

# THE LAND AND CONVEYANCING LAW REFORM ACT 2009

## GENERAL

The Land and Conveyancing Law Reform Act 2009 (“the 2009 Act”) was signed into law on the 21<sup>st</sup> July 2009. The required Commencement Order issued on the 4<sup>th</sup> September 2009 (S.I. No. 356 of 2009) and fixes the **1<sup>st</sup> December 2009** as the day on which the 2009 Act shall come into operation (with the sole exception of S132 pertaining to rent review clauses in business leases).

This article is not intended to be an overview of every provision contained within the 2009 Act which is divided into 14 separate arts comprising 133 sections and 3 comprehensive schedules but merely a commentary on the more significant provisions of same likely to be of practical effect.

### (a) Purpose of Act and Background

The 2009 Act is the result of many years of work on the part of the Law Reform Commission in consultation with the Department of Justice, Equality and Law Reform. Its aim is to radically and comprehensively modernise and reform Irish Land and Conveyancing Law with particular emphasis on the promotion of a simpler conveyancing process to pave the way for the eConveyancing Project.

In the process the 2009 Act repeals 150 pre-1922 statutes together with certain provisions contained in the Acts of the Oireachtas, abolishes feudal tenure and outdated common law rules and replaces those provisions with modern conditions to accord with changes in modern society. The 2009 Act provides useful comprehensive definitions including the definition of ‘land’ which heretofore has never had a single formal statutory definition.

### (b) Explanatory Memorandum

The 2009 Act is accompanied by a helpful Explanatory Memorandum which acts as a commentary and reference point to each part of the Act and synopsis the various provisions enacted thereby. The Memorandum is worth consulting in conjunction with the specific provisions of the Act as an aid to interpretation.

## EASEMENTS

### (a) Abolition of acquisition of easements and profits a prendre by prescription at common law

Section 34 of the 2009 Act abolishes the acquisition of an easement or profit a prendre by prescription at common law or under the doctrine of lost modern grant. Examples of prescriptive easements include rights of way, rights to light, rights of support, shelter and maintenance and even rights to park in certain cases. Examples of prescriptive profits a prendre include rights to mine or quarry, rights to cut timber or turf, rights to graze animals and rights to fish or hunt wild animals. After the 1<sup>st</sup> December 2009 the acquisition of such easements or profits a prendre by prescription shall be strictly in accordance with the provisions of section 35 of the 2009 Act.

### (b) Elements required to acquire easements and profits a prendre by prescription from 1<sup>st</sup> December 2009

Section 35 of the 2009 Act provides that an easement or profit a prendre shall be acquired at law by prescription on registration of a court order only. To acquire such an easement/profit a prendre an applicant must have the relevant user period immediately before the commencement of such court proceedings.

relevant user period is defined as –

- a period of user as of right (without force, secrecy and without the oral or written permission of the servient owner)
- without interruption (interference with or cessation of use or enjoyment of an easement or profit a prendre for a continuous period of at least one year)
- by the person claiming to be the dominant owner/owner of the profit a prendre in gross

for –

- a minimum period of 12 years (where the servient owner is not a State authority [a Government Minister or the Commissioners of Public Works]); or
- a minimum period of 30 years (where the servient owner is a State authority); or
- a minimum period of 60 years (where the servient land is a foreshore per S2(1) of the Foreshore Act 1957)

Previously under the law and practice pertaining to prescriptive easements and profits a prendre the relevant user period was 20 years. The 2009 Act reduced this user period to 12 years which is in line with the law pertaining to adverse possession.

The court may make an order where the relevant user period was not clocked up immediately before the commencement of court proceedings if it is just and equitable to do so in all the circumstances of the case. The court order (once issued) must be registered with the Property Registration Authority (the Registry of Deeds or the Land Registry as appropriate) to enable the easement or profit a prendre to be formally acquired.

**(c) Tenancies**

The position pertaining to tenancies is set out in section 36 of the 2009 Act. Where a dominant owner acquiring an easement or profit a prendre under section 35 owns a tenancy only in the dominant land the easement or profit a prendre attaches to the land and at the end of the tenancy passes to the landlord. If subsequently the dominant owner clocks up a new user period against a landlord taking possession at the end of a tenancy that dominant owner can apply under section 35 in the normal way for registration of the easement or profit a prendre.

Where an easement or profit a prendre is acquired under section against a servient owner owning a tenancy only in the land it ends when the tenancy ends BUT –

- if the servient owner acquires a superior interest in the land it attaches to that interest; and
- if the servient owner obtains an extension or renewal of the tenancy it continues to attach for the period of such extension or renewal.

**(d) Incapacity**

Where a servient owner is incapable at the commencement of or during the relevant user period of managing his/her affairs because of mental incapacity section 37 of the 2009 Act provides that the running of that period is suspended until the incapacity ceases unless the court feels it is reasonable to have expected some other person (e.g. a trustee, the committee of a ward of court, an attorney under an enduring power of attorney) to have acted on behalf of that servient owner during the relevant user period or at least 30 years have elapsed since commencement of the relevant user period.

**(e) Transition Period**

The transitional rules applying under that part of the 2009 Act pertaining to Easements are likely to prove the most controversial sections of the 2009 Act in practice. In relation to any claim to an easement or profit a prendre made after the 1<sup>st</sup> December 2009 Sections 34 to 37 above apply based on a relevant user period notwithstanding it is alleged that an additional user period occurred before 1<sup>st</sup> December 2009. In relation to any claim to an easement or profit a prendre made after the 1<sup>st</sup> December 2009 Sections 34 to 37 above do not apply where the applicant is relying on a user period pre-1<sup>st</sup> December 2009 in cases where the action is brought within 3 years of the 1<sup>st</sup> December 2009.

Essentially therefore an applicant seeking to preserve his/her prescriptive rights to an easement or profit a prendre has three years to instigate court proceedings to safeguard such prescriptive rights, failing which such rights are lost to the applicant forever. The only way in which such an applicant will have to restore the prescriptive rights lost in such a fashion is to re-acquire same under section 35 of the 2009 Act i.e. 'clock up' those rights again – starting from scratch. This has extremely wide and far-reaching implications in practice both in the urban and rural settings, the most common examples of which are likely to be the 'house at the top of a privately owned laneway' scenario in the private client context and the myriad of prescriptive rights such as rights of support, shelter and maintenance in the commercial context.

**(f) Extinguishment**

On the expiry of a 12 year continuous period of non-user (where the dominant owner ceases to use or enjoy the easement or profit a prendre) of an easement or profit a prendre acquired by prescription or implied grant or reservation the easement or profit a prendre is extinguished except where it is protected by registration in the Registry of Deeds or the Land Registry. This highlights the very necessary formality which is the registration aspect imposed by the 2009 Act. Without formal registration the easement or profit a prendre formally acquired under the new procedure for prescriptive acquisition is capable of becoming extinguished on the basis of non-user. It is worth pointing out that for easements or profits a prendre acquired pre-1<sup>st</sup> December 2009 this rule also applies provided at least 3 years of the period of non user occur after the 1<sup>st</sup> December 2009.

The 2009 Act specifically provides that the extinguishment provisions have no effect on the ordinary jurisdiction of the courts to declare that an easement or profit a prendre however acquired has been abandoned or extinguished.

**(g) Implied Grants of Easements**

The rule in *Wheeldon v Burrows* is abolished on foot of the 2009 Act which now provides that where an owner disposes of land in part (or all of it in parts) that disposition creates by implication for the benefit of any part disposed over the part or parts retained which is necessary to the reasonable enjoyment of the part disposed.

The 2009 Act specifically provides that this provision does not affect easements arising as easements of necessity or by operation of the doctrine of non-derogation from grant.

## **CO-OWNERSHIP**

### **(a) Present Position**

There are two types of co-ownership under the law - joint tenancy and tenancy in common. The essential difference between these two types of co-ownership is the right of survivorship. In a joint tenancy on the death of one co-owner the remaining co-owner(s) acquire the deceased's co-owner's share by survivorship and that share falls outside of the deceased co-owner's estate regardless of any provision to the contrary. At present under the law as it currently stands it is possible for a joint tenant to unilaterally sever a joint tenancy thereby creating a tenancy in common.

### **(b) New Position**

The 2009 Act abolishes the current right of unilateral severance by a joint tenant and stipulates that the joint tenant seeking to sever the joint tenancy shall be obliged to obtain the prior consent in writing of all other joint tenant(s). Any attempt to unilaterally sever a joint tenancy is void at law and equity unless the required consent(s) are dispensed with by court order.

The new Act also clarifies the confusing position regarding the effect of registration of a judgment mortgage by providing that such registration against lands held in a joint tenancy no longer severs that joint tenancy (previously it was the case that such registration was capable of severing a joint tenancy of unregistered lands and not severing a joint tenancy of registered lands). Therefore if a joint tenancy remains unsevered in such circumstances the judgment mortgage is extinguished on the death of the judgment debtor.

The 2009 Act specifically provides that these new provisions do not affect the powers of the courts to find that joint tenants by either mutual agreement or their conduct have severed their joint tenancy in equity.

### **(c) Court Orders**

"Persons holding an estate or interest in land" may apply to court for a range of orders pertaining to co-owned land (this definition includes a mortgagee, secured creditor, judgment mortgagee or trustee). These provisions replace the complicated and uncertain provisions of the Partition Acts 1868 and 1876. The types of orders available are broad and wide ranging and include orders –

- for partition;
- for taking account of encumbrances affecting the land and making of enquiries as to the respective priorities of such encumbrances;
- for sale and distribution of the proceeds;
- directing "accounting adjustments" to be made as between co-owners (such adjustments include payment of an occupation rent, compensation for disproportionate expenditure by one co-owner (e.g. for repairs, improvements etc), contributions to disproportionate payments made by one co-owner (e.g. rates, rents, taxes, other outgoings etc), redistribution of rents/profits received by one co-owner disproportionate to his/her interest, any other adjustment necessary to achieve fairness between co-owners);
- dispensing with consent to severance of a joint tenancy as required under the Act where consent is being unreasonably withheld;
- as may be just or equitable in the circumstances of the case.

Orders may have conditions/requirements attached, more than one order may be combined and orders may be refused.

The 2009 Act specifically provides that these provisions have no effect on the powers of the courts under the family law acts pertaining to co-ownership.

The 2009 Act provides that the equitable jurisdiction of the court to make partition orders at law or equity is abolished.

### **(d) Bodies Corporate**

Clarification is provided that a body corporate may acquire and hold property as a joint tenant as if it were an individual. Provision is made that if a body corporate and an individual or two or more bodies corporate become entitled to property in circumstances where if they had been individuals would have created a joint tenancy then they are entitled to hold that property as joint tenants (this provision is particularly important where a corporate body e.g. a bank is appointed as a trustee of property). On the dissolution of a body corporate which is a joint tenant of property the property devolves on the other surviving joint tenant(s).

## **FUTURE INTERESTS**

### **(a) New Rules re Future Interests**

Section 15 of the 2009 Act provides that from the 1<sup>st</sup> December 2009 only the holder of the fee simple in possession in land will have legal title to that land. The holder of a future estate in land will not have any legal title to that land but will rather have an equitable

interest only in that land. The 2009 Act abolishes various old common law rules regarding future interests, the most important of which is the 'rule against perpetuities'. This has led to some concern that individuals may now be free to tie up the ownership of their respective estates for generations. The Law Reform Commission had recommended that the appropriate amendment of the body of Irish Trust Law should be enacted simultaneously with the 2009 Act to cover off this point, amongst others. Whilst this has not occurred, there is a substantial new piece of legislation pertaining to trusts of land due to be enacted in 2010 incorporating the Law Reform Commission's recommendations which will require careful consideration viz the future interests provisions in the 2009 Act on enactment.

**(b) Retrospective Nature of New Rules**

The provisions of the 2009 Act regarding future interests are retrospective in nature - to address concerns about the constitutionality of the retrospective nature of same, the Act allows for some protection of those with an interest in existing settlements/trusts.

## **TRUSTS OF LAND**

**(a) New Definition of "Trusts of Land"**

Section 18 of the 2009 Act provides that all settlements (including strict settlements), holding trusts and trusts for sale whereby land is held for persons in succession to each other and any other situation where land is held on trust including constructive or resulting trusts and land held for a minor will be "trusts of land" under this part of the Act. Section 19 specifies the identity of the trustees of the land depending on the particular nature of the trust at issue. There continues to be a fallback provision where an application may be made to Court for appointment of a trustee. All the powers of an absolute owner are given to the trustees of the land. This is qualified in that the trustees continue to be subject to all the duties of a trustee and any restrictions imposed on them by statute or by the instrument creating the trust (i.e. the settlor can contract out of some of these powers).

**(b) Principle of 'Over-Reaching'**

The principle of 'over-reaching' is introduced by section 21 of the 2009 Act and provides that a purchaser from either the trustees of land or the legal owner will acquire good title even where that purchaser has notice of the existence of a trust for land and equitable interests flowing therefrom. The equitable interest of a beneficiary then attaches to the sale proceeds in the hands of the trustees. There is one proviso which stipulates that if the conveyance is made for a fraudulent purpose of which a purchaser had actual knowledge or to which he/she was a party then the 'over-reaching' principle does not apply.

## **FREEHOLD COVENANTS**

**(a) Enforcement of Freehold Covenants**

Any freehold covenant imposing either an obligation to do or refrain from doing any act or thing is enforceable i.e. both positive and negative freehold covenants are now fully enforceable (up to the commencement of the 2009 Act the rule in *Tulk v Moxhay* provided that only negative freehold covenants were enforceable at law).

Freehold covenants are enforceable by –

- the dominant owner for the time being; or
- a person who has ceased to be the owner in respect of a breach of covenant occurring during his/her period of ownership

against –

- the servient owner for the time being in respect of a breach of covenant by that owner or occurring before and continuing unremedied after the owner became the servient owner; or
- a person who has ceased to be the owner in respect of a breach of covenant occurring during his/her period of ownership.

The 2009 Act provides that these provisions do not affect the enforceability of covenants under the doctrine of privity of contractor a covenant for title.

The 2009 Act also ensures that in "schemes of development" (as defined) covenants are enforceable by any other purchaser/lessee in the scheme of development and not just by the successor in title of the person who originally took the benefit of the covenant which is a helpful provision in the modern context of apartment living and managed estates.

**(b) Discharge or Modifications of Freehold Covenants**

A servient owner can apply to court for an order discharging in whole or in part or modifying a freehold covenant created before or after the 1<sup>st</sup> December 2009 on the grounds that continued compliance therewith constitutes an unreasonable interference with the use or enjoyment of the servient land (prior to the 2009 Act a discharge of a freehold covenant was only possible with the consent of the person entitled to the benefit of same).

**(c) Factors to be Considered by the Court in considering a Discharge/Modification Order**

The factors to which the court shall have regard in determining whether to make an order discharging or modifying a freehold covenant and, if so, on what terms and conditions include –

- the circumstances in which the covenant was originally entered into and the time elapsed since then;
- any change in the character of the lands and the surrounding neighbourhood;
- the development plan for the area;
- any planning permissions granted or refused in respect of the land in the vicinity;
- any practical benefit secured by the covenant;
- whether compliance with any obligation to do works or make a payment under the covenant has become unduly onerous compared with the benefit derived;
- whether the dominant owner has agreed, expressly or impliedly, to the covenant being discharged or varied;
- any representations made by persons interested in the performance of the covenant;
- any other matters which the court considers relevant.

**(d) Court Orders**

If the court is satisfied that a quantifiable loss will be incurred by the dominant owner or such other person as may be adversely affected by its order it may include a condition in the order for compensation to be paid by the servient owner or other affected person.

All discharge and/or modification orders once granted shall be registered in the Property Registration Authority (the Registry of Deeds or the Land Registry as appropriate) to give effect to same.

## **PARTY STRUCTURES**

**(a) Definitions**

Section 43 of the 2009 Act comprises a comprehensive definition section as pertaining to Party Structures which sets out wide definitions of inter alia “building owner”, “adjoining owner”, “party structure”, “works” and “works order”.

“party structure” is defined as –

any arch, ceiling, ditch, fence, floor, hedge, partition, shrub, tree, wall or other structure which horizontally, vertically or in any other way –

- divides adjoining and separately owned buildings, or
- is situated at or on or so close to the boundary line between adjoining and separately owned buildings or between such buildings and unbuilt-on lands that it is impossible or not reasonably practical to carry out works to the structure without access to the adjoining building or unbuilt-on land,

and includes any such structure which is –

- situated entirely in or on one of the adjoining buildings or unbuilt-on lands, or
- straddles the boundary line between adjoining buildings or between such buildings and unbuilt-on lands and is either co-owned by their respective owners or subject to some division of ownership between them.

“works” is defined as *including* –

- carrying out works of adjustment, alteration, cutting into or away, decoration, demolition, improvement, lowering, maintenance, raising, renewal, repair, replacement, strengthening or taking down;
- cutting, treating or replacing any hedge, tree or shrub;
- clearing or filling in ditches;
- ascertaining the course of cables, drains, pipes, sewers, wires or other conduits and clearing, renewing, repairing or replacing them;

- carrying out inspections, drawing up plans and performing other tasks requisite for, incidental to or consequential on any works falling within paragraphs (a) to (d).

For the purposes of this chapter of the 2009 Act “the court” means the District Court and accordingly should amount to a quicker and cheaper method of dispute resolution for issues involving party structures.

**(b) Works Permitted to Party Structures**

A building owner may carry out works to a party structure for the purposes of –

- compliance with any statutory provision, notice or order;
- carrying out exempt development or development in respect of which planning permission has issued;
- preserving the party structure or any building or unbuilt-on land of which it forms a part;
- carrying out other works which will not cause substantial damage or inconvenience to the adjoining owner or if it will it is nevertheless reasonable to carry out such works.

**(c) Financial Provisions**

In carrying out any such works the building owner shall –

- make good all damage caused to the adjoining owner or reimburse the adjoining owner the reasonable costs and expenses of such making good;
- pay the adjoining owners reasonable costs of obtaining professional advice regarding the likely consequences of the works and reasonable compensation for any inconvenience caused by the works.

The building owner may claim from the adjoining owner or deduct from any payment due to the adjoining owner by him/her in respect of reimbursement for damages for making good or compensation for inconvenience a sum to take account of the proportionate use and enjoyment of the party structure which the adjoining owner makes or is likely to make.

**(d) Remedies for Failure to Comply with Financial Provisions**

If a building owner fails within a reasonable time to make good the damage caused to the adjoining owner that adjoining owner may apply to court for an order requiring the damage to be made good and the court may make such order as it thinks fit.

If a building owner fails within a reasonable time to reimburse the adjoining owner the reasonable costs and expenses of such making good or to pay the adjoining owners reasonable costs of obtaining professional advice and reasonable compensation for any inconvenience caused the adjoining owner may recover such costs, expenses or compensation as a simple contract debt in a court of competent jurisdiction.

If an adjoining owner fails to meet a claim for contribution for proportionate use and enjoyment of the party structure which the adjoining owner makes or is likely to make from the works carried out by the building owner that building owner may recover such contribution as a simple contract debt in a court of competent jurisdiction.

**(e) “Works Orders”**

A building owner in dispute with an adjoining owner with regard to the exercise of his/her rights to carry out works to a party structure may apply to the court for a works order and the court shall have regard to the conditions set out in this chapter of the 2009 Act when considering such an application.

A works order shall be on such terms and conditions as the court thinks fit but shall not authorise a permanent interference with or loss of any easement of light or other easement or right relating to a party structure.

The terms and conditions imposed by the court may include authorising entry on the adjoining owners lands and/or the provision by the building owner of an indemnity or security to the adjoining owner.

**(f) Discharge or Modification of “Works Orders”**

Any person may apply to the court for a discharge or modification of a works order provided that person is affected by the order and the court may discharge or modify the order on such terms and conditions as it thinks fit

**MISCELLANEOUS**

**(a) Mortgages**

The 2009 Act alters the way in which a legal mortgage over lands is capable of being created. Heretofore a typical mortgage creates a legal interest in land in favour of the mortgagee by way of conveyance/assignment/demise/sub-demise on the part of the mortgagor. Post-1<sup>st</sup> December 2009 it will only be possible to mortgage lands by way of a formal Deed of Charge thereby bringing unregistered and registered lands into the same regime. The Conveyancing Acts 1881 to 1911 are completely replaced and updated in this regard. The implications of the changes effected by the 2009 Act are immediate in that all forms of Deeds of Mortgage/Charge will now require updating and amendment in line with its new provisions.

**(b) Judgment Mortgages**

There is a simplification and clarification of the registration rules pertaining to judgment mortgages in that the 2009 Act clarifies there is no requirement to re-register a judgment mortgage after the expiry of 5 years from the initial date of registration. The 2009 confers the same legal status on a judgment mortgage as on a mortgage with one single exception – the registration of a judgment mortgage is subject to all prior equities/encumbrances.

**(c) Contracts and Conveyances**

There are a number of new provisions affecting contracts and conveyances, the most notable of which are –

- it is clarified that the payment of a deposit is not necessary to enable a contract to be subsequently enforced unless there is an express agreement otherwise (such as the adoption of the Law Society's General Conditions of Sale);
- the entire beneficial interest in the lands in sale passes to the purchaser on execution of the contract irrespective of what if any deposit is paid (subject to the proviso contained in the 2009 Act whereby it is possible to exclude this provision by inserting an express clause in this regard into the contract);
- where an order for specific performance of a contract is refused by a court the court has discretion to order a refund of all/part of any deposit paid without there having to be any clear evidence of fraud;
- the title required to be deduced by a vendor under an "open" contract is reduced from 40 years to 20 years.

**(d) Deeds and Contents of Deeds**

There are a number of new provisions affecting Deeds and the contents of Deeds, the most notable of which are –

- deeds are now fully effective without the need for a "conveyance to uses" ('unto and to the use of');
- the need for "words of limitation" denoting the estate being conveyed ('to hold for an estate in') has been abolished – the estate or interest of the vendor/grantor is passed unless a contrary intention is expressed;
- if a Deed confers a right on a third party that person may enforce his/her right notwithstanding the fact that the third party may not be a party to the Deed itself;
- the Deed passes on to the purchaser/grantee all benefits and encumbrances attaching to the land in issue unless there is an express reservation to the contrary which should make the drafting of Deeds a little more straightforward in future;
- the abolition of the requirement for an individual to execute a deed under seal (execution of a deed under seal remains a requirement for corporate entities);
- perhaps most importantly the 2009 Act makes provision for certain implied covenants relating to title according to different classes of conveyances (which are set out in detail in Schedule 3 of the Act).

## **RENT REVIEW CLAUSES**

**(a) Commencement date**

The only section of the 2009 Act which is not due to come into operation on the 1<sup>st</sup> December 2009 is section 132 pertaining to rent review clauses and a commencement date has yet to be fixed in respect of same.

**(b) Content of Section 132**

A provision in a lease or an agreement for lease providing for a rent review will be construed as providing that the post-review rent may be fixed at less than, equal to or greater than that rent payable immediately before the review notwithstanding anything to the contrary contained in the lease or agreement for lease.

This provision relates solely to leases or agreements for lease of land used wholly or partly for the purposes of carrying on business and only in respect of that part of the land where the carrying on of business is permitted under the terms of the lease or agreement for lease.

The provision is prospective only and does not apply to a lease or an agreement for lease entered into prior to the commencement of section 132.

## **CONCLUSION**

The Land and Conveyancing Law Reform Act 2009 provides for the most comprehensive reform and modernisation of Irish Land and Conveyancing Law in over 100 years and has significant implications for all land and conveyancing transactions with immediate effect as its commencement date has been fixed for the 1<sup>st</sup> December 2009.

It is therefore vitally important for all parties handling any such transactions to familiarise themselves with the new statutory provisions set out in the 2009 Act and to be prepared to implement the changes required immediately and advise those concerned fully in respect thereof.

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