



REAL ESTATE

Easements and Profits à Prendre

by **Emer Wilkie**

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Protect Your Rights Before 30 November 2021

The Land and Conveyancing Law Reform Act 2009 introduced significant changes to the law governing easements and profits à prendre, which come into force on 1 December 2021.

Landowners who have not taken steps to protect their easements or profits à prendre prior to 30 November 2021 may risk losing those rights.

Easements and Profits à Prendre Explained

Easements and profits à prendre are property rights enjoyed by a landowner over neighbouring lands owned by another party.

Typical easements include a right of way to pass over another's land, a right to support or light, or wayleaves for the passing of service utilities such as foul sewer through the neighbouring land.

Profits à prendre include the right to enter another property and extract natural produce from it, some examples include fishing, mining and quarrying on another's property.

Easements and profits à prendre can be acquired by formal grant, implied grant, reservation and by prescription. This article will focus on easements and profits à prendre acquired by long and established use without force, secrecy or permission, over a substantial period of time, which is otherwise known as prescription.

Relevant Time Periods

From 1 December 2021, the basis on which prescriptive rights can be claimed will change and will be subject to the time periods introduced by the Land and Conveyancing Law Reform Act 2009 (the 2009 Act).

Until 30 November 2021, the applicable time periods to claim a prescriptive right are:

- 20 years for general applications.
- 40 years for foreshore.

After 30 November 2021, the applicable time periods to claim a prescriptive right are:

- 12 years for property which is not owned by the State.
- 30 years for land owned by the State (other than foreshore).
- 60 years for foreshore.

In addition, the 2009 Act provides that any time accrued prior to 1 December 2009 cannot be included. This will have a significant impact if the relevant property is foreshore or owned by the State. In such cases, a landowner will have to wait decades before establishing their prescriptive rights even if they had accrued a sufficient user period prior to 30 November 2021. For example, the earliest date to register such rights will be 1 December 2039 for property owned by the State and 1 December 2069 for foreshore property.

Claims under the 2009 Act can be defeated or delayed due to or an interruption of the user period.

Risk of Non-use

Under the 2009 Act a prescriptive easement or profit à prendre that is not used for a continuous period of 12 years is extinguished unless it has been registered with the Property Registration Authority.

Transitional Arrangements

The 2009 Act provided for a transition period from 1 December 2009 to 30 November 2021 during which landowners can claim prescriptive rights based on the existing time periods.

This can be achieved through:

1. An application to the Land Registry to register their right (Section 49A application); or
2. An application to the Court seeking an Order recognising their prescriptive right.

Landowners should take action before 30 November 2021 in relation to any property rights that they may have acquired by prescription.

Section 49A Procedure and Court Order

The Section 49A application involves the applicant swearing a prescribed Form 68 containing an affirmation that the right claimed was acquired by prescription, and that it was not a public right of way, customary right or licence; that it was not acquired by express grant or reservation; and that it is not an easement of necessity. In doing so the applicant is effectively being required to disclaim other possible rights.

It is important to note that the Land Registry will only register an easement or profit à prendre that is not disputed by the owner of the land over which the easement or profit à prendre is claimed. In the event of a dispute an applicant will be required to apply to Court to assert their right, but they may have precluded themselves from claiming or relying on other rights that are inconsistent with the affirmation sworn under Form 68. The Law Society of Ireland recently reported that it is making representations to have the wording in Form 68 amended, but it remains to be seen if that will happen.

There is no guarantee that a Section 49 application submitted to the Land Registry between now and 30 November 2021 will not be rejected if it is disputed or for other reasons. If an application is rejected after the deadline of 30 November 2021, the applicant will not be able to initiate Court proceedings to protect their rights under the old regime that applied before the new regime under the 2009 Act comes into force on 1 December 2021.

At this point in time, a combination of the looming deadline of 30 November 2021 and the prescribed wording of Form 68 may leave a Section 49A application vulnerable.

Final Thoughts

In addition to prescriptive easements and profits à prendre there are other options to be considered. A proportion of undocumented easements that are considered to be prescriptive in nature are actually implied rights. Where it can be shown that the land in question was subdivided from a larger landholding in circumstances where it is fair and reasonable to assume that the sub divided land was to benefit from certain rights – for example drainage – then it could be asserted that such rights came into existence at that time to give effect to a common intention. Such rights are not capable of registration in the Land Registry. Another option is that a formal grant could be agreed between consensual landowners.

Landowners should consider all options available to them to protect their property rights before 30 November 2021.

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