Prescriptive Easements and Profits: Another Cliff Edge?

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Introduction

This article assesses the problems that arise in relation to potential prescriptive easements and profits as 30 November 2021 approaches. This date represents the end of the 12-year transition period provided for in Pt 8 of the Land and Conveyancing Law Reform Act 2009 ("LCLRA"), as amended by the Civil Law (Miscellaneous Provisions) Act 2011. It is not possible in a short article to consider all the issues that arise in relation to the relevant statutory provisions.[1] The article concentrates on the aspects of the legislation that create pressure to litigate before the deadline. In formulating its own proposals in this area, the English Law Commission sensibly identified the avoidance of litigation as one of its key objectives.[2] Litigation with a neighbour is generally painful, and litigation over alleged prescriptive easements tends to be especially acrimonious and difficult.[3] In the current circumstances of a pandemic, the stirring up of litigation is impossible to defend.

The article will begin by setting out the background to the problems in this area by summarising the rules that will apply until the deadline ("the old law"), the new scheme introduced in the LCLRA 2009, and the subsequent legislative intervention in 2011 which (with limited success) attempted to address the problems created by the original scheme. The article then identifies those situations where—due to bad drafting or questionable policy

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[1] A wider range of issues was considered in an online seminar on 24 February 2021, organised by the Law School at University College Cork, and kindly chaired by Baker J. of the Supreme Court. The speakers were Deirdre Fox, Peter Bland S.C., and the current author. A recording of the seminar is available on the U.C.C. School of Law's YouTube channel: *https://tinyurl.com/y9n5zec7*; papers/slides are available on request from the School of Law. See also John Mee, "Reform of the Law on the Acquisition of Easements and Profits à Prendre by Prescription" (2005) 27 D.U.L.J. 86; Peter Bland, "A 'Hopeless Jumble': The Cursed Reform of Prescription" (2011) 16 C.P.L.J. 54; John Mee, "Reforming the Law of Prescription: A Cautionary Tale from Ireland" in Warren Barr (ed) *Modern Studies in Property Law Volume 8* (Hart Publishing: Oxford, 2015); Una Woods, "The Long and Winding Road of Prescriptive Rights and the Registration Requirement" (2020) 64 Irish Jurist 1; J.C.W. Wylie *Wylie on Irish Land Law*, 6th edn (Haywards Heath: Bloomsbury Professional, 2020), [7.57]-[7.90]; J.C.W. Wylie, *The Land and Conveyancing Law Reform Act 2009: Annotations and Commentary*, 2nd edn (Haywards Heath: Bloomsbury Professional, 2013), [69]-[77]; Peter Bland, *Easements*, 3rd edn (Dublin: Round Hall, 2015), Chapters 6 and 7.

[2] *Making Land Work: Easements, Covenants and Profits à Prendre* (Law Com No 327, 2011), pp.54–55.

[3] Peter Bland, "A 'Hopeless Jumble': The Cursed Reform of Prescription" (2011) 16 C.P.L.J. 54 at 55.

choices—the legislation creates pressure to litigate because a landowner who currently has a good prescriptive claim will, or may, lose that claim after the deadline. These situations include those where (i) the claimant had satisfied the requirements of the doctrine of lost modern grant prior to 1 December 2009 but his or her user has not continued up to the present; or (ii) the servient land belongs to a State authority; or (iii) where the servient owner may have suffered from mental incapacity during the transition period; or (iv) where there may have been a gap of more than one year in the claimant's enjoyment during the transition period. Consideration is also given to the possibility that, even in cases that appear to lack the special circumstances of those situations, there may still be some pressure to litigate. Having considered these scenarios, the article then notes that the procedure under s.49A of the Registration of Title Act 1964, introduced as part of the 2011 reforms, is unlikely in many cases to provide a viable alternative to litigation. The article's ultimate conclusion is that legislative reform is required prior to the deadline. Some tentative suggestions are offered as to the shape that such reform might take.

The Background

The Old Law

Under the old law, a prescriptive easement or profit could be acquired in one of three ways.[4] The first method of acquisition, common law prescription, has long been obsolete in practical terms. The second method is under the doctrine of lost modern grant, which requires the claimant to demonstrate 20 years of "user as of right", i.e. enjoyment without force, secrecy, or permission. The third method is under the badly-drafted Prescription Act 1832.[5] The requisite period of user as of right under this Act is 20 years for easements and 30 years for profits.[6] The Act requires that this period come "next before some suit or action", i.e. the period must come immediately before the matter is litigated. This restriction means that the Prescription Act is, in general, considerably less potent than the doctrine of lost modern grant. Under the latter doctrine, once the claimant can establish 20 years user as of right, it does not matter that there has been a later period of non-user. For example, in *Orwell Park Management Ltd v Henihan*[7] a claim under the doctrine of lost modern grant, based on user

[4] This very brief summary cannot do justice to the complexity of the law. For detailed discussion, see *Wylie on Irish Land Law*, [7.57]-[7.85]; Bland *Easements* (2015), [6.11]-[6.104].
[5] Extended to Ireland by the Prescription (Ireland) Act 1858.
[6] The Act also provides for a longer period of 40/60 years which is primarily of relevance in cases where the servient owner is under a legal disability.
[7] [2004] IEHC 87.

as of right from 1937 to 1972, was not defeated by the fact that the right had not been used from 1972 to 1989.

The New Law[8]

Under the scheme in the LCLRA, the standard period for a successful prescription claim is set at 12 years user as of right, with a more stringent requirement of 30 years for State land and 60 years where the State land is foreshore.[9] There must be no "interruption", which is defined as "interference with, or cessation of, the use or enjoyment of an easement or profit à prendre for a continuous period of at least one year".[10] The user period is suspended for any period where mental incapacity makes the servient owner incapable of managing his or her affairs, extending the period up to a total of 30 years.[11] The suspension does not apply where "[t]he court considers that it is reasonable, in the circumstances of the case, to have expected some other person, whether as trustee, committee of a ward of court, an attorney under an enduring power of attorney or otherwise, to have acted on behalf of the servient owner during the relevant user period".[12] It is provided in s.35(1) that an easement or profit can only be acquired under the statutory scheme upon the registration of a court order in the Land Registry or in the Registry of Deeds, as appropriate. The idea of the registration requirement is "to facilitate conveyancing by ensuring that future purchasers will become aware of the easement's or profit's existence".[13] Significantly, the new legislative scheme includes the requirement that the period of user as of right must come "immediately before the commencement of the action".[14] Although this requirement is already familiar from the Prescription Act 1832, its significance has been masked by the fact that the 1832 Act operates alongside the doctrine of lost modern grant, which does not include a similar requirement. Under the new legislative scheme, the court has a discretion to waive the requirement under discussion if the court "is satisfied that it is just and equitable to do so in all the circumstances of the case".[15] This provision was introduced at the last moment,[16] in light of concerns that had earlier been raised in the Oireachtas. Unfortunately, this attempted solution

[8] See *Wylie on Irish Land Law* [7.90]; Wylie, *The Land and Conveyancing Law Reform Act 2009: Annotations and Commentary* (2013), [69]-[77]; Bland, *Easements* (2015), [6.112]–[6.154].
[9] Section 33.
[10] Section 33.
[11] Section 37(1); s.37(2)(b).
[12] Section 37(2)(a).
[13] Law Reform Commission *Report on Land and Conveyancing Law* (74-2005), p.124.
[14] Section 35(2).
[15] Section 35(3).
[16] At Report Stage, eight days before the Bill was passed. See 686 *Dáil Debates* Cols 712-714.

is of limited value because the unpredictability of the discretion means that a claimant cannot safely be advised to refrain from litigation on the basis that the requirement might possibly be disapplied if a dispute were to arise in the future.

Changes to the Transitional Provisions

The transitional provisions, as originally enacted in the LCLRA, created serious problems. It was provided in s.38(b) that, after a three-year-period, claims would no longer be possible under the old law. Coupled with the fact that claims under the new 12 year prescriptive period can only be made on the basis of user after the commencement of the LCLRA,[17] the result was that anyone with a claim under the old law would have to initiate legal proceedings within the transition period. If this was not done, the result would be that, even if the claimant's period of user as of right continued without interruption, the claimant would be helpless if a dispute arose between the end of the three year transition period and the time, nine years later, when the claimant would have accumulated 12 years of user after the commencement of the LCLRA, so as to be able to claim under the new prescriptive scheme.

The unappetising prospect of an avalanche of litigation prior to the original 30 November 2012 deadline was avoided by reform, introduced by Pts 12 and 13 of the Civil Law (Miscellaneous Provisions) Act 2011. The transition period was extended to 12 years, with the idea that, by the end of this period, a claimant who had continued his or her period of user as of right would have accumulated the 12 years necessary to permit a claim under the new legislative regime. Therefore, it was hoped, it would not be necessary for a claimant in this position to initiate legal proceedings during the transition period. Another reform in the 2011 Act was the creation of a new procedure, under s.49A of the Registration of Title Act 1964, whereby an application could be made for registration through the Property Registration Authority, so that a court action would not always be necessary.[18]

Problematic Cases

The aim of the 2011 reforms was to prevent an avalanche of litigation. Unfortunately, partly due to bad drafting, some serious problems remain and there are a range of circumstances in

[17] At least under the conventional interpretation of the Act; there is actually no clear statement to this effect in the legislation. See Bland, "A 'Hopeless Jumble': The Cursed Reform of Prescription" (2011) 16 C.P.L.J. 54 at 56.
[18] Civil Law (Miscellaneous Provisions) Act, s.41.

which a potential claimant might need to take action prior to the 30 November 2021 deadline to safeguard a prescriptive right.[19] One relevant scenario is where the claimant has previously satisfied the requirements of the doctrine of lost modern grant but his or her enjoyment has not continued up to the present, so that the claimant will not have accumulated 12 years of enjoyment by the end of the transition period and, therefore, will not have a claim under the new law. A problem may also arise because of lacunae in the legislation which make some potential claimants vulnerable even if they satisfied the requirements of the old law before the commencement of the LCLRA 2009 and their user as of right has continued, without interruption, up to the present. These lacunae relate to cases where (one of) the servient tenement(s) belongs to a State authority; or (one of) the servient owner(s) may have suffered from mental incapacity since 1 December 2009; or there was a gap of more than a year in the user at some point since 1 December 2009.

Requirements of Lost Modern Grant Satisfied but Enjoyment Has Not Continued up to Present

It will be recalled that a claim under the doctrine of lost modern grant requires only that there has been a 20-year-period in respect of which the requirements of the doctrine were satisfied. If the requirements of the doctrine have been satisfied but the right has not been enjoyed for some years, then it will not be possible to make a claim under the new statutory scheme.[20] This suggests that it would be necessary for the claimant to take action prior to the deadline in order to secure his or her position. The conventional view of the effect of the legislation is that, even where a successful claim under the doctrine of lost modern grant would have been available prior to the deadline, that claim can no longer be made after the deadline.[21] There is, however, a respectable argument that, once the requirements of the doctrine of lost modern grant have been satisfied, the claimant has acquired the relevant easement or profit and

[19] Although space does not permit the exploration of this point in the current article, there is an argument that the Prescription Act 1832, having been repealed by the LCLRA without any saving clause, may not be available any more, even prior to the deadline (the drafters seeming to have made a mistake reminiscent of the one exposed in *Start Mortgages v Gunn* [2011] IEHC 275, in the context of mortgages). Even if this argument were accepted, the impact would be comparatively limited given that the doctrine of lost modern grant provides a remedy in most, albeit not all, situations where the Prescription Act 1832 applied. See Mee, "Reforming the Law of Prescription: A Cautionary Tale from Ireland" in Barr (ed) *Modern Studies in Property Law Volume 8* (2015), p.43.

[20] Note that, if the period of non-user is sufficiently long, it is necessary to reckon with LCLRA, s.39 which provides that prescriptive easements (and easements acquired by implied grant or reservation) are extinguished on the expiry of a 12-year continuous period of non-user unless protected by registration.

[21] *Wylie on Irish Land Law* (2020), [7.89]; Wylie, *The Land and Conveyancing Law Reform Act 2009: Annotations and Commentary* (2013), [76] note 6.

should not be affected by the subsequent abolition of the doctrine. Section 35 states that "an easement or profit shall be acquired at law by prescription only on registration of a court order under this section". This provision is phrased in the future tense and so may not affect the position of a person who, prior to the commencement of the section, had already "acquired" an easement on the basis of the doctrine of lost modern grant[22] (since this doctrine, unlike statutory prescription, does not require any court action to crystallise the right). On the other hand:

> "The counter-argument to the above interpretation of the LCLRA is that, even though a claim under the doctrine of lost modern grant can be said to be 'in the bag' after 20 years of user as of right, the effect of the LCLRA is to take away the bag. Even if a person has the necessary elements for a successful claim under the doctrine of lost modern grant, he or she needs the doctrine to survive to allow that claim to be made. This is not altered by the fact that, while the doctrine survived, he or she could have—but did not—make a claim under the doctrine."[23]

On this view, the doctrine of lost modern grant should be seen as a part of the law of evidence, which could legitimately be changed (with 12 years' notice being provided) so that at a later point a litigant would be unable to prove a proposition that he or she would have been able to prove if he or she had taken timely action and been able to avail of the older, more favourable, law of evidence. However, it does not seem implausible to argue that, instead, the doctrine is part of the substantive law, so the "presumption" that a modern grant has been made and lost should be seen as merely a convenient legal fiction, being no "more than an artificial and subsidiary rule designed for the purpose of giving effect to a substantive right".[24] On this view, once the requirements of the doctrine have been satisfied, the claimant has safely "acquired" his or her easement or profit.

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[22] See Robert A. Pearce and John Mee, *Land Law* 3rd edn (Dublin: Round Hall, 2011), p.286.
[23] Mee, "Reforming the Law of Prescription: A Cautionary Tale from Ireland" in Barr (ed) *Modern Studies in Property Law Volume 8* (2015), p.45.
[24] *Delohery v Permanent Trustee Company of NSW* (1904) 1 C.L.R. 283 at 309 *per* Griffiths C.J., speaking for the High Court of Australia. For a detailed analysis, which seems ultimately to come down in favour of this way of looking at the doctrine, see Alan Dowling, "The Doctrine of Lost Modern Grant" (2003) 38 Irish Jurist 225, particularly at 259–262. Note also *Welford v Graham* [2017] UKUT 297 (TCC), [41], where Morgan J. identified two presumptions triggered by long user: one an evidential presumption that the user was "as of right", rebuttable by evidence that it was, for example, by permission; the other "a legal presumption, or a legal fiction" of a lost modern grant, which cannot be rebutted by evidence that no grant was ever made. The contrast here reinforces the conclusion that the main "presumption" underlying the doctrine of lost modern grant is not an evidential presumption but amounts to a substantive rule of law.

In the end, it does not seem to be possible to be definitive about the point, partly because, as Bowen J. complained in the leading case of *Dalton v Angus & Co*,[25] the courts have "preferred to leave [the presumption associated with the doctrine of lost modern grant] in a logical cloud".[26] Even if the appropriate interpretation of the legislation is that a previously valid lost modern grant claim will disappear after the deadline, it could be argued that this is in conflict with the protections for property rights in the Constitution and/or with Article 1 of Protocol 1 of the European Convention on Human Rights (even if the provision of a lengthy transition period makes this argument more difficult).

Two points should be clarified. First, the position is different in relation to a claimant who only satisfied the requirements of the doctrine of lost modern grant during the transition period. This is because the abolition of the doctrine of lost modern grant (by means of s.34) took place prior to such a claimant having satisfied the requirements of the doctrine, and the saving clause attached to that abolition is clearly limited by s.38(b) to cases "where the action in which the claim is made is brought within 12 years of [the commencement of the relevant part of the LCLRA on 1 December 2009]". A claimant in this situation cannot argue that he or she had already acquired the easement or profit prior to the legislative abolition of the doctrine of lost modern grant, nor can he or she rely on the saving clause in the legislation in respect of that abolition. Such a claimant will be able to succeed under lost modern grant if he or she takes action prior to the deadline but not otherwise.

Secondly, if it is the law that a claimant who had satisfied the requirement of lost modern grant prior to 1 December 2009 will lose that claim after the deadline, such a claimant will not, in respect of such a claim, be able to rely on s.35(3) which allows the court to make an order "where the relevant user period was not immediately before the commencement of the action if it is satisfied that it is just and equitable to do so in all the circumstances of the case". This is because this applies only to a user period under the new statutory scheme and not to a claim under the old law.

Cases Affected by Lacunae in the Legislation

[25] (1881) L.R. 6 App. Cas. 740.
[26] (1881) L.R. 6 App. Cas. 740 at 782.

There are a number of situations that also create serious problems because—despite the 2011 reforms—in these cases the claimant will not have a claim under the new scheme after the deadline even if the claimant has continued to use the right without a break right up to time of a dispute. These cases will now be discussed in turn.[27]

(i) Cases involving servient land belonging to a state authority

In drafting the 2011 reforms, no account was taken of the fact that the prescriptive period for land belonging to "a State authority"[28] is much longer than the normal 12 years.[29] The result is that even if a claimant has enjoyed a particular right over State land for the last 100 years, and continues to enjoy it without interruption, he or she will not be in a position to establish the right by prescription if a dispute were to arise after the 1 December 2021 deadline. The prescriptive period for land belonging to a State authority is 30 years (and 60 years if the land in question is foreshore) and the transition period is only 12 years. The LCLRA, at least on the drafters' interpretation, only allows a claim to be based on a user period that takes place after 1 December 2009. This means that a claimant could only have accumulated 12 years of user by the deadline. Therefore, it will not be possible to make a successful claim under the new regime until 30 years (or 60 years in the case of foreshore) have elapsed from the commencement of the LCLRA 2009. So, it would not be possible to establish the right if this were required upon the sale of the dominant tenement (as is likely if there is a mortgage involved) or if a dispute arose over the existence of the right in question. The fact that there has never been any break in the claimant's enjoyment would provide him or her with no protection.

(ii) Cases involving incapacity on the part of the servient owner

[27] These were discussed more briefly in Mee, "Reforming the Law of Prescription: A Cautionary Tale from Ireland" in Barr (ed) *Modern Studies in Property Law Volume 8* (2015), pp.46–47. Note the argument considered in the previous section, that a claimant who satisfied the requirements of the doctrine of lost modern grant prior to 1 December 2009 had acquired an easement by prescription and so would not be affected by the LCLRA. This argument, if sound, could also protect a claimant in the situations which are about to be discussed.

[28] A "State authority" is defined in s.33 as "a Minister of the Government or the Commissioners of Public Works in Ireland".

[29] This problem was first pointed out by Bland "A 'Hopeless Jumble': The Cursed Reform of Prescription" (2011) 16 C.P.L.J. 54 at 57. The Conveyancing Committee of the Law Society has published a practice direction drawing attention to this issue: "Registration of prescriptive easements over State land or foreshore" Law Society Gazette, March 2021, p.58.

There would also be a problem if the running of the 12-year-period had been suspended due to the mental incapacity of the servient owner in circumstances where it was not reasonable to expect someone else to act on his or her behalf.[30] The effect of a suspension triggered by mental incapacity would be to ensure that, even though the 12 year transition period had expired, the claimant could not satisfy the requirements of the new law by showing 12 years of user after the new scheme came into effect. This in turn would mean that the claimant's right could be defeated even if his or her enjoyment continued to the end of the transition period and right up to the time that a dispute arose (after the servient owner's land came into the hands of someone with mental capacity). The period of vulnerability after the deadline, during which the claimant would be helpless against an objection to his enjoyment of the right (and would be unable to make a successful claim himself or herself), would last for the same length of time as the suspension of the user period due to the servient owner's mental capacity. It should be emphasised that it is not necessary that the period of incapacity between 1 December 2009 and 30 November 2021 should exceed one year. Even a period of a month would seem to create a corresponding window of a month after the deadline in which it would be possible for the servient owner to successfully challenge the right, notwithstanding the fact that it had continued to be enjoyed without interruption until then.

Unfortunately, a dominant owner might not be in a position to judge whether one of his or her neighbours 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. Perhaps good relations had existed between the dominant owner and his or her elderly neighbour. It could happen, however, that once the elderly neighbour has passed away, the property would be inherited by a child or other relation who would take a different view of the dominant owner's use of the right and who would, because of the lacuna in the legislation, be able to put a permanent end to it, notwithstanding the fact that the right had been exercised for decades.

(iii) Cases where there was a cessation in the claimant's user that was acceptable under the old law

[30] See s.37.

Section 33 of the LCLRA defines interruption to mean "interference with, *or cessation of*, the use or enjoyment of an easement or profit à prendre for a continuous period of at least one year" (emphasis added). Under the 1832 Act, an "interruption" meant only a "hostile obstruction"[31] and did not include "cessation of" use by the dominant owner. As Williams J. put it in *Carr v Foster*[32]:

> "'Interruption' means an obstruction, not a cesser or intermission, or any thing denoting a mere breach in time. There must be an overt act, indicating that the right is disputed."[33]

This point was not appreciated by the drafters.[34] The LCLRA conflates the concept of an interruption with the separate requirement, not expressly set out in the 1832 Act but implicit in the requirement to establish user as of right for a particular period (and so logically applicable also to the doctrine of lost modern grant), that the enjoyment of the right be sufficiently continuous.

Under the old law, user must be continuous but not incessant,[35] so that "a non-user for more than a year … may be so explained as to warrant a jury in finding an actual enjoyment for the statutory period".[36] Thus, for example, in *Carr v Foster*,[37] a claim to a common of pasturage was not defeated by the fact that there had been a two year gap in the use of the right because this was explained by the fact that the claimant's predecessor in title did not have any commonable beasts at the time. Two of the three judges in this case mentioned that even a cessation of seven years might not be fatal.[38]

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[31] Stuart Bridge, Elizabeth Cooke and Martin Dixon, *Megarry and Wade: The Law of Real Property*, 9th edn (London: Sweet and Maxwell, 2019), [27.071].
[32] (1842) 3 Q.B. 581.
[33] (1842) 3 Q.B. 581 at 588.
[34] It is stated in Bridge, Cooke and Dixon, *Megarry and Wade: The Law of Real Property* (2019) that "Mere non-user, or natural occurrences, such as the drying up of a stream, do not suffice" (footnotes omitted). To the contrary, Professor Wylie (primary architect of the 2009 legislation) suggests that an interruption under the 1832 Act "may be due to natural causes, such as a stream drying up": *Wylie on Irish Land Law* (2020), [7.79]. That he is mistaken here is demonstrated by the fact that he cites *Hall v Swift* (1838) 4 Bing. N.C. 381, the same authority that *Megarry and Wade* cites, where the drying up of a stream was held *not* to count as an interruption.
[35] *Hollins v Verney* (1884) 13 Q.B.D. 304, 315 *per* Lindley L.J..
[36] (1884) 13 Q.B.D. 304 at 314.
[37] (1842) 3 Q.B. 581.
[38] (1842) 3 Q.B. 581 at 588 (Patteson J.); at 589 (Williams J.).

Unlike the Prescription Act 1832, the doctrine of lost modern grant is not subject to any statutory rule whereby an interruption can defeat a claim, so under this doctrine also a cessation of use is not fatal but is merely to be considered as part of the inquiry as to whether the right has been enjoyed continuously for the period in question. This means that – as well as the point that has just been made about a cessation in user – there could also be a difference in the treatment of a hostile interruption as between the doctrine of lost modern grant and the new LCLRA regime. The point at which a hostile interruption will be fatal under the Prescription Act 1832 is set at exactly one year but the effect of a hostile interruption is more open-ended under the non-statutory doctrine of lost modern grant. So it is at least conceivable that, in some circumstances, a claimant would fare better under the doctrine of lost modern grant on this point, so that his claim might survive a hostile interruption that lasted somewhat more than a year.

To sum up, the LCLRA's definition of "interruption" changes the law by dictating that any failure to use the right for a year or more automatically stops the user period from running, whereas previously a cessation could have been explained away on the basis of the circumstances (under either the Prescription Act 1832 or the doctrine of lost modern grant). This means that some claimants, who have a good claim under the old law, will no longer have a good claim after the deadline because of a period of non-user exceeding one year. In such a case, if the claimant does not sue under the old law within the transition period, he will be unable to establish his claim after the deadline because he does not meet the requirements of the new scheme.

Other Situations

What if none of the above situations seems to apply? Even in such a scenario, there is some incentive to litigate. If no action is taken until after the deadline, in the context of a future dispute the landowner will be restricted to relying on the post-2009 user period. The claimant will have to prove that the enjoyment continued throughout the full 12 years of the transition period, with no gap in enjoyment, or hostile interruption, for more than one year and no mental incapacity on the part of the servient owner. Given that litigation over alleged prescriptive rights tends to descend into a "swearing match", in which the two sides make

vehement and contrary assertions as to the situation which prevailed in past years,[39] the landowner might end up regretting not being able to secure the right on the basis of showing any 20 year stretch of enjoyment under the doctrine of lost modern grant (something that will be only possible until the deadline).

Does the Section 49A Procedure Provide a Viable Alternative to Litigation?

The scheme originally enacted in the LCLRA provided that an easement by prescription could only be established on the basis of successful court proceedings (followed by the registration of the easement or profit recognised by the court).[40] The 2011 reforms introduced an alternative to litigation in the form of an application procedure under (the newly created) s.49A of the Registration of Title Act 1964. Unfortunately, the utility of this procedure is rather limited. In practice, the Property Registration Authority has treated it as available only in non-contentious cases (even if it might be willing to ignore an objection on the part of a servient owner that appeared to be vexatious).[41] Since it is not expressly stated that an application under the old law, made prior to the deadline, needs to lead to registration of the right prior to the deadline, it seems that it would be sufficient if a section 49A application were made prior to the deadline, with registration of the right possibly following at some point after the deadline. A practical difficulty, however, is that if the application were rejected by the Property Registration Authority after the deadline (whether because of an objection by the servient owner or for other reasons), it would be too late to change tack and initiate legal proceedings under the old law because such proceedings must be initiated prior to the deadline.[42] Therefore, even though it may not be strictly necessary to have one's section 49A application processed prior to the deadline, it may be that in practical terms it would be too risky to hold off on initiating legal proceedings before the deadline. It is understood that applications under the procedure are already taking a significant length of time to be processed and it seems plausible to suggest that a further influx of applications will

[39] See the description in Bland, "A 'Hopeless Jumble': The Cursed Reform of Prescription" (2011) 16 C.P.L.J. 54 at 55.
[40] Section 35(1).
[41] As pointed out on p.2 of the paper delivered by Peter Bland S.C. at the University College Cork online seminar referred to in fn.1 above.
[42] There is no requirement that the legal proceedings must have been dealt with by the court before the deadline; as with a limitation period under the Statute of Limitations 1957, it is sufficient if the action is initiated before the deadline.

increase the problem. It may be, therefore, that the utility of the section 49A procedure will become increasingly limited in practical terms.

It must also be borne in mind that there is, at present, another disadvantage to making a section 49A application. The relevant form, Form 68,[43] requires the claimant to make a sworn statement that (amongst other things) "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". This means that the claimant may have reduced the scope of the arguments open to him or her if the application is rejected, whether due to an objection by the servient owner or for another reason, and the claimant has to initiate legal proceedings.[44] A long-standing right that might be claimed on the basis of the law of prescription may also be supported on the basis of an alternative argument, for example, as an easement of necessity. This argument would be difficult to sustain if the claimant has made a sworn statement, in the terms reproduced above, in an unsuccessful section 49A application. However, it seems that a statement that the right in question does not represent an easement of necessity would not rule out the argument that the right in question is another type of implied easement, such as an easement of common intention, or an easement arising under the Rule in *Wheeldon v Burrows*, or under s.34(1) of the Land Law (Ireland) Act 1896.[45]

On the whole, the existence of the section 49A procedure does not remove the problems associated with the creation of pressure to sue prior to the deadline (although practitioners should certainly bear in mind the possibility of securing the right in question on a legal basis other than prescription).

Conclusion

This article has discussed the pressure to litigate created by the new scheme for the acquisition of easements and profits by prescription. It has been seen that the 2011 reforms were not successful in addressing all the problems in this area. In some cases, a claimant who has a valid prescriptive claim under the old law will cease to have a claim after the deadline,

[43] See Land Registration Rules 2012, r.46.
[44] The Conveyancing Committee of the Law Society has published a practice direction drawing attention to this issue: "Registration of prescriptive easements under Section 49A" Law Society Gazette, March 2021, p.57.
[45] For discussion of the possibility of basing a right on one of these alternative legal arguments, see the paper delivered by Peter Bland S.C. at the University College Cork online seminar referred to in fn.1 above. Note also the Practice Direction on "Rights of way in rural areas" issued by the Conveyancing Committee of the Law Society on 18 June 2018 (referring to s.34(1) of the Land Law (Ireland) Act 1896).

or may have a more doubtful claim. These include situations where the claimant's use of the right has not continued up to the present time, or where it has so continued but a servient owner is a State authority, or a servient owner may have suffered from mental incapacity at some point since 1 December 2009, or there may have been a gap in the user since 2009. In considering the appropriate course of action in any given situation, the legal issues related to prescription must be considered alongside practical factors such as the danger of stirring up a dispute with a neighbour where none now exists, and it is also important to take into account the possibility of finding an alternative legal route, outside the law of prescription, to securing the right in question. Nonetheless, it seems clear that the reform process has created the likelihood of a very significant increase in litigation as the 30 November 2021 deadline approaches.

As was noted at the outset of this article, litigation with a neighbour, particularly in the prescription context, is generally painful and difficult, and should be discouraged, rather than provoked, by the law.[46] The approach in the LCLRA was relatively cavalier on this point but the 2011 reforms represented a change of policy, whereby the intention was to ensure that a claimant who continued his or her enjoyment without interruption would be protected. The idea of extending the transition period to 12 years was that, when claims under the old law became impossible at the end of the transition period, the claimant would have accumulated 12 years of enjoyment. This would mean that the claimant would be in a position to claim under the new regime, and would remain in such a position so long as his or her enjoyment continued, thus avoiding the pressure to litigate where no dispute has actually arisen. The fact that, despite the 2011 reforms, the pressure to litigate has not been eliminated represents a failure of drafting. However, even if the 2011 reforms had achieved their aim, it would still have been the case that rights of very long standing, where the requirements of the doctrine of lost modern grant had been satisfied before 2009, would be at risk if the requirements of the new scheme were not fulfilled throughout the entire transition period. As the imminence of the deadline focuses minds, it has become clear that it may not be reasonable to expect landowners to litigate in order to protect rights of this nature.[47]

[46] Bland, "A 'Hopeless Jumble': The Cursed Reform of Prescription" (2011) 16 C.P.L.J. 54 at 55.
[47] Note that the notion of the widespread registration of prescriptive rights may not have been fully thought through. It appears that the Property Registration Authority has never, to date, registered a prescriptive right to light (with practical difficulties in terms of establishing the extent of such a right making this difficult in practice). It, therefore, seems rather ambitious to think in terms of numerous such rights being established in litigation provoked by the deadline, and subsequently registered.

It appears that legislative reform is needed. One approach would be to extend the transition period for a further time, to allow a thorough reconsideration of the law in this area, with the benefit of full consultation with the legal profession, as a prelude to a fresh attempt at reform.[48] Failing this, it is arguable that some of the problems would be solved by a legislative clarification that rights established under the doctrine of lost modern grant prior to the commencement of the LCLRA are not affected by the new legislative scheme. It might also be possible to stipulate that a claim under the old law would persist after the deadline, provided that the claimant's user as of right continued uninterrupted up to the time of the action (thus addressing cases involving state land or incapacity on the part of the servient owner). It could also be provided that a claimant who has made an application under s.49A would be permitted to sue, notwithstanding the fact that the deadline has passed, if he or she initiated legal proceedings within a specified (and relatively short) time period after receiving notice that the section 49A application had been unsuccessful. A final suggestion is that Form 68 could be modified to remove the trap which currently exists, whereby the claimant must swear that his or her alleged right does not have a legal basis other than in the law of prescription, thus weakening his or her hand in litigation if the servient owner objects to the application or the application is rejected on other grounds.[49] It remains to be seen whether the legislature will be willing to provide a solution to the problems created by its flawed attempt to reform the law in this area.

[48] As suggested in the paper delivered by Peter Bland S.C. at the online seminar referred to in fn.1 above. Any new legislative scheme should excise the requirement that the claimant's user period must come "immediately before the commencement of the action". The Law Commission for England and Wales provisionally recommended the introduction of a requirement of this nature (*Easements, Covenants and Profits à Prendre: A Consultation Paper* (CP 186, 2008)) but abandoned the idea after consultation showed that "is exceptionally unpopular" (Law Commission *Making Land Work: Easements, Covenants and Profits à Prendre* (Law Com No 327, 2011), pp.54–55) and the subject of "clearly evident and widespread dislike" (Law Commission *Easements, Covenants and Profits à Prendre Consultation Analysis* (Consultation Paper 186 (Consultation Analysis), 2011), p.62). In particular, the requirement would cause practical difficulties "in cases where use stopped because of [the] advancing age or illness" of the servient owner (Law Commission *Easements, Covenants and Profits à Prendre Consultation Analysis* (Consultation Paper 186 (Consultation Analysis), 2011), p.61). The primary purpose of the requirement in question is to protect purchasers from a "conveyancing trap of some magnitude" whereby a purchaser could be bound by an easement which has not been used for many years and so is not discoverable upon an inspection of the land (see Law Commission *Land Registration for the Twenty-First Century: A Consultative Document* Law Com No 254 (1998) p.75). Note, however, the alternative solution to this problem in the English Land Registration Act 2002, Sch.3, para.3.

[49] See, though, text to fn.45 above. The reform suggested in the text to this footnote seems reasonable since the essence of prescription is that the law is willing to recognise a right which has long been enjoyed, on the basis that it probably has some legal origin, even if that origin has become difficult to identify with the passage of time. In light of this, it is illogical to require the claimant to swear that, in fact, no such legal basis exists.