decidendi in that case, it being unnecessary to decide the issue in order to determine the appeal before him. But, even if they were, it is clear that (even if he received full argument on the question), the contrary decision in *Neilson v Poole* was not subjected to full consideration in his judgment.”

The judge gave permission to appeal in relation to this fifth ground.

10. He also went on to deal with an alternative submission which Mr Wilmhurst had made in relation to the fifth ground of appeal. The judge stated at [70] that it had been part of the factual case before the district judge that Mr White did not know about the Boundary Agreement until sometime after he purchased Willow Cottage. He also recorded that in his skeleton argument for the trial, Mr Wilmhurst had quoted a passage from the Land Registry Practice Guide 40 which questioned whether a boundary agreement will bind successors in title in all circumstances, in particular, in the absence of their knowledge of the agreement. At [71] the judge noted that in that skeleton argument, Mr Wilmhurst had submitted that, if his primary case about the effect of *Gibson v New* was incorrect, an alternative interpretation of it was that the Boundary Agreement was not binding on Mr White because he did not know about it.

11. The judge pointed out at [72] of his judgment, that the alternative submission was not referred to in the grounds of appeal and did not form part of the criticism of the district judge's decision set out in ground five. He went on to note that:

“Although Mr Wilmshurst's skeleton argument for the appeal made passing reference to the Appellant's [Mr White's] case that he did not know about the Boundary Agreement until long after his purchase, the submissions under Ground 5 did not refer to the alternative interpretation of *Gibson v New* referred to above, or to the above extract from the Land Registry Guidance.

73. However, Mr Wilmshurst did draw my attention to that extract from the Land Registry Guidance during his oral submissions, and he also submitted that *Gibson v New* could be interpreted as set out at paragraph 71 above.

The judge concluded at [74], that:

“... the decision in *Gibson v New* cannot be read in the alternative way that Mr Wilmshurst submits. Mr Wilmshurst has not drawn my attention to anything in the judgment of Murray J. that suggests that he had in mind that knowledge was a pre-condition to a successor in title being bound by a boundary demarcation agreement. However, in my view, it would not be appropriate for me [to] decide Ground 5 based on an issue of law that was not set out in the Grounds of Appeal or the Skeleton Argument for the appeal. Whether this issue may be the subject of a second appeal is, of course, a matter for a different court.”

Grounds of appeal and Respondent's Notice

12. Snowden LJ granted permission to appeal on 23 July 2024 stating that Mr White had a realistic prospect of establishing that the judge was wrong in law to hold that the boundary demarcation agreement found by the district judge was binding on him as a successor in title to Willow Cottage, irrespective of whether he had any knowledge of the agreement when he acquired the property. He went on to note that:

“If it is concluded as a matter of law that knowledge is (or may be) a relevant factor in deciding whether a successor in title is bound, the factual question of the state of the Appellant's knowledge may have to be remitted to the District Judge, since it would appear that the Appellant did assert in his Skeleton Argument for trial that he had no knowledge of the boundary demarcation agreement prior to acquiring Willow Cottage, but the District Judge did not decide whether or not this was so given his view of the law.”

13. The grounds of appeal before us are:

- i) That the judge was wrong not to apply *Gibson v New* to the effect that boundary agreements are not binding on successors in title; and
 - ii) The judge was wrong not to apply *Gibson v New* in the circumstances in which Mr White did not have any knowledge of the boundary agreement prior to acquiring Willow Cottage.
14. By a Respondent's Notice, the Alders contend that the judge would have been bound to come to the same decision he did because of the binding Court of Appeal authorities of *Burns v Morton* [2000] 1 WLR 347 (CA) and *Stephenson v Johnson* [2000] EG 92 (CS) (CA).

Submissions in outline

15. Mr Wilmshurst submits that Murray J's conclusion in *Gibson v New*, that boundary agreements do not bind successors in title was not mere obiter dicta and, in any event, is correct as a matter of law. He says that boundary agreements do not have proprietary effect and that the cases in which it has been held that successors in title are bound also contain other factors such as adverse possession or some form of estoppel. He submits that the foundations for the contrary view are extremely weak and that public policy is best served by restricting the effects of boundary agreements to the parties to them. If he is wrong about that, he says that it is inequitable and unfair that successors in title should be bound in circumstances in which they have no knowledge of the agreement. He says, therefore, that if boundary agreements bind successors in title at all, they should only do so where the successor has knowledge or notice of the agreement.
16. Mr Adams and Ms Cross, on behalf of the Alders, take the opposite position. They say that the proposition that boundary agreements have proprietary effect and bind successors in title is supported by binding precedent, is correct as a matter of principle and is supported by compelling policy reasons. They also say that we have no jurisdiction to consider the ground of appeal as to the need for a successor in title to have knowledge of the agreement in order to be bound. Alternatively, they say that we should not exercise our discretion to allow Mr Wilmshurst to advance the second ground of appeal. In any event, they say that a boundary agreement binds successors in title without the need for knowledge.

Precedent

17. In his skeleton argument Mr Wilmshurst, on behalf of Mr White, submits that both the district judge and the judge below were bound by *Gibson v New* as a matter of precedent. Although we are not bound by it, as it is said that we are bound by *Burns v Morton* and *Stephenson v Johnson* it is helpful to have the relevant principles in mind before turning to the authorities on boundary agreements themselves.
18. Those principles are not in dispute. The ratio decidendi of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him: *Regina (Kadhim) v Brent London Borough Council Housing Benefit Review Board* [2001] Q.B. 955 (CA) per Buxton LJ at [16]. A subsequent court is not bound by a proposition of law assumed by an earlier court that was not the subject of argument before it or

consideration by that court: *Kadhim* at [33]. Further, where there are conflicting decisions of courts of co-ordinate jurisdiction, the later decision is to be preferred if it is reached after full consideration of the earlier decision: *Colchester Estates (Cardiff) v Carlton Industries Plc* [1986] Ch. 80, per Nourse J at 85D.

19. The proper meaning of the terms “ratio decidendi” and “obiter dicta” and the meaning of “necessary” in that context was considered in the concurring judgment of Leggatt LJ (as he then was) in *R (Youngsam) v The Parole Board* [2019] EWCA Civ 229. The Master of the Rolls, Sir Geoffrey Vos, summarised Leggatt LJ’s analysis in *Churchill v Merthyr Tydfil County Borough Council* [2024] 3 All ER 771, in the following way:

“[17] . . . At [48] Leggatt LJ cited the classic definition of the necessary reasoning of a decision (leaving the Latin aside) as ‘any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him’. The proviso that he added that is relevant for our purposes was in [51] as follows:

‘It therefore seems to me that, when the ratio decidendi is described as a ruling or reason which is treated as “necessary” for the decision, this cannot mean logically or causally necessary. Rather, such statements must, I think, be understood more broadly as indicating that the ratio is (or is regarded by the judge as being) part of the best or preferred justification for the conclusion reached: it is necessary in the sense that the justification for that conclusion would be, if not altogether lacking, then at any rate weaker if a different rule were adopted [emphasis added].’”

20. At [49] of *Youngsam*, Leggatt LJ also made clear that where, for example, the judge has given rulings on two or more separate points of law, either of which would by itself be sufficient to justify his conclusion, it is accepted that each ruling can have the status of ratio, despite the fact that the judge would still have reached the same conclusion even if that ruling were reversed.

Boundary Agreements - the relevant authorities

21. With those principles in mind, I turn to the authorities. *Neilson v Poole* is described in “*Ruoff & Roper on the Law and Practice of Registered Conveyancing*” 2025 as the seminal case on boundary agreements. In that case, an oral boundary agreement was made between Mr Neilson and a representative of the Public Trustee, who was the sole personal representative of a Mr Shorthouse, who was the predecessor in title of the defendant, Mr Poole. Megarry J held at 917 that the boundary agreement between the defendant’s predecessor in title and the plaintiff had been made and supported the conclusion that he had reached on the basis of the proper construction of the conveyance. He went on to add, also at 917 that: “If I am wrong in the construction that I have put on the conveyance, I hold that the plaintiff nevertheless succeeds on his alternative claim based on the boundary agreement.”
22. Megarry J then turned to the question of whether the boundary agreement was void against Mr Poole (the successor in title) for want of registration as a land charge

pursuant to section 10(1) of the Land Charges Act 1925. He pointed out at 918 that there are two types of boundary agreement, one of which is a contract to convey land and the other of which does no more than identify on the ground what the documents describe in words or delineate on plans. He put it this way at 918-919:

“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. This view is supported by words of Lord Hardwicke L.C. in *Penn v Lord Baltimore*, a case concerning an agreement relating to the boundaries between Pennsylvania and Maryland. There the Lord Chancellor said:

“To say that such a settlement of boundaries amounts to an alienation, is not the true idea of it; for if fairly made, without collusion . . . , the boundaries settled are to be presumed to be the true and ancient limits.”

This view is also supported by *Lawrence v McDowall*, where at page 444 Chipman C.J. followed *Boyd’s Lessee v Graves*. That was a case in the Supreme Court in the United States in which it was held that a parol boundary agreement of the latter type was not within the Statute of Frauds 1677. For, as Duvall J. said at page 517, in delivering the judgment of the court:

“It is not a contract for the sale or conveyance of lands. It has no ingredient of such a contract.”

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 case, I would hold the agreement not registrable. . . . 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.”

Accordingly, he held that the boundary agreement in that case was not void for want of registration pursuant to section 10(1) Land Charges Act 1925.

23. Megarry J went on also at 919, as follows:

“In this case, the boundary on the conveyance, as I have construed it, coincides with the boundary on the agreement, and so the agreement is not registrable. If the two boundaries had not coincided, because, for example, the true construction of the conveyance yields a different boundary, then the agreement would have been an agreement whereby in fact it was agreed that land belonging to one should thenceforward belong to the other. Nevertheless, even in those circumstances, I should not hold that the agreement was registrable: for, in my judgment, it is not a "contract ... to convey" within clause C (iv). A contract merely to demarcate and confirm is not a contract to convey. No doubt the parties cannot go back on this agreement, and each in time will acquire a title by limitation to the land of the other which falls on his side of the agreed boundary. Even if each were to be entitled to demand a conveyance of that land from the other, I doubt whether the agreement would be registrable: for although the obligation to convey would no doubt arise out of their agreement to demarcate, the contract was merely a contract to demarcate and not a contract to convey.”

24. He also noted that a boundary agreement is an “act of peace, quieting strife and averting litigation and so is to be favoured in the law.” At 920 he also rejected the further contention that once a boundary agreement was made it superseded the conveyance of the land to which it related in so far as the conveyance defined the boundary. He explained the matter in the following way:

“... what the agreement did was merely to establish on the ground, by agreement, what it was that the conveyance showed. A boundary agreement that merely demarcates is, I think, an agreement that is ancillary to the conveyance; it does not supersede it.”

25. Mr Wilmhurst submitted that the foundations for Megarry J’s reasoning were very weak. He took us to *Penn v Lord Baltimore* (1750) 1 Ves. Sen. 444, which, he says, was based upon in personam settlement agreements, to *Boyd’s Lessee v Graves* 17 US (4 Wheat) 513 (1819), (a case in the Supreme Court of the United States) in which he says that the judge instructed the jury on the basis that the boundary agreement had been acquiesced in for 20 years and to *Lawrence v McDowall*, a case reported in the New Brunswick Reports in 1838 which he says was not about successors in title.
26. He also submitted that the ratio of *Neilson* was to be found at 919 and was to the effect that a boundary agreement became binding not by the agreement itself but by means of “limitation”, in other words, as a result of the effect of adverse possession. Mr Wilmhurst also submitted that in each of the cases there was something more than the boundary agreement itself, whether adverse possession or some form of estoppel and that each case turned on its facts. He says that it is the additional factor in each case rather than the boundary agreement itself which leads to successors in title being bound.

27. I disagree with Mr Wilmshurst about the ratio in *Neilson v Poole*. Megarry J's reference to limitation arose in the context of his consideration of whether a boundary agreement was registrable under the Land Charges Act 1925. The situation he was considering was one in which the boundary on the conveyance is different from that arising from the agreement. In those circumstances, ". . . the agreement would have been an agreement whereby *in fact* it was agreed that land belonging to one should thenceforward belong to the other" (emphasis added). He stated that even in those circumstances, he would not hold that the agreement was registrable because it was an agreement to demarcate and not a "contract . . . to convey" for the purposes of the Land Charges Act 1925. It seems to me, therefore, that he was considering the situation in which the agreement is to demarcate but as part of the demarcation, in fact, small parcels of land change hands. In that context, he notes that the parties cannot go back on their demarcation agreement and that title to the small parcels will eventually be acquired by limitation. His reasoning is similar to the approach adopted by Arden LJ in *Joyce v Rigolli* [2004] All ER (D) 203 (Feb) referred to below. He was not considering in this paragraph the type of case with which we are concerned, where the sole effect of the agreement is to provide clarity where there was uncertainty. Nor was he considering the effect of the demarcation agreement on successors but was focussing on whether there was a contract to convey and, if not, how else the title to the small parcels changing hands would be established.
28. In any event, if the judgment from 917 – 920 is read as a whole, the ratio is clear. Megarry J was concerned with whether the agreement in that case bound a successor in title and it was for that reason that he considered the question of whether the agreement should have been registered as a land charge. To reiterate, in that context, he decided that a boundary agreement which establishes by agreement what the conveyance or transfer showed and therefore, merely demarcates, is binding on successors in title without the need for any kind of registration. It is also of note that in that case, the claim in adverse possession failed as did defences of estoppel.
29. The next case is the Court of Appeal authority of *Burns v Morton* upon which the Alders rely for the purposes of their Respondent's Notice. It was not considered by the district judge or the judge below. In that case, Swinton Thomas LJ, with whom Tuckey LJ agreed, quoted from *Neilson v Poole* at some length and noted at 351F that it was of great assistance. Swinton Thomas LJ held that the trial judge had rightly found that an agreement could be implied to the effect that the boundary between the properties in question was in the position of a wall which had been built in 1979. The agreement was between the predecessors in title of the claimants, and the defendant. It was implied from the conduct of the defendant that the claimants' predecessors in title had not opposed.
30. Mr Wilmshurst says that the important feature in this case was the fact that the "boundary" wall had been in place for more than twenty years by the time of the hearing. There was something to put the successor in title on notice, and he says that it was a clear case of adverse possession.
31. In any event, it is not clear to me that the proposition that boundary agreements bind successors in title is necessarily part of the ratio in *Burns* or that it is binding upon us. It was concerned with an implied agreement with which we are not concerned and the point about successors in title was not specifically argued. It also turned on its facts. It

is, nevertheless, an example of the Court of Appeal endorsing the approach adopted in *Neilson v Poole*.

32. The next authority upon which the Alders rely, and which is also next in time, is *Stephenson v Johnson*. It too is a Court of Appeal authority which was not before the judges below. The agreement in question was reached between the defendants, the Johnsons, and the predecessors in title to the claimants, the Stephensons. The boundary agreement was implied from the erection of a fence by the Johnsons to which the Stephensons' predecessor in title did not object. Bennett J, with whom Clarke and Pill LJ concurred, considered the judge's findings as to the implied agreement to be correct. Bennett J set out passages from *Neilson v Poole* which he described at [43] as being of "considerable assistance" and also concluded that as the judge had been correct as to the implied agreement, it was unnecessary and inappropriate to consider the estoppel argument.
33. Just as in *Burns*, *Stephenson* was concerned with an implied boundary agreement, a situation with which we are not directly concerned. *Stephenson* was, however, concerned with successors in title, and it seems to me that the conclusion that it was unnecessary to consider the estoppel argument leads to the further conclusion that the implied boundary agreement alone was sufficient to bind successors in title.
34. The next authority in time is *Joyce v Rigolli*. It did not concern successors in title. It is, nevertheless, a further endorsement of *Neilson v Poole*. The claimant and the defendant each owned neighbouring properties. The defendant built a garage which encroached on the original plot of the claimant's land. Prior to the construction of the garage, an agreement had been reached clarifying the border which had resulted in a marginal exchange of land between the plots. The claimant claimed that the garage constituted a trespass. The judge found in favour of the defendant. He concluded that on the evidence there had been a binding agreement between the parties which had clarified the position of the boundary. He held that there was no requirement for the agreement to be evidenced in writing and that it was valid.
35. Arden LJ, (as she was then) with whom Sir Martin Nourse concurred and Thorpe LJ agreed, held that the boundary agreement between the parties served solely to demarcate the boundary and had not purported to be a contract to convey land. Accordingly, there was no requirement for the agreement to have been evidenced in writing and the judge had been entitled to make the findings which he did.
36. Arden LJ quoted at length from the judgment of Megarry J in *Neilson v Poole* and described that case as the leading authority on boundary agreements. She noted at [29] that the judge found that the boundary as agreed may have encroached on the appellant's land and that Mr Rigolli had given up, or thought he had given up, a small triangle of land by a cherry tree. She held, nevertheless, that the agreement was merely to demarcate the boundary and did not purport to be a contract to convey any land. The parties' purpose had been to fix the boundary where they thought it ought to have been. As I have already mentioned, she also decided at [30] – [33] that section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 did not apply. In particular, she held as follows:

“31. . . . As a matter of ordinary English usage, for a contract to be one 'for' selling or disposing of land, it must have been part

of the parties' purposes, or the purposes to be attributed to them, in entering into such a contract that the contract should achieve a sale or other disposition of land. The fact that the effect of their contract is that land or an interest in land is actually conveyed, when that effect was neither foreseen nor intended nor was it something which ought to have been foreseen or intended, is not the acid test. Indeed, it would be a surprising result if section 2 applied merely because the effect of the contract was that an interest in land was transferred even if the parties had no intention to make any such transfer and could not have foreseen or intended that that would be the effect.

32. In this case, however, Mr Rigolli consciously thought that he was giving up a small triangle of land round the cherry tree. (I am prepared to assume that he was in fact giving up some land and that Mrs Joyce was giving up some land too although on the evidence it would not appear that she or Mr Joyce consciously thought about this at the time of the boundary agreement). Even so, the area of land disposed of by both parties was of a very small amount. It would be unrealistic to require the parties to execute a transfer of the land given up by Mr Rigolli (still less of that unconsciously given up by Mrs Joyce). In both cases the land would also be quite difficult to define without the disproportionate expense of a survey. Further, to make the validity of a boundary agreement dependent on the preparation and execution of a written contract would be contrary to the important public policy in upholding boundary agreements so powerfully identified by Megarry J in *Neilson v Poole*. In those circumstances, I do not consider that Parliament, which after all enacted section 2 against the background of *Neilson v Poole*, could have intended section 2 to apply to transfers of land pursuant to boundary agreements of Megarry J's latter type ("demarcating" agreements) simply because a trivial transfer or transfers of land were consciously involved."

37. Although *Joyce v Rigolli* was not itself concerned with successors in title, the approach in *Neilson* was expressly endorsed. Arden LJ described it at [26] as the leading authority on boundary agreements and adopted its reasoning at [26] – [29]. Further, Sir Martin Nourse described *Neilson* at [42] as "a judgment which has consistently been followed and approved at first instance and in this court" and also adopted its reasoning.
38. *Haycocks & Anr v Neville & Anr* was reported some three years after *Joyce v Rigolli*. It is another Court of Appeal authority concerning a boundary agreement. The leading judgment was that of Lawrence Collins LJ (as he then was), with whom Waller LJ and Charles J agreed. It was concerned with a dispute between neighbours as to the location of the boundary between the front gardens of their houses on an estate which had been developed by the Wates Group. The estate had been developed in the 1990s.

The Haycocks had bought their house from the developers and the property next door was originally owned by a Mr and Mrs Campbell. The front gardens were open and it was Mrs Haycock's uncontroverted evidence that when they moved in, they and the Campbells requested the site manager of the developer to provide clarification as to exactly where the boundaries lay. A plan which became known as the Wykes Plan was produced and the Campbells planted shrubs along the boundary shown on the Wykes Plan.

39. Mr and Mrs Neville purchased the Campbells' property from them in 2000 and a boundary dispute arose almost immediately. Mr Neville believed that the Wykes Plan was incorrect. The trial judge based her conclusions upon the Wykes Plan. The effect of her conclusions was that a strip of land, at no point wider than a metre, formed part of the Haycocks' property rather than that of the Nevilles.
40. On appeal, the Nevilles took a variety of points. The ones which are of relevance to us are that: there was no evidence that it had ever been accepted by the Nevilles' predecessors in title, the Campbells, that it was the purpose of the preparation of the Wykes Plan to determine the boundary; that, in any event, the Nevilles were not involved in the exercise and could not be bound by it; and that the extent of the land that they had purchased, was defined by the legal boundary shown on a plan referred to as Plan J (which preceded the Wykes Plan) which could not be changed by any later agreement.
41. At [25] Lawrence Collins LJ stated that "an agreement to demarcate an unclear boundary is binding on the parties and binds successors entitled (sic) without the need for a written agreement: *Neilson v Poole* (1969) 20 P&CR 909, recently applied in *Joyce v Rigolli* [2004] EWCA Civ 79." He added:

". . . The evidence was that the Wykes Plan had been drawn up to clarify the boundary following discussions between the Haycocks and the Campbells and was drawn at a scale of 1:200. If the Haycocks had pleaded and proved that they and the Campbells had agreed in 1992 that the Wykes Plan represented the boundary, then that would have been binding not only on them but on successors in title, such as the Nevilles."

Lawrence Collins LJ held that the trial judge was entitled to hold as she did and that her findings were open to her on the evidence.
42. As Mr Wilmhurst points out, Lawrence Collins LJ's comments about the effect of a boundary agreement on successors in title are merely obiter dicta. They are a clear and firm endorsement of the approach in *Neilson v Poole*, including the proposition that boundary agreement bind successors in title, nevertheless.
43. *Nata Lee Ltd v Abid* [2014] EWCA Civ 1652 is also of some assistance although it was not concerned with a boundary demarcation agreement. Briggs LJ (as he then was) with whom Underhill and Moore-Bick LJJs agreed, set out and approved Megarry J's judgment in *Neilson v Poole* at 918 – 920 and the approach adopted by Arden LJ in *Joyce v Rigolli*. He explained those authorities in the following way:

“28. Taking those two authorities together, there is to my mind a real difference between an agreement, the purpose of which is to move a boundary so as to transfer land from one neighbour to another, and an agreement the purpose of which is to define a previously unclear or uncertain boundary, even if that agreement may involve some conscious transfer of a trivial amount of land. The former agreement is subject to the formalities of the 1925 Act and the 1989 Act whereas the latter is not.”

He also explained the consideration for a boundary demarcation agreement at [32]:

“In a true boundary demarcation agreement, the consideration is provided, each way, by the substitution of certainty for uncertainty as to the boundary, and the relief of both neighbours from the risk of future dispute.”

44. He considered the presumptions described by Megarry J and Arden LJ and explained them:

“33. . . .The presumption identified by Megarry J was designed to assist in distinguishing between, on the one hand, a pure boundary agreement, for identification or delineation where no land is consciously transferred, and a boundary agreement where, by straightening a line of division, each side gives some land to the other: see p.918. His presumption favours the former over the latter. . .

34. Arden LJ's rebuttable presumption was simply that, where the purpose of an agreement was to delineate a boundary rather than to transfer land, it was to be presumed that any consequential transfer of land was trivial, unless the contrary was shown: see para.33. . . ”

45. What of the most recent case of *Gibson v New*? It was concerned with a dispute between neighbours about the boundary between their respective gardens. They had attended two mediations in relation to their dispute. At the second, they concluded a settlement agreement by which a Royal Institute of Chartered Surveyors surveyor would be chosen by the Mediation and Advice Project, the cost of the surveyor would be divided between them and they would accept the results of the surveyor's report and the dispute would come to an end. The News were not happy with the report which was produced, however. A further report was produced by a different surveyor with which the News were also dissatisfied. The dispute remained live.
46. The trial judge stated that what he had to decide was whether the first surveyor's report, that of a Mr Stephenson, was in accordance with the settlement agreement. If it was, the parties were bound by it. If not, they were at liberty to argue their respective cases on where the boundary should lie, at a further trial. He held that they were bound by the Stephenson Report and made a declaration to that effect.

47. On appeal, Murray J dealt with a number of grounds of appeal with which we are not concerned. He then turned to ground 5 which was that the decision of the judge was unjust by reason of a serious procedural irregularity, namely that the judge had made a declaration that the parties were bound by the Stephenson Report demarcating the boundary between their properties. It was said that this wrongly determined the entire case in the respondent's favour, when the issue of remedies was not before the court.
48. It was Mr Wilmshurst, on behalf of the Appellants, the News, who submitted that the declaration had effect *in rem* and bound successors in title. He gave the example of a local authority wanting to make a compulsory purchase order in relation to one of the properties. In such circumstances, he submitted that the local authority would have to have the boundary drawn in accordance with the Stephenson Report [135]. It was Mr Loveday, on behalf of the Respondents, the Gibsons, who submitted that: the declaration was to the effect that the parties were bound by the Stephenson Report; it recognised the contractual rights and obligations flowing from the Settlement Agreement entered into by the parties to the litigation; and did not bind non-parties to the Settlement Agreement [137] and [138].
49. At [141], Murray J concluded that ground 5 was based on a misconception. He noted that the judge found that the settlement agreement was a boundary agreement of the second kind described by Megarry J in *Neilson v Poole*, which did not convey land, a conclusion which was open to him on the evidence (see [141] and [143]).
50. He went on as follows:

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

. . .

“150 . . . I agree with Mr Loveday that the declaration simply establishes the contractual position as between the parties to the Settlement Agreement. It has no proprietary effect binding third parties . . .”

He had also clarified at [148] that the preliminary issue with which the judge had been concerned was whether the parties were bound by the Settlement Agreement and pursuant to that were bound by Mr Stephenson's determination of the boundary.

51. It seems to me that Mr Adams is correct to point out that Murray J's conclusions in relation to whether a boundary agreement binds successors in title, are obiter dicta. The parties to the proceedings were the original parties to the agreement and the issue in the proceedings was whether they were bound by their own agreement. The real

question for the judge was whether it had been wrong to grant declaratory relief and it was in that context that Murray J observed at [150] “the declaration simply establishes the contractual position as between the parties, . . . it has no proprietary effect between third parties.”

52. I agree with Mr Adams that Murray J was concerned with the effect of the declaration and not with boundary agreements in general. It follows that the district judge and the judge in this case were correct to decide that *Gibson v New* did not change matters and to follow *Neilson v Poole*.

Discussion and Conclusions

53. Where does that leave us? Drawing all of the authorities together, it seems to me that as Megarry J first explained, there are two types of boundary agreement. The first is an agreement the purpose of which is to move a boundary so as to transfer land from one neighbour to another. That first type is subject to the formalities necessary for the transfer of land. The second type is an agreement, the purpose of which is to define a previously unclear or uncertain boundary, even if it includes the conscious or unconscious transfer of a trivial amount of land. It is presumed that the land transferred is trivial unless the presumption is rebutted. This second type, a boundary demarcation agreement, binds the parties to it for the reasons explained by Briggs LJ in *Nata Lee Ltd* at [32]. The consideration for the agreement is the substitution of certainty for uncertainty and the avoidance of the risk of future disputes. Although in many cases, the parties will act upon the agreement, for example, by building a wall or erecting a fence, there is no need for anything more in order to render it binding as between them. That is clear, not only from *Neilson v Poole* itself which has been consistently endorsed in the Court of Appeal, but also from *Stephenson* where it was stated that it was unnecessary to consider the estoppel argument in addition to the implied boundary demarcation agreement, from the clear obiter dicta of Lawrence Collins LJ in *Haycocks* and the approach adopted by Briggs LJ in *Nata Lee Ltd*.
54. Such an agreement has proprietary effect and, as a result, also binds successors in title. It does so because of its very nature. It defines and delineates the boundary between the properties as from the root conveyance or transfer. Such an agreement is, of its very nature, a delineation of the property transferred or conveyed and is so for all purposes. As no one is able to transfer or convey more than they own, such an agreement effectively “binds” successors in title whether or not they have knowledge of it. It does so because it defines what they purchase. As “*Ruoff and Roper on the Law and Practice of Registered Conveyancing*” explains at paragraph 5.020, a legal boundary does not move because the land is subsequently conveyed or transferred. The boundary demarcation agreement is ancillary to the conveyance or transfer. As Megarry J explained at 919 of *Neilson v Poole*, the boundaries established are, in the words of Lord Hardwick L.C. in *Penn v Lord Baltimore*, “presumed to be the true and ancient limits”. In other words, a boundary demarcation agreement establishes on the ground the physical extent of the respective legal estates created by the conveyance or transfer. The boundary is presumed always to have been in that location.
55. In the case of unregistered land, a vendor cannot convey to a purchaser more land than he owns. In the case of registered land, upon registration the purchaser is deemed to be the proprietor of the registered estate: section 58 of the Land Registration Act

2002 (“LRA 2002”). The boundary of that registered estate will, however, only be a general boundary unless exceptionally it has been determined under section 60(1) LRA 2002. A general boundary does not determine the exact line of the boundary: section 60(2) LRA 2002. The exact boundary of registered land may, therefore, be established by a boundary demarcation agreement.

56. In either case, if the extent of the land owned by the vendor has been conclusively established by a boundary demarcation agreement, the purchaser cannot acquire title to more land than was owned by the vendor. If the effect of a boundary agreement is to define the extent of the parcels of land owned by the parties to it, it must logically continue to define the extent of those parcels when they are transferred to a successor in title.
57. Although a boundary demarcation agreement which is implied may be more difficult to prove than an express agreement, there is nothing to suggest that the underlying principle should be different. In just the same way, the agreement defines the parcel of land and as a result, defines what is transferred to a successor in title. This is consistent with the decisions in *Burns* and *Stephenson* where the boundary agreement which bound successors in title was implied from the conduct of predecessors.
58. None of the authorities, including those concerned with successors in title, turns upon or for that matter, makes mention of whether the person seeking to avoid the effect of the boundary agreement had notice or knowledge of it. That is not surprising. A boundary demarcation agreement is neither an equitable interest for the purposes of unregistered conveyancing nor an overriding interest for the purposes of registered land. It clarifies the border or boundary between the properties shown in the conveyance or transfer. It does not turn on knowledge, therefore.
59. All of this is consistent with the public policy identified by Megarry J and reiterated in many of the Court of Appeal authorities to which I have referred. A boundary demarcation agreement is an act of peace which should be encouraged. It avoids uncertainty and the risk of litigation. It does not undermine the formalities for the transfer of land because its purpose is not to effect such a transfer. As Arden LJ pointed out in *Joyce v Rigolli* at [32], where trivial amounts of land are transferred it avoids the disproportionate expense of a survey and avoids the preparation and execution of a written contract which would be contrary to the principle of public policy identified by Megarry J in *Neilson v Poole*. It also avoids the time and expense involved in making a formal application for the determination of the exact line of a boundary pursuant to Rules 118 and 119 of the Land Registration Rules 2003.
60. It seems to me, therefore, that public policy favours the binding nature of boundary demarcation agreements and that the uncertainties which might arise as to the existence of the agreement are no greater than the uncertainties surrounding the effect of the root conveyance itself. The difficulties in proving a boundary demarcation agreement, even if it is implied rather than express, are likely to be fewer than those encountered in delving back to the original conveyance.

Ground 2 – the need for knowledge

61. It follows that in my judgment, as a result of the very nature of a boundary demarcation agreement, a successor in title is bound by it even if they had no

knowledge of it. The question of whether knowledge is required is an integral part of the point of law posed by the first ground of appeal. It is not necessary, therefore, to consider whether we have jurisdiction to hear the second ground of appeal, nor whether we should exercise our discretion to do so.

62. I should address Ms Cross' careful submissions in summary, nevertheless. Had it been necessary, I would have concluded that we have jurisdiction to hear the ground and that in the circumstances, it would be appropriate to exercise our discretion in order to do so. I would have come to this conclusion despite the fact that the point did not form part of Mr White's defence or a draft amended defence and was not raised before the judge. As a result, there were no findings of fact in relation to the state of Mr White's knowledge.
63. As Ms Cross submitted, had permission to raise the ground of appeal before the judge been sought and refused, there would be no right of appeal from that decision to us: section 54(4) of the Access to Justice Act 1999. However, that was not the case here. As Ms Cross pointed out, the relevant principles in relation to whether new arguments may be raised for the first time on appeal were set out most recently in the judgment of Popplewell LJ, with whom Underhill LJ and I agreed in *Rhine Shipping DMCC v Vitrol SA* [2024] EWCA Civ 580 at [23] – [31]. She submitted that the fact that the point was not raised at trial and no evidence was heard or findings made about knowledge would generally be fatal to the point being permitted to be raised at this stage.
64. In this case, however, it was only as a result of the shortage of time that a pragmatic approach was taken in relation to the hearing before the district judge. It was agreed that only the preliminary issues of whether the Boundary Agreement was concluded and, if so, when and what effect it had would be dealt with. Furthermore, knowledge was mentioned in Mr Wilmshurst's skeleton argument before the judge and no objection to it was raised.
65. In any event, as I have already mentioned, it seems to me that the question of whether knowledge is a necessary component to enable a boundary demarcation agreement to have effect as against successors in title is inherent in the question of whether it has effect as against successors in title, in any event.

Conclusion

66. For all of the reasons set out above, I would dismiss the appeal.

Lord Justice Zacaroli:

67. I agree.

Sir Launcelot Henderson:

68. I also agree.