AN CHÚIRT UACHTARACH

THE SUPREME COURT

Supreme Court Record No.: S:AP:IE:2023:000098
[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 Mr. Justice Brian Murray delivered on the 11th of April 2024

The DSA and the 1881 Act

1. The issue in this appeal arises from a collision between s. 24(1) of the Derelict Sites Act 1990 ('*the DSA'*) and s. 21(1) of the Conveyancing Act 1881 ('*the 1881 Act'*). The correct reconciliation of these provisions determines whether (as the defendant ('*DCC*') contends) a statutory charge arising from a levy imposed by DCC under the DSA continues to attach to property purchased by the plaintiff, or whether (as the plaintiff argues) the exercise by Bank of Ireland ('*BOI'*) of its power of sale under the 1881 Act as mortgagee of that property had the effect that the property was transferred to the plaintiff by BOI free of the charge imposed by s. 24(1) of the DSA.

2. Section 23 of the DSA provides for a levy on properties determined by a local authority to be '*derelict'*. Section 24(1) of that Act converts that levy into a charge on the relevant land where demand is made for payment and there is a failure to discharge the levy within two months of that demand. It states that where the levy is due and owing:

> '*the amount of the levy and the interest due and payable thereon shall, on the date on which it becomes so due and payable, become and* ***shall remain until payment*** *thereof, a charge on the relevant urban land.*'
>
> (Emphasis added)

3. Section 24(2) records that this will not apply where a '*vesting order'* is made in respect of a property (a vesting order arises under s. 17 of the DSA and allows the local authority to compulsorily acquire the derelict site). Literally construed, s. 24(1) requires that – absent such a vesting order – the security for which it provides will be discharged *only* where the amount of the applicable levy and interest is paid.

4. In this case, the property purchased by the plaintiff has been the subject of a levy (imposed by DCC in January 2008) and the levy has never been paid. Reading s. 24(1) of the DSA in isolation, the property (which was removed from the Derelict Sites Register in August 2008) is subject to a charge in respect of the outstanding levy. This statutory charge pre-dated the purchase by the plaintiff of the property, but post-dated the BOI security: the plaintiff acquired it in September 2014 by way of an assignment from BOI on foot of powers in a mortgage granted in October 2007 by the previous owner of the property, Provale Construction Ltd.

5. Generally, on a sale by a mortgagee who is not in possession of the relevant property, that mortgagee will apply the proceeds of sale first in discharge of the debts owing to any encumbrancer enjoying priority, then in discharge of their own debt and, if there is any surplus, in discharge of the debts of the subsequent charge holders in order of their respective priorities. This was at the relevant times enabled by s. 21(1) of the 1881 Act (since replaced by s. 104 of the Land and Conveyancing Law Reform Act 2009):

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

6. It appears that this provision reflected the pre-existing legal position whereby when a mortgagee sold under a power, the sale defeated the rights of all subsequent encumbrancers whose remedy was then only against the money in the hands of the vendor (*South-Eastern Railway v. Jortin* (1857) 10 ER 1360). There was no dispute in this appeal that the BOI mortgage had '*priority'* over the charge arising under s. 24(1) as that term is used in s. 21(1). That being so and construing s. 21(1) of the 1881 Act, also in isolation, the effect appears to be that BOI when exercising a power of sale under the section (as it purported to do) enjoyed the power to sell free from the statutory charge, which it pre-dated. Throughout these proceedings this process has been described as '*overreaching'* – a term Simons J. described in the High Court as a useful shorthand to describe the effective transfer of the interests of subsequent encumbrancers, to the sale proceeds.

7. The argument against overreaching as advanced by DCC has the dangerous attraction of apparent simplicity. It says that by providing that the charge arising under s. 24(1) of the DSA '*shall remain until payment'* of the levy and interest, the Oireachtas by those four words has created '*a species of charge that cannot*

be displaced through the invoking, by the holder of a pre-existing mortgage, of a statutory power of sale … and the overreaching that accompanies the exercise of such a power'. This, DCC argues, is the only interpretation that gives effect to those four words, and avoids their being treated as surplusage. Finding that the charge has been overreached is, DCC says, entirely inconsistent with the injunction on the face of s. 24(1) that it '*shall remain'* until payment of the outstanding levy and interest: it cannot '*remain'*, DCC says, if it is overreached.

The literal construction of s. 24(1)

8. There can be no dispute as to the applicable principles of statutory interpretation, nor can there be any doubt but that a Court when construing s.24(1) must start from the position that it will give effect to the plain import of the words used by the draftsman where this meaning is otherwise clear. In the case of s. 24(1) that meaning is at first blush straightforward: the levy creates a charge, and the charge is removed only in one of two situations – when the levy and any interest thereon is paid, or when a vesting order is made in favour of the local authority under the Act. On that basis the plaintiff loses: the levy has not been paid, and the charge remains *in situ.*

9. However, the meaning of otherwise clear words is moulded by their general setting. In any situation involving the interpretation of statutory language the immediate touchstone is the legislation in which the relevant provision appears. But in this case – as will often be the position – the more general legal situation in which the relevant provisions are intended to function is relevant and here,

this comes in the form not merely of s. 21(1) of the 1881 Act, but also (as explained in detail by Baker J. in her judgment) the scheme governing the system of registration of title as reflected in the Registration of Title Act 1964 (‘*the 1964 Act’*).

10. There are, of course, two ways of viewing the relationship between s. 24(1) of the DSA on the one hand, and s. 21(1) of the 1881 Act together with the 1964 Act, on the other. The first is to say – as DCC does – that the fact that it is *only* payment of the liability or vesting that will remove the charge means that the general law has been displaced in its operation *vis a vis* the statutory charge. Looking at s. 24(1) of the DSA alone, this may well be the most obvious construction.

11. However, it is also firmly established – as it was put by McKechnie J. in *Dunnes Stores v. Revenue Commissioners* [2019] IESC 50, [2020] 3 IR 480 at para. 64 – that the plain and seemingly obvious meaning of a provision can be departed from for ‘*compelling reasons’*. Those reasons will most usually be the product of context and purpose. In *Heather Hill v. An Bord Pleanála*, [2022] IESC 43, [2022] 2 ILRM 313 it was explained that before ‘*context’* and ‘*purpose’* can be successfully deployed to displace the apparently clear language of a provision, they must be ‘*decisively probative of an alternative construction that is itself capable of being accommodated within the statutory language’* (at para. 116). The danger with the use of these broadly drawn labels as a basis for *not* giving effect to the plain and ordinary words in an Act is that, all too easily, the process of statutory interpretation can drift from divining and thereafter implementing

the meaning of the legislation, into the imposition on a statute of the Court's subjective assessment as to what parliament *ought* sensibly to have intended to provide. While sometimes question begging, the point underlying all of this has been often repeated and pithly expressed: the Court does not inquire what the legislature meant, only what the statute means (Holmes '*The Theory of Legal Interpretation'* (1899) 12 Harv. L.R. 417 at p. 419).

12. Here the legislation is *capable* of being construed on the basis that because there is no express reference in the DSA to the 1881 Act, s. 21(1) of the latter continues to operate *vis-à-vis* the statutory charge provided for by s. 24(1) of the former. The Courts, it has been said, '*lean against the repeal or exclusion of earlier statutory provisions by implication'* (*DPP v. Grey* [1986] IR 317 at p. 325 per Henchy J.). This has particular force in the context of a provision which is declaratory of the pre-existing law (as was s. 21(1)). It is long and firmly established that insofar as a statute is departing from common law, that departure should be as limited as possible (see most recently *Hassam v Rabot* [2024] UKSC 11 at para. 40). In the case of s. 24 of the DSA it is impossible not to be struck not merely by the fact that the draftsman did *not* expressly oust pre-existing statutory provisions or rules of law from the operation of the provision, but that if DCC's construction of the DSA is correct, a significant diminution of the rights of a prior mortgagee or charge-holder is imposed by the legislation in an arrestingly summary and seemingly incidental manner.

The statutory scheme

13. Here, the scheme of the DSA as a whole is important. The derelict sites levy is imposed on the '*owner'* of land (s. 23(2)). This is defined in s. 2 as meaning:

> *' ... a person, other than a mortgagee not in possession, who whether in his own right or as trustee or agent for any other person, is entitled to receive the rack rent of the land or, where the land is not let at a rack rent, would be so entitled if it were so let.'*

14. Nor does the term '*occupier'* as it is defined in s. 2 of the DSA, extend to a mortgagee who is not in possession. It is defined as including:

> '*any person in or entitled to immediate use and enjoyment of the land, any person entitled to occupy the land and any other person having, for the time being, control of the land.'*

15. Under the DSA, it is only the owner or occupier so defined who is entitled to be notified of the intention to place the property on the Derelict Sites Register and to make representations in connection with that proposal (s. 8(2) DSA). It is only such an owner or occupier who is entitled to be served with notice of an entry in the register when the property is actually placed on it (s. 8(7)). This reflects the fact that it is the owner and occupier – and no-one else – who is under a statutory duty to take all reasonable steps to ensure that the land does not become or does not continue to be a derelict site (s. 9 DSA). Similarly, it is only the owner who is advised of the market value of land that the local authority determines should be entered on the Derelict Sites Register, and it is only the

owner who is given the right to appeal that valuation to the Valuation Tribunal (s. 22(3) DSA). It is that valuation of the land which fixes the amount of the levy (s. 23(1) DSA). The holder of a prior charge or mortgage – who on DCC's case is liable to have their interest significantly devalued by this designation of the site and the value placed upon it – is removed entirely from the picture *unless* they are a mortgagee in possession. It is only the owner of the site so defined who is liable to pay the levy (s. 23(2)) and if the local authority exercises its power to compulsorily acquire the derelict site, it is only the share of the proceeds payable to the owner that is available to discharge the levy. This follows from the relationship between s. 19(1) and s. 19(3).

16. Section 19(1) envisages a range of persons *other than* the owner who may find themselves entitled to obtain compensation following a compulsory acquisition order. These are defined as a person having '*any estate or interest in or right in respect of the derelict site acquired by the order'*, that person may apply '*for compensation in respect of the estate, interest or right'* while the local authority must pay compensation in '*an amount equal to the value (if any) of the estate, interest or right'*. However, s. 19(3) makes it clear that when it comes to the question of the outstanding sum payable in respect of the levy, it is only from the compensation payable by the owner – the person who is liable to pay the levy under s. 23(2) – that the levy falls to be paid: the legislation does not envisage other persons with an interest in the lands having their compensation reduced to discharge the levy. Section 19(3) is as follows:

'Where, after the making of a vesting order by a local authority under this Act in relation to any derelict site, any sum (including any sum for costs) remains due to the local authority by any person by way of derelict sites levy …

(a) If the sum aforesaid is less than the amount of the compensation payable to the person under this section, the amount of the compensation shall be reduced by the amount of the sum, and

(b) If the sum aforesaid is not less than the amount of the compensation aforesaid, the compensation shall not be payable.'

17. These provisions combine, I think, to demonstrate two related features of the statutory scheme. The first is a symmetry between ownership and occupation of a property deemed to be derelict, on the one hand, and obligations to prevent that property from becoming derelict and to pay the derelict sites levy when it does, on the other. Persons with other interests in the property are excluded from these obligations to the extent that upon compulsory acquisition they are under no duty to pay the levy and have an unqualified entitlement to compensation in respect of their interest. This strongly suggests that the mortgagee who is not in possession, being a person excluded from the definition of owner, is not a person envisaged by the Oireachtas as coming under any obligation to contribute to the discharge of the levy.

18. Second, the construction urged by DCC would, if correct, mean that the pre-existing mortgagee of land could find the value of their interest in the property significantly diminished by the taking of a series of steps by a public authority

without their having any right to make representations in relation to those decisions, or indeed any entitlement to notice of them. As I have observed, the DSA is clear in providing that a mortgagee who is not in possession of property has no right to be informed that it is proposed to designate a property as a derelict site, and no right to make representations in relation to the value of the property as entered in the Derelict Sites Register (that value then being the benchmark by reference to which the levy itself is calculated). That strikes me as a surprising state of affairs if the prior charge holder is liable to have their interest encumbered by the levy. Were it intended that the combined effect of the determination that a site was derelict, identification of its value, and subsequent imposition of the levy, were to supersede the priority of the mortgagee's interest without their knowledge or consent, one would expect that that consequence would be spelt out: it is axiomatic that '*a person has a right to be heard by the decision maker exercising a statutory power before a decision is finally made when that decision may materially affect rights vested in them or impose obligations'* (*Dellway Investments Ltd. v. NAMA* [2011] IESC 14, [2011] 4 IR 1 at para. 25 per Murray CJ).

19. The decision in *Dellway* shows that procedural rights can exert a strong force in the construction of legislation. There, the provisions of s. 84 of the National Asset Management Agency Act 2009 were interpreted so as to enable a person whose loans were being acquired by the Agency constituted by that Act, to make representations in advance of such an acquisition. That conclusion was found to follow from the double construction rule. While the language of the provisions to which I have referred – unlike s. 84 – would not bear the

construction that a prior charge-holder would be entitled to be advised of a proposal to designate a site as derelict, or to an opportunity to make representations prior to such designation or in connection with the value attributed to it, the double construction rule is not the only portal through which constitutional principles of this kind enter the process of statutory interpretation. Here, the exclusion of a prior encumbrancer from any of these procedural rights points strongly to the conclusion that it was never intended that their substantive entitlements were affected by the levy given that legislation that both effectively charged the property of that encumbrancer with repayment of the levy, but excluded them from any aspect of the decision making process leading to its imposition would (to put the matter at its lowest) lurk in the shadow of obvious and significant constitutional doubt. A Court in construing a statute is entitled to assume that the Oireachtas has not sailed quite that close to the wind without at least making clear that this was its intention.

20. To be clear for my part (and without expressing a final view on the issue) I can see the strength of the argument that the importance of incentivising those in a position of control over, or having a vested economic interest in, derelict properties may well merit the delimitation of the property rights of a prior encumbrancer. It might be that the importance of this objective is such that legislation could impose these burdens without compensation. However, I would expect something in the legislation that acknowledged that this was what the Oireachtas had decided to do and, whether or not that is correct, would *not* expect that the entire process of designation of a derelict site and fixing the value of the designated property would take place without any reference whatsoever

to the prior encumbrancer. It is in substance over *their* property that the charge, in this situation, is being registered, and (it follows) the very basic principles of fair procedure would require that they be afforded the opportunity to object to the designation, or to contest the amount of the levy. Instead, what the Act does – if it operates in the manner contended for by DCC – is to achieve an expropriation by a four word sidewind, that expropriation not being accompanied by even the most basic of entitlements to take notice of, or to make representations regarding, the administrative decision on which it is based, or the valuation by reference to which the amount of its property that is so taken, is to be calculated.

21. This all strongly suggests that the legislation cannot be construed as contended for by DCC. The effect of s. 24(1) of the DSA is, clearly, to create a charge over the property. That will present a significant limitation on the rights of the owner of the property if it is otherwise unencumbered at the time of the creation of the charge, will allow the local authority where the owner seeks to sell the property in ordinary course to recoup the levy from the proceeds of sale, and may deter the further charging or mortgaging of the land. But there is *nothing* in the legislation to support the proposition that it was intended to, in addition, disadvantage a *prior* encumbrancer. Had this been the objective, provision would have been made requiring that that person be advised of the proposed designation, given a statutory right to object to it, and given notice of designation when made. They would have been given the entitlement to appeal the valuation afforded to the property.

The 1964 Act

22. Although the issue in this case arises in the context of unregistered land, it is of importance that difficulties similar to those presenting when s. 24(1) is placed alongside s. 21(1) of the 1881 Act, arise when the DSA is matched against the provisions of the 1964 Act. This is the subject of detailed consideration by Baker J. in her judgment, with which I agree. In summary, however, it is clear (a) that the charge arising under the DSA is registrable under that Act, (b) when registered the priority of burdens is determined by s. 74 thereof, (c) that that priority operates according to date of entry on the register, and (d) no provision is made in the DSA for priority of the charge arising under s. 24(1). These factors combined to compel counsel for DCC to contend that such a charge is not displaceable even if it is not registered. It does have to be registered in law, he said, but the usual consequences of non-registration do not apply. If it <u>is</u> registered, he argued, it has a form of '*super priorit*y'.

23. This is, on any version, a remarkable weight to place on the four words I have emphasised at the outset as they appear in s. 24(1). In my view Baker J. characterises DCC's position very well in her judgment: 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. This makes little sense, and points to the conclusion that the only way of coherently reconciling the charge envisaged by s. 24(1) of the DSA with the general law

governing the priority of mortgages and charges is by construing the former as fitting into, not casting out, the latter.

Conclusion

24. All of this compels the conclusion that the purpose of the words '*shall remain until payment'* is to reflect the unusual features of a statutory charge of this kind. That charge arises not from the execution of an instrument or agreement between the owner of property and a lender, but by operation of law at the point at which the levy and interest become payable. The four words specify that which might not otherwise be clear and might be thought to require a written instrument of some kind – the point at which release occurs and the charge ceases to attach to the property. What they thus do is describe how the original owner of the land may vacate the charge. What they do not do is set aside the pre-existing law and the entitlement vested by s. 21(1) of the 1881 Act in a mortgagee who exercises a statutory power of sale to overreach charges over which the mortgagee has priority, nor should they be construed as affecting the smooth operation of the system for the registration of title to land under the 1964 Act.

25. I would, accordingly, dismiss this appeal for these reasons and for those explained in greater detail by Baker J. If the Oireachtas wishes to effectively impose on prior encumbrancers the derelict sites levy, it is incumbent on it to do so clearly, and to make express provision for the rights of fair procedures that would normally attend decisions of public bodies having significant adverse

effects on their legal rights. That not having been done in the DSA, there is no warrant for concluding that s. 24(1) was intended to have the effect urged by DCC.