

STEP

Seminar

LAND REGISTRATION RULES 2012

And

Transmissions on Death

Including where there is a Trust in Land and

Prescriptive Easements

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1. Introduction

1.1 This paper is intended to cover the implications of the Land Registration Rules 2012 [LR Rules 2012] for applications in the Land Registry in the following areas

- Transmissions - Assents and Applications and Transfers, assents and applications where there is a Trust in Land
- Prescriptive Easements or Profit a Prendre

1.2 I will deal generally with the LR Rules 2012 and will then deal with the specific matters set out above. .

2. LR Rules 2012

2.1 Recent years have witnessed an acceleration in law reform in land and conveyancing law, in particular the enactment of the Registration of Deeds and Title Act 2006 [2006 Act] and the Land and Conveyancing Law Reform Act 2009 [2009 Act] as amended by the Civil Law (Miscellaneous Provisions) Act 2011 [the 2011 Act]. There has also been implementation of information and communication technologies in the title registration process resulting in the digitisation of the land registers and registry maps. Consequent on these developments, it was necessary to make a series of interim Land Registration Rules to deal with pressing matters and to provide a sound legal basis for implementation of the required reforms. The resulting format of the Land Registration Rules 1972 to 2011 made it time consuming and laborious for users of land registry services to access the relevant Rules and Forms. Consolidation was therefore considered necessary and whilst this process was underway, the Registration of Deeds and Title Rules Committee [Rules Committee] took the opportunity to revise the Rules as deemed necessary. The LR Rules 2012 are a revision and consolidation of the Land Registration Rules 1972, 1975, 1977, 1981, 1986, 2000, 2005, 2006, 2007, 2008, 2009, 2009 (2) and 2011. The LR Rules 2012 were signed by the Minister for Justice and Equality on the 1st December 2012 and came into operation on the 1st February 2013.

2.2.1 The LR Rules 2012 follow on from a consultation process which involved input from the Conveyancing Committee of the Law Society and publication of the proposed revision in advance on the Authority's website www.prai.ie. One particular change came about as a result of this process i.e. the amendment of "opinion of counsel" to "legal opinion" which is defined in Rule 2 as the opinion of a practicing barrister or practicing solicitor [see Rules 15, 16, 19 in relation to first registrations and Rules 35 and 36 in relation to conversion of title and also various Forms].

2.2.2 Another change arose as a result of working group comprising of representatives of the Authority, the Irish Mortgage Council and the Law Society, set up to look at the legal, procedural and practical issues involved in enabling electronic registration of a Priority Application (which protects the interest of a person who has contracted to purchase, take a lease of registered

land or lend money on the security of a charge on it). It was considered that that the current period of protection of 21 days would be a major hindrance to increased use of any proposed ePriority Application facility. The Rules Committee, after due consideration on the matter pursuant to section 108 of the Registration of Title Act 1964 [1964 Act] as amended by section 66 of the 2006 Act, recommended new Rules 161 and 162 which make provision for a period of 44 days protection on the registration of a priority notice and for the possibility of an ePriority notice.

- 2.2.3 The consultation process also informed the Rules Committees view that the Land Registration Forms were not easily accessible or user friendly. Therefore, Forms were amended in light of the feedback received. The result is that Forms are amalgamated where possible and each form now comprises a stand alone document. All are available on-line in a format that will be easy to access and download. Many, which are no longer relevant such as certain transmission Forms have been rescinded and replaced. The application Forms for first registration are amended to include more emphasis on registration requirements which will assist in a smoother processing of first registration applications (as compulsory first registration on sale/lease now exists in all counties). A new Form has been added to emphasise the difference between an application for first registration based on possession and an application based on possession over land already registered. The recent new Form of application for easements and profits acquired by prescription has been updated to assist practitioners in this regard.
- 2.3 The Rule and Form numbers were amended to take account of various Rules previously rescinded and the various Forms previously deleted. New Rules and Forms were inserted where necessary and old Rules and Forms amalgamated. In so far as it was practicable old rule and form numbers are retained. Rules numbers 1-4, 14-28 and 47-56 are retained as are Form numbers 1-5, 7, 16-17, 19-20 and 23. Thus for example rule and form numbers for first registrations [i.e. Rules 14 -16 and Forms 1, 2, 3] are retained as is Form 17 and the basic form of Transfer Form 19. Where relevant, certain Rules and Forms were amended to modernise, simplify and to facilitate eRegistration in so far as possible.
- 2.4 Forms have been amended to be stand alone documents and where relevant the format and wording of similar forms was made consistent
- a. In relation to all Affidavits, applications for registration and forms for transfer or charge
 - i. schedules were inserted before the jurat or execution clause
 - ii. reminders were inserted in the body of the forms in relation to joint tenants or tenants in common
 - b. More explanatory notes were added to assist drafting

3. Transmissions

- 3.1 Rule 85 is a new Rule for Pre 1959 transmissions and it replaces Rules 87-93 of the LR Rules 1972. Form 33 is the form of application and replaces Forms

34-38, 40-44 and 46 and 47 of the 1972 Rules. Form 34 which is an affidavit by the personal representative in relation to burdens or other rights created by will of the testator or relative to the persons by law entitled to the property on intestacy and replaces Form 45 of the LR Rules 1972. In most instances where the death of a registered owner pre 1st June 1959 arises there usually is some element of adverse possession and therefore the appropriate application that should be made is Form 5. Therefore pre 1959 transmissions are now rare and it was no longer felt necessary to have multiple rules and forms in relation to these applications.

- 3.2 If you are lodging a pre 1959 application therefore a Form 33 application should be lodged together with a Form 34 affidavit by the personal representative [setting out, in the cases of a testacy the persons entitled under the will to any estate, burden or other right in the property and in the cases of an intestacy the persons who became by law entitled to the property together with confirmation that no claim is made in relation to the debts, testamentary and funeral expenses] where the property vested in the personal representative('s). Deeds and other documents on which the application is based should be set out in the schedule and lodged. As it is a pre 1959 application the PRA will examine wills and deeds to ensure that the application is in accordance with the will or in the case of intestacy that all persons who became entitled on the death intestate of the registered owner have been accounted for. Form 33 can also be adapted where the application is for the registration of the heir, widow or husband on the death intestate of a registered owner of freehold property that did not vest in the personal representative('s).
- 3.3 Post 1959 Transmissions rules and forms have been assigned new numbers in the LR Rules 2012
- Rules 86 to 89 and 91 to 94 replace Rules 94 to 101 of the LR Rules 1972
 - Forms 35 to 46 replace Forms 48, 50, 52 to 55, 57, 59, 61 and 63 to 65 of the LR Rules 1972.
 - Form 47 is a new prescribed form of withdrawal of name.
- 3.4 The replacement rules are as they were in the LR Rules 1972. The Forms have been amended as follows
- They are stand alone forms and are available for download from the PRA website [www.prai.ie].
 - If there is more than one person entitled it is now required to state whether taking as joint tenants or tenants in common and if taking as tenants in common to state in what shares.
 - In relation to Form 40 and 43 [transfers by personal representative] note added re relevant stamp certificate issued by the Revenue Commissioners or evidence of exemption.
- 3.5 Rule 90 is a new Rule for where a person dies entitled but not registered as owner and provides for an affidavit by the personal representative in Form 34.

- 3.6 Flowchart for transmissions under the LR Rules 2012 is also available as a handout.

4. Transmissions and Trust in Land

- 4.1 The 2009 Act commenced on 1st December 2009 [Land and Conveyancing Law Reform Act 2009 (Commencement) Order 2009 S.I. 356 of 2009].
- 4.2 Section 11 of the 2009 Act sets out the only legal estates and legal interests capable of being created and disposed of. All other estates or interests take effect as equitable interests only [section 11(6)]. Thus where a **life interest** is created a trust will come into operation under Part 4 of the 2009 Act and the legal estate will be held by the trustees. A life tenant and a remainderman under a settlement have an equitable interest only. The Settled Land Acts 1882-1890 were repealed [section 8(3) and Schedule 2 of the 2009 Act].
- 4.3 Section 18 of the 2009 Act establishes the new statutory model of a **“trust of land”**. This covers all forms of trusts in land including
- (a) “strict settlements” where land is settled directly on persons, by an instrument **whenever** created, without the use of a trust;
 - (b) where land is **held on a trust** whenever it arises and of whatever kind [express, implied, resulting, constructive, bare and trust for sale];
 - (c) where land vested before or after the commencement of part 4 in a **minor**.
- 4.4 Section 19 of the 2009 Act sets out **who are “trustees of land” in the case of each type of trust**.
- (a) Strict settlement
 - (i) where it exists before the 1st December 2009, the tenant for life within the meaning of the Settled Land Act 1882 together with any trustees of the settlement for the purposes of that Act. [This is to preserve some continuity with the previous law governed by the Settled Land Act 1882 (under which the tenant for life had limited powers of dealing with the land, subject to an indirect role of trustees of the settlement). If there are no trustees of the settlement, the tenant for life will be the sole trustee, but, in accordance with the safeguard which already existed (see section 21)].

Note: Section 2(8) of the 1882 Act reads
The persons, if any, who are for the time being, under a settlement, trustees with power of sale of settled land, or with

power of consent to or approval of the exercise of such power of sale,

or if under a settlement there are such trustees, then the persons, if any, for the time being, who are by settlement declared to be trustees thereof for the purposes of this Act,

are for the purposes of this Act trustees of the settlement”.

And Section 16 of the Settled Land Act 1890 Act reads

Where there are for the time being no trustees of the settlement within the meaning and for the purposes of the Act of 1882, then the following persons shall, for the purposes of the Settled Land Acts 1882 to 1890, be trustees of the settlement; namely,

- (i) The persons (if any) who are for the time being under the settlement trustees with power of or upon trust for sale of any other land comprised in the settlement and subject to the same limitations as the land to be sold, or with power of consent to or approval of the exercise of such power of sale, or, there be no such persons, then*
- (ii) The persons (if any) who are for the time being under the settlement trustees with future power of sale, or under a future trust for sale of the land to be sold, or with power of consent to or approval of the exercise of such a future power of sale, and whether the power of trust takes effect in all events or not”.*

- (ii) where it is purported to be created on or after the 1st December 2009 the person who would fall within paragraph (b) if the instrument creating it were deemed to be an instrument creating a trust of land

(b) Trust of land created expressly

- (i) any trustee nominated by the trust instrument, but if there is no such person, then
- (ii) any person on whom the trust instrument confers a present or future power of sale of the land , or power of consent to or approval of the exercise of such a power of sale, but, if there is no such person, then,
- (iii) any person who, under either the trust instrument or the general law of trusts, has power to appoint a trustee of the land, but, if there is no such person, then,
- (iv) the settler, or, in the case of a trust created by will, the testator’s personal representative of representatives

(c) Minor

In the case of land vested in a minor before the 1st December 2009 or purporting to so vest on or after the 1st December 2009, the persons who would fall within paragraph (b) if the instrument vesting the land were deemed to be an instrument creating a trust in land

(d) Implied, resulting, constructive or bare Trust.

The person in whom the legal title to the land is vested.

Section 19(3) of the 2009 Act confirms the current ultimate default provision of obtaining an order of the court appointing a trustee of land or vesting land in a person as trustee.

The PRA does not adjudicate on whom is the appropriate trustee for the purpose of any application. It is the responsibility of the lodging party to make the correct application and register the appropriate legal owner ('s) under the 2009 Act. If there are no trustees capable of qualifying under section 19, no registration can proceed and a court order appointing a trustee may be an option.

- 4.5 Section 21 of the 2009 Act provides that subject to sub-section (3) a **conveyance to a purchaser of a legal estate or legal interest in land** [see section 11] by a person or persons specified in subsection 2 **overreaches any equitable interest** in the land **whether or not the purchaser has notice of the equitable interest**. Thus subject to some limitations the general rule is that a purchaser should obtain a good legal title to the land without being concerned with equitable interests. This overreaching will operate in favour of a purchaser only. This overreaching occurs whether or not the purchaser has notice of the equitable interest. This applies currently where a tenant for life conveys settled land under the Settled Land Act 1882. Note the Doctrine of Notice remains see section 86 of the 2009 Act and section 38 of the 2006 Act.

Section 21(2) states that persons specified shall in general [i.e. in the case of a strict settlement, a trust including a trust for sale of land held by persons in succession or land vested in or held on trust for a minor] **be at least two trustees** [this complies with the safeguards in section 39 of the Settled Land Act 1882] or a **trust corporation** but may be a **single trustee or owner of the legal estate or interest** in the case of any other trust in land (subsection 2(b)) [e.g. hidden co-ownership in the case of a resulting or constructive trust].

- 4.6 Section 27 of the Registration of Title Act 1964 [the 1964 Act] was repealed by section 8(3) of the 2009 Act [see Part 5 of Schedule 2] and thus sub-sections 27(b) & (d) of the 1964 Act which provided for the registration of limited ownerships were repealed.
- 4.7 Therefore where a life estate is created in relation to registered land, whether pre or post commencement i.e. 1st December 2009, the only application for registration that can be made post commencement is an application for registration of the trustees as owners. Also for applications lodged on or after

the 1st December 2009 the Land Registry [the LR] will not register a minor as owner. In all these cases a trust in Land exists and only the trustees of the trust in land [see section 19 of the 2009 Act] can be registered. The trustees can be registered as owners *simpliciter*. The Trustees or the beneficiaries of the trust may apply for an inhibition to protect the trusts.

4.8.1 Registrations of limited owners [life estate] and minors made prior to the 1st December 2009 are overridden by the 2009 Act.

- The trustee(s) can apply for registration as owners, see Rule 66 and Form 86 of the LR Rules 2012. Form 66 includes an application for an inhibition.
- Alternatively the matter can be dealt with when lodging the next application for registration.

It was estimated that between 7,000 and 8,000 folios had registered limited owners [or minors] as of the 1st December 2009. Under Rule 3 of the LR (No. 2) Rules 2009 [Rule 145 LR Rules 2012] the following entry [Form 109 (Form 85 of the LR Rules 2012)] was made on these folios “*The title is subject to the provisions of the Land and Conveyancing Law Reform Act, 2009*”.

4.8.2 Further in relation to limited owners [tenants for life] registered prior to 1st December 2009.

- If a registered limited owner dies pre the 1st December 2009 Rules 93 and Form 45 or 46 of the LR Rules 2012 apply [cesser of limited owner].
- If a registered limited owner dies on or after the 1st December 2009 and where the remainderman is entitled to the legal estate [no intermediate interests] the trust will be regarded to have ended and remainderman regarded as being entitled in fee simple in possession. Form 45 or 46 of the LR Rules 2012 can be lodged.
- If the registered limited owner dies on or after the 1st December 2009 and where the remainderman is not entitled to the legal estate [intermediate interest exists] then the only registration that can be made is the registration of the trustees as owners.

4.8.3 It should also be noted that on or after the 1st December 2009

- It will not be possible for a life tenant to exercise a power of sale [Form 24 of the LR Rules – deleted by LR (No.2) Rules 2009].
- In addition it will no longer be possible for a tenant for life and a remainderman to transfer the legal estate to a third party.
- In both these cases the trustees will have to transfer the land and in the relevant application for registration it will have to be shown how the transferees are the trustees.

4.8.4 In relation to minors registered prior to the 1st December 2009.

- If a minor reaches his/her majority prior to the 1st December 2009 the LR will remove the description “minor” on lodgement of proof of age Rule 143 of the LR Rules 2012 [formerly Rule 153 LR Rules 1972 as amended by Rule 24 LR (No. 2) Rules 2009]
- If a registered minor reaches his/her majority on or after the 1st December 2009 the trust will be regarded to have ended and the minor regarded as being entitled in fee simple in possession. The LR will delete the description “minor” or “infant” on proof of age.

4.8.5 A single trustee can apply for registration. A purchaser from a single trustee will not have the benefit of section 21 of the 2009 Act unless the single trustee is a trust corporation.

5. Drafting Assents in Cases of Trusts in Land

5.1 To ‘A’ for life remainder to B’ (C and D being trustees). I will only deal with post 1959 transmissions. As stated above the only application for registration that can be made is for registration of the trustees [in this case C and D (note if the settlement was created prior to the 1st December 2009 the life tenant A would also be a trustee see section 69(1)(a)(i) of the 2009 Act]. In the case of the death testate of a registered owner

- Where the personal representatives are C and D Form 39 of the LR Rules 2012 should be used which includes an application for an inhibition.
- Where the personal representatives are not the trustees the relevant forms are an assent in Form 35 and Application in Form 37 [includes an application for the registration of an inhibition] or a transfer in Form 40 of the LR Rules 2012

5.2 A distinction must be drawn between a personal representative applying for registration of her/himself where s/he is not a trustee but is beneficially entitled. In such a case Form 38 should be used where the registered owner died testate and Form 44 should be used where the registered owner died intestate [both of the LR Rules 2012 and both are combined applications and assents].

5.3 Note in a case of an intestacy and an application for the registration of trustees is required [e.g. where the person entitled is a minor or where a family settlement created a trust in land] what forms should be used. Please note there are no separate forms for persons taking beneficially or as trustee in the case

of an intestacy. Form 44 should be used where the personal representative is also the trustee and Forms 41 and 42 or Form 43 should be used where this is not the case. These Forms should be amended as appropriate to include an application for registration of an inhibition [see Rule 52 of the LR Rules 2012].

- 5.4 Note Form 86 should not be used in a transmission application. It is to be used solely where there is a current registered limited owner or minor and an application is being made to register the relevant trustees as owners.
- 5.5 Independently of transmissions you may be faced with the situation where you wish to transfer property to trustees as a result of a deed of trust [any Trust in Land including a trust for sale]. The appropriate form to use is Form 29. It is a straightforward transfer and includes an application for the registration of an inhibition. Note the trusts under which the property is held should be declared in a separate deed of trust and should not be lodged.
- 5.6 ‘X’ is left an exclusive right of residence in a house which has been left to ‘B’ and ‘C’. How do you proceed? There is no element of a trust in land involved. ‘B’ and ‘C’ take as owners and the exclusive right of residence in favour of ‘X’ can be registered as a burden [section 69(1)(q) of the 1964 Act]. The relevant assent and application forms should be used and should include an application for registration of the exclusive right of residence as a burden.
- 5.7 Drafting inhibitions. Where on a transmission an application is made for the registration of trustees as owners an inhibition should be applied for to protect the beneficiaries of the trust. Examples of inhibitions are set out in Form 77 of the LR Rules 2012. It is not the duty of the PRA to advise on the suitability or otherwise of any particular form of inhibition, nor should the terms of an inhibition be phrased in such a manner as would involve it in an enquiry into the manner in which the trusts are being administered. Normally, the interests of the beneficiaries would be adequately protected by the entry of an inhibition requiring the consent of, or notice to, the beneficiaries or, (in the case of persons of unsound mind) their committees. The usual inhibition applied for is paragraph 1 of Form 77 “*No registration under a disposition by or transmission from the registered owner, except a transfer on sale, is to be made without prior notice to*”.

6. Easements and Profits à Prendre acquired by Prescription

- 6.1.1 Prior to the commencement of the 2009 Act [1st December 2009] easements or profits à *prendre* acquired by prescription could only be registered in the Land Registry on lodgement of a court order re same.
- 6.1.2 The 2009 Act abolished both prescription at common law and the doctrine of lost modern grant [section 34]. In addition it repealed the Prescription Act 1832 and the Prescription (Ireland) Act 1858 [which extended the 1832 Act to Ireland]. Sections 33 to 39 of the 2009 Act deal with the acquisition of easements or profits à *prendre* by prescription. The relevant user period was

amended to 12 years unless the servient owner is a State authority where it is 30 years or 60 years if foreshore [section 33 of the 2009 Act] [the old law under the Prescription Acts had different user periods for easements (20 or 40 years) and profits *à prendre* (30 or 60 years)]. One single statutory method of prescription was retained [section 35 (1)] which stated that easements or profits *à prendre* can be acquired by prescription only upon the registration of a court order under that section. Legal title is acquired by registration of the order against the servient land either in the Land Registry [Section 69(1)(h) of the 1964 Act] for registered land, or in the Registry of Deeds for unregistered land. If such a court order is registered in the Registry of Deeds and the dominant tenement is the subject of a first registration application an application can be made for the registration of the easements or profits *à prendre* as appurtenant.

6.1.3 Section 38 of the 2009 Act provided that “

*“In relation to any claim to an easement or profit *a` 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”.*

Section 38(b) provided, firstly, that the 2009 Act’s provisions will not apply where the user period under the ‘old’ law was completed before 1 December 2009 provided the claim is brought within 3 years of that date, i.e. before 1 December 2012. Secondly, it provided that where a user period was not completed by 1 December 2009 but will be completed in sufficient time to permit a claim to be made before 1 December 2012, the easement may be claimed before that date. However, after 1 December 2012, all claims to an easement would have to be made under section 35 and be based on a user period commencing after 1 December 2009

6.1.4 Under Section 37 of the Civil Law (Miscellaneous Provisions) Act 2011 [relevant provisions commenced 2nd August 2011] Section 35(1) of the 2009 Act was amended to read

*“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”.*

Section 49A was inserted into the ROT Act by section 41 of the 2011 Act

*“(1) Where any person claims to be entitled to an easement or profit *à prendre* and the relevant requirements set out in sections 33*

to 38 of the Land and Conveyancing Law Reform Act 2009 have been met, that person may apply to the Authority and the Authority, if satisfied that there is such an entitlement to the easement or profit à prendre concerned, may cause it, as appropriate, to be—

- (a) registered as a burden under section 69(1)(jj),*
 - (b) entered in the register pursuant to section 82 or, in the case of a profit à prendre in gross, in the register of ownership maintained under section 8(b)(i).*
- (2) Subsection (1) applies only in relation to claims in respect of which—*
- (a) the land benefited by the easement or profit à prendre, to which other land is subject, is registered land, or*
 - (b) the claim is made as part of an application for first registration of that land”.*

6.1.5 Under Section 38 of the Civil Law (Miscellaneous Provisions) Act 2011 [relevant provisions commenced 2nd August 2011] Section 38(b) of the 2009 Act was amended by the substitution of “within 12 years” for “within 3 years”.

It extends the period during which a claim can ripen under the old law. It extends it to the earliest date when a claim could be made under the new law, i.e. in accordance with the new “user period” applicable to all easements and profits – 12 years (see section 33). This is, of course, the “earliest” date because in some cases more than 12 years’ user will have to be shown, such as in the case of claims against the State or cases of incapacity.

The amended section 38 now provided, firstly, that the 2009 Act’s provisions will not apply where the user period under the ‘old’ law was completed before 1 December 2009 provided the claim is brought within 12 years of that date, i.e. before 1 December 2021. Secondly, it provided that where a user period was not completed by 1 December 2009 but will be completed in sufficient time to permit a claim to be made before 1 December 2021, the easement may be claimed before that date. However, after 1 December 2021, all claims to an easement would have to be made under section 35 and be based on a user period commencing after 1 December 2009

6.1.6 Therefore up until the 1st December 2021 applications to the Land Registry under the new Section 49A can only be based on the old law under which three methods of prescription were used; i.e.

- (1) At common law, based on user dating back to the year 1189. This has been regarded as impossible to establish and in practice the courts have accepted evidence of 20 years continuous user or user since living memory, however there is a substantial restriction on establishing such

a claim as this can be easily rebutted by showing user was not possible at some point since 1189 or by showing that at some point since 1189 there was unity of possession.

- (2) Under the doctrine of lost modern grant (a presumption from long user that a grant had been made some time after 1189 but had subsequently been lost). This method developed as rights under common law could be easily defeated. A claim however can be defeated where it is shown during the entire period of user that there was nobody that could have lawfully made a grant. The only addition that the application of this doctrine made to the law was to establish that a claim will not be defeated by proof that the right could only have come into existence at some point after 1189.
- (3) Sections 1 and 2 of the 1832 Act lay down two periods of user whereby profits [section 1] and easements [section 2] may be acquired by prescription, i.e. in the case of a shorter period being shown, 30 years' user without interruption of a profit and 20 years' user without interruption of an easement (other than of light which is provided for in section 3). These sections provide that the profit or easement claimed cannot be defeated by showing only that it was first enjoyed at any time prior to the 30 or 20 year period. **A claim under the 1832 Act based on the shorter period must meet the full requirements of establishing user as of right and such a claim cannot be made by a tenant against his own landlord or against a tenant so as to bind his landlord. Oral consent, in the case of the shorter period, will always defeat the claim whether given at the start or during the statutory period.**

Where a claimant can show longer period of user, i.e. 60 years without interruption for a profit and 40 years without interruption for an easement (other than light which under section 3 is 20 years without interruption) the Act is more positive and **the right is deemed "absolute and indefeasible" unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.** Oral permission given at the start of the period will not defeat the claim whereas oral permission given during the statutory period will defeat the claim.

The Prescription Act provides an additional basis for a claim and does not exclude the pleading of common law or the doctrine of lost modern grant as the basis for acquisition.

Section 1 of the 1832 Act does not apply to profits held in gross and therefore such rights can only be claimed under common law or deed of last modern grant.

It should be noted that the law in this area has been substantially amended by the 2009 Act apart from the user period e.g. in relation to leasehold property. Under Section 36 of the 2009 Act where the dominant owner owns a tenancy only in the dominant land the easement or profit attaches to that land and where the tenancy ends, passes to the landlord. Where the

servient owner owns a tenancy only in the servient land it generally ends when the tenancy ends. Based on Irish case law [see “Irish Land Law”, 4th Edition, JCW Wylie paragraph 6.86].

- (1) prescription against a tenant can be claimed under the 1832 Act [longer period only] and the doctrine of lost modern grant. No authority re at common law.
- (2) A tenant can probably prescribe against other land held by his own landlord under the 1832 Act [longer period only] but not under the doctrine of lost modern grant. No authority re at common law.
- (3) A tenant can prescribe against another tenant holding under the same landlord under the 1832 Act, probably also under the doctrine of lost modern grant and possibly even at common law.

To succeed in acquiring a profit or easement by prescription it is necessary to show no matter which method is claimed, user as of right [except for right to light under section 3 of the 1832 Act] without force, secrecy and in the absence of permission for the requisite user period. Permission sufficient to prevent a claim can be given by whoever is in occupation of the servient tenement. User must be continuous (without interruption). The frequency of use required depends on the type of easement.

6.1.7 The Land Registration Rules 2011 made the necessary rules [new Rule 46A] and provide for the necessary Forms [application form – Form 5A and notice form – Form 113] to apply for registration of easements or profits acquired by prescription. The relevant part of the LR Rules 2011 came into effect on the 2nd November 2011. The relevant **Rule in the LR Rules 2012 is Rule 46** and the relevant application form is **Form 68** [see handout] and the relevant notice form is Form 69. In addition a PRA practice direction in relation to same is also available on our website. For further on the law in this area see paragraphs 6.78 to 6.111 “Irish Land Law”, 4th Edition, 2010, JCW Wylie, Bloomsbury Professional and Chapter 16 of “Easements”, Second edition, Peter Bland, 2009, Round Hall Thomson Reuters.

6.1.8 The procedure under section 49A is intended for cases that are uncontested, i.e. there is no dispute between the parties. If the application is contested it may still be made directly to court under section 35(2) of the 2009 Act or if refused by the Authority can be appealed to court under section 19(2) of the 1964 Act. The procedure does not extend to rights acquired by express grant or reservation, to public rights [affect without registration under section 72(1)(f)] or to customary rights [affect without registration under section 72(1)(g)]. It also does not apply to the acquisition of implied easements [easements of common intention] or to easements of necessity the registration of which would require a court order [section 69(1)(h)].

6.1.9 Form 68 of the LR Rules 2012

Please note the experience of the PRA in dealing with Form 68 [previously Form 5A] applications lodged to date. In the majority of cases, all that is being averred by the applicant is long user and insufficient facts are being averred to support a claim based on prescription being grounded in fact and in law. It is *ultra vires* the PRA to register rights not acquired by prescription under Section 49A, for example to register implied rights under the new scheme. Therefore, please pay full attention to providing full details in order to establish a right pursuant to Paragraph 2 and ensure that all matters have been dealt with and averred by the applicant in full. This will reduce the need for further rulings and requests by an examiner of titles and for additional averments to be sworn by the applicant.

It appears these applications are often being lodged in anticipation of a sale with requests for the matter to be dealt with immediately by the PRA. In order to expedite, the case must be fully grounded before notice can be served. Rulings on title will lead to delays being experienced in the processing of the case so any effort made in advance to fully ground a claim incorporated into the body of the Form 68 will eliminate or minimise rulings and result in speedier registration for the applicant. Also, please pay particular attention to mapping requirements and ensure the right being claimed is clearly marked on a suitable map. Frequently the map lodged does not show all of the subject land burdened by the right claimed. Another common omission is the failure to establish the extent of the easement being claimed i.e. no description of the nature, extent or scope of the right being claimed.

It was evident from the applications lodged to date that sufficient attention was not being paid to this note and it is hoped that the change of location will result in better prepared applications. It should be noted that all the other paragraphs in Form 68 are standard. All the notes to this form should be read and understood prior to the drafting of the Form 68. As a consequence one amendment was made to Form 68 in the LR Rules 2012 in that a note that was formerly located at the end of the form has now been inserted in paragraph 2. *(Describe how and when the user period began and set out such facts as are relied upon in support of the applicant's claim to have established his right. The applicant must establish that there was at all material times a capable grantor and grantee, that the right was capable of forming the subject matter of a grant, that the right claimed was acquired by prescription and was not a public right of way, customary right, franchise or licence, nor acquired by express grant or reservation nor is it an easement of necessity, that there has been the requisite period of user, that the exercise of the right has been without force, without secrecy and without permission and that the grant of the right would not have been illegal).*

6.1.10 Mapping

In all cases the application must be accompanied by a suitable map i.e. either a 'Land Registry Compliant Map' which is an ITM (Irish Transverse Mercator) map published by the Ordnance Survey or by a Land Registry ITM coordinate

referenced map or such other map which complies with Land Registry Mapping regulations, **with the right(s) claimed clearly highlighted and identified thereon.**

6.1.11 Checklist for lodgment of applications:

- 1) Form 17.
- 2) Form 68
- 3) Is the dominant land unregistered? An application for first registration in the appropriate form must be made simultaneously.
- 4) Is the servient land unregistered? As much information and enquiries/searches to be made prior to lodgment to establish the owner of the servient tenement for the purpose of notice of registration.
- 5) Suitable map with right clearly marked thereon.
- 6) Fee of €130.

6.1.12 Sample Form 68 Rulings for Reference

- (i) It must be confirmed whether or not the right claimed is a public right of way, customary right, franchise, licence, implied right or easement of necessity.
- (ii) A right of way of necessity as understood under Irish Law is one implied into the grant of a tenement to provide the grantee with a means of access to that tenement over the lands of the grantor where there is no other available access. No registration under this type of application can be made in respect of an easement of necessity.
- (iii) It must be confirmed whether or not the exercise of the right has been without force, without secrecy and without permission.
- (iv) It must be confirmed whether or not the grant of the right would not have been illegal.
- (v) It must be confirmed that the right was capable of forming the subject matter of a grant.
- (vi) It must be confirmed that there has been the requisite period of user.
- (vii) A fee of €130 is payable.
- (viii) This information sought should be set out in a supplemental affidavit from the applicants.
- (ix) It is not acceptable to qualify the averment by phrases such as “as far as I am aware”. The averments grounding the application must be clear and unequivocal.

- (x) Each application must establish that it comes within the requirements of the Practice Direction before notices are served.
- (xi) You are referred to the Practice Direction on Registration of Easements and Profits a Prendre acquired by prescription, available on our website. If, as you aver, the easement was acquired by express grant or reservation this type of application cannot be made and the dealing is accordingly rejected.
- (xii) It is stated that the right claimed is a customary right. A customary right cannot be registered under this type of application – see the Practice Direction on *Easements and Profits á Prendre* on our website.

A customary right is a certain and not unreasonable right applicable to a particular district which has been enjoyed by an undefined class of local people over the land of another from time immemorial without interruption. The difference between prescription and custom is that prescription is claimed for a specific person, but custom is claimed for a specific place (Peter Bland; *Easements* 2nd ed., 2009 at 1-61 and 1-63).

A customary right can only be registered on foot of a Court Order. If the right claimed is a customary right, it would appear that the application should be withdrawn.

- (xiii) An application cannot be made by a person entitled to be registered as owner. Such a person should make an application to be registered as owner prior to, or simultaneously with, this application.
- (xiv) If the applicant is applying as personal representative of the present registered owner, this should be stated in the affidavit and the application should be accompanied by the original or an office copy of the grant or letters of administration.
- (xv) In respect of the deceased registered owner, please supply the name and address of their personal representative or their solicitors, as well as the party in occupation of the property.
- (xvi) Have a notice in the form set out in the enclosed draft inserted in the local newspaper having the largest circulation in the area. On the expiry of one month from the date of publication lodge the relevant extract from the newspaper.
- (xvii) With reference to the above application please refer to the Practice Direction on Registration of Easements acquired by prescription available on our website and Form 68 of the LR Rules 2012. It is important to note that the scope of this Practice Direction applies to rights acquired by prescription only and does not extend to rights acquired by express grant/reservation, to the acquisition of rights implied by law, easements of necessity etc... [*e.g. Rights implied by the principle of non-derogation from grant, ways of necessity, common intention of the parties etc....*]

- (xviii) Where the dominant land is unregistered and the servient land is registered an application for first registration must be made at the same time in the appropriate form. *[See further our Practice Direction - First Registration and Other Examiners cases]*. It is not possible to register the interest in the absence of a first registration application as Section 49A (2) clearly states that the dominant land must either be already registered land or the subject of an application for first registration.
- (xix) Please refer to the Practice Direction on Registration of Easements acquired by prescription available on our website and Form 5A of the LR Rules. Note this procedure is intended only for non-contentious cases. Having regard to the objections received I must request that you withdraw the application. I await such request for withdrawal and return of the documentation.
- (xx) Please note the non-contentious nature of this type of application and consider whether obtaining a Grant from the Servient owner would be more appropriate or in the alternative an application to Court pursuant to the Act of 2009.
- (xxi) Please furnish a map suitable for registration purposes and drawn to the usual acceptable professional standards with the easement properly shown thereon.
- (xxii) As regards the matter of whether the passageway was previously a public way please furnish a letter of confirmation from the Local Authority that said passageway is not now a public right of way and is not in charge of the Local Authority.
- (xxiii) Your letter requesting expedition confuses matters in that you indicate the property HAS been sold. If the title to the Dominant Lands has passed to another party then the current applicants cannot maintain an application and any application would have to be made by the current holders of the legal title.
- (xxiv) The Right of Way affects “unregistered” land. There is no conclusive evidence of ownership of same furnished therefore in view of that please provide an indemnity *[by the Applicant – properly signed and independently witnessed]* indemnifying the Property Registration Authority and the State against all claims, losses, damages or compensation, arising from registration of the right of way as an Appurtenant Right on Folio on the basis of the limited proofs furnished. *[Wording of indemnity as highlighted.]*
- (xxv) The right claimed must be described in the First Schedule. It is insufficient to refer only to the way coloured yellow etc...with no description of the nature extent or scope of the right claimed...

(xxvi) Please ensure comprehensive and accurate names and addresses are provided in the Third Schedule for effective service of notices. It is not always sufficient to quote names and addresses from existing registered owner details on Folios as the Titles may not be up to date.

7. **Conclusion**

If you are making an application to the PRA in relation to any of the above matters please try to ensure that you comply with our requirements as set out above and in our Practice Directions on available on our website at www.prai.ie . Help us to provide an efficient and effective service to you.