



Proposed guidebook on established case law for land surveyors on property boundaries

D. O'Brien & W. P. Prendergast

To cite this article: D. O'Brien & W. P. Prendergast (2014) Proposed guidebook on established case law for land surveyors on property boundaries, Survey Review, 46:334, 58-65, DOI: [10.1179/1752270613Y.0000000047](https://doi.org/10.1179/1752270613Y.0000000047)

To link to this article: <https://doi.org/10.1179/1752270613Y.0000000047>



Published online: 06 Dec 2013.



Submit your article to this journal [↗](#)



Article views: 319



View related articles [↗](#)



View Crossmark data [↗](#)

Proposed guidebook on established case law for land surveyors on property boundaries

D. O'Brien and W. P. Prendergast*

Since the introduction of the common law system, precedent case law has been a core element of its existence. Owing to the high number of boundary surveys conducted as part of boundary disputes during the past number of years, research of Irish High Court case law judgements delivered in the past 10 years on property boundary disputes was identified. This paper outlines a proposal to be considered in the form of a 'Guidebook' for surveyors to follow when involved in a property boundary dispute. The court judgements will be assessed via a case briefing technique that is used worldwide in universities and an understanding of surveying case law and how decisions can be used in the construction of principles to be applied will be evaluated and analysed. Detailed information on these cases is not the subject of this paper. This paper presents results documenting how case law can be seen to be of fundamental importance for surveyors when involved in property boundary disputes. Documented in the form of a 'Guidebook', this information would be of benefit for surveyors and property professionals in understanding the principles applied to previous cases and thus the principles to be applied in future cases to try to resolve boundary dispute incidences (before litigation). The rulings made in court can be employed as set principles for surveyors to follow when carrying out property boundary rectification and resolving property boundary disputes in the future.

Keywords: Property boundary disputes, Precedent case law, Surveying principles, Guidebook of Irish case law

Introduction

Improvements to the current mapping system in Ireland have been suggested and agencies continue to strive to reach solutions to minimise their frequency of mapping and boundary disputes. Boundary disputes are known for their exorbitant costs incurred by landowners, the stress and strain that they impose on the individuals involved and the difficulty in resolving disputes amicably.

With the ever-increasing number of court cases in Ireland today, mainly because of the recession, this research identified the number of High Court case law judgements within the past 10 years. Examining case law is of paramount importance in describing the collection of legal principles emanating from reported cases on a given issue and today people are encouraged to go down the route of mediation, and not litigation. However, it is from litigation and real life case law that legal principles are developed and these principles may be used to resolve incidences outside the court.

Lord Hoffman describes boundary disputes as the most 'painful form of litigation' [18]. He states that disproportionate amounts of money are spent on claims that are too small in comparison to the value of the land

and recommends that the rules on boundaries need to be clarified. Justice Clarke strongly advised both parties in *Charlton & Anor-v-Kenny & Anor* [2007] IEHC 308 to avoid litigation and engage in mediation as litigation was only going to favour one side of the dispute [16].

Greatholder believes that the courts should not disregard boundary disputes because feelings run high and thus must deal with them appropriately. Landowners have a right to go to court and have their boundary dispute resolved as they are a product of human nature and are not going to go away [11]. Analysing court cases is not about who won or who lost the case; it is primarily about the legal principals that were applied and thus identifying the principles that should be applied to similar issues in the future.

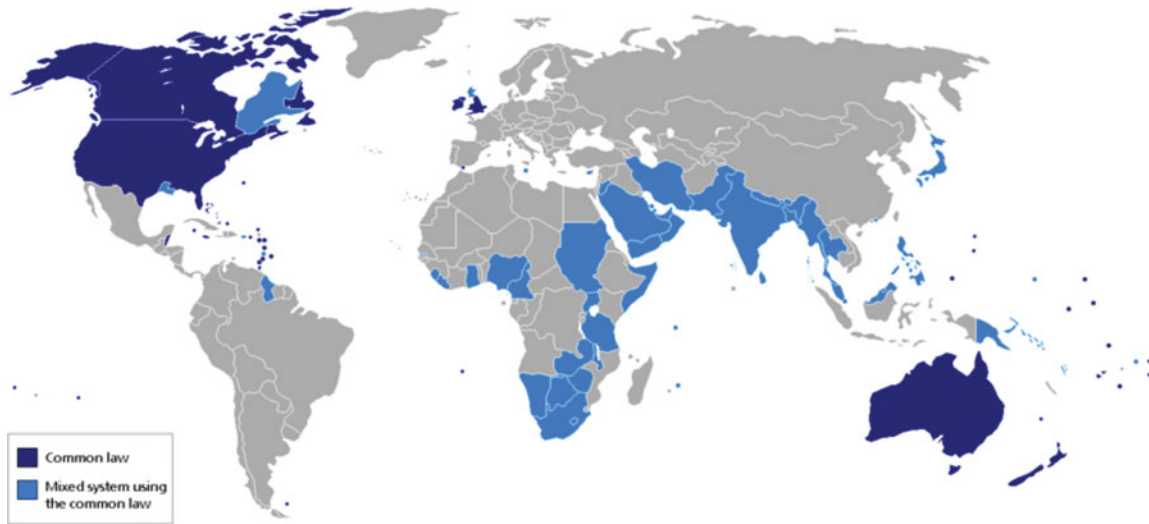
The objective of this paper is to determine how many High Court cases involving property boundary disputes occurred during the past 10 years and to determine how and why case law could be of valuable information to surveyors in resolving property boundary disputes.

Legal proceedings in Ireland

Before the current common law system, Ireland had its own system of law, known as Brehon Law. Originating from the Celtic period, Brehon law developed from customs, which had been passed on orally from one generation to the next and were first written down in the seventh century AD. Brehon law was administered by

Dublin Institute of Technology, Bolton Street, Dublin 1, Ireland

*Corresponding author, email Patrick.Prendergast@dit.ie



1 Map of common law countries [33]

Brehons who were the successors to Celtic druids, and while similar to judges, their role was closer to that of an arbitrator. Their task was to preserve and interpret the law rather than to expand it [7].

In many respects, Brehon law was quite progressive. It recognised divorce, and equal rights between the genders, and also showed concern for the environment. In criminal law, offences and penalties were defined in great detail and restitution rather than punishment was prescribed and capital punishment was not available as a penalty. The absence of either a court system or a police force suggests that people had strong respect for Brehon law. Brehon law was finally replaced by common law in Ireland in the eighteenth century [7].

By 1800, these laws were collectively known as the common law of England and thus any system of law which was based on rules handed out by Judges is known as a common law system [4].

In 1922, Ireland became an independent and free state. The Constitution of Ireland (*Bunreacht na hÉireann*) was adopted by referendum on 1 July 1937 and is the fundamental law governing the State and defines the structure and power of the courts. Countries that use common law can be seen in Fig. 1.

Legislation is deliberate law making where its purpose is to create certain rules that are to be applied for future events rather than adjudicating individual disputes [4]. In Ireland, legislation consists of Acts of the Oireachtas (Irish Parliament), also referred to as Statute Law. The Oireachtas [consisting of the President of Ireland and two houses of the Oireachtas; The Dáil & Seanad (Senate)] has sole and exclusive authority in making law for the state. All primary legislation is introduced as 'Bills' and is brought before the Dáil and Seanad for it to be enacted. The 'Bills' go through a five-stage process and must be passed by both houses where it is then signed by the Taoiseach and the President of Ireland. Secondary legislation is also possible in the form of Statutory Instruments, of which there are five main types: orders, regulations, rules, byelaws and schemes. Statutory Instruments are not enacted by the Oireachtas, but by individuals and bodies to whom legislative power have been delegated by statute to legislate the day-to-day matters arising from relevant primary legislation such as

government ministers. Several hundred Statutory Instruments are produced annually [23].

An important Statutory Instrument in Ireland is the Land Registration Rules of 2012. These rules are prescribed conditions for landowners to follow when registering land and in particular, rules 148–151 for the registration of property boundaries as conclusive. As noted by the Irish Institution of Surveyors (IIS), some of these rules need to be amended as they were initially designed for paper mapping and are not equipped to deal with digital mapping or the modern surveying techniques that are used today. Changes they suggest are: making it illegal to move boundary monuments and outlining the priority between the location of boundary monuments on the ground and recording their location within the Property Registration Authority (PRA) [26].

Legislation that deals with the rectification or re-establishment of property boundaries is contained in the Registration of Title Act 1964 [14]. Under Sections 86, 87 and 88 of the Act, landowners who have an issue as to the location of their property boundary and would like to register their boundary to conclusive are entitled to do so. A new registered boundary can be agreed with the Land Registry; however, this is rarely used [26].

To date no legislation has been enacted to regulate the surveying of property boundaries. There are however certain practice procedures for surveyors to follow in relation to disputes over property boundaries. These are not statutory rules but guidelines for surveyors produced by the IIS and the Society of Chartered Surveyors Ireland (SCSi).

In 2008, the IIS published a Green Paper that outlined proposals to introduce standards and procedures for boundary surveys. This suggested that property boundaries would need to be established on the ground initially and then surveyed to a high standard for property boundaries to be registered as conclusive boundaries. Conclusive boundaries are also important for e-Conveyancing, as non-conclusive boundaries are not reliable enough. Ireland's land registration system is made up of folios and maps where the folios are deemed reliable, thus the title is conclusive and guaranteed by the state. In contrast, the Land Registry maps are regarded as unreliable, non-conclusive and are consequently not

guaranteed by the state. This aspect of the Irish mapping system is less secure and is an area where reform is needed [26].

As the current mapping of non-conclusive boundaries is not reliable enough for e-Conveyancing, mapping in Ireland needs to be improved to allow e-Conveyancing to be introduced. This conveyancing process requires confidence in the quality of information produced by the PRA to allow for the re-establishment of boundaries to have been properly defined. New standards and procedures are required to implement this [25].

Non-conclusive boundaries are usually represented on the ground by physical features, natural or man made, for example, fence, hedgerow, wall, ditch, road or tree line [31]. The IIS also proposed formulating and adopting a new set of standards and procedures for boundary surveying to promote a gradual migration from non-conclusive boundaries to conclusive boundaries over a number of decades [26].

In 2010, the SCSi published a guidance note, 'Boundaries: procedures for boundary identification, demarcation and dispute resolution in Ireland'. The aim of this publication was to encourage private individuals, businesses and professional advisers to opt for a suitably qualified Chartered Surveyor as an expert who can examine and understand documents, maps, carry out inspections and prepare a report. The guidance note provides the SCSi members with the procedural role that the surveyor plays in identifying the property boundary, aids the parties involved and encourages resolving disputes through mediation [3].

Case law has been derived through judicial decisions that have been delivered in the courts for the last nine centuries, although only introduced in the seventeenth century in Ireland, early cases date back further and have grown to produce its own band of law, i.e. common law. Consistency and uniformity of the law were required and this is why judge made law was implemented. Courts back in the twelfth century were not bound by previous decisions; it was only when a settled hierarchy of courts and accurate case reporting was made available that the courts followed previous decisions [12].

Case law is of paramount importance in describing the collection of all the legal principles emanating from reported cases on a given issue. Today, courts encourage litigants to first try mediation and not resort to litigation, though it is litigation and real life case law that legal principles and legal rules are developed [11]. Is this a potential problem for the development of case law in the future, if mediation is very successful, would this minimise new case being developed?

Judges decide the law, mindful of what other judges have done in similar circumstances (i.e. following precedent). In fact, much of what the legal profession debate in court is to try and convince judges that the present situation is sufficiently similar or different to other cases previously brought before the courts. In applying precedent and principles of previous cases, judges will decide on the strength of the evidence brought before them and apply the law (i.e. judicial precedent) to the facts of the case in question [32]. With new cases, the more similar the facts are to older cases of precedent, the easier it will be for a judge to determine what law is to be applied to the new case. Once the facts

are different or novel to those of previous decisions, the more difficult it will be to find a match and a new case of precedent may be established [32]. Each case is different and the judge must decide whether 'this' case should be decided in the same way as previous cases. Cases of precedent remain binding until they are overturned by a higher court [24]. The way in which case law is embedded into common law is through three main doctrines, *stare decisis*, *ratio decidendi* and *obiter dictum*.

Stare decisis

A fundamental principle in common law is the doctrine of *stare decisis* (Latin: 'Let the decision Stand'), which means that courts are bound by precedent decisions made in previous cases. *Stare decisis* creates a methodology by which the relevant legal principles are applied from earlier decisions. When a particular court makes a decision in a case, any courts, which are of equal or lower status to that court, must follow that previous decision if the case before them is similar to the earlier case [24]. *Stare decisis* decides cases based on judicial precedent. It is essential for the courts to use similar precedents as used in the past. When the courts make a decision, they base their decision on how previous courts made similar judgements. Under the common law principles of *stare decisis*, a court must follow the decisions in previous cases based on similar facts, which ensures consistency with previous court decisions. Therefore, when researching cases, it is essential to ascertain what the law is on a particular issue [4].

With this system of *stare decisis*, the Judge must decide a case on the basis of prior decisions even though they might believe a better, more just solution might be reached by ignoring those decisions. While the system of precedent might constrain a judge, it also operates to justify their decisions and preserve confidence in the judiciary by promoting consistency and uniformity. Thus decisions reached are not attributable to the whims of judges but to the preceding body of law [4]. In one sense, no two cases are similar; each case presents its own unique set of circumstances, which differentiates it from any other.

If there was no *stare decisis* in a particular case, the judge could decide a case based on his/her own logic. Clarke believes that *stare decisis* should be applied on a more selective basis rather than 'as a matter of course', as he believes that any justified decision is the law, it is claiming to interpret and thus any decision that is relying on faulty inferences is not reliable interpretation of the law and would excuse the courts from following some precedents [6].

Ratio decidendi and obiter dicta

The reason for the decision given by the judge who forms a binding precedent for the future is known as *ratio decidendi* (Latin: 'The Reason'). It is not based on an open discussion or hypothetical set of circumstances. When a judge delivers judgement in a case, they outline that the facts that they find have been proved by the evidence. They apply the law to those facts and arrive at a decision, for which they give reasons. The courts are required to follow the *ratio decidendi*, i.e. courts must follow earlier decisions of a superior or equal court and are not bound to follow decisions by lower courts [24].

The principles of judicial precedent can easily be stated but might be difficult to apply in practice and in

certain incidences, the 'ratio' of a case may not so easily be discoverable. When judges are writing a court judgement, they do not follow a standard form or template. It is unusual for a court judgement to expressly state the *ratio decidendi* of its decision and instead then to leave it concealed in its reasoning (Grimes *et al.*, 1988). They may use the words, 'rule' or 'principle' to highlight the *ratio decidendi*. This is designed merely not to hinder or inhibit future courts and thus discovering the *ratio decidendi* is mainly a marker for interpretation for later courts. The judges' main concern is resolving the case before them, not future cases [4].

Judges tend to set out their reported judgements in three parts:

- (i) facts of the case are set out
- (ii) reviews a number of applicable principles
- (iii) applies the principles and states the final decision [12].

To understand the *ratio decidendi*, one must construct the legal principle, not merely extract it from the judgement. As all case facts are different, generalities will not be found and a base starting point to locate the *ratio decidendi* would be to select the underlying principle of the judge's decision and the material facts of the case [12]. However, if the judge considers that the material facts are different to those previous cases, then that particular case is not bound by previous court decisions. Scholars have been suspicious of this element of *ratio decidendi* as they believe that it undermines *stare decisis* as it then becomes 'more mythical than real' [12].

Under *ratio decidendi*, any other statement made in a court judgement is of persuasive value only (i.e. is not essential to the decision). This is known as *obiter dictum*. In essence, *ratio decidendi* is of binding authority, while *obiter dictum* is of persuasive authority [24]. For example, a judge may go on to speculate about what his decision would or might have been if the facts of the case had been different. This is an *obiter dictum*. An *obiter dictum* is not binding in later cases because it was not strictly relevant to the matter at hand in the case [28].

Property boundary dispute case law in Ireland

Priority of this paper was to locate court cases from 2000 to 2010 to ascertain the number of incidences of property boundary disputes that occurred in the High Court and thus differentiate between the different types of property boundary disputes occurring. With this in mind, documenting the cases in a manner without misunderstanding the legal language used was a desired goal. Access to reliable and accurate documentation of judicial decisions was essential for this research. Most

Table 1 Total (65) number of High Court cases between 2000 and 2010

Type of dispute	Reported case law (High Court) 2000–2010
Property boundary disputes	18
Adverse possession	9
Rights of way	16
Other, e.g. planning permission, land transfer/title	22

legal research is achieved via legal periodical books and the use of online resources.

The main sources of reported case studies used were from databases such as www.bailii.org, www.courts.ie, www.firstlaw.ie, www.lexisnexis.com, www.ucc.ie/law/irlii/ and www.westlaw.ie. These particular web databases are maintained by law schools and government agencies and are updated on a regular basis. The main periodical books that document reported court judgements are the Irish Reports published by the Incorporated Council of Law Reporting of Ireland (cited I.R.) and the Irish Law Reports Monthly (cited I.L.R.M.) published on a commercial basis by Round Hall Ltd.

Initial research located disputes that encompassed property boundaries, land law and disputes over land in Ireland. A total of 65 (2000–2011) reported cases were identified that were relevant to land law (Table 1). Of the 65, 18 were specifically property boundary disputes (Table 2). The selection criteria for these cases were disputes over the location of property boundaries, disputes over boundaries between neighbours and those in relation to the inaccuracies of the PRA mapping system. As the main focus of this research is property boundary dispute cases, cases of adverse possession, rights of way and title of land were not analysed as they would require a different research approach to be investigated.

Indeed, case law does go back centuries since the adoption of common law in Ireland in the eighteenth century which included a body of law that went back to the thirteenth century and case law is vital in the creation of law. Many cases on property boundary disputes have gone before the year 2000 and will continue to evolve in the years to come. This 10 year period of case law only documents the last 10 years.

Case briefing

The way in which these court cases are described and outlined is though a procedure widely known as 'case briefing'. Used widely in universities, law schools and law firms, case briefing is a method to identify the rules of law found in court judgements and how the courts

Table 2 Names of litigants and years of property boundary dispute cases

Year of case	Name of case
2000	Boyle versus Connaughton Mulhern versus Brady
2001	Persian Properties Ltd versus Registrar of Titles
2002	Battelle & Anor versus Pinemeadow Ltd
2007	Charlton versus Kenny Taylor versus Luas
2008	Duffy versus Ridley McCoy versus McGill Nessleside Builders versus Carlow County Council
2009	Barnes versus Land Registry Collins versus Callan Collins versus Duffy Kelly versus Lennon
2010	Casey versus Dowdall Church versus Trustee Act Gannon versus Ní Ghrúagain Keane versus Considine Walsh versus Sligo County Council

Table 3 Different case briefings methods

	Harvard Law School [22]	University of Idaho College of Law [29]	University of Wisconsin Law School [30]	University of Miami School of Law [20]	This research
Case name/citation	✓	✓	✓	✓	✓
Headliner	✓				
Objectives of parties				✓	
Theory of litigation				✓	
Facts	✓	✓	✓	✓	✓
Procedure	✓	✓	✓	✓	✓
Issue	✓	✓	✓	✓	✓
Ruling	✓	✓	✓	✓	✓
Decision/conclusion	✓		✓	✓	✓
Precedent case's					✓

applied the rules of law to the facts of cases in awarding final decisions (Table 3).

Different versions and techniques of case briefing are used throughout the legal profession and law schools. In an effort not to rely on solely one method, a variety of elements were brought together to form the most suitable and logical items of the technique to be applied in this research (Table 4). In dissecting and briefing an opinion, clear and identifiable headings need to be applied in a systematic way. It enables one to clearly identify the main aspects and the reasoning behind the judgement and to understand the detail of cases more easily. For this research, naming the previous cases (precedent case's) that were used in the resulted outcome of the reported judgement is highlighted to show what previous cases were examined and to show how the judge came to the decision.

This research considered the use of cross case analysis of the Irish judgements. However, this would seem to be redundant. What new knowledge could be achieved from this method? In fact, this is what the courts do in common law, comparing previous judgements to see if they are to be applied to the current case at hand using doctrine of precedent. The very essence of this would be rewriting what is already noted. In fact, if a new resolution was discovered, it might open up the case entirely. This was considered unlikely and unwarranted.

Case law principles for land surveying

In describing the common law system, could surveyors benefit from this knowledge? Should surveyors require an understanding of legislation and of case law? It is these case studies where decisions made by judges that decide the alignment of property boundaries and other

issues for the parties involved. These cases are fundamental to the development of surveyors' understanding of the principles applied to these previous cases and thus the principles to be applied in future cases of boundary dispute incidences (outside court). The rulings/decisions made in court can be employed as further information for surveyors when carrying out property boundary rectification and resolving property boundary disputes.

To develop and suggest ways to minimise property boundary disputes one needs to examine and consider the importance of previous case law that is used within other countries and how they use it to minimise property boundary disputes before mediation or litigation is considered.

USA

In the USA, the importance of case law and adhering to state regulation is fundamental for surveyors to carry out their work with the upmost professionalism. Surveyors must be aware of rules and principles during their boundary surveys. Failing to do so directly impacts the client and others who rely upon the surveys result [27]. No matter where in the USA, when a surveyor is called upon to resolve a dispute within that state they must evaluate all circumstances regarding property disputes and arrive at a well-balanced and impartial view rather than an assumption of the correct solution [9].

Stahl believes that surveyors must know the rules and procedures that courts follow when locating property boundaries in the USA.

The courts have established the rules; the surveyor must apply the rules to the unique facts as the case admits and expresses his opinion as to the location of the boundary [27, pp. 6].

Table 4 Example of case briefing using the template for this research

Heading	Details
Case name/citation	Case name, year, volume number (if one exists), publication abbreviation, first page of case, court abbreviation and additional information. e.g: D.P.P v. Carolan, [1998] 2 I.L.R. M 212 (H.Ct.) (Ir) [2].
Facts	Facts of the case describe the details that gave rise to the dispute. Facts are very important and a case may turn of certain facts, so they need to be clear.
Procedure	Describes the history of the dispute and how it got to court and what was the history before court?
Issue	What the dispute is fundamentally about. The issue a court may have to deal with is the specific legal question, which is being asked by either party.
Ruling	What pre-existing rule does the court apply to the facts at hand?
Judgement/decision	What conclusions did the court come too? For the case to be officially reported, the outcome of the case should add something new or noteworthy to the already existing body of law.
Precedent cases	To highlight other cases used for precedent within the court's opinion. This is novel to this research.

He also notes Thomas M. Cooley (Chief Justice of Michigan's Supreme Court), advocating that surveyors must enquire into all the facts of a dispute and cover the same rules as the courts, as surveyors will be tested upon those rules when giving evidence in court.

Both Stahl and Cooley believe that there is very little difference between what the judge decides in the courtroom and the role that the surveyor plays when out on site carrying out a survey resolving a dispute. The rules, which the surveyor applies in the field, are those already applied in court made law. For example, a surveyor cannot claim that they found a boundary monument as to the location of the boundary line, and nor can they set out a new boundary line with a boundary monument without a legal principle that supports the surveyor's reasoning. Thus by understanding the legal principles of boundary disputes and the rules of the judicial process, it can provide the surveyor with a further insight in resolving property boundary disputes on site and carrying out the boundary surveys [27].

Interestingly, Foster states that the role of a surveyor when in conflict should be one of an objective expert and unbiased. Surveyors should be unbiased and assist the landowner; however, they should assist in their resolution, as their knowledge is crucial in resolving boundary conflicts [9].

South Australia

Although South Australia has a common law legal system, similar to Ireland, they have different mapping systems thus have different practices when it comes to resolving property boundary disputes. With common law, a build up of case law has been determined to set out rules and principles for the courts to follow. Case law on disputes over property boundaries has been built up and surveyors are made familiar with this through surveying books and journals. Surveyors are required to be familiar with these rules and principles in order to provide a quasi-legal service to clients and communities of South Australia. Therefore, for surveyors to carry out their work in South Australia, it is essential to know case law [10].

South Australia's Department of Planning, Transport and Infrastructure implemented guidelines for surveyors in 2008, 'The cadastral surveying guidelines' [10]. Even though South Australia uses a cadastral mapping system, they use the common law legal system and in particular, precedent case law to minimise disputes. An entire chapter of the guidelines is dedicated to this; 'Section 4: survey principles and case law rulings' [10]. The main objective of these guidelines is for surveyors to follow and emulate the courts decision-making process when rectifying and redefining property boundaries. It also suggests that in their day-to-day work, surveyors must base their decisions on case law decisions and provide their community with a 'quasi-legal service' rather than suggesting litigation. Only in the most complex of circumstances should litigation be advised.

These guidelines suggest that case law and understanding the principles applied in each case is of fundamental importance to surveyors. The importance of this is further emphasised, as no legislation currently exists for surveyors in the context of property boundary re-establishment in South Australia. By implementing previous judgements from the courts to those decisions that need to be made on the ground which are of similar

nature, this can only minimise the amount of disputes occurring. There is however certain regulations that exist in South Australia with regard to re-establishing co-ordinated cadastre areas and incorrectly positioned boundary areas under sections 5.3 and 6.4 of these guidelines [10].

Tasmania

In reinstating the location of property boundaries in Tasmania, the Office of the Surveyor General and the Department of Primary Industries, Parks, Water and Environment have created a list of precedent case law to aid registered land surveyors when reinstating property boundaries. Cadastral boundary reinstatement is the process where a registered land surveyor describes and re-establishes the position of property boundaries created by earlier actions. In defining the location of the property boundary, power rests with the courts, not the surveyor. The surveyor however has a responsibility to collect sufficient evidence and interpret the location of the boundary that is consistent with precedent set by previous court decisions [5].

The Surveyors Act 2002 and Surveyors Regulations 2003 govern cadastral boundary surveying in Tasmania. These regulations are to control the technical and administration services of registered land surveyors. Just like South Australia, no legislation currently exists that direct surveyors in reinstating property boundaries under common law, the surveyor assumes a quasi-legal role with boundary disputes. Tasmanian case law is made up of decisions from other jurisdictions that use common law such as Canada, USA, New Zealand, and South Africa and its own brand of case law from Tasmania. As stated within these guidelines, caution must be adhered to when applying foreign decisions unless they have been applied and accepted locally. With this in mind, these guidelines of legal precedent are for the benefit of land surveyors in assisting the reinstating of property boundaries. The document consists of a short synopsis of previous case law and is categorised into different types of disputes most notably measurement, monument and natural boundaries [13].

In referring to case law in Australia when re-establishing a boundary line, Campbell believes that when a dispute is in court, the rules that surveyors must adhere to should not be weighed upon heavily as they may have more importance in one case than another. Campbell believes that this is contriving as it gives students and surveyors a nuanced view of the cadastral reinstatement process. By focussing on a more principle based approach rather than the rules based approach when re-establishing property boundaries, it may help students and surveyors better understand how the courts view evidence and apply the procedure when on site [5].

He also believes that when a surveyor is involved in a dispute and discovers a situation whereby the courts have applied rules in the past to a similar situation, it limits the flexibility required by a surveyor when confronted with contradictions in the 'physical and documentary cadastral evidence that makes the application of the traditional hierarchy problematic' [5, pp. 17].

Discussion and conclusions

For property boundary disputes to be minimised, one way in which this may occur is for a surveyor to be more

familiar with case law on property boundary disputes by creating a 'Guidebook' of case law. By embracing, utilising and implementing case law in surveyor's day-to-day routine, it can significantly assist them and clients when a boundary issue is brought before them [19]. It is the surveyors responsibility to accurately establish property boundaries in a professional manner with the facility to defend their work in court if needs be [21]. Not only do surveyors have a responsibility to themselves and their profession, they have a responsibility to their clients and landowners. Landowners expect them to be fully informed and know what to do when called upon and resolve the situation to the best of their ability.

In South Australia [10] and Tasmania [13], the State guarantees the location of the property boundaries as these countries have statutory regulations about registering boundaries, how the property boundaries should be surveyed and also authorises surveyors to alter the base map to define the location of property boundaries using licensed boundary surveyors. In Ireland, case law is of more fundamental importance when concerned about non-conclusive boundaries in establishing the law as the location of property boundaries is a private matter between adjoining landowners and is not a public good or guaranteed by the state.

Some surveying professionals in the USA believe that surveyors should just stick to measuring and not pass judgement on a dispute and the laws that operate around them. Law is for the legal profession, not for surveyors [19]. King believes that building surveyors in the UK should not get fixated on case law especially if they only know the judgement of a case. She believes that the facts of a case are the most important as cases often turn on the facts [17], so should surveyors just collect and supply facts to the legal profession?

However, based on the criteria set out by Stahl [27], Hoogesteger [13], Campbell [5] and the Government of South Australia [10], case law has been appreciated to be of a major benefit to surveyors in recognising the importance of precedent set by the courts in practicing their profession.

As outlined, surveyors in the USA follow court rulings and decisions to influence the outcome of future property boundary disputes. A main feature of this is for surveyors to enquire into all the facts of a dispute and cover the same rules as the courts, as surveyors will be tested upon those rules if the case proceeds to court. A great benefit of this rules-based approach is that, the rules that applied in the courtrooms can then be brought on site to help clarify and resolve a similar issue more easily [27].

In South Australia [10] and Tasmania [13], surveyors use a more principle-based approach in resolving disputes over property boundaries. Surveyors are required to be familiar with previous case law and are required to use the court made principles to provide a quasi-legal service to clients in these states when resolving disputes. As no surveying legislation exists in South Australia in resolving boundary disputes, they believe that this is the most appropriate and most effective way to minimise property boundary disputes. Only in the most complicated situations and where no previous case law exists should litigation be suggested. Similar to South Australia, Tasmania has case law for surveyors to follow when resolving property boundary disputes. These guidelines

and principles are set out in precedent cases to aid surveyors to make an assessment of the situation, when on site and not to follow a set policy of rules. A hierarchy of rules would limit the freedom of a surveyor and could use the rules (controlling actions) in a contriving way in resolving the dispute when in fact this was not required [5].

To fully understand why principles may be more applicable than a rules-based approach, it may be appropriate to look at another industry and examine how it distinguished between a rules-based approach and a principle-based approach. In the past number of years, the financial service industry has been shifting from a rules-based system to a more principle-based regulation approach. The UK Financial Services Authority and The Institute of Chartered Accounts of Scotland both believe that a rules-based approach in the financial industry limits the freedom of professional judgement and prescriptive rules and controlling actions into how a firm operates is not best practice. They believe that a principle-based approach would restore more confidence in the markets because of its flexibility and it would also empower firms with the responsibility to decide how best to align their business objectives with regulatory compliance [8,15].

In assessing this, a new approach is suggested. With a principle-based approach, it would enable surveyors to use the decisions by previous judges at their own judgement. This means that the surveyors on site would not be enforced to use certain rules or stiff criteria to resolve a particular issue. By highlighting a previous case law principle, it would enable the surveyor to judge the situation accordingly and attempt to resolve the boundary dispute the best way that they see fit in accordance to previous case law principles, not following a set of rules. Rules are an integral part of regulation; however, they are not a perfect regulatory instrument [1]. The meaning and clarity can be lost in what the rule is trying to achieve and thus reduces the scope of creative compliance. The proposal of a surveyor's 'Guidebook' would greatly aid professional surveyors in resolving and clarifying boundary issues in the future.

This 'Guidebook' would examine previous case law and detail the cases in the case briefing manner. With the reported 18 High Court judgements in the past 10 years specifically on property boundary disputes, each one offers a different and novel solution for these most avant garde issues. It is these issues that seem to keep arising in court and these previous cases are used to resolve them. Hence the small number of reported property boundary disputes in the past 10 years in the High Court. By highlighting these principles and requiring surveyors to apply them on site with the aid of a 'Guidebook', it would reduce complexity in resolving a property boundary issue. With a more principle-based approach, it would require greater assessment of a particular situation as it would allow the surveyor to bring his own professionalism and knowledge into play in assessing particular issues. This approach would focus on the purpose behind the court ruling, rather than its exacting details and this would offer greater flexibility in determining the boundary issue on site and thus hopefully resolving the issue. This approach would also reduce the concern of getting it wrong if one was

following set rules, as they are more precise and limit the freedom to assess every situation according.

It should be noted that the 'Guidebook' would not discuss the cases themselves as this goes beyond the scope of this research. The case briefing technique has highlighted the principles applied to each case, i.e. the ruling judgement. However, a cross case analysis of other cases would not be appropriate as this would have already been covered by legal counsel when advising clients on their boundary issue before litigation. In time this 'Guidebook' will hopefully detail all case law in relation to property boundary disputes and will continually be updated, with this 10-year period as just an example for this proposal.

As there is no such directive for surveyors to follow when faced with resolving a boundary dispute, this is an opportune time to bring to bear just one incremental change of reform that is needed to minimise property boundary disputes. Assistance and support from the professional bodies will be required to generate the awareness needed for the 'Guidebook' to be implemented into practice. Further training in continuing professional development and if required, specific training in case law and legislation will be necessary. With this in mind, it is anticipated that this 'Guidebook' will help assist and benefit how property boundary disputes are resolved in the future.

Boundary disputes will continue to be a source of heartbreak for landowners and headaches for property professionals. With disputes seemingly on the rise, there has never been a more opportune time to introduce a 'Guidebook' in the form of briefed case law, briefing facts, judgements and principle-based approach to be applied to the profession. This seems like a pretty good place to start.

References

- Black, J., Hopper, M. and Band, C., 2007. Making a Success of Principle Based Regulation. Available from: http://w.lse.ac.uk/collections/law/projects/lfm/lfmr_13_blacketal_191to206.pdf (accessed from 24/11/12).
- Bluebook. 2010. A Uniform System of Citation, 19th edition. The Harvard Law Review Association, Cambridge, MA.
- Bray, C. and Murray, H., 2011. Out on the Boundary. *Surveyors Journal*, 1(2): 28–29.
- Byrne, R. and McCutcheon, J. P., 2005. The Irish Legal System, 4th edition. Lexis Nexis, Dublin.
- Campbell, G., 2011. A Principles-Based Approach to Cadastral Reinstatement for Australian Jurisdictions. Available from: http://eprints.usq.edu.au/19118/3/Campbell_JSS_2011_AV.pdf (accessed 22/10/12).
- Clarke, D., 2011. Judicial Reasoning: Logic, Authority, and the Rule of Law in Irish Courts. *Irish Jurist*, 46(1): 152–179.
- Courts Service. 2012. Brehon Law. Available from: <http://www.courts.ie/Courts.ie/library3.nsf/pagecurrent/3CBAE4FE856E917B80256DF800494ED9?opendocument> (Accessed 19/11/12).
- Financial Services Authority. 2007. Principle Based Regulation – Focusing on the Outcomes that Matter. Available from: www.fsa.gov.uk/pubs/other/principles.pdf (accessed 04/10/12).
- Foster, R., 2010. Boundary Disputes – The U.S. Surveyors Role. Available from: http://www.fig.net/pub/fig2010/papers/ts10k%5Cts10k_foster_4352.pdf (accessed 17/07/12).
- Government of South Australia. 2011. Cadastral Survey Guidelines. Available from: [http://www.sa.gov.au/subject/Housing,+property+and+land/Customer+entry+points+and+contacts/Industry+professional+entry+point/Conveyancing+and+surveying+professionals/Cadastral+Survey+Guidelines+\(CSG\)](http://www.sa.gov.au/subject/Housing,+property+and+land/Customer+entry+points+and+contacts/Industry+professional+entry+point/Conveyancing+and+surveying+professionals/Cadastral+Survey+Guidelines+(CSG)) (accessed 02/02/2011).
- Greatholder, P., 2010. Boundary Disputes. Available from: http://www.russell-cooke.co.uk/clientUpload/document/file/Boundary_Disputes_April_2010.pdf (accessed 23/08/12).
- Grimes, R. and Horgan, P., 1981. Law in the Republic of Ireland. Wolfhound Press, Dublin.
- Hoogesteger, F., 2010. Legal Precedents in Cadastral Boundary Reinstatement. Available from: [http://www.dpiw.tas.gov.au/inter.nsf/Attachments/CPAN-8H66YP/\\$FILE/FHhoogesteger%2011.2010.pdf](http://www.dpiw.tas.gov.au/inter.nsf/Attachments/CPAN-8H66YP/$FILE/FHhoogesteger%2011.2010.pdf) (accessed 14/09/12).
- House of the Oireachtas. 2012. Registration of Title Act 1964. Available from: <http://www.irishstatutebook.ie/1964/en/act/pub/0016/index.html> (accessed 21/09/2010).
- Institute of Chartered Accountants of Scotland. 2006. Principles-Based or Rules-Based Accounting Standards? A Question of Judgment. Available from: icas.org.uk/rs_pvr_literature_review_pw.pdf (accessed 19/10/12).
- Kelly, T., 2007. Solving Disputes Between Neighbours. *The Irish Times* [online] 29 October 2012. Available from: <http://www.irishtimes.com/newspaper/finance/2012/1029/1224325864784.html> (accessed 05/12/12).
- King, V., 2005. Why Surveyors Should Not Get Hung up on Case Law. *Journal of Building Appraisal*, 1(3): 268–273.
- Lord Hoffman. 1999. Alan Wibberley Building Ltd v. Insley [1999] UKHL 15: 24 March 1999. Available from: <http://www.bailii.org/uk/cases/UKHL/1999/15.html> (accessed 02/02/2011).
- Lucas, J., 2008. The Surveyors Duty and Responsibility. *Point of Beginning*, 33(7): 56–58.
- Metschikoff, S. and Stotzky, I., 2005. The Theory and Craft of American Law. University of Miami. Lexis Nexis.
- Milton, D., 2012. The Art of Land Surveying. *Point of Beginning*, 37(4): 32–33.
- National Institute of Legal Academic Support. 2005. The Practical Guide to First Year Law Series of Workshops, How To Brief A Case. Available from: nilas.us/uploads/NILAS-How_to_Brief_a_Case_v1.2.pdf (accessed 18/11/12).
- Office of the Attorney General. 2012. Acts of the Oireachtas. Available from: <http://www.irishstatutebook.ie/about.html> (accessed 26/10/12).
- Office of the Revenue Commissioners. 2009. Chapter 1 – Introduction to the Manual and Legal System. Available at: <http://www.revenue.ie/.../chapter-1-introduction-to-the-manual-and-legal-system.pdf> (accessed 26/10/12).
- Prendergast, W. P., 2011. Workshop on Issues Related to Boundary Mapping in Ireland. 30 March 2011 [Workshop]. The Royal Institute of the Architects of Ireland, Dublin.
- Prendergast, W. P., Martin, Á., Moran, P., Flynn, M., Sweeny, B. and Corrigan, P., 2008. Green Paper Proposing Reform of Boundary Surveys in Ireland. Irish Institution of Surveyors, Dublin.
- Stahl, J., 2011. The Surveyors Role in Conflict Resolution. Available from: http://proceedings.esri.com/library/userconf/survey11/papers/pap_4027.pdf (accessed 12/06/2012).
- Tufal, A., 2012. Judicial Precedent – Ration Decidendi and Obiter Dictum. Available from: <http://www.lawteacher.net/PDF/Judicial%20Precedent.pdf> (accessed 15/06/12).
- University of Idaho College of Law. 2007. Critical Skills for Law School – Case Briefing Basics. Available from: <http://www.pdfport.com/view/127637-case-briefing-basics.html> (accessed 18/11/12).
- University of Wisconsin Law School. 2012. A Students Guide to Case Briefing. Available from: http://www.law.wisc.edu/orientation/case_briefing_guide.pdf (accessed from 11/09/12).
- Williamson, I., Enemark, S., Wallace, J. and Rajabifard, A., 2010. Land Administration for Sustainable Development. ESRI Press Academic, Redlands, CA.
- Wilson, S., Mitchell, R., Storey, T. and Wortley, N., 2011. English Legal System Directions – Directions Series – Chapter 6: The doctrine of Judicial Precedent. Available from: www.oup.com/uk/orc/bin/9780199557745/hw7e_ch06.pdf (accessed 23/07/12).
- World Law Direct. 2009. Common Law Countries – World Map. Available from: <http://www.worldlawdirect.com/forum/law-wiki/33066-common-law-countries-world-map.html> (accessed from 21/11/12).