

## LAND AND CONVEYANCING LAW REFORM ACT 2009

The Land and Conveyancing Law Reform Act 2009 ("the Act") might have passed with only a modicum of concern and controversy. We recall, locally, that there was some concern by local members of the IFA and other interested parties and there was a well attended meeting / seminar at the time to discuss some of the main provisions of the Act. The dust may have settled now, but the issues remain which may have a real impact on your property.

### *What is an easement?*

Easements comprise a category of rights in relation to land whereby an owner of land has an entitlement to enjoy rights over the land of another. They are to be distinguished from a lease or licence whereby an individual may be given limited permission to enjoy certain rights. An easement is proprietary and so, the owner of the easement may transfer the ownership of it with his land to another or it may be inherited from him with his land.

### *What are typical examples of easements?*

A right of way to travel across private land belonging to another to gain access to your own land.

A right to have a water pipe laid across land owned by another to bring water to your own land.

A right for the building on your land to be supported by buildings on another's land (e.g. terraced premises)

It is a contentious area of law at the best of times and it looks likely that the next few years will see increased litigation in this area due to the effects of the recent changes.

Many of us enjoy rights of way without ever really thinking about them. You don't own the roadway but you are entitled to use it. Many business owners will need to consider service entrances via laneways that are owned by other parties. Farmers also whose land is accessed thought their neighbour's land should be aware of the effects of the new Act. Losing your right of way could have serious consequences for your farm, business or home.

### *Acquiring an easement by Prescription*

This may happen by deed where a landowner intends to grant rights to another over his land. For instance, this might arise when the landowner is selling part of his land (e.g. a site) and has to grant certain rights to the owner of the sold land, which will be exercised over the land retained by the Vendor (e.g. a right of access over a private lane). In these circumstances this new legislation should not concern you as what you have is a registered easement.

**In many cases, however,** there will be no deed or other written document granting the easement or rights but the rights may have been in existence for a long number of years. In these circumstances, the person using the rights will generally be said to have an easement by

prescription (i.e. by long use).

Rights of way often come into existence without any contract or agreement between the parties. In some cases you may not even know who owns the road or land that you are traversing. You and your family before you might have been using the road for a long number of years if not generations and as a result you have what is called a prescriptive right of way. Under the old law a prescriptive right could be acquired by 20 years use without force, without secrecy and without the oral or written consent of the servient land owner i.e. the land owner whose property is being crossed. These prescriptive rights of way were rarely registered in the Property Registration Authority.

### *How will the Act affect you?*

Effectively, the Act means that people with unregistered rights of way and other easements have from 1 December 2009 until 1 December 2012 to register their rights in the Property Registration Authority. If they don't, then their right may be extinguished and the time period for re-acquiring that right (12 years) starts all over again from 1 December 2009 with previous use being considered irrelevant. The result could be the complete loss of the right of way.

### *Panic postponed, but not averted!*

Section 38 of the Civil Law (Miscellaneous) Provisions Act 2011 has amended the 'deadline' within which to have your prescriptive rights registered in the Property Registration Authority, to 1 December 2021.

### *If the Act affects me, how do I deal with it?*

This is quite an important issue and may require you to consult your solicitor. If you have an unregistered right of way then registering it may simply require drawing up an agreement or Deed of Grant of Right of Way / Easement / Wayleave between you and the owner of the land over which the right of way runs. This can then be registered in the Property Registration Authority – job done!

Unfortunately there is the possibility that if a land owner is asked to confirm a right of way they may refuse, thus necessitating a Court Order. To obtain such a Court Order a person claiming a right of way will be required to prove in Court that they had been using the road or path in question for the relevant period of time without force, without secrecy and without the oral or written consent of the servient land owner.

### *Deal with this now if you intend to sell or mortgage your property*

If you are using a right of way to gain access to your property you should ascertain if this right of way is registered in the Property Registration Authority or if your property is Registry of Deeds title that you have a formal executed Grant of Right of Way. This is essential where you may be thinking of mortgaging or selling your property. Since the passing of the Act solicitors must advise purchasers not to rely on unregistered rights but to insist that the vendors register these rights either by the agreement of the servient land owner or by obtaining Court Order.

## **Land and Conveyancing Law Reform Act 2009**

Abolition of certain methods of prescription.

**34.**— Subject to [section 38](#), acquisition of an easement or *profit à prendre* by prescription at common law and under the doctrine of lost modern grant is abolished and after the commencement of this Chapter acquisition by prescription shall be in accordance with [section 35](#).

Acquisition of easements and *profits à prendre* by prescription.

**35.**— (1) An easement or *profit à prendre* shall be acquired at law by prescription only on registration of a court order under this section.

[PA 1832]

[PA 1858]

(2) Subject to *subsection (3)*, in an action to establish or dispute the acquisition by prescription of an easement or *profit à prendre*, the court shall make an order declaring the existence of the easement or *profit à prendre* if it is satisfied that there was a relevant user period immediately before the commencement of the action.

(3) The court may make an order under *subsection (2)* where the relevant user period was not immediately before the commencement of the action if it is satisfied that it is just and equitable to do so in all the circumstances of the case.

(4) An order under *subsection (2)* shall be registered in the Registry of Deeds or Land Registry, as appropriate.

Application of *sections 34 to 37*.

**38.**— In relation to any claim to an easement or *profit à prendre* made after the commencement of this Chapter, [sections 34 to 37](#)

(a) apply to any claim based on a relevant user period notwithstanding that it is alleged that an additional user period occurred before that commencement,

(b) do not apply to any claim based on a user period under the law applicable prior to the commencement of this Chapter and alleged to have commenced prior to such commencement where the action in which the claim is made is brought within 3 years of such commencement.

## **Civil Law (Miscellaneous Provisions) Act 2011**

Amendment of section 35 of Act of 2009.

**37.**— Section 35 of the Act of 2009 is amended by the substitution of the following subsection for subsection (1):

“(1) An easement or *profit à prendre* may be acquired at law by prescription—

(a) on registration of a court order under this section, or

(b) in accordance with section 49A of the Act of 1964.”.

Amendment of section 38 of Act of 2009.

**38.**— Section 38 of the Act of 2009 is amended, in paragraph (b), by the substitution of “within 12 years” for “within 3 years”.

I you think you have a right over someone else's land then be sure to consult your solicitor and find out how the Land and Conveyancing Law Reform Act 2009 affects you.

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