

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

INTRODUCTION

Today I am going to talk about s272 of the Property Law Act and its scope, effect and intention together with its effect (if any) on adverse possession claims.

Section 272 provides for a margin of error in the description of survey boundaries. Essentially, it states 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."¹ If it is found the discrepancy does not exceed those measurements, then s272 applies and no action can be brought in respect of such difference. "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".

No comparable provisions can be found in any other Australian jurisdiction.

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 any form of title.

So how is this section interpreted in practice? We are fortunate that the case of **PCH Melbourne Pty Ltd v Break Fast Investments Pty Ltd [2007] VSC 87** which considered s272 and its effect. The facts of the case are as follows:

In 2002, 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 adjoining land. As the Plaintiff wanted to build a high-rise on their own land, the encroachment of the cladding by 60mm caused a substantial issue.

¹ Victoria Law Reform Commission "Review of the Property Law Act 1958" Final Report 20, 2010 p120 (D1635279:1)

As an aside, 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.

It is interesting to note that in 1922 the NSW Parliament enacted Australia's first building encroachment legislation to control rent-seeking behaviour by adjacent owners (which the Minister likened to an innocent owner being blackmailed in respect of an inch or two of land). Five Australian jurisdictions and New Zealand have provisions dealing with encroachments of buildings whereby a court can grant an order for the removal of the encroachment, the payment of compensation or the regularisation of the encroachment through an order for a transfer, lease or easement over the affected portion of land. In considering an application, the Act sets out a range of discretionary factors to be considered such as:

1. the situation and value of the land;
2. the nature and extent of the encroachment;
3. the character of the encroaching building and purpose for which it is used; and
4. the loss and damage which would be incurred by each owner.

As there was no such building encroachment legislation in Victoria, the Plaintiff sought a permanent injunction requiring the Defendant to remove the cladding and signage. The Defendant sought to rely on s272 of the PLA stating that if there was any encroachment, "it did not constitute a trespass because it was of such a trifling nature."

The Defendant contended that:

1. 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";
2. In the current circumstance, 50mm of the claimed encroachment was allowed by the application of s272 which means that Plaintiff's claim was for a mere 10mm at most; and
3. 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".

In response ,the Plaintiff's argued that:

1. 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".
2. The words "more or less" do not allow a landowner to assert the right to occupy up to 50mm over the title boundary; and
3. The section does not enable a Court "to ignore the fact that the Plaintiff has been in actual occupation of the land".

Justice Smith confirmed that there was an encroachment by the Defendant of approximately 60mm over the Plaintiff's land and then considered whether s272 could be relied upon.

When determining judgment the Justice Smith also considered:

1. The second reading speech of when the legislation was first introduced in 1885. The Judge found that the speech also favoured monumentation over the title measurements; and
2. 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.

After consideration of both arguments, the Smith J held:

1. that the encroachment constituted a trespass over the Plaintiff's land and that an injunction should be granted.
2. that s272 allowed a "flexibility into the dimensions on title documents so that minor discrepancies between them and the monumentation² cannot give rise to disputation and the monumentation will prevail, meaning that whilst a margin of error in

² Monumentation in surveying refers to the practice of marking known horizontal and vertical control points with permanent structures such as concrete pedestals and metal plaques. Once surveyed and marked, these monuments can be used for further surveying and for the alignment of land-parcel boundaries and infrastructure. (the case refers to monumentation as "the physical evidence of long term occupation by the owners of the properties shown on the titles".)

dimensions appearing on title documents is allowed, it does not refer to the actual title boundary "as found by admeasurement on the ground".

3. "at best for the Defendant, s272 raises an issue as to the extent of the encroachment in relation to the boundaries as described on the title, however that is not the issue in this case. The issue is the extent of encroachment over the actual title boundary between the two properties, therefore s272 does not apply"

There was an appeal of the case by the Defendant, however this was dismissed by the Court of Appeal and is not of any real benefit to the interpretation of s272 as the Defendant abandoned it as a ground for appeal.

Accordingly, from that case, s272 can only be relied upon when there is a title boundary discrepancy appearing on title documents, not when the discrepancy is found through monumentation - meaning from measurements taken on the actual property boundaries.

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*³, providing an opportunity to overhaul such Act for the first time in 82 years. The Commission's final report in September 2010 expressed a view that the legal effect of s272 is that it 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.

In addition, it was recommended that a building encroachment relief provision be inserted to coincide with other Australian jurisdictions.

ADVERSE POSSESSION

As discussed above, 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 although it may be extended to 30 years if the landowner is under a legal disability. So long as the trespass continues, the encroaching neighbour may be deemed to be in adverse possession of the portion of land on which the encroachment extends. Once the limitation period expires, the adjacent owner's title to the portion of land under encroachment is automatically extinguished by section 18 of

³ Victoria Law Reform Commission "*Review of the Property Law Act 1958*" Final Report 20, 2010 p120 {D1635279:1}

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". Such part parcel adverse possession is not allowed in all jurisdictions with a building encroachment relief provision, except WA. In Victoria, there are no restrictions as to the size of the area that can be claimed, however claims cannot be made against certain public authorities such as the Crown, Victorian Rail Track, water authorities and Councils.

In a submission made to the Victoria Law Reform Commission by the Surveying & Spatial Sciences Institute on 30 June 2010, 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". In part, this argument is no longer relevant as from 1 May 2010, where land is successfully claimed by adverse possession under section 62 of the *Transfer of Land Act*, the Registrar will have discretion to consolidate the claimed land with the adjoining land owned by the applicant.

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 if s.272 cannot be relied as a defence for a claim of encroachment over the actual title boundary between the two properties, nor adverse possession claims, when can it be practically applied?

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. However, it is important to note General Condition 3 of the Contract of Sale of Real Estate 2008 which 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 for example of 80mm, a Purchaser may not even rely upon s.272 to claim 30mm excess.

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

In 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. It also seems that s272 has no effect on adverse possession claims.