Mediation in boundary disputes
Per Kåre Sky

Abstract
In this paper I look in some detail at the use of mediation in disputes on property and easement boundaries. Norway has a far higher number of boundary disputes than comparable countries. Each year, more than 1 300 boundary disputes are heard, and approx. 4 500 decisions on property and easement boundaries are made by the land consolidation courts. I discuss the reasons for this, and look at the typical features of boundary disputes. Mediation has been, and will remain, an important way of resolving these conflicts, in addition to normal court cases. I will draw on various findings of a research project that started in 1996 (Rognes and Sky 1998, 2003 and 2008 and Sky 2008).

1) Introduction – types of boundary dispute

This paper discusses two main types of boundary dispute: disputes about property boundaries and disputes about easement boundaries. A property boundary is any boundary between properties, whether it runs on land, at sea, in a lake or in a river. There are many different types of easement boundaries, such as the boundaries around rights of way, grazing land, forests and mooring rights. In Norway there are no figures on how many disputes there are in each category.

In many cases the parties do not merely disagree about the boundary. As an example, let us look at the boundary around a right of way. The parties might also disagree on how maintenance costs should be split, the standard to which the road should be maintained, how much it should cost to buy a right to use the road, etc. This complicates the mediation process, but also permits a great variety of solutions to the problem. I will later look more closely at this using a conflict-of-interest analysis. The preliminary results of a study carried out by Hoddevik and Laskemoen (2009) reveal that in legally mediated boundary disputes ending in an agreement, more factors are included in the final agreement than are mentioned in the claim form. In other words, there is often integrative potential in these disputes.

2) The extent of boundary disputes

Norway has a far higher number of boundary disputes than comparable countries. Each year approx. 1 300 boundary disputes are heard by the land consolidation courts. In addition, a number of decisions[1] are made on property and easements boundaries: in 2008 there were over 4 500 of them. These judgements mainly relate to property or easement boundaries. The level of conflict in these cases ranges from uncertainty, where the parties are in virtual agreement, to open conflicts that could equally well be resolved through a judgement. In terms of legal force, there is no difference between decisions on easements and court judgements. When the term of appeal runs out, the decision is final.

There are no figures on how many boundary disputes are heard through the normal court system. Nor are there any figures on how many disputes are resolved in conjunction with municipal mapping processes.

The main reason for the large number of disputes and uncertainties is that in Norway laymen were responsible for all partitioning of property from 1764 until as recently as 1981, when the Land Subdivision Act came into force. In addition to the fact that laymen were responsible for

[1] In Norwegian named: ”Rettsfastsettende vedtak”.

partitioning, the only results of the process were a description of the boundary line. No maps, nor what we today call measurement certificates, were produced.

A typical description might read: "*The boundary between gnr. 19/1 and gnr. 19/2 starts at the cross in the bedrock and runs for 23.2 metres in a southerly direction to a cross in a stone, a further 15.5 metres in a south-westerly direction to a planted stone.....*". Easements were also merely described, in many cases even less precisely. A typical right of way description might read: "*A has a right of way across the main farm*". If the property has a right to have a well, the description is equally vague: *"A is entitled to have a well on the main farm."* These descriptions raise a number of unanswered questions that the parties must often resolve through the courts. Typical uncertainties relating to a right of way include:

- Where does the route run across the main farm?
- How wide can the road be?
- What type of road does the right of way cover?
- Can the main farm use the road?
- How should maintenance costs be split?
- What happens if the main farm has partitioned off sites that come into conflict with the cheapest and most obvious route for the road?
- What if the planning authorities in the meantime have introduced a prohibition against construction work?

By using conflict-of-interest analysis (Rognes 2008), we can determine whether the parties have common interests, different priorities and conflicting interests. A common situation is that the owner of a holiday property has a right of way across a farm. The common interest of the parties may, for instance, be that both of them want a road and a solution to the conflict. The conflicting interests may be that they want different routes and different standards of road. A closer analysis may reveal that the main priority for the owner of the holiday cottage is to get the road built quickly, whilst the route is less important. For the farmer, meanwhile, the route is more important than when the road will actually be built. I will use an example to help illustrate the potential complexity of a situation involving rights of way and the building of a road.

Figure 1: *The map shows an area with 25 holiday cottages, whose owners all want a road to their respective properties.*

In Figure 1 we can see 25 holiday cottages whose owners all want a road to the boundaries of their properties. All of them were given some kind of right of way when their sites were partitioned from the main farm. Currently there are only paths to the cottages. The parties are uncertain of their rights, and of whether they are entitled to a road suitable for cars. They disagree on the route, and about how the costs of building and maintaining the road shall be split. It would be difficult for the 25 parties to negotiate an agreement. There are bound to be conflicting interests between the parties. This case was resolved by mediation at a land consolidation court. Important factors that helped produce an amicable settlement included the fact that the holiday cottage owners nominated someone to lead the negotiations, and that the road had to be built in accordance with objective standards (the norm for the construction of farm roads). This case only comprised holiday cottages. The situation can become even more complicated if there is a mixture of houses and holiday cottages, as shown in the figure below.

Figure 2: *Aerial photo of a residential and boathouse area, with a shared road down to the sea.*

In Figure 2 we can see an area with a private road down to the sea, which is supposed to serve several private houses, some of which have mooring rights, and several boathouses. Here the issue was who had a right of way, where the road should go, how much people with boathouses and mooring rights should pay for the maintenance of the road in relation to the people with a house. In this case the land consolidation court had to pronounce several judgements and decisions, before finally coming up with rules on the use of the road, and a private road committee was created. The court was unable to mediate a solution.

Unfortunately, the new act on property registration[2] has not ensured that legally binding boundaries are established at the time of registration. It will still be possible to bring to court a dispute about a property boundary that has been determined through a mapping process. New boundaries that are established today are, of course, described much more clearly than the

[2] Lov om eiendomsregistrering av 17. juni 2005.

ones that were established under the previous legislative regime. Since 1981, maps have been a compulsory part of mapping and partition processes. I assume that in the future there will continue to be a large number of boundary disputes heard by the courts.

3) The sociology of land tenure disputes

What are the specific characteristics of real property, and how may this affect the mediation process? Real property is a limited resource, it occupies a specific location (x, y and z), its value varies greatly depending on its location and planning status, it is often lived in or used by the owner for a long period of time, it is our most important investment and we often have a dependency relationship with our neighbours.

What can be said about property owners in general? Firstly, I would claim that many of them have problems reading and understanding maps. Many are also unaware of which documents are vital to documenting their property rights. When the relevant documents are finally found, the boundary descriptions can be difficult to interpret and the boundary markers are not easy to find in the ground. In Norwegian law, markers found in the ground are given great importance. It is often the markers found in the ground that are the decisive proof of where the boundary runs between two properties. For laypeople, coordinates are also meaningless and impossible to reconstruct without the help of experts.

Whether you are dealing with a dispute over a property boundary, the partition of a joint ownership or an easement crossing the property, the parties will remain neighbours after the conflict has been resolved. Furthermore, they often have a long-term relationship. Properties can, and often do, stay in the same family for several generations. This is, perhaps, particularly true of farms. People do not sell real estate because of disagreements with their neighbours. At least it is very rare for them to do so.

Figure 3: *It may be tempting for the owner of this house to move. His neighbour has blocked his drive with large rocks, and put his car in the hedge (Photo: Bergensavisen, 31 May 2005).*

Owners often have strong relationships to their properties, and put some of their "soul" into them. We farm a piece of land, we create a beautiful garden, we thin the forest, etc. Sevatdal (1989) has split these relationships into the following four main function categories: business, capital, consumer and social.

I will briefly describe some typical features of the various functions. Business function: the area is a productive factor in a production process. Conduct must be viewed in the context of the production business. Capital function: the most important aspect is the return on the investment and changes in market value. The property can be split into various components (production premises, residential, etc.). The consumer function is based on land as a consumer good. In order to value the property, you have to look at what it would cost to rent or purchase an equivalent good. Social function: the property has a certain personal value (e.g. family farm, status, etc.).

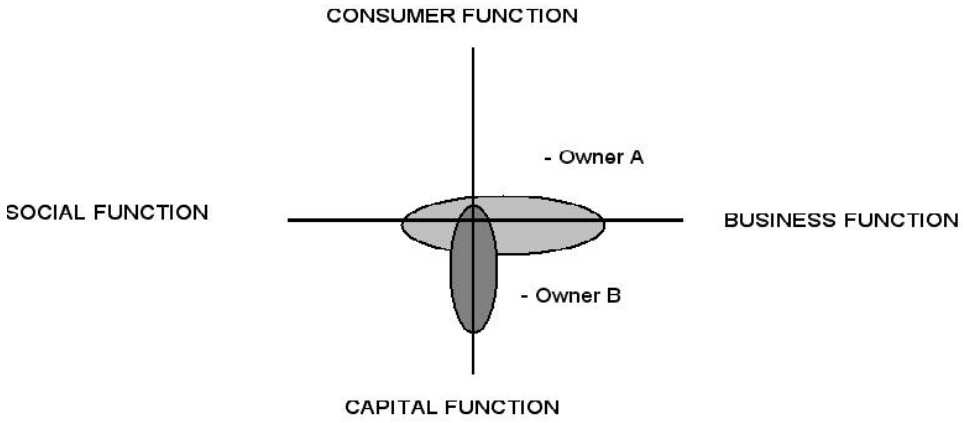

Figure 4: *Owner A's profile shows a situation where the business function is dominant, but where there is also a slight social function. This may be a full-time farmer who owns a historic family property. Owner B's profile shows a situation where the capital function is the dominant factor. The owner may rent out the property or be a property speculator.*

Another example would be the owners of two apparently "identical" farms, who may have completely different relationships to their properties. A is a professional farmer who lives on the property. B has moved away from the property and uses it for leisure activities. A's main income comes from the property, and he may wish to change the way in which the land is used in order to increase his income. B wants to keep the area in its current state. It is important to be aware of these factors when mediating both boundary disputes and land consolidation cases.

4) The institutions

In Norway there are three main institutions that deal with and resolve boundary disputes. They are:

- The municipal surveying department
- The ordinary courts
- The land consolidation court

In addition to these institutions, a few boundary disputes are heard by the conciliation courts, municipal mediation boards or through the mediation of a lawyer. I will not discuss these other methods any further here.

For municipal mapping processes, the person responsible for the mapping process can act as the arbitrator, if the parties and he/she so wish, cf. the first subsection of Section 2-2 of the Land Subdivision Act. There are no figures on how common this is, but I believe that it is very rare. We do not know why this is the case, but it may be that many of the people

responsible do not consider themselves competent, and that there is an institution (the land consolidation court) with a long history of hearing boundary disputes, to which they can refer the parties. There is also a certain amount of informal mediation in conjunction with mapping processes. We do not know a great deal about this, but there is reason to believe that it is common. Over the past 5-10 years, many land surveyors have attended courses on conflict resolution, and are therefore supposed to be trained mediators.

There are not any figures from the ordinary courts on this either, but Falkanger and Falkanger (2007:111) write that the vast majority of people choose to bring boundary disputes to the land consolidation courts. The problem with taking boundary disputes to the ordinary courts is that subsequent to the judgement the parties have to demand a municipal mapping process in order to mark and register the outcome of the judgement. This means that the process may take somewhat longer, and be somewhat more expensive, than if it had been handled by a single institution.

The land consolidation courts handle approx. 1 300 boundary disputes each year, and if we include decisions on property and easements boundaries, somewhere in the region of 4 000-5 000 uncertainties or disputes are resolved each year. In these cases too the boundaries are measured, mapped, marked and the final outcome is registered.

I will now list some of the features of the mediation process at land consolidation courts: land consolidation judges have specialist knowledge, land surveyors perform all of the necessary technical work, the parties attend without legal representatives, practical/ logical mediation methods are often used and the site is always surveyed. Much of the mediation is done outside during the survey, using GPS and digital maps.

In 1996 approx. 43% of boundary line disputes were resolved amicably through mediation at the land consolidation courts (Rognes and Sky 1998:16). There is no reason to believe that this percentage has changed much. Legal mediation, which was introduced in April 2007, has been used very little at the land consolidation courts (Pedersen 2008), and does not appear to have led to a higher percentage of amicable settlements.

In the next section I will look more closely at mediation methods, and at the types of cases that are suitable and unsuitable for mediation.

5) Methods

There are two main ways of handling the mediation of boundary disputes at courts. Below I will briefly describe them:

- Ordinary proceedings under Sections 8-1 and 8-2 of the Dispute Act.
- Legal mediation under the rules set out in Sections 8-3 to 8-7 of the Dispute Act or the regulations on mediation at land consolidation courts[3]

Ordinary proceedings shall be fully adversarial. Any mediation shall be done in such a way that any solutions suggested by the judge do not damage the parties' confidence in the court. The judge cannot have separate meetings with the parties. If the mediation during the main proceedings is unsuccessful, the case concludes with a judgement being delivered.

[3] Forskrift om forsøksordning med rettsmekling for jordskifterettene av 22. januar 2007.

In the event of legal mediation, which can be, and often is, performed by a judge, the person responsible is called a mediator or court mediator, even if everything is done under the auspices of the court. The mediator can have individual meetings with the parties, and it is part of his or her mandate to propose ways of resolving the dispute. If mediation fails, the case is dealt with in the normal way, and in most cases a new judge, who was not the mediator, takes over the case. Land surveyors at the land consolidation courts can also act as mediators. The regulations on legal mediation have been translated into English, and can be downloaded from the Lovdata website.[4] The regulations were also presented at the conference of European surveyors at Strasbourg in September 2008.[5]

Rognes and Sky (1988:22) investigated which cases were suitable for mediation and which ones were unsuitable. The typical features of the suitable cases included: they involved few parties; the values at stake were low; they involved wide-ranging claims; the parties were able to distinguish between the case and the personality of the counterparty; or they involved several aspects, disputed facts, little documentation and unclear witness statements. The key is that the parties must want mediation.

The typical features of the unsuitable cases were that: they were inherited conflicts; they involved fundamental disagreements; there were many parties to them (often difficult to get everyone to attend); they involved a mixture of weak and strong parties; or the outcome of the case was clear.
Our findings should only be considered an indication of what cases are suitable and unsuitable. As we saw in Figure 1, it is possible to reach an amicable settlement in a complex case involving 25 parties.

Rognes and Sky (1998:19) identified 35 different mediation techniques for boundary disputes being heard by the land consolidation courts. I have listed 17 of them below:
1. Put questions to, or interview, the parties
2. Bring in external factors.
3. Read out all of part of the documents that the parties invoke.
4. Mediate during the mapping of the disputed boundary.
5. Show where in the terrain the boundaries for proposed settlements would go.
6. Sit down with the parties to come up with a settlement.
7. Ascertain what is important to the parties.
8. Inform the parties of what any judgement will involve.
9. Hold a court hearing and send a proposed settlement to the parties.
10. Argue in favour of a practical boundary.
11. Encourage the parties to have meetings in groups.
12. Attempt to get parties to see the case from the counterparty's point of view.
13. Draw/ measure the parties' claims on a map in order to initiate mediation.
14. Leave the parties alone, so that they can discuss the matter without the presence of the judge or court.
15. Focus the mediation process on the aspects of the case where there is most chance of an amicable settlement.
16. Repeatedly bring up settlement discussions.
17. Underline the values at stake in the dispute.

[4] http://www.ub.uio.no/ujur/ulovdata/for-20070122-0080-eng.pdf
[5] http://www.geometre-expert.fr/docs/congres/18_M_3_EN.pdf

Some of these methods border on the unethical. This is true of numbers 8 and 16, for instance. Several of the methods are what we might call logical, such as numbers 5, 6 and 10. These are the kinds of methods that are typically used by a mediator who has worked as a land consolidation judge.
Finally I would like to mention some pieces of advice given by land consolidation judges in relation to mediation (Rognes and Sky 1998:22-23). 1) Several judges mentioned that experience was needed before becoming an active mediator. 2) Knowledge about human reactions in different situations. 3) Time to learn from other, more experienced, judges (mediators). 4) Be humble towards the parties and their property and take the parties seriously. 5) Be a good listener. 6) Remain neutral. 7) Make the parties feel confident. 8) Try to gain the confidence of the parties and 9) Let the parties speak out.

6) Conclusion

We have a large number of boundary disputes in Norway. The land consolidation courts are the institutions that deal with by far the greatest proportion of these disputes. Mediation within a fully adversarial process is currently the most common method used. A trial arrangement of legal mediation at the land consolidation courts was introduced on 1 April 2007, but so far only a few cases have been mediated in this manner. It may appear that the land consolidation courts prefer rapid decisions and traditional procedures to mediation, which has a greater focus on the interests of the parties. During mediation it is important to bear in mind that the parties may have very different relationships to their properties.

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Biographical note:
Per Kåre Sky holds a masters degree and Ph.D. in land consolidation from the Agricultural University of Norway. He is a land consolidation appeal judge at Gulating land consolidation court of appeal and a professor at The Norwegian University of Life Sciences. He is on leave from his position as professor of land consolidation at Bergen University College.

Contact:
Per Kåre Sky
Gulating land consolidation court of appeal
P.O.B. 7318
N-5020 Bergen, Norway
E-mail: Per.kare.sky@domstol.no