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Lines in Space

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Abstract

A review of the impact of unknown land boundaries in a real estate transfer.
The concept of *caveat emptor* as applied to a purchaser in a property transaction.
A case study. Protective measures which can be taken to avoid pitfalls.

The land boundary

*A real estate boundary is almost invariably defined as a line, whereas it is in truth a fan shaped surface presumed by the law to extend skyward vertically from the centre of the earth.*¹

The New South Wales Certificate of Title is the corner stone document for land ownership. All information within this Certificate is also available in electronic form as an up to date computer folio Title Search. This Certificate specifies the actual land parcel, land ownership and any encumbrances over the subject lot.

The title diagram nominates the land parcel and this is usually a lot in a registered Deposited Plan of Survey, prepared and surveyed by a NSW Registered Land Surveyor. Land boundaries on the ground may be ascertained from this Deposited Plan.

The Board of Surveying and Spatial Information (BOSSI) sets and regulates competency standards for surveyors and surveying practices in NSW. These standards are designed to maintain the integrity of land boundaries across the State (ie. the State's cadastre), which in turn maintains the integrity of the NSW property market and ensures community interests are protected. Lands implements and monitors these standards on behalf of the Board.

*To ensure a high level of competency in surveying services in NSW, only surveyors registered with the Board of Surveying and Spatial Information can prepare plans of survey. Such plans of survey are required when new land parcels are formed through subdivision or when all or part of an existing parcel is to be used for a specific purpose (i.e. easement or lease).*²

¹ Frank Hallmann -
Legal Aspects of Boundary Surveying as apply in New South Wales, 1973, pp22

² NSW Department of Lands
Web : http://www.lands.nsw.gov.au/survey_mapping/surveying/cadastral_integrity

An artificial, man-made land boundary is the vertical plane containing two marked ground points. Land boundary lengths as shown on a DP, are the projection onto a local horizontal plane of these two marked points, at ground surface height. The bearing of a line within a vertical plane is the horizontal angle between it and an arbitrary reference line called a north point. Various north points are utilised.

The Deposited Plan (DP) details the establishment of a Lot or a number of Lots within a particular DP. At the date of initial survey, created land boundaries are physically marked on the ground and have mathematical integrity, ie precise lengths and bearings of land boundaries are able to be checked by closure computations and compliance accuracy standards verified.

Statutory Regulations require that marked land boundaries created by a DP are required to be discernible, meaning capable of being seen, noticed or capable of being perceived clearly. It is important to note, that this requirement applies at the date of initial survey of the creation of the DP.

Over time, post the initial DP survey, previously correctly placed land boundary survey markings may now be gone, removed or rendered obscured or unnoticeable by vegetation regrowth, planted vegetation or weed infestation. Survey markings may be disturbed or taken out by road and utility services earthworks and wrongly repositioned. Boundary fencing may have been erected on an incorrect ground position and is subject to verification by survey.

Accordingly for a particular location, there may not be immediate evidence of the exact correct location of the land boundary. The potential impacts of this circumstance in a land and property transaction, are addressed in this paper.

Land Boundary Implication

During the period 1999 to 2007, as a Consultant Land Surveyor working in the NSW far north coast region, I have found on an irregular basis, clients not being aware of the implications of land and easement boundaries and associated problems of building structures encroaching on adjoining lands. The extent of structures encroachment varying from part of a building structure being located on adjoining land, not in the same ownership, to the whole of a residence building and all out buildings being located on the wrong lot. Client unawareness of boundary locations, has resulted in detrimental and substantial financial loss, stress and sometimes a lengthy and costly rectification process.

The initial involvement of a Registered Land Surveyor as part the proposed property purchase process would reveal problems, if any, from the outset and potentially negate future unnecessary hardship for the proposed purchaser.

The stakeholders in a land and associated building structures purchase may include and are not limited to -

- The Vendor
- The Purchaser
- Financial Institution / Bank
- Federal, State and Local Government
- Real Estate Agent or Real Estate Salesperson
- Solicitor or Property Conveyancer
- Registered Land Surveyor
- Architect and / or Builder
- Engineer.

A recent High Court of Australia court case outcome gives consideration to the expected function of participants in the property transfer process and the impact of disclaimers in land sale documentation.

*Judgment in Butcher v Lachlan Elder Realty Pty Limited [1] was delivered on 2 December 2004. In the circumstances, the Court, by a 3 to 2 majority, found that the conduct of a real estate agent, in including certain incorrect material contained in an advertising brochure which induced the purchaser to enter into a contract, was not misleading and deceptive conduct as defined in s52. Further, the Court found that the agent was entitled to rely on a disclaimer, which appeared in fine print on the advertising brochure, to answer a claim under s52.*³

Part of the brochure showed a survey diagram undertaken in 1980 and on the basis of this survey, it was accepted that a swimming pool was within the subject property. In 1997, the vendor bid successfully for this property at auction for a substantial purchase price.

Post the property purchase, it was established that the location of the existing mean high water mark (MHW) had changed from the 1980 survey, resulting in part of the pool encroaching on government land. This led to the commencement of legal proceedings.

Had the purchasers known about the impact of the changed 1997 MHW location from 1980, their property purchase at auction would not have taken place. This would have been revealed by a current and up to date survey, available for inspection on the auction day. The auction process commits the successful bidder to a prompt signing of the contract for sale of property. This contract was not subject to any further land survey investigation.

³ Andrew Nicholson of Mullins Lawyers, High Court Warns on Disclaimers
Web : <http://www.findlaw.com.au/articles/default.asp?task=read&id=12992&site=GN>

This High Court of Australia outcome distinguishes the Real Estate Agents specific role in a property transaction. Bearing in mind that two High Court Judges dissented with this judgement, the majority said that -

The purchasers were intelligent, shrewd and self-reliant. The agent was a small suburban real estate agent, who was not an expert in complex matters of surveying or land title. They said it was a matter of common experience that the skill of suburban real estate agents lies in making contracts on behalf of sellers with buyers, in locating persons who wish to sell real property and interesting persons who might wish to buy that real property, and in advising the former what prices are obtainable and the latter what prices might have to be paid. They said that suburban real estate agents do not hold themselves out as possessing research skills or means of independently verifying title details about the properties they seek to sell. ⁴

Caveat Emptor

The onus is wholly on the purchaser to make all necessary enquiries and checks in a proposed real estate purchase, inclusive of seeking professional advice and recommendations from the aforesaid mentioned stakeholders. The common law of *caveat emptor, qui ignorare non debuit quod jus alienum emit* applies. Latin for - let a purchaser, who ought not be ignorant of the amount and nature of the interest which he is about to buy, exercise proper caution. In plain English - buyer beware.

A stereotypical disclaimer used by the Real Estate industry may read as follows -

The information on this website / brochure / advertisement has been furnished to us by the seller and their Solicitors and Representatives. We have not verified whether or not that information is accurate and do not have any belief one way or the other in its accuracy. We do not accept any responsibility to any person for its accuracy and do no more than pass it on. All interested parties should make and rely upon their own inquiries in order to determine whether or not this information is in fact accurate.

This aforesaid statement is not of any assistance to the proposed property purchaser and places the purchaser in the position of accepting all liability for assumptions and decisions taken. Accordingly, in consideration of the burden placed on a property purchaser, every right and sufficient time needs to be taken, to understand all relevant elements of the proposed property purchase. The purchaser should not be coerced into committing to a purchase without the benefit of a full and proper investigation.

⁴ Definition of roles, disclaimer protects, against liability for, misleading conduct
High Court of Australia, 2 December 2004.
Butcher & anor v Lachlan Elder Realty Pty Ltd
Ebsworth and Ebsworth Insurance Review , 17.1, MAY 2005

Vendor disclosure under the NSW legislative regime requires that certain minimum documentation must be annexed to the contract of sale for land, before the purchaser signs it -

- a certificate disclosing the planning status of the land, issued pursuant to s 149 of the Environmental Planning and Assessment Act 1979 ;
- a copy of the folio of the register comprising the title, Certificate of Title;
- a copy of the registered plan of survey ; which may be old or compiled;
- a sewerage diagram, if available from the Authority ;
- copies of all deeds, dealings and other instruments lodged or registered in the Land Titles Office relating to: easements, profits a prendre, restrictions on the use of the land and positive covenants that affect the land. ⁵

From a land boundary perspective, in a real estate property transaction under NSW Vendor Disclosure Legislation, there is **no** requirement for a recent and up to date Identification Survey, which may evidence problems, if any, with building structures and property boundaries.

Basically and most importantly, for the real estate property being considered, it is critical that the ground location of land and easement boundaries be known and the relationship of building structures to these boundaries be understood and clarified.

The Real Estate Agent / Salesperson, the Solicitor, the Architect or Builder are not qualified to deal with land boundaries on the ground - under the NSW Surveying Act 2002, this is the function of the NSW Registered Land Surveyor.

A Case Study

In 2006 I received a phone call from a client and accepted an instruction to mark part of the boundaries of a rural lifestyle property of about 15.2 hectares and purchased about 18 months previously. Preliminary office investigation revealed that the subject lot was created by a DP registered in 1978 and could be considered a relatively modern plan of survey.

Within this lot was an unconstructed crown road 20.115 metres wide. This crown road severed the land parcel and intersected with a public constructed road giving road frontage access to the subject lot. In the Second Schedule of the computer folio Title search it was clearly stated - " Land excludes the road shown in DP --- ---. "

⁵ NSW Conveyancing (Sale of Land) Regulation 2005 - Schedule 1
Part 2 Vendor disclosure for contracts for sale of land

Further office investigation, using online resources and existing 1: 25000 topographical mapping, indicated that a building structure may be located near or within the aforesaid crown road reserve.

Initial discussions and field inspection with the client on site, indicated that there was no existing rural fencing and that the client was unaware of a crown road severing the property. Within the property was a timber residence, attached garage with storage shed and other outbuildings. In the vicinity of the public road and around the residence buildings there was thick bush regrowth vegetation with pockets of lantana weed infestation. The client had a vague and misinformed idea of the location of the existing land boundaries with respect to his recently purchased property.

Original survey reference marks and marked corners placed by the 1978 land survey, were located on the adjoining lots. Field survey traversing together with on site computation resulted, after the clearing of lantana, in finding the original marked road frontage corners of the subject land parcel. The client advised me that the correct property corners surveyed and found by myself, were substantially not in accordance with his perception during his property sale experience.

Now, that the true location of the property corners had been established and part side boundaries remarked, I advised that further survey should be undertaken, to relate existing building structures to the nearby unconstructed crown road boundaries.

After field survey and extensive check computations, I had the unpleasant experience of having to report to my client that the whole of the existing residence and a greater part of the garage and storage shed, were wholly located within the unconstructed road reserve. Additionally, it was not a pleasant experience for my client, who had paid a substantial sum for the property 18 months previously. My client is now burdened with the process of rectifying this matter.

A request for, or the commissioning of an Identification Survey, prior to proceeding to finalisation of the property sale, would have been relevant and important information for my Client's assessment.

It is important to note here, that primary land search documentation, available to all relevant stakeholders, clearly indicated the presence and location of the unconstructed crown road reserve within the subject property. The title search clearly noted - "land excludes the road shown in the title diagram" ie the DP. The 1978 DP clearly showed the dimensioned road reserve severing the subject property.

Concluding remarks

In real estate property transactions, knowledge of specific ground location of land boundaries and the correct relationship of building structures to land and easement

boundaries are of critical importance.

In my experience, on occasion and where it might seem importantly appropriate from my perspective, I have seen no alerts given to prospective property purchasers with respect to land boundaries or the requirement of an identification survey. In some instances this has resulted in substantial problems post sale. The urgency seems to be, to finalise the actual sale process.

The astute purchaser should ask questions, have documentation explained by persons of professional competence and with respect to land boundaries, request a land survey, be it the marking of specific boundaries by a Registered Surveyor or an Identification Survey. Both types of survey are accompanied by a Survey Sketch Plan detailing land survey work undertaken, together with a detailed written report.

A boundary remark survey or identification survey should preferably be undertaken prior to the signing of a contract for sale of property. Alternatively, the purchaser should proceed with a sale contract with the explicit provision that the sale finalisation be subject to the outcome of an identification or remark survey. That is - if defects or problems are identified in the survey, the purchaser can lawfully withdraw from the sale.

To ensure community interests are protected, consideration should be given that Identification Surveys be mandatory in NSW Real Estate Transfers and perhaps described as a pre- purchase Identification Survey, particularly where there is any doubt concerning a building structure in relation to a land or easement boundary. In the minimum, a warning statement alerting prospective purchasers of the need to understand and check land boundaries should be included in the contract documentation for the sale of real estate.

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