

APPROVED

[2023] IEHC 408



THE HIGH COURT
CIRCUIT APPEAL

2022 No. 195 CA

BETWEEN

MICHELLE MAHER

PLAINTIFF

AND

DUBLIN CITY COUNCIL

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 18 July 2023

INTRODUCTION

1. This judgment addresses a short point of statutory interpretation in respect of the Derelict Sites Act 1990. The point is this: is a charge arising under the Act overreached in circumstances where the subject property is sold by a mortgagee pursuant to a statutory power of sale. Put otherwise, does the exercise of a statutory power of sale result in the purchaser taking the property free of the charge. The resolution of this issue requires consideration of the interaction

NO REDACTION REQUIRED

between Section 24 of the Derelict Sites Act 1990 and Section 21 of the Conveyancing Act 1881.

STATUTORY POWER OF SALE AND OVERREACHING

2. It may assist the reader in better understanding the dispute which has arisen between the parties to pause here, and to explain what is meant by the term “*overreaching*”. The term describes the legal mechanism whereby, in certain circumstances, land may be conveyed to a purchaser free from incumbrances such as mortgages or charges. The incumbrances are, in effect, transferred from the land to the sale proceeds. The practical result is that the purchaser obtains a “*clean*” title to the land and the incumbrancers must seek payment out of the sale proceeds rather than from the purchaser.
3. The form of overreaching at issue in the present case is that arising on the exercise by a mortgagee of their statutory power of sale. The practical effect of overreaching can be illustrated by the following example. Suppose that a landowner is indebted to a number of different financial institutions. In each instance, the debt is secured by a mortgage over the land. Further suppose that the landowner then defaults on his debt. The holder of the first mortgage in time would be empowered to convey the land to a purchaser free from the subsequent mortgages. The holders of the subsequent mortgages would no longer have any interest in the land but would, instead, be entitled to their share of any surplus sale proceeds remaining after the debt secured by the first mortgage has been discharged.
4. The modern version of the power of sale is to be found at Section 104 of the Land and Conveyancing Law Reform Act 2009. On the facts of the present case,

the subject property had been conveyed pursuant to the statutory precursor to this provision, i.e. Section 21 of the Conveyancing Act 1881. That section has been repealed but with a saver for mortgages, such as that in the present proceedings, which had been created prior to 1 December 2009. This saver is provided for under the Land and Conveyancing Law Reform Act 2013.

5. Section 21(1) of the Conveyancing Act 1881 provides, relevantly, as follows:

“A mortgagee exercising the power of sale conferred by this Act shall have power, by deed, to convey the property sold, for such estate and interest therein as is the subject of the mortgage, freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests, and rights which have priority to the mortgage; [...]”

6. As appears, the property is conveyed free from “*all estates, interests, and rights*” to which the mortgage has priority. The position of the subsequent incumbrancers is addressed as follows under Section 21(3) of the Conveyancing Act 1881:

“The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject, if any, or after payment into Court under this Act of a sum to meet any prior incumbrance, shall be held by him in trust to be applied by him, first, in payment of all costs, charges, and expenses, properly incurred by him, as incident to the sale or any attempted sale, or otherwise; and secondly, in discharge of the mortgage money, interest, and costs, and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorised to give receipts for the proceeds of the sale thereof.”

7. As appears, this section provides that the mortgagee is to hold the purchase monies in trust, and directs the order in which those monies are to be applied. In the event that there is a residue remaining after the mortgage has been discharged, the mortgagee is required to pay the surplus sale proceeds to the

person next entitled to the mortgaged property. If there are subsequent incumbrancers, then the surplus sale proceeds are to be paid to the incumbrancer next entitled and so on, with any residue remaining thereafter being paid to the mortgagor. See, generally, *Walsh v. Governor and Company of Bank of Ireland* [2018] IEHC 828.

8. The term “*overreaching*” is often used as a shorthand to describe this process whereby the interests of the subsequent incumbrancers are, in effect, transferred to the sale proceeds. The term does not, however, actually appear in the legislation.
9. The dispute in the present case centres on whether a charge arising under the Derelict Sites Act 1990 is capable of being overreached in this way.

DERELICT SITES ACT 1990

10. The Derelict Sites Act 1990 provides, *inter alia*, for the imposition of a levy on sites, situated in an “*urban area*”, which have been entered on the relevant local authority’s register of derelict sites. The levy is referred to under the Act as “*the derelict sites levy*”. Relevantly, the Act provides that the derelict sites levy is to be paid by the “*owner*” of the land. The definition excludes a mortgagee not in possession.
11. The derelict sites levy is payable on demand being made by the local authority in that behalf; and in default of being paid within two months after becoming payable, shall be recoverable as a simple contract debt in any court of competent jurisdiction. (This is subject to the possibility of the local authority providing for the payment of the levy by instalments).

12. Section 24 of the Derelict Sites Act 1990 provides as follows:
- “(1) Where a derelict sites levy for a local financial year, or any portion of it, is due and owing, the amount of the levy and the interest due and payable thereon shall, on the date on which it becomes so due and payable, become and shall remain until payment thereof, a charge on the relevant urban land.
 - (2) Subsection (1) shall not apply in any case where a vesting order is made in relation to a derelict site.”
13. Section 24 is striking in its sparseness. There is, for example, no provision made for the enforcement of the statutory charge. It is not said, for example, that the local authority is to enjoy a statutory power of sale. There is no provision made, under the Derelict Sites Act 1990, for the registration of the statutory charge. In this regard, it should be emphasised that the statutory charge will not apply to all sites entered in the register of derelict sites. It is not an automatic consequence of land being entered on the register. Rather, for the charge to arise, the local authority must have imposed a levy in respect of the particular land and made demand for payment; and that demand must not have been paid within the two months allowed.
14. As discussed below, the parties are in dispute as to what significance, if any, should be attached to the phrase “*shall remain until payment thereof*” under Section 24.

PROCEDURAL HISTORY

15. These proceedings relate to the sale of land in Dublin in September 2014. The land had been conveyed by a mortgagee pursuant to their statutory power of sale under Section 21 of the Conveyancing Act 1881. These proceedings are taken by the individual who had been the purchaser of the land under the conveyance.

For ease of exposition, the plaintiff will be referred to as “*the purchaser*” for the remainder of this judgment. The purchase price had been €176,600.

16. The mortgage, pursuant to which the sale had been effected, had been created on 8 October 2007. The mortgage was registered in the Registry of Deeds on 31 October 2007. The following year, Dublin City Council made demand of the (then) owner of the land for the payment of a derelict sites levy pursuant to the Derelict Sites Act 1990. The demand was for the financial year 2008. The levy was in an amount equivalent to three per cent of the market value of the land.
17. The levy was not paid within the two month period allowed. The legal consequence of this is that the unpaid levy became a “*charge*” on the land pursuant to Section 24 of the Derelict Sites Act 1990. The charge was not registered in the Registry of Deeds until May 2013. The land was subsequently removed from the register of derelict sites on 14 August 2008.
18. As of the time of the intended sale of the land in 2014, the outstanding derelict sites levy was a charge on the land. The aggregate amount secured by the charge as of 30 September 2014 had been approximately €37,000, consisting of a levy of €18,575.84 and penalty interest. The solicitor acting on behalf of the purchaser sought clarification from Dublin City Council as to whether his client, *qua* purchaser, would be required to pay the levy. The answer to this question depended on whether a charge under the Derelict Sites Act 1990 is exempt from the overreaching provisions which apply in the case of a sale by a mortgagee pursuant to their statutory power of sale.
19. The purchaser’s solicitor engaged in correspondence with officials in Dublin City Council over the period August to September 2014. The response of the local authority was, to put it charitably, unhelpful. The local authority refused

to say whether the purchaser would be liable to pay the outstanding levy. The approach ultimately adopted by the local authority was to say that a mortgage “*may*” have priority over a charge under the overreaching provisions, but that it was a matter for the purchaser to satisfy themselves as to the precise position in the particular case. The implication being that whether the overreaching provisions applied would depend on the timing of the creation and registration of the mortgage relative to the creation and registration of the charge. See, in particular, the letters from the Law Agent dated 19 September and 24 September 2014.

20. (These letters refer, mistakenly, to the modern version of the overreaching provisions, Section 104 of the Land and Conveyancing Law Reform Act 2009, rather than to Section 21 of the Conveyancing Act 1881. Nothing turns on this given that the effect of the two provisions is broadly similar).
21. As an aside, it is regrettable that the officials of Dublin City Council could not bring themselves to be more helpful. The query raised on behalf of the purchaser had been entirely reasonable and admitted of a straightforward response. It is contrary to the principles of good administration for a public authority not to explain how it applies a statutory scheme which imposes significant financial levies on landowners. This could have been done, for example, by publishing guidance. The position of Dublin City Council as of 2014 compares unfavourably with that adopted by, for example, the Revenue Commissioners who regularly publish guidance for taxpayers.
22. Returning to the chronology, the sale of the land closed on 30 September 2014. The title had been unregistered, but the sale of the land was subject to compulsory first registration.

23. The following year, the local authority wrote to the purchaser on 30 June 2015 demanding payment of the outstanding derelict sites levy. The local authority was now maintaining the position that the overreaching provisions could never apply to a charge under the Derelict Sites Act 1990. This represented a *volte face* on the part of the local authority. At all events, following a further exchange of correspondence, the outstanding levy was paid under protest. The payment was in an aggregate amount of €50,153.42, consisting of a levy of €18,575.34 for part of the financial year 2008, together with penalty interest of €31,578.08. Interest is charged at 1.25 per cent per month or part thereof.
24. Thereafter, these proceedings were instituted in the name of the purchaser. The proceedings had been instituted before the High Court but, on consent, were remitted to the Circuit Court, by order dated 14 September 2020, in circumstances where the overall value of the levy and penalty interest fell within the jurisdiction of that court and where the market value of the land is less than three million euro.
25. The Circuit Court (His Honour Judge O'Connor) dismissed the proceedings by judgment and order dated 27 July 2022. The plaintiff/purchaser lodged an appeal against that decision to the High Court. The appeal ultimately came on for hearing before me on 11 July 2023. The sole witness was the purchaser's solicitor. There is no material factual dispute between the parties: the conveyancing history and the correspondence between the purchaser and the local authority was proved by the purchaser's solicitor in his oral evidence. Dublin City Council accepts the fact of the correspondence but denies that same contains an unequivocal representation on its part such as might ground an estoppel.

DISCUSSION

26. The dispute between the parties turns on whether a charge arising under the Derelict Sites Act 1990 is capable of being overreached pursuant to the Conveyancing Act 1881. If the overreaching provisions do apply, then the local authority should have sought to recover the outstanding levy from the mortgagee, out of any surplus sale proceeds, and not from the purchaser.
27. Before turning to the detail of the dispute between the parties, it is instructive to rehearse the points upon which the parties are in agreement. It is common case that a statutory charge of the type created under Section 24 of the Derelict Sites Act 1990 is one which is capable, in principle, of coming within the concept of “*all estates, interests, and rights*” for the purposes of Section 21 of the Conveyancing Act 1881. The local authority, in its initial correspondence on 18 August 2015, had queried this but counsel confirmed at the hearing before me that the local authority is not now relying on that argument.
28. It is also common case that the concept of “*priority*”, for the purposes of Section 21 of the Conveyancing Act 1881, is confined to questions of timing and registrability only, i.e. an earlier interest has priority over a subsequently created interest, subject to the rules on registration. The mortgage in the present case would have priority over the statutory charge in circumstances where the mortgage was created, and registered in the Registry of Deeds, prior to the statutory charge arising.
29. The dispute between the parties thus centres on whether Section 21 of the Conveyancing Act 1881 applies at all, rather than on some disagreement as to the interpretation of that section. The local authority’s case is that the statutory

language of Section 24 of the Derelict Sites Act 1990 indicates that there is only one circumstance in which the charge may be released, namely where the outstanding derelict sites levy has been paid. The local authority contends that to apply the overreaching provisions would be inconsistent with the legislative intent of the Derelict Sites Act 1990.

30. The difficulty with the local authority's arguments is that they assume that the nature and extent of the charge is to be found exclusively in the Derelict Sites Act 1990, without reference to the background law of conveyancing. This assumption is unfounded. The Derelict Sites Act 1990 provides almost no detail as to the nature and extent of the charge. The Act makes no provision for how the charge is to be enforced. The Act neither addresses the registration of the charge nor prescribes the procedure by which the charge may be vacated or discharged.
31. Having regard to the sparseness of the Act, it must be assumed that the Oireachtas intended that the charge would be understood as having the *indicia* generally associated with charges on land. In the absence of express provision for enforcement, it must have been intended that the normal procedure which is available for enforcing a charge would apply. In the case of unregistered land, this would involve an application for a well charging order and order for sale; in the case of registered land, the holder of a statutory charge may apply to register the charge pursuant to Section 77 of the Registration of Title Act 1964 and then seek to enforce the newly registered charge pursuant to Section 62. The registered charge would be subject to overreaching in the ordinary way.
32. The Oireachtas must also have intended that the well-established principles in respect of notice and registration would apply. It is a general principle of

conveyancing law that a *bona fide* purchaser of land for value without notice is not bound by a prior unregistered interest. There is nothing in the Act which suggests an intention to displace this principle, nor to displace other well-established principles of conveyancing law, such as, for example, the principle that a newly created charge cedes priority to existing interests in the land, including, relevantly, any existing mortgage. Equally, there is nothing in the Act which suggests an intention to displace the long-established principle that a mortgagee, in the exercise of their statutory power of sale, may convey a mortgaged property free of subsequent incumbrances.

33. The local authority's reliance on the inclusion of the phrase "*shall remain until payment thereof*" under Section 24 of the Act is misplaced. This phrase is, at most, descriptive of how the original owner, by whom the levy has become payable, may vacate the charge. The Act does not address, at all, the contingency of a derelict site being sold on to a third party. There is no provision made, for example, for the issuance of a certificate of discharge, such as that found in the case of the vacant sites levy under the Urban Regeneration and Housing Act 2015. Nor does the Derelict Sites Act 1990 address the position of a *bona fide* purchaser of land for value without notice. In this regard, it should be reiterated that the Act makes no express provision for the registration of a charge. It is not mandatory to enter the existence of the charge in the derelict sites register. As explained at paragraph 13 above, the creation of a charge is not an automatic consequence of land being entered on the register.
34. Yet, the logic of Dublin City Council's position is that the charge is always binding against a purchaser of the land: the local authority insists that the charge remains on the land unless and until the levy has been paid. On this analysis, a

bona fide purchaser of registered land would be bound by a charge under the Derelict Sites Act 1990 even where the charge had not been registered under the Registration of Title Act 1964. (A charge under the Derelict Sites Act 1990 does not come within the overriding burdens under Section 72 of the Registration of Title Act 1964, but is registerable under Section 69). The notion that an *unregistered charge* would be binding against a *bona fide* purchaser of registered land would involve a radical change in the law and a significant undermining of the conclusiveness of the registration system.

35. There is a presumption of statutory interpretation that imprecise language will not be interpreted so as to impose significant changes to the pre-existing law, particularly where the change is contrary to the actual objects of the relevant Act; and a related presumption that legislation will be strictly construed when it interferes with vested rights (*Heather Hill Management Company clg v. An Bord Pleanála* [2022] IESC 43, [2022] 2 I.L.R.M. 313 (at paragraphs 159 to 162). The Court of Appeal in *Promontoria (Oyster) DAC v. Fox* [2023] IECA 76 (at paragraph 74) emphasised that any significant changes in land law, and, in particular, changes to the entitlements of creditors and debtors in creating and/or realising security, should be, as far as possible, clearly specified within any legislative amendments.
36. Here, there is nothing in the Derelict Sites Act 1990 which suggests that the charge arising under Section 24 was intended to be *sui generis* and to defy long-established principles of conveyancing law. There is certainly no indication of an intention to undo the protection afforded to prior interests in land. Rather, the legislative intent is that the charge arising under Section 24 of the Act was to have all the normal *indicia* of a charge.

37. More generally, it is apparent from the scheme of the Derelict Sites Act 1990 that, as between the original owner of the lands and a mortgagee, the responsibility for payment of the derelict sites levy resides with the former. This is evident, in particular, from the provisions in relation to the payment of compensation in the event of the compulsory acquisition of a derelict site. Section 19(3) of the Act indicates that any unpaid levy is to be deducted from the owner's compensation as the owner is the person liable to pay the levy.
38. The interpretation contended for on behalf of the local authority would produce the opposite result in the case of a private sale where the market value of the site is less than the aggregate value of the mortgage debt and the outstanding levy. If the purchaser were to be liable to discharge the outstanding levy, they would insist on the purchase price being reduced to reflect this liability. This would reduce the funds available to discharge the mortgage.
39. To take a worked-out example: suppose that a property has a market value of €150,000 and that there is an outstanding debt of €125,000 secured against the property by way of mortgage. The mortgage was created and registered long before a charge arose under the Derelict Sites Act 1990. Suppose next that there is an amount of €50,000 due by way of derelict sites levy and interest. If the purchaser is liable to pay the levy and interest to the local authority, they would not be prepared to pay more than €100,000 for the property, i.e. market value less levy and interest. This would result in the sale proceeds being less than the outstanding mortgage debt. In effect, the local authority would have achieved priority over the existing mortgagee. The charge would have to be paid ahead of the mortgage, notwithstanding that the mortgage had been created first.

40. In summary, the interpretation contended for on behalf of the local authority necessitates attributing to the Legislature an intent to create a charge which is *sui generis*, and which reverses the normal principles in respect of priorities and the rights of mortgagees. There is nothing in the statutory language which is indicative of such a radical intent.

ALTERNATIVE ARGUMENT BASED ON ESTOPPEL

41. Having regard to my findings on the point of statutory interpretation, it is not necessary to address the alternative argument advanced, namely that the local authority is estopped by its correspondence of September 2014 from insisting that the purchaser pays the levy.

CONCLUSION AND PROPOSED FORM OF ORDER

42. A statutory charge arising under Section 24 of the Derelict Sites Act 1990 is, in principle, subject to the overreaching provisions under the Conveyancing Act 1881 and its successor, the Land and Conveyancing Law Reform Act 2009. The question of whether a particular estate, interest or right has priority over a statutory charge will require consideration of the timing of the creation and registration of that estate, interest or right relative to the timing of the creation and registration of the statutory charge. On the facts of the present case, the mortgage had priority over the charge in circumstances where both the creation of the mortgage and its subsequent registration in the Registry of Deeds predate the charge arising. It follows, therefore, that the charge was overreached on the sale by the mortgagee and that the purchaser was not liable to pay the outstanding derelict sites levy.

43. My provisional view is that the plaintiff is entitled to a declaration broadly along the lines sought at paragraph (a) of the statement of claim. It should not be necessary to make a formal order directing the repayment of the levy and interest, given that the defendant is a public authority and, as such, is to be expected to give effect to the declaratory judgment. I will hear counsel further as to the precise form of order.
44. The matter will be listed before me, for final orders, on Monday 24 July 2023 at 10.30 o'clock.

Appearances

Angus Buttanshaw for the plaintiff instructed by Peter Nugent and Company
John Donnelly SC and Paul Coughlan for the defendant instructed by the Law Agent
for Dublin City Council

Approved
Gemma S. Mans