LAW SOCIETY SUBMISSION

LAW SOCIETY OF IRELAND

Urgent need to review the law relating to easements

Submission to the Department of Justice

May 2021

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

Contents

1. Introduction

1.1. The Land and Conveyancing Law Reform Act 2009 ('the **2009 Act**') provided for fundamental reform and modernisation of land law and conveyancing law in Ireland. It was the culmination of a number of years work by the Law Reform Commission ('the **LRC'**) and the Department of Justice, Equality and Law Reform.

1.2. In summary, the 2009 Act repealed a great many old statutes (150 pre-1922 Statutes including De Donis Conditionalibus from 1285, Quia Emptores from 1290 and the Statute of Uses from 1634). It also consolidated and simplified the law in many respects.

1.3. It received a widespread welcome from solicitors, barristers and academics.

2. Issues in relation to easements

2.1. An area which the 2009 Act sought to reform was the law relating to easements and profits a prendre. Unfortunately, this small segment of the 2009 Act did not achieve that objective and has received widespread criticism from academics, the Bar and the solicitors' profession.

2.2. There was a serious flaw in the 2009 Act in relation to transitional arrangements around easements and it was amended by Section 38 of the Civil Law (Miscellaneous Provisions) Act 2011 ('the **2011 Amendment**'). The 2011 Amendment extended the period within which prescriptive easements acquired under the old law could be registered for a further nine years (which was helpful) and also amended the Registration of Title Act 1964 in relation to the registration of easements by the Property Registration Authority.

2.3. The facility to avail of a system of registration without having to apply to the Circuit Court was welcome, but the procedure introduced by the PRA to implement the 2011 Amendment has not been as helpful as the solicitors' profession hoped it would be. On the contrary, it has given rise to significant difficulties in practice.

However, the 2011 Amendment did not deal with the main difficulty created by the 2009 Act which is that Section 35 (1) of the 2009 Act provides that an easement can only be "acquired at law" on registration of a court order under that section, or in accordance with Section 49A of the Registration of Title Act of 1964 ('**the Section 49A Procedure**') whereby an easement is registered in the Land Registry. The only way of acquiring an easement at law since 2011, therefore, is to have it registered in one of those two ways

3. Practical problems

3.1 Section 35 (1) – registration as a new pre-requisite to acquisition

The most common problem which the 2009 Act created for solicitors and their clients related to rights of way to homes. The application of Section 35 (1) has proved particularly troublesome in rural areas where many homes are accessed via roads or laneways which are not in charge of the local authority. There are many thousands of

such properties throughout the country. Previous practice around such rights of way was to have the existence of the long user of a right of way verified by statutory declarations. Such proofs of user were universally accepted in the absence of a formal grant of right of way. The Society's Conveyancing Committee believes that there was no desire among practitioners to change this long-established practice.

3.2 The second most common problem which the 2009 Act created for solicitors and their clients related to rights of way to farms, many of which are also accessed via roads or laneways which are not in charge of the local authority. These provisions impact farmers when selling land but also, more importantly, when seeking loans to fund development and improvement of those farms – something which is encouraged by Government.

3.3 Obviously, these provisions of the 2009 Act apply to all properties, not just homes and farms (which are the principal problem areas).

3.4 Following the 2009 Act, many solicitors acting for purchasers reasoned that best practice, when purchasing properties (either residences or farms) accessed by such rights of way, was to require the vendor to procure its registration. Lenders then began to insist on registration. As a result of the uncertainty around clients losing rights, solicitors felt obliged to seek registration. For two years after commencement of the 2009 Act, the only way of procuring registration was to persuade the neighbour(s) to enter into a deed of grant of a right of way or to apply to the Circuit Court for a court order which could then be registered.

3.5 Our profession had hoped that the Section 49A Procedure would be of considerable assistance. Unfortunately, this did not prove to be the case.

3.6 Vendors of property are faced with either negotiating a grant of right of way or applying to the Circuit Court to validate their right. Rural practitioners report that, in many cases, there are too many owners who would be required to join in a deed of grant of the easement. It is not unusual to have up to eight or nine owners of part of an access road. This is because, when landed estates were subdivided by the Land Commission, the practice resulted in the ownership of half of roads and laneways being included in the ownership of the adjoining properties. Also, on occasions, the owner of part of a strip of roadway is unknown. Where a number of family members inherit a property over which a right of way runs, some members may have emigrated and be difficult to trace. Others may refuse to engage or have an expectation of financial gain in return for their cooperation. In other cases, there will be an owner of a segment of a laneway where due to incapacity, infirmity or otherwise would not be in a position to execute a grant of right of way or where a neighbour would not feel it appropriate to request that they do so. While a right of way may be exercised for centuries without any difficulty, when it comes to negotiating a grant of a right of way, issues suddenly arise around matters such as - who will pay for future maintenance and repair, who will be responsible for public liability, what purposes it can be used for and who can upgrade or resurface the access? Such issues are not easily resolved.

3.7 The alternative to negotiating a deed of grant of right of way is to take court proceedings to establish the right. Such proceedings require all owners of part of the access to be served with the proceedings and have the effect of pitting neighbour against neighbour, creating considerable anxiety and stress, including for elderly or vulnerable people. The costs of such actions cause further friction.

3.8 As a result of these provisions, sales of such properties have fallen through in many cases and are protracted in many others. Houses may not be unsaleable but perhaps are only saleable to a cash buyer who will insist on a steep discount. Solicitors report that substantial discounts are being sought and agreed in order to persuade purchasers to drop the requirement for registration of a right of way.

3.9 Section 37 of the 2009 Act and the capacity of the servient owner

Another problematic area is that of the capacity of the land owner over which a right of way is claimed (i.e. the servient owner). Section 37 of the 2009 Act provides that time does not run during the incapacity of a servient owner. A dominant owner might not be in a position to judge whether the servient owner was, for example, beginning to suffer from dementia and so lacked mental capacity in a way that would trigger a suspension of the prescription period.

3.10 In applying to the PRA under the Section 49A Procedure, an applicant has to swear that there has, at all times, been a grantor and a grantee with capacity. Applicants are tempted to make assumptions in such cases without actual knowledge of the true position.

3.11 These provisions require a landowner to inquire into the mental capacity of adjoining landowners, with significant intrusion into a personal and sensitive area of their lives. This area requires further consideration, perhaps in conjunction with the ongoing preparations for implementation of the outstanding provisions of the Assisted Decision-Making (Capacity) Act 2015.

3.12 Rights of way are the most common easements which create problems for owners and their legal advisers, with easements for drainage and other services ranking a close second.

3.13 The Society believes that there is widespread concern around the implications of these provisions of the 2009 Act and that change in the law of prescriptive easements has needlessly created problems for property owners. While well-intentioned, the change has far reaching implications which require further consideration and analysis.

4. Other problem areas

4.1 State land and the 30-year period

If an application to validate rights over State land is not lodged before 1 December 2021, no application can be made to validate such rights for another 18 years, even where someone had been exercising those rights for 50 years or more. The effect of the legislation is that someone who currently has rights will be deprived of those rights (or at least have no means of registering same) if an application is not made before 1 December 2021. This could have the effect of making property unsaleable (or greatly reduced in value) and is likely to impact most significantly on people who live in isolated locations.

4.2 It seems unlikely that it was the intention of the legislature, when introducing these provisions, to deprive someone of rights they currently hold. Very often people are not conscious of the need to register rights until a challenge is made or an issue arises such that they need to protect their position, or when they consult a solicitor with a view to selling or raising a mortgage on a property with the benefit of such right.

4.3 Foreshore and the 60-year period

If an application to register rights over foreshore is not made before 1 December 2021, it cannot be made until 2069 i.e. 60 years from 2009. This is the case irrespective of how long the rights have been exercised for in the past. Again, this reality is unlikely to reflect what the legislature intended.

5. What did this requirement for registration of easements hope to achieve?

5.1 The principal argument for registration was that, in the advance towards eConveyancing, having details of an easement for access or drainage registered on a folio would provide clarity. This justification does not stand up to scrutiny.

5.2 Most easements that a home may have are implied easements which are not capable of registration under the 2009 Act. A typical semi-detached house in the suburbs of a city or town would have a number of deemed easements - a right of support, often an easement for the use of a combined sewer, a combined surface water drain, a right to light and an easement for overhanging gutters.

5.3 The Society sees little point in requiring registration of one easement while others remain incapable of registration.

5.4 See the article by Peter Bland S.C. (a leading expert in this area) entitled *"A "Hopeless Jumble": The cursed Reform of the Law of Prescription"* in the Conveyancing & Property Law Journal'. 2011 16 Conveyancing & Property Law Journal 54.59.

See also the Article by Professor John Mee of University College Cork entitled *'Reforming the Law of Prescription: A cautionary Tale from Ireland.' Warren Barr (ed) Modern Studies in Property Law, Volume 8; pp 31-48 (Hart Publishing 2015).*

In the conclusion of that article, Professor Mee states that:

"In practice, this approach has the disadvantage of encouraging litigation in relation to matters that otherwise might never have become the subject of dispute. There is much to be said for the Law Commission for England and Wales's view that the avoidance of litigation should be one of the principles guiding the reform of the law of prescription. Modifications to the Irish scheme in 2011 have improved the situation somewhat but do not seem to have eliminated all the problems."

6. The LRC

6.1 The LRC Report on the Acquisition of Easements and Profits a Prendre by Prescription (LRC 66-2002) reviewed the law of easements and profits a prendre by prescription and made recommendations, which formed the basis of the provisions in the 2009 Act. However, one of the projects selected in the Report on the 5th Programme of Law Reform (LRC 120-2019) (launched in 2019) is prescriptive easements. That report illustrates that the LRC recognises that there are difficulties with the existing legislation which require further consideration. The stated intent is to

examine whether the 2009 Act needs to be amended to prevent any ongoing confusion and to prevent any uncertainty concerning the ambit of the rights involved.

7. Submission

7.1 The Society submits that Section 38 of the Civil Law (Miscellaneous Provisions) Act 2011 should be extended for another six years. During this period, the LRC can review the whole area of easements and their registration in light of day-to-day experience since commencement of the 2009 Act. Practitioners will be willing to participate in such a review and can describe the difficulties that have arisen in practice. The Society's Conveyancing Committee also commits to participating that review to whatever extent may be required by the LRC.

7.2 In addition, the question of mental capacity, and the extent to which it should form part of the considerations in establishing prescriptive easements, needs further consideration. The relationship between the Assisted Decision-Making (Capacity) Act 2015 and section 37 of the 2009 Act regarding capacity requires further examination.

7.3 The Society also submits that the legislative provisions which result in distinctions in how foreshore and State lands are dealt with under the 2009 Act (for the purpose of registration post 1 December 2021) should be revised in the interests of justice.

8. Conclusion

8.1 The Society requests that Government urgently considers the above submissions in light of the looming deadline of 1 December 2021.

8.2 The Society's Conveyancing Committee is available to answer any queries you may have in relation to the substantive content of this submission and any other matter that might arise and will be glad to discuss any potential solutions in good time prior to the upcoming deadline.

For further information please contact:

Fiona Cullen
Public and Government Affairs Manager
Law Society of Ireland
Blackhall Place
Dublin 7

Tel: 353 1 6724800
Email: f.cullen@lawsociety.ie