AN CHÚIRT UACHTARACH
THE SUPREME COURT

Supreme Court Record No.: S:AP:IE:2023:000098

High Court Record No.: 2022/195 CA

Circuit Court Record No.: 0527/2020

[2024] IESC 14

Dunne J.

Baker J.

Woulfe J.

Murray J.

Collins J.

BETWEEN/

MICHELLE MAHER

Plaintiff/Respondent

- AND -

DUBLIN CITY COUNCIL

Defendant/Appellant

JUDGMENT of Ms. Justice Baker delivered on the 11th of April 2024

1. This appeal raises a net question of law: whether a sale by a mortgagee exercising the statutory power of sale under the Conveyancing Act 1881 ("the Act of 1881"), and now section 104 of the Land and Conveyancing Law Reform Act 2009, ("LCLR Act of 2009"), can overreach a statutory charge created by the Derelict Sites

Act 1990 ("DSA"), so that a purchaser from such mortgagee takes freed from the derelict sites charge.

The Background Facts

2. By contract dated 27 June 2014 the respondent Ms. Maher ("the purchaser" or "the respondent" where appropriate) agreed to purchase property at East Wall, Dublin from Bank of Ireland ("the Bank"). The Bank was selling in order to realise its security created by a legal mortgage dated 8 October 2007. The property in question is unregistered leasehold title. The contract was entered into by Stephen Tennant, a receiver appointed by the Bank. A special condition provided that the sale would be completed by an assignment by the Bank as vendor.

3. Before the sale closed, the solicitor acting for the vendor notified the solicitor for the purchaser that the property was subject to an unregistered charge securing a derelict sites levy under the DSA. The premises was vacant and in a state of dereliction. The owner had been served with a demand for payment of a levy under the DSA before the sale was agreed, and the amount of the levy remained unpaid after demand.

4. In accordance with the statutory provisions creating the charge, which I discuss in detail below, the levy became due on the date of demand, 9 January 2008, and thereafter, it not having been paid, became a charge on the subject property pursuant to section 24(1) of the DSA. The statutory charge created by failure to pay the levy within two months of demand, therefore, postdates the Bank's mortgage, and in the ordinary scheme of title to land the Bank's mortgage would rank in priority.

5. The amount of the levy secured by the derelict sites charge was €50,153.42. The precise amount owed is immaterial to the issues in this appeal.

6. In the letter notifying the solicitor for the purchaser of the charge, the vendor's solicitor expressed the view that the charge would be overreached by the vendor as it was "selling as mortgagee in possession." I will later in this judgment comment upon the precise method of sale and the role of the receiver appointed by the Bank and named as vendor.

7. In the event, title was in fact assured by deed of assignment from the Bank, and it expressly sold in exercise of the statutory power of sale in section 21 of the Act of 1881. The operative part of the deed, dated 30 September 2014, made this clear:

> "… as mortgagee and in exercise of the powers vested in it by virtue of the said Mortgage and the Statute or Statutes in that behalf and of every other power it enabling hereby grants and assigns onto the purchaser …"

8. Thus, by this mode of sale to Ms. Maher, at least *prima facie*, the vendor could hope to sell and overreach the derelict sites charge.

9. Following the initial letter informing him of the charge, the purchaser's solicitor sought confirmation from Dublin City Council ("the Council" or "the appellant" where appropriate) of its view of the legal position regarding the continuance of the charge following the sale**.** In correspondence before the sale closed, the Council indicated its view that the Bank's mortgage may in law have priority over the charge for the purposes of the overreaching provisions, but it was for an individual purchaser to satisfy themselves as to the correct factual position. After the sale closed further correspondence was had between the solicitor acting for Ms. Maher and the Law Agent of the Council in which it was asserted on behalf of the Council that the charge would remain on the property until it was paid in full.

10. The sale closed on 30 September 2014, and these proceedings were issued on 10 June 2016 seeking a declaration that the plaintiff held her property free from the derelict sites charge. She paid the sum of €50,153.42 to the Council under protest on 8 August 2019, with a view to facilitating a sale by her of the property, and thereafter the proceedings were by consent remitted to the Circuit Court where she sought the recovery of that sum from the Council.

11. The action was heard by Judge O'Connor who delivered his reserved written judgment on 27 July 2022 by which he held that the charge was not overreached for the reasons set out. Simons J. allowed the appeal of Ms. Maher in his reserved judgment delivered on 18 July 2023, [2023] IEHC 408, and this Court granted leave to appeal by Determination dated 17 October 2023, [2023] IESCDET 121. This Court held (at para. 19):

> "The point sought to be raised regarding the interpretation of s.24 of the [DSA] does appear to the Court to be one of general public importance and to be a net question of statutory interpretation of potentially broad application. The decision of the High Court on Circuit is final by reason of s.39 of the Courts Act 1961 save when leave is granted to appeal to this Court. The test articulated in [*Pepper Finance Corporation v. Cannon* [2020] IESC 2, [2022] 1 I.R. 128] for such leave is met here."

The Judgment of the High Court

12. The question which requires consideration is the interaction between the DSA and section 21 of Act of 1881. The judgment of Simons J. is succinct and analytical. As he says, the term "overreaching" is not found in the legislation but is a useful shorthand to describe the process by which the interests of subsequent incumbrancers are "in

effect transferred to the sale proceeds" which are, after sale, held by a vendor on trust to distribute in the order and according to the priorities set out in section 21(3) of the Act of 1881. He says that, if the overreaching did apply, the local authority could have recovered the levy out of any surplus sale proceeds, but not from the purchaser (para. 26).

13. The High Court judge gave a useful description of the practical effect of overreaching at paragraph 3 of his judgment where he said:

> "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."

14. Simons J. went on to examine the nature of the statutory charge created by the DSA and noted that section 24 of the Act is "striking in its sparseness", in that it makes no provision for the enforcement of the statutory charge or for registration with the Property Registration Authority (now Táilte Éireann), whether the title be unregistered or registered. He further noted that the charge to secure the levy is not an automatic consequence of the land being entered in the Register of Derelict Sites, but rather arises by operation of law after demand being made for payment, and a failure to pay within two months of said demand.

15. The core issue identified was what significance, if any, should be attached to the phrase in the DSA that the amount of the levy "shall remain until payment thereof", a charge on the relevant land. The question in the High Court, then, was whether section 21 of the Act of 1881 applied at all, as the local authority asserted that there is one

circumstance only in which the derelict site statutory charge may be released, that is, on payment of the levy.

16. Simons J. was of the view that because of the "sparseness" of the DSA it must be presumed that the Oireachtas intended that the charge would have all of the indicia generally associated with charges on land. Therefore, it must have been intended that the normal procedure for enforcing a charge would apply, including that the holder of the charge to complete enforcement would apply for a well-charging order and order for sale or apply to register the charge pursuant to section 77 of the Registration of Title Act 1964 ("RoT Act").

17. He also took the view that the Oireachtas must have intended the ordinary principles applied, including that a *bona fide* purchaser of land for valuable consideration without notice is not bound by the charge insofar as it was a prior unregistered interest. He thought that were an unregistered charge to be binding against a *bona fide* purchaser of registered land without notice that would amount to a radical change in the law and that a charge under the DSA could not be seen as a burden under section 72 of the RoT Act.

18. He held that the local authority's reliance on the phrase "shall remain until payment thereof" was misplaced, as that phrase was no more than descriptive of how the original owner of the land could vacate the charge. As the DSA did not address what would happen where the site was sold to a third party, the general law must be deemed to apply.

19. In coming to this conclusion, he relied on the principle that imprecise language should not be interpreted so as to impose significant changes in the pre-existing law,

and the related presumption that legislation be strictly construed when it interferes with vested rights. He relied on *Heather Hill Management Company CLG v. An Bord Pleanála* [2022] IESC 43, [2022] 2 I.L.R.M. 313, and *Promontoria (Oyster) DAC v. Fox* [2023] IECA 76, and the general proposition that changes to the entitlements of creditors and debtors in creating and/or realising security should as far as possible be clearly specified in any legislative amendments.

20. He said that a reading of the DSA did not suggest that the section 24 charge was *sui generis*. Other provisions of that Act bore out this view, including the fact that section 19(3) provides that any unpaid levy is to be deducted from the owner's compensation in the event of a compulsory acquisition of a derelict site, as it is that person who is liable to pay the levy.

21. He gave an example which he suggested showed that the interpretation for which the local authority contended would produce the result that the purchaser would discharge the levy, and that, if the market value of the derelict site is less than the aggregate value of the mortgage debt and the outstanding levy, the local authority would in practice have achieved priority over the existing mortgagee, thus reversing the normal principles of priorities, as the charge would come to be paid ahead of that mortgage, and the amount of the charge would be deducted from the amount available to discharge the prior interest.

22. He rejected the argument that the derelict sites charge cannot be overreached.

23. He concluded accordingly that the derelict sites charge was overreached by the sale by the Bank in the exercise of its statutory powers of sale, and that the purchaser was not liable to pay the outstanding derelict sites levy, but rather took the premises

freed from the statutory charge. Judgment was granted to the respondent in the sum she had already paid in respect of the levy.

Grounds of appeal

24. The grounds of appeal are concisely stated to contend that the High Court judge erred in his conclusion, which is argued is inconsistent with the plain meaning of the words used in section 24(1) of the DSA, and failed to address or properly address the meaning of the provision that the levy would remain a charge on the land "until payment". It is contended that the clear and unambiguous wording of section 24(1) did not yield the conclusion to which he came.

25. The respondent pleads in opposition that the High Court judge was correct, and correctly identified and applied the principles of statutory interpretation, including that principle that imprecise language is not be interpreted so as to impose a significant change in pre-existing law.

Submissions

26. In its written submissions, the appellant points towards the purpose of the derelict sites levy, namely that it is directed towards the important public goal of addressing the problem of derelict sites by either deterring dereliction or facilitating effective action in respect of derelict sites which negatively impact the community. The levy is described as performing an important social function, as well as providing to a local authority a means to recover financial redress. The charge created by section 24(1) of the DSA provides security for that redress and supports the goal of the legislation.

27. Essentially, the Council argues that the particular and *sui generis* nature of the charge created by the DSA means that it is not capable of being overreached in the

manner for which the respondent contends, as the plain words of the statutory provision creating the derelict sites charge expressly provides that it shall continue until payment of the levy secured by the charge. This means that it cannot be overreached or otherwise vacated save on payment of the amount due on the levy.

28. The respondent argues the High Court judge was correct to conclude that the legislation creating the charge did not displace the ordinary principles of property law, and that the scheme of the DSA does not on its plain terms create the exceptionality for which the appellant contends. The charge is payable by the "owner" of derelict land as defined in the DSA and does not include a mortgagee not in possession. The consequence for which the appellant contends would require very clear legislative displacement of existing general rules of priority and overreaching, as well as being an unjustifiable, and potentially unconstitutional, interference with the vested property rights of prior incumbrancers now protected by the Act of 1881, and with the system of registration in respect of unregistered and registered land.

29. The submissions will be further recited in the course of this judgment.

Scheme of the Derelict Sites Act

30. It is useful to first explain the operation of the DSA and the statutory provisions for the enforcement of the levy imposed on the owner of a derelict land. I will for convenience, and because it is the word used in the DSA, use the term "land" in the course of this judgment to refer to property, whether registered or unregistered, and whether it contains buildings or otherwise.

31. Section 9 of the Act imposes a general duty on owners and occupiers of land to take reasonable steps to ensure that their land does not become, or does not continue to

be, a derelict site. Section 11 gives power to the local authority, when in its opinion it is necessary to do so to prevent land from continuing to be a derelict site, to serve notice on an owner or occupier of the land which *inter alia* may direct such person to take remedial measures to prevent or remedy the dereliction. Any person who is the owner or occupier of land on whom such notice has been served may make representations in writing, and the local authority, having considered such representations, may amend or revoke the notice per s. 11(3).

32. The statutory provisions under s. 11(4) makes it obligatory for a person, being an owner or occupier of land served with such notice, to comply with the notice and in default the local authority may itself take steps to "give effect to the terms of the notice" and may recover any expenses from the owner or occupier as a simple contract debt.

33. It is of some importance for the issues in this appeal that s. 2 of the DSA broadly defines "owner" to include categories of owner other in the sense in which the term is normally used. It includes a mortgagee, but expressly excludes from the definition a mortgagee not in possession. It is the owner thus defined that is responsible for the payment of the levy. The definition of owner includes any person who in his or her "own right, or as trustee or agent for any other person, is entitled to receive the rack rent of the land, or would be so entitled if it were so let". I will return later in this judgment to the import of the definition of "owner" on the question in issue in this appeal.

34. Section 8 of the Act provides for the creation of a Register of Derelict Sites by each local authority within its functional area and provides for notification to be given to any owner or occupier of notice of an intention to make an entry into the register. The local authority is mandated to consider any representations made in writing by any

such owner or occupier and may then come to a decision as to whether the entry in the register should be made or not having regard to such representations.

35. What is noteworthy in those statutory provisions is that no mention is made of the giving of a remedial notice to a mortgagee, save and insofar as a mortgagee in possession is regarded as an "owner" within the meaning of the Act. No provision exists for service on the mortgagee of the statutory remediation notice, and no duty is imposed on the mortgagee to remediate or keep the land from falling into dereliction. Further, the legislation does not make provision for the making of representations by such mortgagee in regard to the entry of the land on the Register of Derelict Sites in the first place, or on the contents of the remediation notice and the requirements therein contained. The consequence is that the mortgagee whose interests are capable of being impacted by the entry on the Register of Derelict Sites, and, if the appellant is correct, whose priority is lost by reason of the statutory charge, has no right to be heard in advance of the entry of the land on the Register or at any other stage of process.

36. Section 14 provides for the acquisition by a local authority, either by agreement or compulsorily, of the derelict site. Section 15 provides for the publication of a notice of intention to compulsorily acquire the derelict site, and for the service on the owner and occupier of such notice.

37. Any person served with a notice may object to the proposed compulsory acquisition. When objection is made the derelict site may not be acquired compulsorily without the consent of the Minister. The procedure then is for the local authority to apply to the Minister for consent and that application is accompanied by any objection made under s. 16(1), and the comments of the local authority on such objection. The Minister decides on whether a compulsory purchase is to proceed, having served notice

on the objector who in turn is invited within the specified period to make observations. The Minister then grants or refuses to grant his consent to the compulsory acquisition, whereupon on completion of the statutory steps the local authority may by a vesting order acquire the derelict site.

38. Title to the derelict site is transmitted to the local authority by means of a vesting order. Sections 18 of the Act deals with the making and effect of a vesting order and it is expressed and operates to vest the derelict site in the local authority in fee simple free from encumbrances and all estates, rights, title and interests of whatsoever kind.

39. Section 18(2) of the DSA provides:

> "A vesting order shall be expressed and shall operate to vest the derelict site to which it relates in the local authority in fee simple free from encumbrances and all estates, rights, titles and interests of whatsoever kind on a specified date (in this Act referred to as the vesting date) not earlier than twenty-one days after the making of the order."

40. Section 18(3) provides that after vesting the local authority is liable, from the vesting date, for the payment to the Irish Land Commission or the Commissioners of Public Works of any annuity on the derelict site, as if the local authority had acquired the site by assurance from the owner.

41. When the local authority becomes aware of an annuity payable to the Land Commission, the Commissioners of Public Works, or the Revenue Commissioners those bodies are entitled by reason of section 17(2) to be served with notice of the intention to make the order. No provision is made for notice on a mortgagee not in possession.

42. Under s. 17(3), a local authority is required to give notice to all those who appear to it to have an interest in the derelict site but only after the acquisition by vesting order. Provision is similarly made for the publication of a notice in a newspaper circulating the functional area of the local authority following the making of the vesting order.

43. Section 19 provides for compensation to be payable to any person with an estate or interest in the derelict site acquired by vesting order. A mortgagee has such an estate or interest, and the Act provides for the payment of compensation to persons other than the "owner" as defined in the Act, being the person responsible for the payment of the levy. The compensation payable is an amount equal to the value (if any) of the estate, interest or right pursuant to s. 19(1). Provision is made for an arbitration under the Acquisition of Land (Assessment of Compensation) Act 1919 in default of agreement.

44. Section 19(3) is of some importance, and it provides that if, after the making of a vesting order, any sum remains payable on foot of the derelict sites levy, the sum payable by way of compensation to the owner shall be reduced by such sum. Where the amount of the levy exceeds the amount of the compensation, no compensation is payable.

45. It is of note that the fact that the amount of any unpaid levy is deducted from the compensation payable to the owner is consistent with the general scheme of the Act by which the owner is the person liable to pay the levy. I agree with Murray J. at para. 16 *et seq*. of his judgment that s.19 does not envisage that other persons with an estate or interest in the land, such a mortgagee not in possession, having their compensation reduced to discharge the levy.

The Levy and the Charge

46. Part III makes provision for a levy on derelict sites. Section 23 provides for payment of the levy on all land entered in the Derelict Sites Register, and s. 23(3) provides that the levy is calculated at three percent of the market value, or such other amount not exceeding ten percent as may be prescribed by each urban area.

47. Section 22 requires that the local authority should determine the market value of land by making an estimate of the value of an unencumbered fee simple of the land on the open market. The notice of the valuation is served on the owner of the land and provision is made for an appeal to the Valuation Tribunal against the valuation fixed by the local authority and a further appeal to the High Court on a question of law under s.22(6). The Tribunal is to transmit a copy of every appeal received by it to the local authority and to any person appearing to the Tribunal to be affected "directly" by the determination, which person shall be entitled to be heard and adduce evidence at the hearing of the appeal.

48. As with the provisions regarding the notices of dereliction and for compulsory acquisition, no provision exists by which a mortgagee not in possession may be served with notice, make representation in regard to, or appeal to the Valuation Tribunal the calculation of the value of the land and the amount of the levy.

49. Under the scheme of the Act a levy is recoverable as a simple contract debt against the owner and no other person has a liability to pay.

General Comments Regarding the DSA

50. It is striking that no provision is made in the DSA for service of notice of dereliction, or of an intention to acquire compulsorily, on a mortgagee, other than a

mortgagee in possession. No provision exists by which such mortgagee not in possession may make representation or objection at any stage of the process leading to entry in the Register of Derelict Sites or to a compulsory acquisition, nor that it be compensated. No procedure exists by which such mortgagee may appeal, object or make application to the Valuation Office to determine the amount of compensation in default of agreement.

51. It follows that it was not the intention of the legislation to make a mortgagee not in possession liable to pay the levy and the High Court judge correctly observed that it would be surprising if the effect for which the appellant contends were to make the mortgagee liable indirectly. However, as the analysis in this judgment shows, a number of statutory provisions and general principles of law require to be considered before a conclusion can be arrived at concerning the issues in this appeal.

The Power to Sell and Overreach: General

52. The question in this appeal will be answered in the light of the statutory provisions of the Act of 1881 (as amended and repeated by the LCLR Act of 2009) alongside provisions of the DSA itself and the RoT Act of 1964.

53. It is useful to now turn to examine the concept of overreaching and the power of sale of a mortgagee.

54. The holder of a security over property will for the purpose of realising that security seek to sell in the most convenient way possible, and to give title to a purchaser freed, not just from its security interest, but from others who rank below it in the hierarchy of priorities. The ability to do so without statutory intervention was limited at common law, although, as I will discuss presently, the power of overreaching may

be seen as intrinsic to the nature of a mortgage of unregistered title. The Act of 1881, and before that The Powers of Trustees, Mortgagees, etc. Act 1860 (23 & 24 Vict. c. 145) ("Lord Cranworth's Act"), which it repealed and repeated in part, introduced a legislative means by which title could be assured so that a purchaser from a legal mortgagee holding a security interest created by deed, would take unencumbered title, free from not just the security interests of the vendor but also any subsequent mortgages or charges over the land held by others.

55. Part IV of the Act of 1881 conferred certain powers on the holders of security interests to sell the land, and a power to convey the property free from all estates, interests and rights to which the mortgage has priority.

56. Section 19 of the Act of 1881 creates a statutory power of sale by which a mortgagee holding land under a mortgage made by deed has power to sell the mortgaged property when the secured monies have become due. It also provides a statutory power to appoint a receiver, which is not relevant to the present case, and also powers such as the power to lease. The section replaced Part II of Lord Cranworth's Act and gave more complete and extensive powers than those conferred by that statute. The powers thereby vested in a mortgagee operate only insofar as the contrary was not expressed in the mortgage deed. This in turn made possible the use of a simplified form of mortgage deed and also protected mortgage holders from drafting errors in the mortgage deed.

57. The present appeal concerns the power created by s. 21 of the Act of 1881 by which a mortgagee exercising the statutory power of sale has power by deed to convey the property free from all estates, rights and interests to which the mortgage had priority. Section 21(1) of the Act of 1881 provides:

> "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."

58. The advantage of a sale made pursuant to the statutory power contained in the Act of 1881 was to obviate the need for subsequent, or *puisne,* mortgagees to join in the deed, and it provided an advantage for the purchaser who, on a purchase from a mortgagee holding under a mortgage created by deed, takes the property freed from later incumbrances. This benefit of a sale under the statutory power had the consequential effect that subsequent purchasers would not require to investigate the title of *puisne* mortgages and whether their interest had been appropriately assured. The advantage for the debtor is also obvious in that the more simplified conveyancing process would be expected to result in a less expensive conveyancing process and realisation of an asset to discharge a debt. The debtor's debt is not increased by the costs of a cumbersome process of sale involving multiple parties when there are subsequent mortgages.

59. Section 21(2) provides that when a conveyance by a mortgagee is made in professed exercise of the power of sale conferred by the Act, the title of the purchaser shall not be impeachable on the ground that a case has not arisen to authorise the sale or that some of the other procedural requirements for which the Act provides were not met. Thus, any irregularity in the actions by the mortgagee prior to the sale, or in the course of entering into a contract for sale, and execution of a deed shall not imperil the title of the purchaser. This dispenses with the requirement on the part of the purchaser

to inquire whether the power of sale has arisen and is properly exercised. An exception is made when a purchaser has notice of any impropriety or irregularity in the exercise of the power.

60. The mortgagee exercising the statutory power of sale itself is not required to so state in the deed of conveyance, although a recital to that effect is commonly found. This statutory protection for purchasers is not in issue in this appeal, but by the deed to Ms Maher the Bank did expressly sell under and by virtue of the statutory power.

61. Section 21(3) provides that any money received by the mortgagee from a sale, after discharge of prior encumbrances, is to be held by the vendor on trust to distribute the same amongst the holders of subsequent, or *puisne*, mortgagees in accordance with their respective priorities.

62. This power contained in s. 21(1) is commonly described as the power of overreaching, and what is overreached are all mortgages to which the mortgagee has priority. Those mortgages which have a superior or prior interest are not overreached and that is neither unexpected nor unreasonable, but the vendor selling in exercise of the statutory power of sale contained in s. 21 can give title by deed without the jointure of those persons holding an inferior security.

63. The overreaching power fixes the proceeds of sale such that the mortgagee selling is entitled to repay to itself any monies due in discharge of its mortgage, and the costs of sale, and thereafter to discharge the amount due on the puisne mortgages in their order of priority, and pay the balance to the mortgagor.

64. It was common case in the High Court, and sensibly remains so in this appeal, that the statutory charge of the type created by section 24 of the DSA is one capable in

principle of coming within the concept of "all estates, interests, and rights" within the meaning of section 21 of the Act of 1881. It is also common case that for the purposes of section 21, "priority" relates to timing and registrability, and that the mortgage of the vendor did have priority over the statutory charge, by reason of timing, it having been created prior to the statutory charge.

65. Many of the provisions of the 1881 Act (as amended by the Act of 1911) were re-enacted in Part 10 of LCLR Act of 2009. That Act made substantial changes to the power of a mortgagee to sell or take possession of mortgaged property, most of which are not relevant to the current appeal. Section 100 of the Act provides a power of sale, such that a mortgagee or any other person for the time being entitled to receive the mortgage debt, or give a discharge therefor, may sell the mortgaged property, subject only to compliance with the notice provisions of that section, where there has been a breach by the mortgagor of a provision in the deed or any material statutory provision, other than the covenant to pay the mortgage debt or interest thereon. That power of sale is not exercisable without a court order in the case of a housing loan.

66. Section 104 of the LCLR Act of 2009 repeats, with some amendments not material to this appeal, the provisions of s. 21 of the Act of 1881 by which a mortgagee exercising the power of sale created by statute, or an express power of sale contained in the mortgage deed itself, has the power to convey the property free from all estates, interests and rights in respect of which the mortgage has priority, and subject to all estates, interests and rights which have priority to the mortgage itself. Any conveyance by a mortgagee extinguishes the interest created by the mortgage, including the equity of redemption, but without prejudice to any personal liability of the mortgagor to repay a debt which is not discharged out of the proceeds of sale.

67. That power was revived for mortgages created prior to 1 December 2009 by the Land and Conveyancing Act 2013 ("Act of 2013"), it having, probably unintentionally, been repealed by the LCLR Act of 2009 itself.

68. Section 105 repeats s. 21(2) of the Act of 1881, as amended by s. 5(1) of the Act of 1911.

69. A provision dealing with registered land is contained in s. 62(6) of the RoT which provides that the owner of a registered charge on land has all the powers and rights of a mortgagee under a mortgage by deed including the power to sell the land and overreach *puisne* incumbrances, or sell the land subject to the charge.

Method of Creating, Vacating or Cancelling the Charge

70. The focus of this appeal is that part of s. 24(1) of DSA which provides that the levy which operates as a charge from the date on which it becomes due and payable remains on title until payment thereof. Section 24(2) provides that the charge does not affect the land where a vesting order is made in relation to a derelict site under s. 17(1) whereby a local authority may compulsorily acquire a derelict site.

71. While section 26 facilitates the making of an allowance for hardship, and a pause in the accrual of interest, the section does not affect the existence of the charge:

> "Where, in the opinion of a local authority, payment of the derelict sites levy or of interest payable under this Act at a particular time by a particular person would cause undue hardship to the person, the local authority may, by notice in writing sent by post or given to the person, suspend action or further action under this Part to secure payment of the whole or part of the amount of the levy due for such period as may be specified in the notice and where, in relation to

any amount of derelict sites levy, there is a suspension under this section for any period—

(a) subsection (8) of section 23 shall not apply, in respect of that period, to that amount, and

(b) section 24 shall, notwithstanding the suspension, continue to apply in relation to that amount during that period."

72. Section 26 permits a local authority to form a view that collecting the derelict sites levy from the owner can cause hardship, but does not relieve an indigent owner from any obligation to pay. Section 26(b) provides that "that amount" as is payable in respect of the levy remains a charge on the land even in circumstances where collection of the levy is not undertaken on account of hardship.

73. The DSA therefore expressly provides only two means by which the charge is to be vacated. The appellant points to the fact that the local authority has no power to release a charge other than on the making of a vesting order or when payment is made in full. It is argued therefore that the Oireachtas intended that the charge will be vacated only in a manner for which the Act expressly provides. The argument is that the High Court judge failed to give sufficient effect or to take cognisance of the plain meaning of section 24(1) and treats the words "shall remain until payment" as surplusage.

74. The appellant argues that it is wrong to fail to have regard to the phrase that provides that the charge will remain until the levy is paid, as this constitutes the derelict sites levy as something other than a generic charge vulnerable to overreaching, but that the Oireachtas added an explicit incident that changed the form of the charge so that it was not capable of being overreached other than by payment, or by vesting order on compulsory purchase. The Appellant argues that there are no circumstances arising here

permit a court to depart from plain meaning of an instrument, which are the "first port of call in its interpretation." He relies on *Dunnes Stores v. The revenue Commissioners* [2019] IESC 50, [2020] 3 I.R. 480, and *Heather Hill* to support that argument.

75. As to how the charge is created, it is wholly statutory in origin and the DSA provides no means by which the charge is to be created by, or reflected in, a deed, order or other registerable document. It appears on the plain words of s.24 to come into effect by operation of law. This, in itself, creates an immediate difficulty as there is no provision for the creation of a registrable memorandum or other document. That fact, and the arguments concerning the nature of the charge, will form part of the reasoning in this appeal and will be further considered below.

Statutory Interpretation: Displacement of Earlier Legislation

76. Section 24 of the DSA provides that the derelict sites charge shall remain a burden on the relevant derelict land until payment of the levy. The language is unambiguous. So too is the language of section 21 of the Act of 1881. There is no express repeal, or variation of the effect, of s.21 in the DSA. Section 21 is not expressly repealed or even mentioned in the DSA, and the Act of 1881 is not mentioned in the Schedule.

77. This appeal cannot be resolved without a consideration of the interplay between section 21 of the Act of 1881 and the express provision of s.24 of the DSA which provides that the derelict sites charge remains on title until the levy is paid.

78. The appellant argues that the DSA has the effect of disapplying the overreaching provisions in the Act of 1881. I do not agree that position could be stated in such absolute or simple terms for reasons I now explain.

79. The proposition that a later statute can repeal a relevant earlier statutory provision, or, a less ambitious proposition, that the later section can permit an earlier section to be ignored, is not without authority, and a later instrument may in certain circumstances indirectly or by implication amend existing law.

80. In the absence of an express amendment, substitution or repeal by an express provision in the DSA to provide that the overreaching power does not apply, the proposition that the statutory provisions in s.24 have amended or repealed the earlier s.21 of the Act of 1881 must be assessed in the light of the authorities dealing with implied amendment and repeal.

81. As Dodd puts it at para. 4.69 of his text, *Statutory Interpretation in Ireland* (Bloomsbury Professional, 2008), "contradictory interpretations cannot both at the same time be true." Thus, the provisions of section 21 of the Act of 1881 which provides that a mortgagee exercising the statutory power of sale can overreach later encumbrances cannot be reconciled with, and operate at the same time as, the contradictory provision in the DSA that the charge shall remain on the land until the levy is paid. It is not possible to give effect to both provisions, and a resolution of the question that simply ignores the provisions in the DSA is unattractive.

82. First, the derelict sites charge will affect the interests of the owner of the land and will bind a subsequent purchaser in a sale by that owner who in accordance with the general scheme of land law can sell only the interest that he or she owns. Even a receiver who has no power of overreach would sell land subject to the charge which will continue to bind a subsequent purchaser.

83. Second, it is well established that words in a statute are not used without a meaning, and that effect must be given to all words used: see for example the *dicta* of O'Higgins C.J. in this Court in *Goulding Chemicals Ltd v. Bolger* [1977] I.R. 211, at pp. 226-227:

> "It is to be presumed that words are not used in a statute without a meaning and, accordingly, effect must be given, if possible, to all the words used, for, as has been said 'the legislature is deemed not to waste its words or to say anything in vain'…."

84. It is possible to give full effect to s.24 in the scheme of the DSA as the owner remains liable to pay the amount of the levy thereby secured, but the clear and absolute terms in which the provision for vacating the charge are stated must nonetheless be seen as inconsistent with the overreaching provisions in the Act of 1881 and cannot therefore be simply treated as surplusage.

85. An amendment or repeal may be implied, but such implication has rarely been found in practice. In *DPP v. Gilligan* [1993] 1 I.R. 92, O'Flaherty J. in this Court accepted that a repeal could happen by implication.

86. Henchy J. in *McLoughlin v. Minister for Public Service* [1985] I.R. 631 considered that in the case of a possible repeal or amendment by implication, the later provision should prevail as it "represents the later thinking of the Oireachtas" (p. 635) but that conclusion related to the differing language in Garda Compensation legislation, and is not readily transposed to the circumstances of the present case, where the later provisions are found in an entirely different statutory scheme.

87. *DPP v. Grey* [1986] I.R. 317 offers some clarity. There it was argued that conflicting provisions existed as regards sentencing provisions for excise offences, and the question arose whether section 8 of the Criminal Justice Act 1951 rendered inoperative or repealed by implication s.78 of the Excise Management Act 1827 (as amended). Henchy J. gave judgment with which the majority agreed, and stated a general proposition which can usefully unlock the difficulty in the present appeal:

> "It may be stated as a general rule that the courts lean against the repeal or exclusion of earlier statutory provisions by implication. The rationale underlying this approach is that a statutory provision, formally and solemnly enacted by Parliament, should not be deemed to have been abrogated or excluded, obliquely or indirectly or inadvertently, by a provision in a later statute when that later statute contains no expression of an intention to abrogate or exclude the earlier provision." (p. 325)

88. He noted, as I have above with regard to the provisions of section 24, that the Act of 1827 was not mentioned in the schedule of repealed enactments, and that the modern practice of recording a list of repealed provisions would suggest that a repeal therefore was not intended. His conclusion was that the later provision did not render the earlier provision inoperative in the cases for which it was enacted and that the two sections could not stand together and operate separately and independently, save where there was a clear statutory provision to that effect.

89. Henchy J. endorsed the test, which in my view is a useful marker of the correct approach, in *West Ham (Church Wardens and Overseers) v Fourth City Mutual Building Society* [1892] 1 QB 654, at 658 per Smith J., as follows:

> "The test of whether there has been a repeal by implication by subsequent legislation is this: are the provisions of the later Act so inconsistent with, or repugnant to, the provisions of an earlier Act that the two cannot stand together?"

90. Henchy J. linked the test to the maxim *generalia specialibus non derogant*, that a general provision does not derogate from the special one, so that a general legislative provision will not be held to undermine, amend or abrogate the effect of special words used to deal with a particular situation:

> "There is therefore brought into application the rule of statutory interpretation that when Parliament has provided specifically by statute for a limited set of circumstances, there is a presumption that general words in a later statute are not to be taken as overriding the earlier specific provisions, unless an intention to do so is clearly expressed. The presumption to that effect is encapsulated in the maximum *generalia specialibus non derogant*."

91. Henchy J. quoted with approval the words of the Earl of Shelborne L.C. in *The Vera Cruz* [1884] 10 App. Cas. 59, at page 68:

> "Now if anything be certain is this, that where there are general words in a later Act capable of reasonable sensible application without extending them to subjects specifically dealt with by earlier legislation, you are not to hold that earlier in special legislation indirectly repealed, altered or derogated from merely by force of such general words, without any indication of a particular intention to do."

92. Henchy J. came to a similar view in the latter case of *DPP v. Flanagan* [1979] I.R. 265 where the question was whether the implication would extend to the imposition

of new criminal liability, and where he stated that such extension could happen only by clear, direct and unambiguous language.

93. The provisions of section 24 are stated in general terms, but no indication is contained in the DSA that it was intended to repeal or alter or derogate from the overreaching power 21 of the Act of 1881. Further, and to apply the test from *The Vera Cruz*, the provisions of section 24 are capable of a reasonable and sensible application and one that is consistent with the scheme of the DSA as a whole, and with the imposition on an obligation to pay the levy on owners as there defined to exclude mortgagees other than a mortgagee in possession. Section 24 continues to have full force and effect against such owner or mortgagee in possession, and is capable of being, to borrow the language of the Earl of Shelborne L.C., reasonably and sensibly applied to the obligations and corresponding rights of those persons, but without having to come to a view of the meaning and effect of section 24 which displaces section 21 of the 1881 Act in the case of the sale by a mortgagee, other than one in possession.

94. Section 21 of the Act of 1881 expressly provides that a mortgagee exercising the power of sale may thereby overreach *puisne* mortgages, and this a special enactment, not to be interfered with by a later general enactment unless the later Act expresses its intention to amend or repeal the earlier provision. In *McGonagle v. McGonagle* [1951] I.R. 123 the former Supreme Court adopted the opinion of the Judicial Committee of the privy Council in *Barker v. Edger* [1898] AC 748, at 754 that:

> "Where the Legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that tension very clearly."

95. Most legislation can be classified as "general" in this sense. However, the terms of section 21 would suggest that it intends to deal with the specific rights of a mortgagee selling under the statutory power of sale. It is in that sense a statutory provision focused on the effect of such a sale in those limited circumstances.

96. Section 24 is capable of application to all derelict land against which a levy is raised by a local authority which is converted to a charge on failure to pay following demand. It has for that reason a general application across a number of different scenarios, and makes provision for the creation and discharge of all levies over all land, whether freehold or leasehold, registered or unregistered.

97. It seems to me that the maxim *generalia specialibus non derogant* operates in the present instance as follows: the later general words in section 24 of the DSA cannot displace the power of overreaching contained in section 21 of the Act of 1881 without express language by which that is done; section 21 was enacted to deal specifically with the powers and rights of a mortgagee selling under power of sale, and thereafter the statutory protection of a purchaser from such vendor. It is not displaced by a later provision that has a broad reach, which makes no express provision that it does not impact upon the overreaching powers, but which remains effective in all other circumstances, including on sale by the owner.

98. Further, as I observed above, the DSA makes no provision for the obligation of a mortgagee, other than a mortgagee in possession, to pay the levy, for service on such mortgagee of the derelict sites notice or of the intention to impose a levy, and does not make provision that such a mortgagee may make representations with regard to the valuation of, or appeal to the Valuation Tribunal, the amount of the levy. By the exclusion of any involvement by such mortgagee with the process of the creation and

valuation of the charge, other than the express involvement of a mortgagee in possession, the Oireachtas did not intend that the rights of such mortgagee would be abrogated, limited or otherwise impacted by charge securing the levy. Any such abrogation, limitation or impact on the property rights of such mortgagee would need clear language to avoid constitutional frailty. A constitutional interpretation would suggest further that the Oireachtas did not intend, and could not have intended, to restrict or limit the power already vested in the mortgagee to avail of the statutory and common law overreaching provisions, when such mortgagee had no right to make representations at any stage of the process by which the charge became registered and enforceable. Administrative acts which impact property rights require notification and fairness of process. This is not apparent under the DSA. The absence of a means of participation and vindication of the rights of adversely effected property owners can itself raise constitutional issues of fair procedure, see Walsh, *Property Rights and Social Justice* (Cambridge University Press, 2021) at pp. 130 – 131. I agree with the observations of Murray J. at paras. 18 *et seq.* of his judgment in this regard.

99. Accordingly, I do not agree with the submission of the appellant that the statutory provision does not specify that the levy is to be paid by the owner or by a person upon whom it was originally imposed, but simply provides that it be paid following demand. No provision is made for payment other than by the owner, and the broad definition of who comprises an owner for this purpose is such that the Oireachtas must not have intended to impose an obligation on any other person to pay. That conclusion is supported by the fact that no provision exists for service on any person other that such owner of notices, at the various stages provided in the DSA for the creation of a levy and charge and the calculation of value and compensation.

100. In short, it would require very clear language to displace the existing statutory provision that at present permits overreaching. To do so without compensation, without notice and without provision being made for an appeal or for representations to be made before the levy becomes operative amounts to a very significant displacement of existing law. When what is to be abrogated are existing or established rights, the legislation would have to be clear.

101. The practical effect of the argument the appellant makes is that a mortgagee would either have to reduce the price at which it was selling land to realise its security, or it would have to pay off the levy before sale. Simons J. in his judgment gives a clear example of this, and his example shows that the effect of the consequence for which the appellant argues would make the levy payable by the mortgagee contrary to the words of the Act, and by displacing rights in circumstances where no notice or right to object is provided in the statutory scheme.

102. The long title of the Act refers to owners and occupiers and the purpose of the Act as thus expressed is to fix liability for the payment of the derelict sites charge or levy on those persons. That is also the general purpose and effect of Part III of the Act which, as I explained above, sets out a complete structure and procedure for notification, the making of representations and the determination of challenges or appeals. I cannot accept the argument made by the appellant that s.24 of the DSA has the effect of imposing on mortgagees (other than mortgagees in possession) an obligation to defray the amount of the derelict sites levy. The argument for which the appellant contends is that enforcement of the levy is permitted against prior mortgagees and that in effect a mortgagee has the value of its security reduced by the amount of the levy, and no compensation is payable.

103. Counsel for the appellant argues that the charge once created has priority over all prior interests and, in response in oral argument to the question as to whether this amounts to the silent abrogation of preexisting rights, counsel says that while that might appear undesirable the legislative purpose is one in furtherance of the common good and to avoid and counter dereliction, and that therefore the legislature was competent to interfere with existing rights to achieve that end. I have already noted that the provisions of s. 24 clearly provide a mechanism for securing payment of the levy by the owner of the derelict land, and do not permit the owner to sell without either paying the levy, and thereby securing a release, or selling subject to the levy.

104. Counsel accepted that the legislation did not admit of a reading which implied a right on the part of a mortgagee to be notified, to be heard, or to appeal. No legal mechanisms exist to protect the rights, or even the rights to be heard of the prior mortgagee. Even the fact of dereliction is not open to appeal by the mortgagee. The object of the Act is to keep the owners of derelict sites liable for dereliction and to encourage them to put and keep the premises in repair.

105. The interpretation that extends to oblation to pay the levy onto a person who is not an "owner" in the broad senses defined in the Act does not further the objectives of the DSA of ensuring that an owner of land does not let it fall into disrepair. Laudable and all as that objective may be, it cannot be achieved by imposing an obligation by implication from the scheme of the Act on a party who does not under the express provisions in the Act have any obligation to pay. Nor is such an interpretation necessary to further the purpose of the DSA as the levy continues to be payable by the owner, and the charge cannot be displaced by a sale by such owner.

106. Finally, I am not persuaded that any assistance is found from reliance on the statement in the judgment of Murray J. in *Heather Hill* at para. 160 that there is no presumption that imprecise language will not be interpreted so as to impose a significant change to the existing law. *Minister for Industry and Commerce v. Hales* [1967] I.R. 50, referred to by Murray J. in his judgment in *Heather Hill*, considered the effect of the presumption against unclear changes, and there Henchy J. approved a statement from p.78 of Maxwell *On Interpretation of Statutes* that the presumption against implicit alterations of law means that the legislature does not intend to make any substantial alterations in the law "beyond what it explicitly declares, either in express terms or by clear implication, or, in other words, beyond the immediate scope and object of the statute". Murray J. thought that the principle is sometimes applied beyond its proper limits, and that changes in the law are frequently, if not always, brought about by every statute, and that few statutes do not in some shape or form impinge upon rights or effect alterations to the general law. What the presumption means rather is that imprecise language will not be interpreted so as to impose significant changes in the law or, as Murray J. said, that legislation would be narrowly construed when it interferes with vested rights. That approach readily permits a reading of s.24 which charges the interest of the owner of derelict land but does not make significant and far reaching changes to the law regarding the extent of the limited class of overreaching powers in s.21 of the Act of 1881.

107. In my view the DSA does not need to be interpreted to impose any further obligation to pay to further that purpose and does not require that the obligation to pay should be extended beyond the owner, as broadly defined in the DSA.

The Nature of the Statutory Incumbrance

108. The appeal can and must be approached too from the nature of the charge and its place in the scheme of property law generally, and by an analysis of the legal nature of an incumbrance on land.

109. The appellant argues that the charge created by s. 24 is *sui generis* and it cannot be removed from the title until it is paid, even by the local authority itself. The charge is a creature of statute and is thus to be seen as unique and does not arise from any contractual relationship between the parties.

110. The premises in question in this appeal was unregistered at the date of sale to the respondent. I propose to consider the effect of s.24 first when the land subject to the charge to secure the levy is unregistered. I will then discuss the effect of the charge on registered title.

Unregistered Title Before 2009

111. Until the commencement of the LCLR Act, a legal mortgage of unregistered land was created by the conveyance or other assurance (in the case of the lease by sub-demise, or, rarely, assignment of the leasehold interest, now abolished as a means of creating security by s. 89(2) LCLR Act) of the legal estate.

112. Section 2(vi) and (vii) of the Act of 1881 defined an incumbrance to include a charge for securing money or other capital sum. The charge created by the DSA must be seen to be an incumbrance in this sense.

113. Until Lord Cranworth's Act enacted in 1860, a mortgagee did not have any implied power to sell the property, either at common law or in equity. As Wylie puts it in the *Irish Land Law* (6th edition, Bloomsbury Professional, 2020) at para. 14.55, a

mortgagee could transfer the interest he had *i.e.*, the interest acquired by the mortgage deed, and subject to the equity of redemption of the mortgagor. That, as Wylie suggests, could scarcely be described as the ability to sell a "commercial interest in lands." For that reason, mortgage deeds often or invariably contained an express power of sale enabling the mortgagee to sell free from the mortgagor's equity of redemption.

114. Section 11 of Lord Cranworth's Act conferred a statutory power of sale upon a person owed money secured or charged by deed on lands and section 15 provides:

> "The Person exercising the Power of Sale hereby conferred to have Power by Deed to convey or assign to invest in the Purchaser the Property sold, for all the Estate and Interest therein, which the Person who created the Charge had Power to dispose of …"

115. That provision was repealed and re-enacted in an extended form in the Act of 1881. It seems however, that most conveyances did not rely upon the statutory provisions in Lord Cranworth's Act, which of their nature were limited, as the power was to convey the land for all the estate of the mortgagor, but with no power to overreach any mortgages over which the mortgagee might have priority.

116. Such interest as remains in a mortgagor after the creation of a legal mortgage of unregistered land is twofold. First, the mortgagor retains the right to redeem the mortgage. This is a legal right to redeem on the payment of the capital borrowed plus interest: *Irish Land Law* at para. 13.35. The mortgagor also has an equitable right to redeem after the date of the redemption has passed, the so-called "equity of redemption". The mortgagee may sell, mortgage or transfer his or her interest (*Lyall on Land Law* (5th edition, Round Hall Press, 2023) at para. 24.208). As Wylie notes, equity has always treated a mortgage as being in substance a secured loan (*op. cit*. para 12.04).

This means that, whilst at common law a mortgagee is regarded as owner of the property, the mortgagor is treated in equity as owner, and the mortgagee as an encumbrancer only. The mortgagor has an "equity" in the property, a valuable interest which as Wylie said, can be sold, demised or mortgaged like any other item of property. Second, land value inflation (virtually unknown in 1881 and so not a factor which was afforded any consideration in the Act of that year) means that a mortgagor frequently nowadays has a valuable interest in the mortgaged land, being calculated as any monetary value that might remain after discharge of the money secured by the mortgage. This is frequently, and not incorrectly, described as the "equity" in the land, and was explained by McDonald J. in *Re Lowe, a Debtor* [2020] IEHC 104, [2020] 3 I.R. 655 at para. 45 as "the difference between the value of the house, on the one hand, and the extent of any existing indebtedness secured on the property, on the other", and, as he said, this is colloquially described as the "positive equity in the property" (para. 47).

117. Invariably a mortgage by deed will contain a power that the mortgagee may sell to realise its security. Once such a power of sale exists, the mortgagor, who has assured the legal title to the land by way of security, is vulnerable to the exercise by the mortgagee of the power of sale by which the land becomes converted into money. Equally any person taking or creating an encumbrance on unregistered land which is already subject to a prior mortgage can take such interest only against whatever equitable interest is left in, and is capable of being assured by, the mortgagor.

118. This means in effect that overreaching, the power on the part of the mortgagee to sell the land and displace the title of the mortgagor and any person holding a

subsequent encumbrance, is a necessary and logical consequence of the essential nature of unregistered land.

119. This may explain why, as counsel for the respondent helpfully pointed out, the early texts on real property following the enactment of the 1881 Act including *Williams, Principles of the Law of Real Property* (14th edition, 1882), *Goodeve's Real Property* (3rd edition, 1891), *Carson's Real Property Statutes* (2nd edition, 1910) and Fisher, *The Law of Mortgage* (6th edition, 1910) make little or no mention of the statutory overreaching power.

120. The absence of academic commentary in the early years of the Act suggests that the academic writers did not attach a great deal of significance to the overreaching power. The respondent points to the comment in *Halsbury's Laws of England* (1912) Vol.21, p. 259, para. 460 as follows:

> "The effect of a sale under the power of sale is to destroy the equity of redemption on the land (c) and constitute the mortgagee exercising the power of sale a trustee of the surplus proceeds (if any) after satisfying his own charge, first with the subsequent incumbrances, and ultimately for the mortgagor. In the absence of provision in the power of sale, this principle determines the application of the proceeds, but provision is contained in the statutory powers and usually in express powers."

121. In its footnote (c) at para. 460, *Halsbury* explains the destroying the equity of redemption "defeats the rights of all subsequent incumbrances whose remedy is then only against the proceeds of sale". He cites *The Directors, etc. of the South Eastern*

Railway Company v Jortin (1857) 10 E.R. 1360, 6 H.L. Cas. 425 as authority for this proposition.

122. That explanation is logical because the subsequent incumbrances are granted out of the legal and equitable right of redemption and cannot survive its destruction.

123. *Ashburner on Mortgages* (2nd edition, 1911) does at least explain the position as follows:

> "Sale by a mortgagee under a power of sale defeats the rights of all subsequent incumbrances against the mortgage property. There only remedy is against the surplus monies in the hands of the vendor. *S.E. Railway Company v Jortin* 6 HLC 425, 435)." (at p. 243)

124. The case cited by *Ashburner* was in fact a decision concerning a sale in 1843 before the enactment of the 1881 Act, although 21(1) of the Act of 1881 is broadly similar to the provision it repealed and replaced. The judgment of the House of Lords in *Jortin* nonetheless deserves comment, as it concerns a situation where the priority of an earlier incumbrance was displaced by statute in favour of a later incumbrance by s. 23 of the Public Works Act 1817 (The Poor Employment Act 1817).

125. The Exchequer Loan Commissioners had sold property to the railway company as mortgagees in purported exercise of powers conferred upon them by statute. The applicable legislation provided that the securities of prior incumbrances could be postponed behind a security granted to the Commissioners if four-fifths of the prior incumbrances consented. Ms. Jortin was the holder of a prior incumbrance which she sought to enforce against the railway company after the sale closed. The railway company said that the Commissioners sold under a power to free the title from

incumbrances and that Ms. Jortin's claim did not lie against the railway company, the purchaser. The House of Lords regarded Ms Jortin as a subsequent incumbrance and Lord Cranworth giving the judgment of the House of Lords explained it as follows:

> "Now when a mortgagee sells under a power, that sale defeats the rights of all subsequent encumbrances whose remedy then is only against the money in the hands of the vendors." (at p. 435)

126. The comment made by Lord Cranworth in his judgment that a purchaser would take the sold lands free of subsequent incumbrances is worth repeating:

> "I incline to think that this would have been so if there had been no express enactment upon the subject…. The commissioners are to be treated by purchasers as absolute owners, so far as regarded the interest of those whose rights were subsequent to the right in respect of which the sale was made, for those are the persons to whom a loan foreclosure could apply." (at p. 435-436)

127. Lord Wensleydale also gave a judgment saying that the intent of the legislation was to facilitate the advance of money on public works generally, particularly those already incumbered, as further advances would not be made unless the Railway Commissioners had security and could grant that security without the consent of every prior mortgagee.

128. In my view the overreaching powers expressed in the Act of 1881 are an inevitable and necessary consequence of the essential nature of a mortgage of unregistered land and of the exercise by a mortgagee of a power of sale. Once a mortgagee exercises a power of sale, the mortgagor's legal right to redeem and the equitable right of redemption are destroyed, and that must mean as a matter of law and

logic that the overreaching of subsequent incumbrances has occurred, because those incumbrances attached only to that legal right to redeem and the equity of redemption.

129. I agree therefore with the argument advanced in supplemental submissions by the respondent, and not made in the High Court, that the section 21 overreaching power is merely declaratory of the existing law and does not create the overreaching power in itself.

130. I conclude accordingly that as a matter of principle it is not legally possible, save by express and precise legal provisions, to create a charge which is not overreached in this way. How such statutory charge might operate over unregistered title is difficult to discern because a charge can be granted or created only over an interest of land which is owned by a party granting or subject to the charge, and if that interest is the legal or equitable right to redeem, or an equitable or beneficial interest reflecting the amount by which the value of the land exceed the secured debt, the charge cannot survive its destruction or conversion to money's worth. The statutory charge is not "created" by an owner, but nonetheless no encumbrance can affect the interest of the mortgagee when it has already taken the entire legal estate.

131. Some statutory provisions that I will examine later in this judgment create a statutory scheme to enforce payment of a levy or other similar obligation, but the "sparseness" of the DSA, to borrow the term usefully employed by Simons J., do not in any manner operate to save the DSA charge from the overreaching power.

Registered Land

132. Since 2009, by reason of s.89 of the LCLR Act of 2009, there has been an alignment for registered and unregistered title such that all encumbrances are now

effected by means of a charge, and both are now called a "mortgage". It is useful to consider the argument of the appellant that the derelict sites charge is *sui generis* in the light of the fact that in time all land in the State will be registered, and because future incumbrances on unregistered land will be made by way of charge and not by assurance of the legal title.

133. It is also useful to consider the argument that the power of overreaching is not applicable to the statutory DSA charge, as it becomes impossible to be rationally maintained when the implications of the proposition are tested against the existing system for registration of title.

134. The charge to secure the derelict sites levy is a burden which may be registered as affecting registered land under section 69 (1)(a) or (b). It is not a burden that affects registered land without registration under s. 72. The DSA is silent as to the type of burden thereby created; hence it is difficult to discern the precise statutory category in which the charge belongs, save to note that it was properly conceded in argument that the charge is registerable.

135. Such a charge must by reason of section 62 be registered, as without registration the owner of the charge takes no interest in the land: 62(2) RoT Act.

136. In the course of the argument before the Circuit Court and later in the High Court, and in the written submissions furnished by the parties to this Court, it was contended that a charge to secure the derelict sites levy did not require to be registered to be effective, was not in fact generally registered or purported to be registered by the City Council, and was entitled to what counsel described as a "super priority". Later in

oral argument, counsel for the appellant said that it was often the practice of the Council to register the charge.

137. Section 74 of the Act of RoT Act provides for the priority of registered burdens which are ranked in priority "according to the order in which they are entered on the register and not according to the order in which they are created or arise". This provision is subject to any entry to the contrary on the register. The section also excludes from this scheme of priority any burdens whose priority is fixed by statute. See generally McAllister, *Registration of Title in Ireland* (1973) chapter IV, pp. 175ff.

138. As is apparent from the analysis of the DSA above, no provision is made in the statute for any statutory priority for the derelict sites charge, or any displacement of the provisions of section 74. No rational basis could be found for the implied displacement of such clear statutory provision concerning priority as are contained in s.74 of the RoT Act, and which have the practical and legal effect of clarifying a matter of such importance as the priority of incumbrances on registered land.

139. Ever since the Registration of Title Act 1891 the legislature intended that a purchaser inspecting the register on a purchase from the registered owner of a charge "should be in a position to see from the register who was in fact the owner of the paramount registered charge" (McAllister *op.cit.* p.179) and could safely pay the purchase money to him without regard to the existence of other burdens.

140. This is a registerable charge and in a case of registered land a purchaser is entitled to acquire on purchase for value free from registerable but unregistered interests. To accept the argument made by the Applicant would wholly undermine the

system of registration and the conclusiveness of the register and the means by which a purchaser acquires title to register land.

141. A further peculiarity is also apparent from the fact that it is also wholly statutory in origin, and from the argument advanced by the appellant that no document, deed or memorandum is required to reflect its existence. This factor was the subject of some queries from members of the Court during the oral hearing, when the precise operation of the charge and how, and if, it became registered on the title, as an entry in the Registry of Deeds or as a charge in the Land Registry. The proposition first advanced by counsel for the appellant was that, while the charge was registerable, it did not require registration to be effective at law to charge the land. That proposition is strictly speaking correct in the case of unregistered title, where registration can affect the priority that the charge has over other later registered charges, but not its validity as an incumbrance. In the case of registered land, it is not correct to state that a registerable charge is valid without registration and s. 62 of the RoT Act expressly provides that a charge must be registered to bind and operate to bind registered land.

142. The entire scheme of the registration of title to land and the creation of a register of property ownership in Ireland provides for the conclusiveness of the register and in particular with regard to charges, a charge operates against the land and the owner of the charge may take enforcement proceedings only if the charge is registered. The law was explained in some detail in my judgment in *Tanager DAC v. Kane* [2018] IECA 352, [2019] 1 I.R. 385.

143. The argument of the appellant presupposes that the DSA made a radical change in the scheme of registration and provided a method by which rights which are

registerable and registered are displaced by rights which are registerable but not registered.

144. No document, deed or memorandum capable of being the subject of an application for registration in the Registry of Deed or the Land Registry was furnished in this court or in the lower courts. However following questions from members of the Court as to the general practice of the Council concerning registration and notification of the existence of derelict sites charge, a request was made that samples of entries on the Land Registry where these were made, or entries in the Registry of Deeds in the case of unregistered land, be furnished to the members of the Court.

145. The Council after the hearing furnished copies of the Manager's Order made on 15 April 2013 reciting the levy and recommending that application be made to the Property Registration Authority to register the charge either in the Land Registry or the Registry of Deeds as appropriate. There was also furnished an application for registration of the charge. The Council also provided a formal document of discharge and release.

146. These documents undermine the factual basis of the argument advanced by counsel on behalf of the appellant that the charge existed and would bind land, whether registered or unregistered, without registration, and that a formal deed or memorandum of release and discharge was not necessary. Further, I note that the document of release and discharge, executed after payment by the respondent of the amount secured by the charge, released the owner of the land from the obligation to pay the charge. That properly reflects the statutory provision by which the levy is payable by and only by an owner.

147. The Council also furnished a copy Folio which does not contain any note of a claim to priority. The entry of the charge on the Folio suggests very strongly that it takes its place in accordance with the priority it has by reference to the date of registration.

148. Every step taken by the Council illustrated in these documents, some of which were proffered to the Court by way of illustration of the practice it usually engaged with regard to registration and discharge of a derelict sites charge, is consistent only with an understanding that in order to give effect to the charge, and gain priority over other charges, the DSA has to be registered, either in the Registry of Deeds or the Land Registry.

149. The form of the documentation and the steps taken wholly undermine any suggestion that the Council regards section 24 of the DSA as operating outside the registration of title regime, or that a section 24 charge has some form of super priority.

150. For these reasons, I consider that the appellant is incorrect in its contention that the derelict sites charge is wholly *sui generis*, excludes the overreaching power and can operate and create priority without registration.

Other Legislation Creating Statutory Charges.

151. Similar provisions for the enforcement of obligations are found in other legislation, but with far clearer provisions: thus, the charge that arises in respect of local property tax is provided for in section 123 of the Finance (Local Property Tax) Act 2012 as follows:

"Any local property tax, interest referred to in section 149 or other monetary penalty amount which is due and unpaid by a liable person shall be and remain a charge on the relevant residential property to which it relates."

152. Section 124 provides:

"Notwithstanding section 36 of the Statute of Limitations 1957, the charge referred to in section 123 shall continue to apply without a time limit until such time as it is paid in full."

153. Section 126 requires the discharge of the outstanding liability prior to a sale as follows:

"Subject to section 139 (4), a liable person who proposes to sell a residential property shall, before the completion of the sale of the property, pay to the Revenue Commissioners any local property tax, penalties imposed under this Act and accrued interest which is due and payable in respect of that property."

154. The consequence of that non-payment is laid down in section 127:

"Where a liable person does not comply with section 126 , any unpaid local property tax and any penalties and accrued interest referred to in that section shall remain a charge on the relevant residential property to which it relates."

155. Thus, either the vendor pays off the local property tax or sells the land subject to the charge. The same conclusion is warranted in respect of the DSA charge, but the legislation is less clear.

156. Section 47 of the Capital Acquisitions Tax Act 1976 provides that tax due and payable in respect of a taxable gift or inheritance shall be, and remain, a charge which shall have priority over all charges and interest created by the donee or successor, or

any person claiming through him or her. There is an express provision in section 47(2) and (3) which provides protection for a *bona fide* purchaser or mortgagee for full consideration without notice at the expiration of 12 years from the gift and inheritance, and for a person deriving title from or under such purchaser or mortgagee.

157. That provision provides considerably more clarity as to the continuation of the charge after sale than that provided in the DSA.

158. Other similar provisions are contained in the Local Government (Charges) Act 2009 in respect of unpaid non-principal private residence charge and unpaid household charges by reason of section 8 of the Local Government (Household Charges) Act 2011.

159. These examples are illustrative of other statutory provisions which create statutory charges, but which clearly set out the means by which the charge can bind and continue to bind the land on a sale. None makes provision for the disapplication of the statutory power of overreaching. I do not have to come to any conclusion here on the full meaning and effect of these provisions, and mention them by way of illustration of other far clearer statutory charges than those created by section 24 of the DSA.

Some General Comments on the Contract for Sale

160. Before concluding this judgment, I would like to take the opportunity of making some comments on the contract for sale. The contract for sale provided that the sale would be completed by the Bank acting as mortgagee in possession. The vendor was identified as the receiver who had been appointed by the Bank pursuant to the power in the mortgage deed. A number of comments might usefully be made.

161. Special condition 7.4 of the contract for sale provided that the purchaser would accept an assurance of the subject property from the Bank as "mortgagee in possession."

162. There was no evidence to suggest that the receiver had a power of sale under the express terms of the mortgage, and none would have been implied by statute. A receiver appointed by a mortgagee under the statutory power contained in s.19(1)((iii) of the Act of 1881 is a receiver of the income of the mortgaged property. The powers of such receiver appointed under the statutory power are to demand and recover the income from the property. No statutory power of sale is conferred on the receiver. Many modern mortgage deeds do confer upon the receiver a power to act on behalf of the mortgagee in the sale of the property, and in other cases an express delegation of that power is made to a receiver who can on foot of that delegation offer the property for sale. Section 108(3)(c) of the LCLR Act of 2009 makes express the power of the receiver to exercise such delegated powers.

163. A receiver does not have a statutory power of overreaching, as will be apparent from the terms of section 21 of the Act of 1881. The analysis above shows that it is the mortgagee who may overreach when selling in exercise of the statutory power of sale. Any receiver so acting is not entitled to exercise the statutory power of overreaching in s. 21and to give title to the purchaser freed from subsequent incumbrances.

164. However, a mortgagee would not have had a power to overreach merely on account of being in possession.

165. Further, a purchaser from a mortgagee takes good title, freed from subsequent encumbrances, by a deed from the mortgagee, not from a receiver it has appointed.

166. The receiver is by statute, s. 24(2) of the Act of 1881 and s.108(2) of the LCLR Act of 2009, the agent of the mortgagor. Thus, the appointment of a receiver does not constitute the mortgagee a mortgagee in possession, as the possession is that of the mortgagor.

167. The receiver may in the case of a leasehold interest, where the mortgage is made by demise or sub-demise, join in the deed, as agent of the mortgagor, to assure the reversion that remains vested in the mortgagor following the creation of the sublease.

168. The receiver does not take title to the property and is not in that sense properly called a vendor. See the full and useful discussion in the judgment of Roberts J. in *Langan v. PRA &Ors* [2023] IEHC 276 and the judgment of Butler J. in the same proceedings in the Court of Appeal [2024] IECA 59.

169. The facts of this case illustrate a particular trap of which a solicitor drafting a contract for sale by a mortgagee, or a solicitor acting for a purchaser, should be aware. If, as was said in the contract for sale in the present case, the mortgagee is a mortgagee in possession, then in that capacity it is an owner as defined in the Act. The mortgagee in those circumstances, being a mortgagee in possession, may if notice is served by a local authority have an obligation to repair. This imports more than the normal obligations on a mortgagee in possession to keep the premises in repair. It was clarified for the purposes of the hearing in the High Court, and again in this Court, that the mortgagee was not in possession, and it never did take possession and thus cannot be said to have been subject to the derelict site notices in respect of which it could have availed of the right to appeal or to make representation.

Conclusion and Summary

170. The Derelict Sites levy and statutory charge to secure payment thereof do indeed purport to reflect a valuable social purpose. The legislative scheme does achieve that purpose in part. However, the scheme created by the DSA does not displace the overreaching power contained in section 21 of the Act of 1881, now section 104 of the LCLR Act. The scheme of the Act does not purport to impose an obligation to pay the levy on anyone other than the owner of the derelict land as broadly defined. That scheme does not provide that the liability would attach to a mortgagee, other than to a mortgagee in possession, expressly identified as an owner for the purposes of payment of the levy.

171. The ordinary rules of registration, and the scheme of priorities for which the law of property generally provides, whether with regard to registered or unregistered land, does not admit of an interpretation of s. 24 of the DSA that gives the derelict sites charge a form of super priority over prior registered charges. In addition, in the absence of any clear provisions in the DSA itself that permits the derelict sites charge to be treated as having special characteristics, the DSA charge must be treated as one requiring registration where it purports to affect registered land, and to be subject to the general principles attaching to the creation of security interests and the respective security interests over unregistered land.

172. The DSA is not effective to displace the provision of section 21 of the Act of 1881, and the High Court judge was correct to hold as he did that the sale by the Bank to the respondent meant that the charge was payable by the owner of the land, remains (or remained so at the time the sale closed) recoverable as a simple contract debt from

that owner, but ceased to affect the land on a sale by the mortgagee exercising the statutory power of sale with its attendant right of overreaching.

173. I would dismiss the appeal.