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Title	Mortgages, repeals and the Land and Conveyancing Law Reform Act 2009
Authors	Mee, John
Publication date	2010
Original Citation	Mee, J. (2010) 'Mortgages, Repeals and the Land and Conveyancing Law Reform Act 2009', Commercial Law Practitioner 2010, 17(6), pp. 114-116.
Type of publication	Article (peer-reviewed)
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Download date	2026-11-04 06:08:29
Item downloaded from	https://hdl.handle.net/10468/15774



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Mortgages, Repeals and the Land and Conveyancing Law Reform Act 2009

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Introduction

This article discusses a puzzling aspect of the provisions related to mortgages in the Land and Conveyancing Law Reform Act 2009 ("the 2009 Act"). As explained in more detail below, the 2009 Act repeals certain provisions of the Conveyancing Acts 1881-1911 which, it appears, were intended to continue to operate. The new regime in Pt 10, Ch.3 of the 2009 Act ("Obligations, powers and rights of mortgagee") applies to mortgages which are created subsequent to the coming into force of the 2009 Act.[1] The same position applies in respect of Pt 10, Ch.4 ("Leases and surrenders of leases"). However, the older provisions which governed the relevant aspects of mortgages have been repealed. In addition, the 2009 Act has repealed s.62(7) of the Registration of Title Act 1964, which allowed the court to make an order for possession in favour of a person holding a registered charge over registered land, but no replacement provision has been introduced to govern pre-December 1, 2009 mortgages. At first sight, the result seems to be a gap in the legislative regulation of pre-December 1, 2009 mortgages. In fact, the situation may be rescued by the operation of the Interpretation Act 2005. However, this does not appear to be an entirely satisfactory state of affairs and it is difficult to see why the relevant provisions were repealed, unless this occurred as a result of an oversight.

The problem

There are two aspects to the problem. The first arises from the fact that the 2009 Act repeals the provisions of the Conveyancing Acts 1881-1911 concerning mortgages.[2] All the provisions of the 2009 Act, including the repealing provisions, are now in force.[3] The repeal of the old provisions makes sense in some instances, since their place is taken by new provisions in the 2009 Act which govern both pre- and post-December 1, 2009 mortgages.[4] However, the repealed provisions include ss.18-24 of the 1881 Act and ss.3-5 of the 1911 Act. These repealed provisions stated that a power of sale and to appoint a receiver would be implied in any mortgage by deed.[5] They also provided that there would be safeguards for the position of a purchaser when these powers were exercised and dealt with other consequential matters,[6] as well as addressing the question of insurance.[7] Finally, they governed the leasing powers of mortgagors and mortgagees.[8] The new legislative provisions relating to the points which have just been detailed, contained in Chs 3 and 4 of Pt 10 of the 2009 Act, only apply to mortgages created after December 1, 2009. This is made clear in s.96(1)(a) of the 2009 Act which states that the rules in ss.97-111 of the 2009 Act "apply to any mortgage created by deed after the commencement of this Chapter".[9] Similarly, s.112(5) makes clear

that the powers in relation to leasing apply "only to mortgages created after the commencement of this Part".[10] The assumption appears to be that, in respect of the relevant matters, pre-December 1, 2009 mortgages are to be governed by the old regime in the Conveyancing Acts 1881-1911. But, as has been pointed out above, the relevant provisions of those Acts have been repealed. This seems to leave a gap in terms of legislative provision for pre-December 1, 2009 mortgages.

While it is difficult to predict the potential practical consequences of this gap, there would, depending on the terms of the individual mortgage, seem to be the possibility that uncertainty would be created in relation to the enforcement powers available to the lender[11] and in relation to the power to lease (and in relation to insurance, though this may be less significant in practical terms).

The second aspect of the issue relates to s.62(7) of the Registration of Title Act 1964, which is repealed by the 2009 Act.[12] This provision allowed the holder of a registered charge over registered land to apply in a summary manner for an order for possession, provided that the purchase money was due. Without this provision, the holder of a registered charge would not have a right to possession, since the charge does not confer an estate in the land in question.[13] Thus, s.62(7) is clearly a key provision. Although the 2009 Act repeals s.62(7), the new regime in respect of possession set out in s.97 of the 2009 Act applies only to post-December 1, 2009 mortgages.[14] It seems clearly to have been envisaged that s.62(7) would continue to operate in relation to pre-December 1, 2009 mortgages.[15] As a result, the decision to repeal the relevant provision is, at first inspection, difficult to understand.

Possible solutions

In terms of possible counter-arguments suggesting that no problem arises, a partial solution would exist if the relevant repealed provisions of the Conveyancing Acts 1881-1911 could be read as having incorporated the relevant terms, once and for all, into the mortgage deed at the moment a mortgage was created. This would mean that the provisions in question could safely have been repealed, given that all old mortgages would have been dealt with as they were created and all new mortgages would be governed by the new regime in the 2009 Act. However, the wording of the 1881 Act does not seem consistent with this idea, for e.g. s.19 begins "A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, …" The words "as if they had been in terms conferred by the mortgage deed" seem to govern the "extent" of the powers, rather than to prescribe the mode in which the powers are conferred – the powers seem to exist "by virtue of this Act", i.e. on the strength of the now repealed provisions of the 1881 Act. Moreover, the survival of the protection in s.21 of the 1881 Act[16] for

a person who purchases from a mortgagee exercising the implied power of sale, and of the other provisions regulating the effect of the exercise of this power and of the power to appoint a receiver, is more difficult to explain on the basis of the implied incorporation of terms into the mortgage. In relation to the powers of leasing in s.18 of the 1881 Act,[17] there seems to be no argument based on incorporation into the mortgage deed. Furthermore, this argument would not help at all in relation to the repeal of s.62(7) of the Registration of Title Act 1964. A more promising argument is that the situation is saved by s.27(1)(c) of the Interpretation Act 2005, which provides that, where an enactment is repealed, the repeal does not "affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment". Without purporting to address the matter in depth in this brief note, it seems that the question of which rights are preserved upon repeal is a fairly complex one and that not all rights in a general sense are preserved (since, if the idea of preserving "rights" were taken far enough, the result could be that the repeal would have no impact).[18] For example, the "right" of a mortgagee to sell under the implied power of sale in the 1881 Act is dependent upon the right arising and, if the mortgagee is to be protected from being liable to the mortgagor, upon it becoming properly exercisable. These are events which would often occur after the time of the repeal of the relevant provisions of the Conveyancing Act 1881 – so, if this right were to come within the saving in s.27(1)(c), it would have to be considered to have "accrued" or been "acquired" even before it "arose" or became properly exercisable. Similarly, in respect of s.62(7) of the Registration of Title Act 1964, it would have to be argued that the mortgagee's right to apply for possession, in circumstances where the mortgage money has become due, had accrued or been acquired at the time the registered charge was created (and before the money became due).

There is recent High Court authority which suggests that the relevant provision of the Interpretation Act 2005 could indeed serve to preserve the effect of the various repealed provisions which have been discussed above. In *O'Sullivan v Superintendent, Togher Garda Station Cork*,[19] the applicants had been disqualified from driving. At the time of their conviction, the terms of s.29(1)(a) of the Road Traffic Act 1961 entitled them to apply to have their licence restored once nine months had elapsed from the time of their conviction. After their conviction, but before the nine months had elapsed, s.29(1)(a) was amended so that it would no longer have permitted the applicants to apply to have their licences restored. Dunne J. held that the applicants had, for the purposes of s.27(1)(c) of the Interpretation Act 2005, "acquired" a right to apply for the restoration of the licence at the time of the conviction, prior to the repeal of the relevant provision (even though that right would not have "accrued" until the nine month period had elapsed). Thus, the applicant's right to apply survived the repeal of the relevant provision.[20] This case arose in the context of a criminal law penalty and it remains to be seen whether the same reasoning would be applied in a case where the effect of the repeal was to alter the balance of rights as between two parties to a contractual arrangement.

Conclusion

It may very well be that on the basis of the Interpretation Act 2005 (or on the basis of some other argument not considered in this article) the effect of the repealed provisions has survived. However, until the point is clarified by judicial decision, it also seems possible that an opportunistic defendant could think it worthwhile to raise the fact of the repeal of the underlying legislation if, in respect of a pre-December 1, 2009 mortgage, a lender sought to rely on an implied power of sale or to appoint a receiver. Lenders, or potential purchasers of the mortgaged property, might also have concerns about relying on a particular reading of the Interpretation Act 2005 (or on another saving argument) and lenders could think it safer to apply for a court order for sale, even if this was less desirable apart from the difficulty under discussion.[21] Uncertainty may also exist in respect of the power of a mortgagor or mortgagee in respect of leasing. Finally, in light of the repeal of s.62(7) of the Registration of Title Act 1964, there seems to be some uncertainty in relation to the fundamental question of the entitlement of a mortgagee of registered land to apply for possession.

Overall, it seems that the dictates of transparency and caution would have strongly pointed in favour of retaining s.62(7) of the Registration of Title Act 1964 and ss.18-23 of the Conveyancing Act 1881 (and the relevant sections of the 1911 Act). In light of this, it is difficult not to suspect that their repeal was accidental. Why would a deliberate decision be made to allow the existence of various powers on the part of the mortgagee, in respect of pre-December 1, 2009 mortgages, to depend on a certain reading of the Interpretation Act 2005? The area in question is one in which certainty is of particular importance. Thus, given that the relevant repealed provisions appear to have been intended to continue to operate, there seems to be an argument in favour of restoring them.

[*] I am grateful to Professor Robert A. Pearce for his observations on some of the issues raised in this article, although he bears no responsibility for the argument made here and for any errors which it may contain.

[1] Note, however, that s.111, in relation to "tacking", and s.96(2), abolishing the remedy of foreclosure, apply to mortgages made before or after the commencement of the relevant provisions.

[2] See s.8(3) and Sch.2, Pt 4 of the 2009 Act.

[3] See, in the present context, Land and Conveyancing Law Reform Act 2009 (Commencement) Order 2009 (S.I. No. 356 of 2009).

[4] See the provisions in Pt 10, Ch.2 of the 2009 Act. Note, however, s.92, which deals with the mortgagee's right of consolidation (whereby the mortgagee could, in certain circumstances, prevent the mortgagor from redeeming one mortgage without also redeeming other mortgages over different properties with the same mortgagee). Under s.17 of the Conveyancing Act 1881, this right was only available to the mortgagee if it had been expressly reserved in the mortgage. Section 92 of the 2009 Act provides that, in a housing loan mortgage, no right of consolidation will exist even if it has been provided for in the mortgage. However, the fact that the 2009 Act repeals s.17 of the Conveyancing Act 1881 appears to have implications in respect of non-housing loan mortgages, in that - unless the effect of s.17 is somehow preserved - the right to consolidate would be available to the mortgagee even if it was not reserved in the mortgage.

[5] See s.19 of the Conveyancing Act 1881.

[6] See ss.20-22 of the Conveyancing Act 1881 and ss.4-5 of the Conveyancing Act 1911.

[7] See ss. 19 and 23 of the Conveyancing Act 1881.

[8] See s.18 of the Conveyancing Act 1881 and s.3 of the Conveyancing Act 1911.

[9] See J.C.W. Wylie, The Land and Conveyancing Law Reform Act 2009: Annotations and Commentary (Dublin: Bloomsbury Professional, 2009), p.271.

[10] Section 114 of the 2009 Act deals with the surrender of leases and covers leases which have been granted pursuant to s.112, which relates only to mortgages created on or after December 1, 2009. However, s.114 also refers to the surrender of a lease "as authorised by the terms of the mortgage" and this aspect of the section does not appear to be limited to post-December 1, 2009 mortgages.

[11] It appears that it was common for mortgages to include an express contractual provision in respect of the power of sale, which would displace the implied statutory power of sale: see Wylie, fn.9 above, p.279. See also Wylie, pp.255-256, stating that "it was common practice for the statutory provisions (particularly those involving mortgagee remedies) to be incorporated, often with some modification, in commercial mortgage or debenture documents".

[12] See s.8(3) and Sch.2, Pt 5.

[13] See Northern Bank v Devlin 1924 1 I.R. 90.

[14] See s.96(1)(a).

[15] See art.4(xii) of Rules of the Superior Courts (Land and Conveyancing Law Reform Act 2009) 2010 (S.I. No. 149 of 2010), amending Ord.96, r.14 of the Rules of the Superior Courts. The amended text refers to the procedure to be applied in respect of applications for possession under s.62(7) in relation to pre-December 1, 2009 mortgages.

[16] Note also s.5 of the Conveyancing Act 1911.

[17] Note also s.3 of the Conveyancing Act 1911.

[18] See the discussion in D. Dodd, Statutory Interpretation in Ireland (Tottel, 2005), paras 4.50-4.54.

[19] [2008] IEHC 78.

[20] To support her decision, Dunne J. also relied on s.27(1)(b), which provides that, when a provision is repealed, the repeal does not "affect the previous operation of the enactment or anything duly done or suffered under the enactment". However, this argument is more difficult to understand, since s.27(1)(b) seems directed to events prior to the repeal and would not seem to be relevant to the question of whether, after the repeal, a person has a continuing right to rely on the terms of the repealed enactment.

[21] Note, in relation to mortgages "to consumers in respect of their principal private residence in this State", the terms of the Financial Regulator's Code of Conduct on Mortgage Arrears (February 2010). This Code states (p.7) that, "Repossession of a property may come about by voluntary agreement with the lender, through abandonment of the property by the borrower without notifying the lender, or by Court Order." Note that it appears to be common at present that an order for sale would be sought in the same proceedings as an order for possession: see N. Maddox, Land and Conveyancing Law Reform Act 2009 :A Commentary (Dublin: Round Hall, 2009), p.141.