

APPROVED

[2023] IEHC 451



**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 25 July 2023

INTRODUCTION

1. The principal judgment in these proceedings was delivered on 18 July 2023, *Maher v. Dublin City Council* [2023] IEHC 408. This supplemental judgment addresses a number of procedural matters consequential upon the principal judgment. These were the subject of a short hearing on 24 July 2023.

NO REDACTION REQUIRED

DISCUSSION

2. The first matter which arises is as to the precise form of order. In the principal judgment, I suggested that it might not be necessary to make a formal order directing the repayment of the derelict sites levy (and the penalty interest thereon) in circumstances where the defendant is a public authority and, as such, can be expected to comply with the spirit of the judgment. Having regard to the oral submissions made, however, it seems prudent to make a formal award of damages. This is done in circumstances where, as explained below, there is a dispute as to whether or not interest should be paid on the award of damages, and, more broadly, where there is to be an application for leave to appeal to the Supreme Court. It seems desirable that the precise remedy granted by the High Court should be clear from the terms of the order.
3. Here, the plaintiff paid a sum in respect of the derelict sites levy (together with penal interest thereon). It was reasonable for the plaintiff to have made this payment *in advance* of the determination of the proceedings in circumstances where penal interest was accruing at the rate of 1.25 per cent per month. In the event, this court held, for the reasons explained in the principal judgment, that the plaintiff *qua* purchaser of the lands was not liable for the derelict sites levy. Accordingly, I will make an order directing that the defendant pay the plaintiff the sum of €50,153.42 in damages. This figure represents the aggregate paid by the plaintiff, as purchaser, under protest on 24 June 2019.
4. (In this regard, it should be acknowledged that there is an error in the chronology set out in the principal judgment. It is stated, mistakenly, at paragraphs 23 and 24 of the principal judgment that these proceedings were instituted *subsequent* to the making of the payment. In fact, the proceedings had been

instituted prior to the payment: the plenary summons issued on 10 June 2016, with the payment being made some three years later. The error in respect of the procedural history does not affect the rationale of the judgment.)

5. The second issue which arises is as to whether interest is payable on that sum. There is a distinction in this regard between (i) the period from the date of payment to the defendant (24 June 2019) to the date of judgment (18 June 2023), and (ii) the period post-judgment. Counsel on behalf of the plaintiff submits that the defendant should pay interest from the date of payment, and further submits that the court should consider applying a rate of interest equivalent to that imposed under the Derelict Sites Act 1990, i.e. a rate of 1.25 per cent per month.
6. For the reasons which follow, I have decided that no interest is recoverable in relation to the period from the date of payment to the defendant to the date of judgment. There is no claim for interest in the pleadings. This is entirely understandable: as of the date the statement of claim was delivered, no payment had yet been made to the defendant. The payment was only made three years later. Importantly, however, the pleadings were never amended to reflect the fact of the payment having been made, still less to advance a claim for interest. Moreover, the plaintiff's side indicated, in correspondence written in the context of the application to remit the proceedings to the Circuit Court, that the claim was confined to the recovery of the sum paid together with legal costs. The claim had been described as follows in a letter of 2 December 2019 from the plaintiff's solicitor to the defendant:

“Counsel has advised that given that the money, demanded by you and paid by us, is only €50,153.42 and that the case now concerns the recovery of that amount together with the costs of same, we write to you seeking consent to the matter being remitted to the Circuit Court that the costs of such application can be costs in the cause.”

7. This was responded to by email dated 20 December 2019 indicating that the defendant was consenting to remittal in reliance on the statement that the case now concerned the recovery of an amount of €50,153.42 together with (legal) costs.
8. The omission from the pleadings of an express claim for interest might not, in other circumstances, have been fatal to the claim for interest, especially in the context of proceedings which seek *equitable* relief. Here, it is the combined effect of the pleadings and *inter partes* correspondence which has led to the decision to refuse to order the payment of interest.
9. The position in relation to the period post-judgment is different. As with any judgment, the parties are expected to comply with same in good time, and in the event that they fail to do so will be liable to pay interest at the rate prescribed for the purpose of the Courts Act 1981.
10. The third and final issue is in relation to legal costs. The default position under Section 169 of the Legal Services Regulation Act 2015 is that a party who has been “*entirely successful*” in proceedings is entitled to their costs. This is subject always to the court’s overriding discretion to make a different order for stated reason. The defendant has not pressed on the court any reason as to why there should be a departure from the default position: it is not suggested, for example, that the proceedings were of general public importance (cf. *Lee v. Revenue Commissioners* [2021] IECA 114). In the circumstances, costs follow the event. The plaintiff has been entirely successful in achieving the objective of the proceedings, namely, to establish that the plaintiff *qua* purchaser of the lands was not liable for the derelict sites levy. This is not a case where there should be an *apportionment* of costs, on the basis that the party who was successful

overall did not prevail on certain issues which took up time unnecessarily. Rather, here, the plaintiff's interpretation of the statutory provision prevailed.

11. Counsel on behalf of the defendant has indicated that his clients intend, as is their right, to make an application for leave to appeal to the Supreme Court. Accordingly, a stay will be placed on the above orders pending the determination of the application for leave to appeal, and, in the event that leave is granted, pending the determination of such appeal or further order. This is not a case where it would be appropriate to direct the payment of the award of damages on an interim basis (cf. *Redmond v Ireland* [1992] 2 I.R. 362). The proceedings arise in the context of what was, in effect, a commercial transaction, and there is nothing to suggest that it would cause undue hardship to the plaintiff to await the outcome of the application for leave to appeal to the Supreme Court. Such applications are determined expeditiously. Similarly, in the event that leave to appeal were to be granted, it is to be anticipated that the appeal would be listed for hearing in a short period of time. The parties have liberty to apply.

CONCLUSION AND FORM OF ORDER

12. For the reasons explained in the principal judgment and in this supplemental judgment, the following orders will be made.
13. A declaration that the statutory charge arising under Section 24 of the Derelict Sites Act 1990 in respect of the scheduled lands was overreached, pursuant to Section 21 of the Conveyancing Act 1881, on the sale of the lands by Provale Construction Ltd.
14. An order directing the defendant to pay to the plaintiff the sum of €50,153.42 in respect of the derelict sites levy (and interest) paid by the latter on 24 June 2019.

Interest is payable on this sum from the date of judgment only (subject to the stay below).

15. An order pursuant to Section 169 of the Legal Services Regulation Act 2015 and Order 99 of the RSC that the plaintiff is to recover its costs of and incidental to the proceedings from the defendant. The costs order includes the costs above and below, i.e. the costs of the hearings before the Circuit Court and the High Court. The costs order also includes the costs of all written legal submissions and all reserved costs. In default of agreement between the parties, the costs are to be adjudicated under Part 10 of the Legal Services Regulation Act 2015.
16. These orders are stayed pending the determination of the defendant's application for leave to appeal to the Supreme Court, and, in the event that leave is granted, pending the determination of such appeal or further order.
17. The parties have liberty to apply.

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