Fuzzy and uncertain boundaries:
Boundary Agreements following Gibson v New [2021] EWHC 1811 (QB)

1. In the recent High Court appeal of *Gibson v New*, Murray J held that a Settlement Agreement, which incorporated an expert determination provision, amounted to a boundary agreement. Murray J went on to say that that Settlement Agreement (and therefore the boundary agreement):

   147. … does not bind successors in title…

   150. … It has no proprietary effect binding third parties…

2. Whilst the case had a peculiar set of facts, the conclusion has significant ramifications for the law of boundaries. Here we (might) have High Court authority stating that a boundary agreement is personal to the contracting parties.

3. In the real world, that would mean that any boundary dispute which was resolved by way of a boundary agreement (either found to exist by the Court, or formed as a compromise) could be re-opened once one party to that boundary agreement sells their property. It would also mean that a pretty standard case raised in boundary disputes would no longer be available.

4. Was Murray J's view on this correct, in light of the authorities? Does this fill in a jurisprudential gap? Or was it simply wrong?

THE LAW ON BOUNDARY AGREEMENTS

5. Boundary agreements are a special feature of boundary disputes. They are of a contractual character, and can have the effect of transferring land from one person to another. However, the boundary agreement will be effective notwithstanding non-compliance with s2(1) Law of Property (Misc Provisions) Act 1989 ["LP(MP)A"], which reads as follows:

   A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed.

6. Boundary agreements avoid this requirement, although following *Gibson v New* it is important to establish precisely why.

7. It needs to be borne in mind that a legal boundary is a fixed line, established at the point of the original dividing conveyance. It may change over time, but only if one of a number of legal operations occur (such as adverse possession). In the real world, where conveyances are vaguely drafted, and title plans are hopelessly unclear, the actual position of the boundary line may be extremely difficult to work out.

8. There are two types of boundary agreements. The first type is an actual conveyance of land. Part of a person's land is transferred to his neighbour, and in so doing a new (and hopefully clear) boundary is set. This is subject to s2(1) LP(MP)A. ["Type 1 boundary agreement"]

9. The second type is what is of interest here. It is a contract where the uncertain or "fuzzy" line becomes clear and definite. There is no conveyance of land – the parties are agreeing that this line is where the legal boundary is – and always was. As there is no conveyance, s2(1) LP(MP)A does not apply ["Type 2 boundary agreement"].

NEILSON V POOLE

(1969) 20 P&CR 909

10. This is the seminal case on boundary agreements.

11. The relevant facts can be set out simply:
    a. Owner 1's agent decided that the boundary between Property 1 and Property 2 ought to be clarified before Property 1 was put up for auction;

    b. Owner 1's agent went to the Properties and staked out where he thought the boundaries were;

    c. Owner 1's agent orally sought to agree with Owner 2 that the boundary was in the staked out position. Owner 2 was broadly in agreement, although asked that some of the pegs be adjusted. Owner 1's agent moved the pegs as requested. The boundary position was then orally agreed;

12. Having found that the above amounted to a boundary agreement, Megarry J went on to consider the effect.

13. Having discussed Type 1 boundary agreements, Megarry J made the point that a boundary agreement may simply.

"identify on the ground what the documents describe in words or delineate on plans. Nothing is transferred." (at 918)

14. Megarry J quoted Lord Hardwicke's decision in *Penn v Lord Baltimore*, relating to state boundaries. Lord Hardwicke crucially said that, in the case of an informal boundary agreement,

"the boundaries so settled are to be presumed to be ***true and ancient limits****"*
(emphasis added)

15. This was the basis of the Type 2 boundary agreement. The Court was firmly of the view that boundary agreements would be presumed to be Type 2 boundary agreements unless it could be shown that, in fact, the parties had intended to convey land from one to the other.

16. Megarry J went on (at 919) to consider a situation where a boundary agreement was plainly not an agreement to convey, but where the agreement was inconsistent with the true position of the legal boundary line. He maintained that this would still be a contract to confirm and demarcate, notwithstanding its inconsistency with the true boundary position. In time, by way of adverse possession, the true boundary would then shift to match the position as agreed. ["the Inconsistent Boundary Point"]

17. The Inconsistent Boundary Point is not entirely clear (and was the source of the confusion in *Gibson v New)*. There are two interpretations:

    a. First, that no Type 2 boundary agreement affects the legal boundary position, and it only becomes proprietary by way of adverse possession. In that sense, it is only a personal agreement between the contracting parties, and would not affect successors in title;

b. Second, that where a subsequent boundary agreement is inconsistent with a **known** boundary position, the boundary agreement does not constitute a conveyance. It will nonetheless bind the parties, and their successors, to the agreed boundary position until adverse possession changes that **known** boundary position (at which point the boundary agreement will not matter any more).

18. From the wider context of the case, the second interpretation is to be preferred. The Inconsistent Boundary Point was made wholly within the context of whether a Type 2 boundary agreement needed to be registered to bind successors. The Inconsistent Boundary Point was to illustrate that a Type 2 boundary agreement does not need to be registered, even if it is inconsistent with an ascertainable boundary position. The point does not rob the Type 2 boundary agreement of its nature, which is an agreed interpretation of the extent of the parties' proprietary interests.

19. Two other important points are made by Megarry J on this topic.

    a. First, he states that boundary agreements should be encouraged and upheld where possible. He was expressly attempting to avoid a conclusion whereby boundary agreements are void against successors for lack of registration. The Inconsistent Boundary Point needs to be read in that context;

    b. Second, he states that a boundary agreement does not supersede a conveyance. A Type 2 boundary agreement establishes what the conveyance shows, and is ancillary to the conveyance. This is important because, of course, the conveyance is a proprietary contract. If the Type 2 boundary agreement is ancillary to it, this would indicate that it is proprietary too.

20. We can add to this the quotation of Lord Hardwicke – that a Type 2 boundary agreement determines the boundary's "true and ancient limits".

21. All taken together, it seems clear that *Neilson v Poole* is authority for a boundary agreement being proprietary in nature, and binding on successors. The Type 2 boundary agreement is an interpretation, by agreement, of a proprietary contract (IE the original dividing conveyance).

22. The difficulty is that the context of the decision is not particularly relevant – it is all in respect of whether a Type 2 boundary agreement is covered by s10(1) Land Charges Act 1925. Later cases therefore assist in determining what exactly *Neilson v Poole* means.

JOYCE V RIGOLLI

[2004] EWCA Civ 79

23. The facts of this case are not particularly important, but Arden LJ's treatment of *Neilson v Poole*, in light of s2(1) LP(MP)A, is.

24. This was the first appellate decision which considered whether s2(1) LP(MP)A applied to Type 2 boundary agreements.

25. Arden LJ held that Megarry J's reasoning regarding registration applied equally to s2(1) LP(MP)A. The key question was whether parties objectively intended to sell or dispose of an interest in land.

26. The Court held that s2(1) LP(MP)A did not apply to Type 2 boundary agreements, even if the effect of the Type 2 boundary agreement was to transfer some small piece of land. The reason for this was that s2(1) LP(MP)A was enacted against the background of Megarry J's reasoning. Megarry J had held that there were strong policy reasons for Type 2 boundary agreements existing and operating, notwithstanding lack of formality.

27. Arden LJ considered that, although a Type 2 boundary agreement may involve a conscious transfer or exchange of land, s2(1) LP(MP)A will not apply because that transfer or exchange will likely be trivial. It is for the Court to assess whether the transaction is trivial or not.

28. This creates an additional distinction between Type 1 and Type 2 boundary agreements. The difference between the two types is now as follows:

    a. It will be presumed that a boundary agreement is Type 2, unless it can be shown that the parties objectively intended there to be a conveyance or disposition of land, in which case it will become Type 1; and/or

b. If a Type 2 boundary agreement would result in a non-trivial transfer or disposition of land, it would be caught by s2(1) LP(MP)A and therefore shift over to Type 1.

29. There was no discussion in this case as to whether a Type 2 boundary agreement was proprietary in character. It seemed to be completely taken for granted. If it was not proprietary, there would be no question of LP(MP)A being engaged.

HAYCOCKS v NEVILLE

[2007] EWCA Civ 78

30. This case involved identifying a "pivot point" in a boundary line. Once this was determined, the position of the boundary would be entirely clear.

31. The judge at first instance found that an older plan had been drawn up to define the boundary, and therefore was a binding starting point.

32. It was argued on appeal that there was no evidence that both property owners had agreed that that plan would demarcate the boundary, and in any event, if there was such an agreement, it was personal to the Appellants' predecessors in title.

33. Lawrence Collins LJ, with whom the remainder of the Court agreed, cited both *Neilson v Poole* and *Joyce v Rigolli*. He then stated, at Para 25, that:

An agreement to demarcate an unclear boundary is binding on the parties and binds successors entitled without the need for a written agreement … If the Haycocks had pleaded and proved that they and the Campbells had agreed … 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.

34. Whilst it is impossible to know from the report what arguments were raised on the point, it seems that this determination was necessary to dispose of one of the grounds of appeal. However, *Haycocks v Neville* needs to be treated with a degree of caution as the decision was arguably obiter.

35. And now we come to the recent decision. As stated at the outset, the decision deals with many points.

36. In summary:

    a. Owner 1 and Owner 2 fell out over a boundary;

    b. The Owners mediated, and came to a settlement agreement. The settlement agreement was that the mediator would select a land surveyor who would determine the boundary position. Both Owners would be bound by this determination;

    c. For many reasons, Owner 2 was dissatisfied with the surveyor's determination and refused to follow it;

    d. The claim was issued by Owner 1. A preliminary issue arose, as to whether the Owners were bound by the surveyor's determination. This would require interpretation of the settlement agreement.

37. One issue of note is that the settlement agreement, which called for expert determination, was held to be capable of being a boundary agreement. It follows that this would be a Type 2 boundary agreement, as the expert was being called upon to determine the existing boundary.

38. The question of whether s2 LP(MP)A applied to this particular boundary agreement was swept away in pleading points and not dealt with in detail.

39. Most importantly, the judge at first instance found that the surveyor's determination was binding on the parties, and then made a declaration that that determination demarcated the boundary. Part of the Appellants' argument was that this was not the intention of the preliminary issue trial – the judge had gone too far by making a declaration as to the boundary position.

40. It was here that the Appellants argued that, by declaring that the expert determination was binding, the court was imposing a proprietary outcome prematurely.

41. Murray J rejected this particular argument, on the basis that he understood that a Type 2 boundary agreement is not proprietary, and does not bind successors in title.

42. His justification for this was the Inconsistent Boundary Point in *Neilson v Poole*. Murray J used the first interpretation, which I have set out at Para 17(a) above. His interpretation was that a Type 2 boundary agreement has no proprietary character until adverse possession has moved the legal boundary.

CONCLUSION

43. Type 2 boundary agreements are proprietary. This is clear enough from *Neilson v Poole* and *Joyce v Rigolli.* It was confirmed, albeit obiter, in *Haycocks v Neville.* They should be held to bind successors in title, and not be dependent on adverse possession to operate. In this respect, *Gibson v New* is wrong.

44. It will be interesting to see if the Court of Appeal grants permission to appeal. If not, we will be left with an intolerable conflict within this already tricky area.

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