

# Land and Conveyancing Law Reform Act, 2009

*Adrienne Cawley BL, provides a comprehensive overview of this far reaching and, with regard to certain provisions, controversial legislation. She urges practitioners to read the Act to familiarise themselves with the changes aimed at simplifying and modernising land law and conveyancing.*



The Land and Conveyancing Law Reform Act, 2009 (“the 2009 Act”) came into force on the 1<sup>st</sup> December 2009, <sup>1</sup> save for Section 132 in respect to rent reviews. This Section came into force on 28<sup>th</sup> February 2010. <sup>2</sup>

This article is intended to be an overview of the 2009 Act. I have decided to deal specifically with matters that arise in day to day business. In order to understand any piece of legislation it is always better for a person to read same. I believe that in circumstances where one’s business involves property it is necessary to be familiar with the provisions of this Act.

The 2009 Act is an Act which provides, inter alia, for:

- The reform and modernisation of land law and conveyancing;
- The repeal of enactments that are obsolete;
- The variation of trust;
- The modernisation of land law relating to *lis pendens*;
- The amendment of the law in relation to review of rents.

The 2009 Act comprises 14 Parts. It effectively abolishes 150 pre-1922 Statutes. The aim behind the 2009 Act is to simplify and modernise land law and conveyancing. The difficulty in doing this is that it still remains necessary to understand land law and conveyancing in order to appreciate the changes that the 2009 Act seeks to make.

Part I of the 2009 Act deals specifically with definitions and also the need to serve notices and the entitlement of the Minister to make regulations pursuant to the 2009 Act.

## Ownership of Land

Prior to 1<sup>st</sup> December 2009 ownership of land in Irish land law involved various old concepts, such as feudalism and in particular the Doctrine of Tenure. The basis of our land law is that all land is held from the State. This arose at the time of the Norman Conquest when William the Conqueror regarded England as his conquest and he rewarded his followers by making grants of land to them. Naturally because land was such a source of wealth, William was not prepared to make grants of land free gratis and in return he was provided with certain services of a feudal nature. This system became known as tenure, meaning how land was held. From this system arose the doctrine of estates, which means the length of time land is held. Although in modern times one speaks of owning land when in actual fact what one has is an interest in land. The doctrine of estates is made up of fee simple, fee tail and life estates. Also, under the doctrine of estates, an interest in land is either freehold or leasehold.

The 2009 Act purports to change certain of the older concepts of land ownership; in particular, it abolished the old feudal

concept of tenure while retaining the concept of estates.

Sections 9 to 14 of the 2009 Act contain provisions seeking to reform and modernise the ownership of land. What is effectively “owned” is an “interest” in land. The only legal estates in land which may be created or disposed of are freehold and leasehold.<sup>3</sup>

There are now a number of legal interests in land which may be created or disposed of, for example, Easements; Freehold covenants; Incumbrances, etc.<sup>4</sup>

The creation of a Fee Farm Grant is now prohibited. A Fee Farm Grant is a Fee Simple interest subject to the payment of a rent. These types of grants originally arose from the use of Leases for Lives Renewable Forever, which were converted into fee farm grants by the Renewable Leasehold Conversion Act 1849.<sup>5</sup>

The future creation of a Fee Tail is also abolished. A Fee Tail is an interest in land which is limited in a specific way. Fee Tails were very popular to ensure that land was kept within a family. Often lands were settled on marriage by a son or daughter in such a way that land would pass from one son or daughter to another. Fee tails are often described as being a creature of statute being De Donis Conditionalibus 1290. Difficulties arose with a Fee Tail in circumstances where a tenant in tail wished to bring their interest to an end. This resulted in a complicated method of barring the entail.<sup>6</sup>

## Future Interests

Part 3 deals with the complicated area of future interests. It provides that all future interests in land whether vested or contingent exist only in equity. Many of the rules in respect to future interests have been abolished. In particular, the common law contingent remainder rules; the Rule in *Purefoy v Rogers*; the Rule in *Whitby v Mitchell*; the Rule against Perpetuities and the Rule against Accumulations.

## Trusts

The area of Trusts in land is now dealt with under Part 4 of the 2009 Act.

Where land is limited by an instrument, to persons by way of succession without the interposition of a trust, or held on a trust, or vested in a minor, there is deemed to be a trust of land. Trustees under a trust in land are defined in Section 19 of the 2009 Act. Trustees have the full power of an owner to convey or otherwise deal with the land. This includes the power to permit a beneficiary to occupy or use land as the trustees think fit. It also permits the trustees to sell or re-invest the proceeds in the purchase of land.<sup>7</sup>

The 2009 Act defines what is to be regarded as a trust of land and further sets out the power and functions of the trustees of land. In the event of a dispute between any persons having an interest in a trust for land, an application can be made to court.

In deciding how to resolve the dispute, a court will have regard to the interests of the beneficiaries.<sup>8</sup>

Part 5 provides for the variation of trusts and the court is given jurisdiction to either approve or vary any trust arrangement. Persons who can apply to the court include a person who has an interest under the trust.<sup>9</sup>

Part 6 deals with the powers relating to property. These powers are often used in family settlements and trusts where the settler gives another person power to appoint from a group of potential beneficiaries who should become actual beneficiaries.

## Co-ownership

A topical area and an important change made under the 2009 Act are in relation to co-ownership. Co-ownership concerns the ownership of property by more than one person. Commonly the forms of co-ownership that exist are those involving joint tenancies and tenants in common. Most married couples own their property as joint tenants. Many other arrangements, including business arrangements and cohabiting couples, hold their property as tenants in common. The main difference between both is the right of survivorship which exists under a joint tenancy. This means that the surviving joint tenant will be entitled to the ownership of the property. A tenant in common has an undivided share in the property which, on their death, will fall into their estate for distribution.

Prior to 1<sup>st</sup> December 2009, applications in respect to disputes involving co-owned lands were brought under the Partition Acts, in which reliefs were sought for an order for sale in lieu of partition and the distribution of proceeds of sale.

Part 7 of the 2009 Act deals specifically with co-ownership. It provides that any conveyance of land held in a joint tenancy by a joint tenant without the consent of the other joint tenant is void both at law and in equity unless that consent has been dispensed with.<sup>10</sup> Consent in this instance means prior written consent.

Prior to the 2009 Act, a judgment mortgage registered in the Registry of Deeds would sever a joint tenancy, however, this would not occur where the land was registered in the Land Registry. Since the coming into force of the 2009 Act, it is important to note that registration of a judgment mortgage against the estate or interest in land of a joint tenant does not sever the joint tenancy and if the joint tenancy remains unsevered, the judgment mortgage is extinguished upon the death of the judgment debtor.<sup>11</sup>

Naturally, joint tenants are entitled to mutually agree to sever a joint tenancy.

Applications can be made to the court seeking relief in respect to co-owned lands. Such applications give a court power to do the following in respect to a property:

- an order for partition;
- an order for the taking into account of any incumbrances affecting the land;
- an order for sale and distribution of the proceeds of sale;
- an order directing that accounting adjustments be made between the co-owners;
- an order dispensing with consent to severance;
- such other order in relation to the land as the court deems just and equitable in the circumstances of the case.

The court also has the power to attach conditions to its orders.<sup>12</sup>

A body corporate (a company) now has the power to hold property as a joint tenant. On dissolution of the body corporate, the property devolves onto the other surviving joint tenant or tenants.<sup>13</sup>

## Appurtenant Rights – Easements and Profits à Prendre

Part 8 of the 2009 Act deals with easements and profits à prendre. An easement is a right an owner of land would have by virtue of his ownership of that land over the land of his neighbour, e.g. a right of way, a right to light, a right to support, a right to water. A profit à prendre are rights which can only exist between neighbouring landowners. It is a right to go onto another person's land and take from it something belonging to the land naturally, e.g. fish, cut timber or turf.

Acquisition of an easement or profits à prendre by prescription at common law or under the doctrine of lost modern grant is abolished.<sup>14</sup> From the coming into force of the 2009 Act, the acquisition of an easement or profits à prendre shall be acquired at law by prescription only on registration of a court order.<sup>15</sup>

Under the 2009 Act an easement or profit à prendre shall be extinguished on the expiry of a 12 year continuous period of non-user of the easement except where it is protected by registration in the Registry of Deeds or Land Registry.<sup>16</sup>

The Rule in *Wheeldon v Burrows* is abolished and replaced by subsection (2) of Section 40 which provides that where the owner of land disposes of part or all of the land, the disposition creates by way of implication an easement over the part retained.

## Party Structures

Section 44 of the 2009 Act confers a new statutory right on a landowner to carry out certain works to a party structure. This is in respect to compliance with a planning decision; statutory provision or notice or order; preservation of the party structure.

The works involved are, inter alia, defined as alterations, cutting into or away, decoration, demolition, improvement, lowering, maintenance, raising, renewal, repair, replacement, strengthening or taking down.<sup>17</sup>

If a dispute between neighbours arises in this regard, an

application can be made to the court. The court can authorise that the works be carried out by way of a “works order”.<sup>18</sup>

## Freehold Covenants

Freehold covenants can now be enforced under Section 49 of the 2009 Act. The Rule in *Tulk v Moxhay* whereby the burden of a negative covenant can only bind successors, i.e. is now abolished.<sup>19</sup>

Any freehold covenant which imposes in respect to servient land an obligation to do or refrain from doing any act or thing is enforceable by the dominant owner or the person who ceased to be that owner against the servient owner. If a dispute results an application can be made to court.<sup>20</sup>

A servient owner<sup>21</sup> can apply to the court for an order discharging in whole or in part or modify a freehold covenant on the ground that its continued compliance would constitute an unreasonable interference with the use and enjoyment of the servient land.<sup>22</sup> The court in such an application will have regard to the circumstances under which the covenant was created; any change in the character of the dominant<sup>23</sup> and servient land or neighbourhood; development plan for the area; planning permission.

## Conveyances and Contracts

Part 9 of the 2009 Act provides for changes in respect to contracts and conveyances. The Statute of Frauds 1695 is replaced by Section 51 which provides that no action shall be brought to enforce any contract for the sale or other disposition of land unless the agreement on which such action is brought, or some memorandum or note of it, is in writing and signed by the person against whom the action is brought or that person's authorised agent.<sup>24</sup>

On the making of an enforceable contract for sale the entire beneficial interest passes to the purchaser. The law restricting damages recoverable for breaches of contract as a result of defects in title is abolished (the Rule in *Bain v Fothergill*).

The court has the power to order the return of a deposit in circumstances where the court refuses to grant specific performance or in an action for the return of the deposit.<sup>25</sup>

The procedure under Section 9 of the Vendor and Purchaser Act 1874 is now contained in Section 55 of the 2009 Act which provides that a party to a contract for sale may apply to the court in a summary manner for an order determining a question relating to the contract. This type of application arises where the issue involves the title to the lands and not whether or not there is an enforceable contract.

The title a vendor is required to deduce under a contract for sale is reduced to 15 years. The 2009 Act also reiterates that where title commences with a fee farm grant or lease, that grant or lease must be produced. The root of title is the period for proof

of title which the purchaser may require.<sup>26</sup> In any conveyance, a vendor must provide a good root of title. That is, the vendor must show that not only does he own the property but there are no difficulties in respect to his ownership. In respect to unregistered land a root of title could easily commence with a deed from the 1700s or 1800s. In order to prevent a situation where each and every deed affecting the property is read and considered, rules developed over the years which meant that a vendor could commence his title and then jump to 20 years prior to the date of sale.

Section 2 of the Vendor and Purchaser Act 1874 Act is now incorporated into the 2009 Act and it provides that recitals, statements and descriptions of facts, matter and parties contained in instruments, statutory provisions or statutory declarations 15 years old at the date of the contract are, unless and except so far as they are proved to be inaccurate, sufficient evidence of the truth of such facts, matters and parties.<sup>27</sup> That means that, once a deed provides for specific details in respect to land same are to be accepted if the deed is at least 15 years old. The exception is if the deed is incorrect.

In respect to this Part of the 2009 Act, any attempt by a person to commit a fraud or conceal information or falsify information in respect to a conveyance is guilty of an offence.<sup>28</sup>

Section 62 of the 2009 Act provides that a legal estate or interest in land may only be created or conveyed by deed. Exceptions to Section 62 are in respect to assents by a personal representative; a surrender taking effect by operation of law; a disclaimer not required by a deed; a grant or assignment of a tenancy not required to be by deed; a receipt; a vesting order.

Normally a deed is executed or signed when a seal is affixed to the deed and it is delivered. Since the coming into force of the 2009 Act a seal for the valid execution of a deed or authority to deliver a deed is abolished.<sup>29</sup>

Section 67 of the 2009 Act now provides for the use of “words of limitation”. These words are used in order to convey or assign land to another person. It has always been imperative that the correct words of limitation are used in the appropriate deed. The Section provides that a conveyance of unregistered land with or without words of limitation passes the fee simple or the other entire estate or interest unless a contrary intention appears in the conveyance.

The 2009 Act introduces provisions in relation to the construction of deeds and definitions of key words which would be contained in deeds in respect to the purchase or sale of lands.<sup>30</sup>

## Mortgages

Mortgages can often be a difficult area and Part 10 purports to simplify same. Legal mortgages can now only be created by deed. Part 10 applies to both registered and unregistered land.

A mortgagor and a mortgagee have the same rights and powers

they enjoyed prior to the commencement of the 2009 Act. A mortgagor, as long as his right to redeem exists, can inspect and make copies or abstracts of the documents relating to the title of his land. A mortgagor also has the right to redeem any housing loan mortgage without having to pay money due under any other mortgage with the same mortgagee, whether that other mortgage is of the same or other property.<sup>31</sup> Also, under Section 93 a mortgagor who is entitled to redeem may require the mortgagee instead of discharging the mortgage, to assign the mortgage debt and transfer the mortgage to any third person as the mortgagor directs. This is subject to compliance with the terms on which the mortgagor would be entitled to require a discharge.

Sections 97 to 111 of the 2009 Act sets out the powers and rights of a mortgagee. These are in relation to the following:

- taking possession of mortgaged lands;
- abandoned property;
- mortgagee in possession;
- power of sale;
- selling lands;
- appointment of receivers;
- application of monies received.

In respect to leasehold lands, a mortgagor in possession can lease the land with the consent in writing of the mortgagee which consent shall not be unreasonably withheld. A mortgagor or mortgagee in possession can accept a surrender of a lease previously granted.<sup>32</sup>

## Judgment Mortgages

Part 11 deals with Judgment Mortgages. A creditor who has obtained judgment against a person may apply to the Property Registration Authority to register a judgment mortgage against that person’s property.<sup>33</sup> A judgment mortgage shall be registered in the Registry of Deeds or Land Registry.

The registration of a judgment mortgage operates to charge the judgment debtor’s land with the judgment debt and entitles the judgment mortgagee to apply to the court for an order under Section 31 of the 2009 Act.<sup>34</sup>

On the making of such an application the court can:

- make an order for the taking of an account of any other incumbrances affecting the land;
- make an order for sale and distribution of the proceeds of sale;
- such other order for the enforcement of the judgment mortgage as the court thinks appropriate.

In order to vacate the judgment mortgage, registration in the Registry of Deeds of a certificate of satisfaction of a judgment extinguishes the judgment mortgage.<sup>35</sup>

## Lis Pendens

Part 12 deals with *Lis Pendens*.

A *lis pendens* means pending suit. This would arise where a party registers a caution on land where a dispute is in existence between parties in respect to the land.

A register of *lis pendens* shall be maintained in the Central Office of the High Court. An entry of a *lis pendens* shall be cancelled with the consent of the person on whose application it was registered, or upon lodgment in the Central Office of the High Court of a notice of an order vacating the *lis pendens*. A court can make an order vacating a *lis pendens* under Section 123 of the 2009 Act.<sup>36</sup>

It should be noted that The National Asset Management Agency Act, 2009 provides that where NAMA has acquired a bank asset no *lis pendens*, caution or inhibition registered after 30<sup>th</sup> July 2009 shall have effect against NAMA or any person who acquires that asset from NAMA.<sup>37</sup>

Part 13 makes various amendments to the Registration of Title Act, 1964, in particular, in relation to compulsory registration of title.

## Rent Reviews

Part 14 deals with miscellaneous matters, including an important and controversial law in respect to rent reviews.

A provision in a lease which provides for the review of the rent payable under the lease shall be construed as providing that the rent payable following such review may be fixed at an amount which is less than, greater than or the same as the amount of rent payable immediately prior to the date on which the rent falls to be reviewed.<sup>38</sup>

This Section shall apply notwithstanding any provision to the contrary contained in the lease and only as respects that part of the land demised by the lease in which business is permitted to be carried on under the terms of the lease. Therefore, under the

2009 Act rent review clauses are no longer limited to upward only reviews.

It should be noted that Section 132 only came into force on 28<sup>th</sup> February 2010.<sup>39</sup>

Of interest, is a proposed new law which effectively seeks to amend the 2009 Act, particularly with regard to upward only rent reviews. The Land and Conveyancing Law Reform (Review of Rent in Certain Cases) (Amendment) Bill 2010 seeks to introduce a law that provides that if the Government is of the opinion that, arising from a serious disturbance in the economy and a decline in economic circumstances in the State, tenants of business premises cannot fairly be expected to pay rents at rates that were previously prevailing, or at any increased rate, the Government may make an order in respect to that rent.<sup>40</sup>

The Order which it may make could limit the application of the order to a class or type of business premises, or apply to the whole of the State or to a particular geographical area in the State. It further seeks to make provision that the Government can make any incidental or ancillary order that it considers necessary or expedient to give full effect to any provision of the order or secure compliance with it.

It may be that such a proposal would have difficulties especially as regards private arrangements between individuals. I believe the intention is that this type of proposed law would be retrospective, however, regard must be had to binding contracts, i.e. leases, already entered into between private individuals.

## Conclusion

In concluding and as stated above, this article is intended as an overview of the 2009 Act and I hope that this is what it achieves. For anyone who is in any way involved in property, I would recommend that they read the 2009 Act and be familiar with its provisions as this is a seminal piece of legislation which radically reforms the entire area of land and conveyancing law. It has far reaching implications and, for now, it remains both new and untested.

## REFERENCES

- |                      |                                                                                                                                   |                                                                                                              |
|----------------------|-----------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------|
| 1 S.I. 356 of 2009   | 17 Section 43                                                                                                                     | 29 Section 64                                                                                                |
| 2 S.I. 471 of 2009   | 18 Section 45                                                                                                                     | 30 Section 75                                                                                                |
| 3 Section 11         | 19 Section 49(1)                                                                                                                  | 31 Sections 91 and 92                                                                                        |
| 4 Section 11(4)      | 20 Section 49(2)                                                                                                                  | 32 Sections 112 and 114                                                                                      |
| 5 Sections 12 and 14 | 21 Servient owner is defined as the owner of freehold land which is subject to a covenant benefiting other freehold land          | 33 Section 116                                                                                               |
| 6 Section 13         | 22 Section 50                                                                                                                     | 34 Section 117                                                                                               |
| 7 Section 20         | 23 Dominant owner is defined as the owner of freehold land with the benefit of a covenant to which other freehold land is subject | 35 Section 118                                                                                               |
| 8 Section 22         | 24 Section 51                                                                                                                     | 36 Sections 121 and 123                                                                                      |
| 9 Section 24         | 25 Section 54                                                                                                                     | 37 Section 195 National Asset Management Agency Act, 2009                                                    |
| 10 Section 30        | 26 Section 56                                                                                                                     | 38 Section 132(3)                                                                                            |
| 11 Section 30(3)     | 27 Section 59                                                                                                                     | 39 S.I. 471 of 2009                                                                                          |
| 12 Section 31        | 28 Section 60                                                                                                                     | 40 Section 1 of the Land and Conveyancing Law Reform (Review of Rent in Certain Cases) (Amendment) Bill 2010 |
| 13 Section 32        |                                                                                                                                   |                                                                                                              |
| 14 Section 34        |                                                                                                                                   |                                                                                                              |
| 15 Section 35        |                                                                                                                                   |                                                                                                              |
| 16 Section 39        |                                                                                                                                   |                                                                                                              |