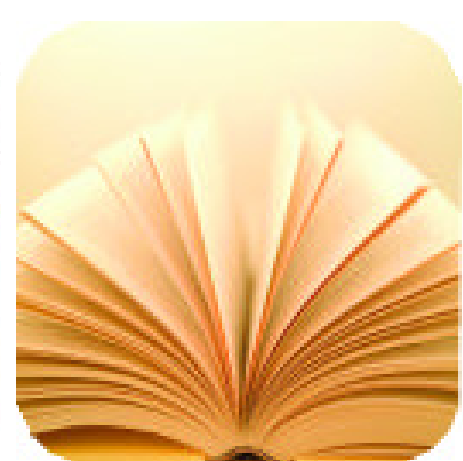
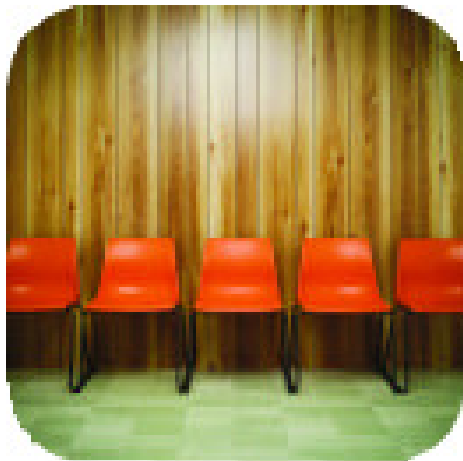




SECTION 272 OF THE PROPERTY LAW ACT 1958 ("PLA") - ITS EFFECT ON TITLE DISCREPANCIES INCLUDING ADVERSE POSSESSION CLAIMS

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Section 272 of the PLA

- Provides that the boundaries of any parcel of land, as stated in any document of title or on any plan, are construed as though the phrase "a little more or less" immediately followed the dimensions.
- It is deemed to cover any discrepancy that does not exceed 50 millimetres where the boundary line is less than 40.30 metres and 1/500 of the boundary line where it exceeds 40.30 metres.
- If it is found that s272 applies because the discrepancy does not exceed those measurements, then no action can be brought in respect of such difference “and any case where such difference does exceed such limits an action for damages or compensation in respect thereof shall lie in respect of such excess only”.

Section 267 of the PLA

- Pursuant to section 267 of the PLA, document of title includes "any Crown grant or Crown lease or any folio of the Register, deed of conveyance, partition, release or assurance, or other deed, will, lease written contract or writing". Accordingly, s272 will apply to boundaries in any form of land title.

PCH Melbourne Pty Ltd v Break Fast Investments Pty Ltd [2007] VSC 87

Facts of the case:

- The Defendant attached metal cladding to sections of the western face of their 12 storey building which encroached 60mm into the airspace above the Plaintiff's land.
- The Plaintiff wanted to build a high-rise on their own land, the encroachment of the cladding by 60mm caused a substantial issue.
- The Plaintiff sought a permanent injunction requiring the Defendant to remove the cladding and attached signage.

Victorian Encroachment Laws

- In Victoria, an owner of an encroaching building commits a trespass to land.
- On the application of the adjacent owner, a court may grant a mandatory injunction to require the removal of the encroachment.
- The court has the discretion to refuse an injunction and award damages instead, including damages for a continuing trespass where the injury caused by the encroachment is small and capable of being estimated in money and which would otherwise be oppressive in the circumstances to grant an injunction.

PCH Melbourne Pty Ltd v Break Fast Investments Pty Ltd Continued

The Defendant contended that:

- although there is an encroachment over the land, the effect of the words “a little more or less” in s272 introduces “a margin for error or tolerance in determining the dimensions of any boundary stated in the document of title”;
- in the current circumstances, 50mm of the claimed encroachment was allowed by the application of s272 which means that the Plaintiff’s claim was for a mere 10mm at most; and
- when applying s272, the maximum 10mm encroachment by the Defendant results in a “trifling encroachment” which “should not be viewed as a trespass” or “should be regarded as insufficient” and therefore not “warrant the exercise of the discretion to grant the injunction sought”.

PCH Melbourne Pty Ltd v Break Fast Investments Pty Ltd Continued

In response, the Plaintiff argued that:

- s272 addresses "only the accuracy of dimensions on a Certificate of Title in relation to the parcel of land concerned and was directed to vendor and purchaser disputes".
- The words "more or less" do not allow a landowner to assert the right to occupy up to 50mm over the title boundary; and
- The section does not enable a Court "to ignore the fact that the plaintiff has been in actual occupation of the land".

PCH Melbourne Pty Ltd v Break Fast Investments Pty Ltd Continued

When determining judgment Smith J considered:

- The second reading speech of when the legislation was first introduced. The Judge found that the speech also favoured monumentation over the title measurements; and
- The older case of *National Trustees Executors and Agency Co v Hassett* [1907] VLR 404 which supported that when dealing with the situation of a common title boundary not reflecting actual occupation, s272 was not to be used to determine the actual boundary, rather consideration was to be had as to what was in fact occupied and by whom.

PCH Melbourne Pty Ltd v Break Fast Investments Pty Ltd Continued

After consideration of both arguments, Smith J held that:

- the encroachment constituted a trespass over the Plaintiff's land and that an injunction should be granted.
- s272 allowed a "flexibility into the dimensions on title documents so that minor discrepancies between them and the monumentation cannot give rise to disputation and the monumentation will prevail. Meaning that whilst a margin of error in dimensions appearing on title documents is allowed, it does not refer to the actual title boundary "as found by admeasurement on the ground".
- "at best for the Defendant, s272 raises an issue as to the extent of the encroachment in relation to the boundaries as described in the title, however that is not the issues in this case, The issue is the extent of the encroachment over the actual title boundary between the two properties, therefore s272 does not apply".

Review of *Property Law Act 1958*

- In August 2009 the Attorney-General asked the Victoria Law Reform Commission to review Victoria's property laws, in particular the *Property Law Act 1958*.
- The Commission's final report in September 2010 expressed a view that the legal effect of s272 is that only applies to claims relating to small boundary discrepancies in sales of land and that it does not limit claims of adverse possession and trespass arising from boundary discrepancies.
- The Commission also recommended that a building encroachment relief provision be inserted to coincide with other Australian jurisdictions.

Adverse Possession Claims

- A land owner has the right to sue in trespass for damages or an injunction where there is an encroaching fence, wall or other structure, however such right to sue expires if legal proceedings are not commenced before the limitation period expires.
- The limitation period for an action to recover land is 15 years.
- Once the limitation period expires, the adjacent owner's title to the portion of land under encroachment is automatically extinguished by section 18 of the *Limitation of Actions Act 1958* and an application for a vesting order can be made.
- Such acquisition of portions of land is known as the rule of "part parcel adverse possession".

Submission by the Surveying & Spatial Sciences Institute

- While supporting the retention of the rule of adverse possession, the Institute saw a need to exclude claims to very small portions of land, citing an example of a claim for a 50-80mm strip of land along a side fence which abutted a number of other lots and required amendment of multiple titles therefore creating "unnecessary slivers of land".
- Whilst the Institute suggested that consideration be given to exclude adverse possession claims by amending s272 of the PLA, the Commission held that as s.272 does not limit claims of adverse possession from boundary discrepancies (even if under 50mm for a boundary line less than 40.3m), any minimum area requirement for adverse possession claims would have to be a total new provision, not an amendment to s.272.

So when can s.272 be used?

- It seems that a sale of land where the Purchaser buys the land using the title documentation to identify the boundaries would be the only instance that s272 may be applied by a Purchaser against a Vendor if it is later found by the Purchaser that a neighbour encroaches on their land within the margin of error set out in s272.
- General Condition 3 of the Contract of Sale of Real Estate 2008 states:
"An omission or mistake in the description, measurements or area of the land does not invalidate the sale and that the purchaser may not make any objection or claim for compensation for any alleged misdescription of the property or any deficiency in its area or measurements".
- As s.272 states that the margin of error allowed in the description of title boundaries applies *"unless such construction is expressly negated or modified by such document of title or contract"*, it is arguable that General Condition 3 prevails over s.272, meaning that even if there was a title discrepancy a Purchaser may not even rely upon s272.

So when can s.272 be used?

- However, General Condition 3 of the Contract of Sale of Real Estate 2008 will always be subject to the common law principle the so-called rule in *Flight v Booth* as applied in *Fullers Theatres Ltd v Musgrove (1923)* 31 CLR 524 to the effect that a significant discrepancy will justify avoidance of the contract by the Purchaser, and the associated rule of thumb that a 5% or greater diminution in area is likely to be considered significant.
- Example: After executing a Contract of Sale, a Purchaser discovers that the fence along the 20 metre boundary is incorrect by 100mm. Pursuant to General Condition 3, despite an encroachment over the actual title boundary between the two properties, the Purchaser is arguably prevented from making a claim under s272 for 50mm (being the difference between the allowed allowable margin of error and the actual difference). The Purchaser would only be able to:
 - Avoid the Contract if the incorrect boundary results in a 5% or greater diminution in area of the land (unlikely); or
 - After settlement, sue the adjoining owner in trespass for damages or an injunction (however if the encroachment exceeds 15 years the adjoining owner may make an application for adverse possession).

CONCLUSION

- Subject to any title or contract provision to the contrary, it appears that s272 can only be relied upon when there is a discrepancy as to the boundaries on title documents and not when the discrepancy is discernable using the actual boundaries of the properties themselves.
- s272 has no effect on adverse possession claims.



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