AN ARD CHÚIRT
(The High Court)
BAILE ÁTHA CLIATH 7
(Dublin 7)

24th October 2023

A chairde,

When the law is changed, who tells the judges?

You may find the answer in the enclosed. You may not!

Also, please find a copy of my correspondence with the Governor of the Central Bank which I previously copied to the Finance Committee.

Le gach dea ghuí

Edmund Honohan
The Master of the High Court.

AN ÁRD CHÚIRT
BAILE ÁTHA CLIATH 7
☎ (01) 888 6000

THE HIGH COURT
DUBLIN 7
Fax (01) 872 1620

Re: Directive (EU) 2021/2167 on Credit Servicers and Credit Purchasers
The New EU Mortgage Moratorium on Repossessions

To all TDs and Senators,

A Chairde,

Your staff are frequently asked for advice and help in regard to mortgage arrears on their housing loans. Legal aid is not available to distressed borrowers in court and an obvious inequality of arms blights all *"repossession"* proceedings. How any litigant *"in person"* can be expected to be familiar with inaccessible provisions in EU Directives or Amendments thereto, which are even less accessible, or Irish Statutory Instruments, is beyond me.

You should be aware that, as of end December, the above Directive will have been transposed into Irish domestic law by a Ministerial Statutory Instrument to be signed by Minister Michael McGrath.

In part, that Directive (which deals primarily with Central Bank regulation of credit servicers and credit purchasers) also amends the 2014 Directive on Mortgage credit to require that mortgagors in distress be provided with helpful options *"before foreclosure proceedings are initiated"*. Effectively this imposes a new moratorium to enable "creditors to make efforts to exercise, where appropriate, reasonable forbearance." Article 28 of the 2014 Directive, as now amended by the 2021 Directive, now reads:

> *Member States shall require creditors to have adequate policies and procedures so that they make efforts to exercise, where appropriate, reasonable forbearance before foreclosure proceedings are initiated. Such forbearance measures shall take into account, among other elements, the Consumer's circumstances and may consist of, among other possibilities:*
>
> *(a) A total or partial refinancing of a credit agreement;*
> *(b) A modification of the existing terms and conditions of credit agreements, which may include, among others:*
> *i. extending the term of the agreement;*
> *ii. changing the type of credit agreement;*
> *iii. deferring payment of all or part of the instalment repayment for a period;*
> *iv. changing the interest rate;*
> *v. offering a payment holiday;*
> *vi. partial repayments;*
> *vii. currency conversions;*
> *viii. partial forgiveness and debt consolidation*

The Land and Conveyancing (Amendment) Act 2019 (the "Boxer Moran" Act) introduced the yardstick of "proportionality" into the court's "repossession" jurisprudence. It also required the court to weigh a Defendant's counterproposals. Building on the Act, and at the request of "Dublin Gazette," in December 2019, I put together some model alternatives to repossession, each with a user-friendly acronym, including the "Extended Redemption Option" (ERO); the "Portable Trade

Down" (PTD); the "MTR Put Option"; the "Bailout Carried Forward" (BCF); and the "Court Managed Receivership" (CMR). (I didn't charge any fee for this, obviously!). (see appendix)

Also active on the side of distressed borrowers, Deputy Michael McGrath, now Minister for Finance, introduced the Consumer Protection (Regulation of Credit Servicing Firms) Bill, which was passed in 2018, and which brought the Central Bank into the dynamic as a watchdog. And now, three years Later, we have the EU's Europe wide Directive, (2167 of 2021), underpinning and reinforcing that regulatory objective and extending regulation to so-called credit "purchasers", shadow bank entities which have bought the loan portfolios of the retail bank "loan originators". In turn, these entities, "orphaned" SPVs owned by "charities" (believe it or not), act as intermediaries and float the receivables to RMBS (residential mortgage-backed securities) investors in the capital bond market.

From "encouraging..." to "requiring" creditors...

Amendments to Directives are big news. Brussels means business on this one, clearly.
The debt forbearance measure in the original 2014 Directive required Member States to "adopt measures to *encourage* (my emphasis) creditors to exercise reasonable forbearance, etc...." but this has now been firmed up to read "Member States shall *require* (my emphasis, again) creditors to have adequate policies and procedures so that they make efforts to exercise, where appropriate, reasonable forbearance before foreclosure proceedings are initiated."

Perhaps I should also have added emphasis to the word "before" in the provision quoted above. Creditors now have to press the "pause" button on court action.

Clearly, the new moratorium is not open-ended, but neither is it time limited. The court will decline to entertain any "foreclosure" (collateral recovery/"repossession") claim unless it is satisfied that the "efforts" have been conducted with due regard firstly, for the EU's Charter of Fundamental Rights, and then also to some, if not all, of the loan modification measures (including partial forgiveness) listed in the Directive.

Credit Servicers

Some of you will recall that in the past housing loans were secured by the borrower handing the title to the house to the lender, retaining the right to redeem by repayment. But in 2009 we streamlined that business by substituting a legal charge on the house in place of the old mortgage though, confusingly, retaining the terminology. The borrower's title was then subject to the lender's charge but he remained the legal owner.

But then came a revolution in banking. Lenders started to fund the consumer loans by themselves borrowing *"securitising"* from the capital markets. In turn, these funds regularly remortgaged their portfolio of loans raising further capital by "leveraging" from the capital markets and collateralising these funds by the old fashioned mortgage involving a transfer of title of loans to the capital market funder.

We have had the term *"credit servicer"* in legislation for nearly ten years now, but the term *"credit purchaser"* now appears for the first time (to my knowledge). What many do not realise is that the retail mortgagee who advances the home loan (the *"loan originator"*) holds title to the loan for only as long as it takes him to sell on the credit to an unregulated *"credit purchaser"*. This is first stage, "securitisation". Sometimes the process of commodification proceeds further, and ownership of the risk and collateral can become fragmented amongst many investors.

For this reason, management and administration of the loan contract of the borrower is contracted out to a credit servicer. And more often than not, it is the loan originator who undertakes this role. (This can cause confusion for the borrower. Seemingly, also sometimes for the loan originator!)

It's surely clear that *only* the party which is entitled to possession of the house is entitled to seek a possession order. No one else. A recent portfolio sale of Ulster Bank loans was reported as a purchase by AB Carval *("through a vehicle called Elmscott Property Finance")* and that the new owner *"has enlisted loan servicing firm Pepper Finance to manage the loans as legal title holders"*. (Irish Times 6th September).

You cannot be the *"legal title holder"* of the mortgage charge unless you are the owner. The credit servicer doesn't have ownership; it just has a contract for services. As loan originator, he was owner of the mortgage once but, after a "true sale" securitisation, did the credit purchaser assign even the legal title back to the servicer? Even an equitable assignment? I can't find it.

A new species of unregistrable burden? An unregistered burden on a registered burden? How "conclusive", then, is the Register? (Lord Denning once complained about what he described as *"the welter of registration"*. One can see why).

Nor is the servicer the *beneficial* owner "in due course". That interest clearly now belongs to the loan note holders joined in the "true sale" purchase of the portfolio.

This process of "securitisation" is certainly confusing, but only when it becomes necessary to *"foreclose"* the mortgage (a process known in financial circles as "collateral recovery"). The party entitled to possession is the party whose capital is at risk. In accountancy terms, on whose balance sheet does the charge appear as an asset? (NB. If it's on your balance sheet and you're not the registered owner, you've got a problem!

In order, presumably, to expedite prosecution, many of the credit servicers have falsely represented themselves as owners of the loans. The existence of funders who are the true owners is concealed from the courts. In the case of Housing Loans, Section 97 speaks of possession orders at the application of mortgagees. By implication, a possession order is *unavailable* to any other applicant, Credit Servicers are not mortgagees.

The Directive is also clear on the point. A new provision, Article 28, paragraph 1(a) is now to be read into the 2014 Mortgages Directive to the effect that *"In the event of an assignment to a third party of the creditor's rights under a credit agreement, the consumer shall be entitled to plead against the assignee any defence which was available as against the original creditor."* Obviously, the EU Commission so provided because the law expects the third party assignee, the *"credit purchaser,"* as owner, to be the Plaintiff in possession proceedings, and no one else.

My Take

After securitisation, the loan originator becomes the credit servicer. Not a problem. Just don't tell the PRA the charge has been sold on. And don't tell the Court it's been sold on.
Say: "*I'm registered as owner*" (the truth: that's what it says on the register of title), but don't say: "*I'm not the owner*" (the whole truth).

Then, instead of selling as mortgagee in possession ('cos you're not the mortgagee anymore, just the servicer), get a possession order from the Court in your own name and use that as your title document. You could then sell the order itself (sic).or evict and sell the property "with vacant possession." Remit the proceeds to the credit purchaser.

And, of course, the shortcut is equally convenient for *performing* loans because the credit servicer, persisting in his charade as mortgagee, can give good (bad) discharge by endorsing receipt on the deed. No need to bother the (offshore) credit purchaser, even though the relevant Statutory provisions have not been complied with.

The legal charge can be listed as a "burden" on the folio registering ownership of the land but, as confirmed by the retired Deputy Registrar, John Deeney, in his comprehensive book, at page 142: *"Registration of a charge as a burden on registered land is not evidence of its ownership, it is evidence only that the charge is an encumbrance on the estate of the registered owner."*

Claims to ownership of the charge, when made by credit servicers registered as owners, must be rejected as fraud. *"Mere entry will not, of course, give validity to an invalid claim."* In reality, their validity is never challenged or adjudicated, largely because the name it bears is that of the original lender even after it had morphed into a credit servicer without title to the charge, and the change has not been notified to the Register. It is a *"conveyancers' artifice"* and involves several prosecutable offences, not to mention, when the case comes to court, clear perjury in the failure to tell not just the truth but the whole truth regarding ownership.

This topic has also struck the Supreme Court as one which demands full debate but, of course, the Court can (perhaps frustratingly) only deal with the issues which arise in those cases which arrive in its list. Actually, members of the Court have effectively signalled that they are on the lookout for a suitable case. In a "Determination" declining to entertain an appeal, on other grounds, in Pepper v Jenkins 2020 IESC DET 118, the Supreme Court noted as follows:

"The Court does not exclude the possibility that, in a suitable case, the entitlement of the transferor of the beneficial interest in a security who retains the legal title to seek an order for possession might meet the constitutional threshold but the present application does not raise that issue."

This may be ominous news for credit servicers. It also suggests that s.31 of the Registration of Title Act is no longer fit for purpose. That Act dates back to a time when mortgages were not collateralised. "Owner"? There is no point in being the registered "owner", if only the beneficial owner can sue for possession. There is nothing to be gained from the (misplaced in my view) reading of the section to the effect that the registered "ownership" is presumed to be "conclusive". Conclusive of what? Forget about s.31. Prove your title the old way. The registered ownership doesn't cut it.

These are technicalities (apart from perjury, which is, to my mind, foundational) and one can understand why courts have long upheld the moral hazard viewpoint and are loathe to refuse a lender the orders he seeks against a defaulting borrower when a societal lynchpin might be destabilised, but two wrongs don't make a right.

"Unfair" terms: negative clearance

It is in consumer contracts (contracts of "*adhesion*" – take it as you find it) that terms unfair to the consumer are most likely to be found. They may even be considered to be unfair if the small print language is unintelligible.

The court will not look at contract terms which have been "individually" negotiated (or at core terms, the main subject matter, the price etc., which are "in plain intelligible language"). Only at terms ("of adhesion") which are the same for all customers. Any non-negotiable term may be determined to be unfair where, *"contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer."*

The scope of the review of these terms includes "all circumstances attending the conclusion of the contract." Terms which were not individually negotiated might still be nuanced. A.I. might not pick it up. All contractual terms are factually contextualised. Interpreting them, on the balance of probability, involves judgement of evidence, and preferably not relying (hilariously) on the oath as quality control of evidence of code compliance. Commenting on the Judicial Review test of "substantial evidence" supporting an agency's finding, (Universal Camera 340 U.S. 474 1931), Mr. Justice Frankfurter said that *"It is not permissible for courts to determine the substantiality of evidence without taking into account... whatever in the record fairly detracts from its weight."*

The circumstances include, of course, Consumers' reliance on what is said to them. *"If they can be induced to part with money by claims and promises, and the seller can then simply disclaim responsibility on the basis of "variation clauses," the scope for "bad faith" is clear."* (OFT Bulletin 5). But the OFT also noted that "there may be no unfairness in a term that enables a supplier to change prices only in line with an independent published index."

The current rate changes being demanded of mortgagors by the non-bank funds need to be examined in regard to fairness/unfairness of price changes during the term of the contract. I haven't yet seen any breakdown of these *"credit purchasers"* cost of funds in the capital market. They are not tracked to ECB bank rates. Yet, to be fair, the formula used to measure interest chargeable is supposed to be clear.

Changes to interest charges "not fairly related" to the credit purchaser's cost of funds (including so-called "price gouging" by non-bank mortgagees) may be found to be unfair and unenforceable (on a case-by-case basis). In 2020 the Supreme Court looked in passing (*"obiter"*) at interest charges imposed *after a default* and thought it "likely" that rates "not fairly related" to the costs of the lender would be found to be an unfair "penalty".

It is unusual to find an *obiter* to the effect that a particular outcome is "likely". On the authority of that judicial comment, I say that it is "likely" that the courts will need open book access to credit purchasers' business accounts when interest charges are hiked because of (alleged) underlying "cost of funds" inflation.

Own Motion Assessment

There is strong institutional resistance to the obligation imposed on the courts to scan consumer contracts and satisfy themselves that the terms are not unfair, even in cases when neither party requests the court to do so. Lawyers strive to draft written terms which are certain and binding and the notion that a subset of contracts – consumer contracts – might be uncertain (or might operate "*unfairly*") is counterintuitive to the judges.

This push back was, perhaps unwittingly, aided by a section of the Consumer Rights Act which reproduced a distorted version of the EU Law principle. Section 13b provided an escape clause. It provided that the obligation *"shall not apply unless* (my emphasis) *the courts consider that it has before it sufficient legal and factual material to enable it to determine whether the term is unfair."* An easy opt out for a judge? No sanction for the opportunistic Plaintiff who omits key documents in order to game the system?

My reading of EU case law suggests a much firmer obligation. In SPV Project 1503 (Case C – 693/19) the ECJ found that *"effective judicial protection* necessitates (emphasis added) *that the court hearing the proceedings is able to assess whether the contractual terms are unfair."* I read that as a direction to the national court to make the appropriate arrangements to ensure its ability to assess, failing which the claim should fail.

In my view, any case involving a consumer contract must be deemed to be a *"contested"* case *ipso facto*, and court rules require it to be placed in the Judges' list. It's also clear from that ECJ judgment that the suggestion that the County Registrar could do the negative clearance of terms instead of placing the case in the Circuit judge's list is not a runner. It's a task for "the court hearing the proceedings," not a quasi judicial court officer (who, *"while not expected to give detailed written rulings, should always give the gist of the reasons for a decision."*).

Another standard contract term, the "transfer of rights" clause - the contractual entitlement of a lender to sell on all or any part of the *security* (emphasis added) without notice to the borrower - piqued the interest of the Supreme Court (*Pepper Finance v Cannon [2020] IESC 2*), who noted that *"the Appellants have not given any indication as to how the clause in this case could be found to have been unfair to them."* Does this not suggest that the Supreme Court would welcome an opportunity, in another case, to delve into this issue also? (The Supreme Court specifically referred back to a 2011 judgement of Judge Peart in which he rejected an unfair contract terms challenge on this issue on the basis that such clauses *"are neither unusual, mysterious nor unlawful."* No mention of "fairness." Perhaps trial judges need to look more closely at contract terms.)

Access to Justice

Writing in *Prospect* magazine in 2018, David Neuberger, former President of the UK Supreme Court, said: *"Without the rule of law, society becomes unjust, violent and poor. It is of fundamental importance that Courts are open and accessible. Accessibility means that people with grievances and those being sued must get access to legal advice and to Courts. It is an affront to justice if people cannot understand or enforce their rights."*

If you need insight into the shortcomings of our system, you could hardly do better than dig out and read two written judgments of our High Court Judge Max Barrett. He plays a straight bat, but his unease is obvious. (*Start v Cussen* [2021] IEHC 531 ; *EBS v Ryan* [2020] IEHC 212).

Looking over our Judges' shoulders, the European Court of Human Rights frequently insists on access to courts allowing for *"effective participation,"* and this ECHR Article 6 prescription is further bolstered by the EU's own Charter of Fundamental Rights, applying due process guardrails (A.47) to all litigation referencing EU law. Note: once mortgage credit materialised in the form of an EU Directive, the Charter is engaged.

In the absence of significant legal aid for housing cases here, will any litigant manage to "participate" to the extent of raising specific issues regarding either (a) the new forbearance moratorium under the amended Article 28, or (b) the specifics, the intelligibility,.and the bona fides of contract terms in consumer contracts of adhesion? Or both (a) and (b)?

When we find the Court of Appeal having to spell out to a trial judge that he was wrong to read hearsay evidence, objection notwithstanding, and then *"simply refraining from referencing the documents in the judgment delivered... without expressly ruling on admissibility or engaging with the consequences of the ruling."* (*Comerford v Carlow Co.Co.* [2021] IECA 253), what hope is there for reasoned rulings on all these new complex issues in consumer mortgage litigation (mostly, when the lay litigant doesn't even know he can object!).

Regulatory role of the Central Bank

In adversarial court proceedings with *"inequality of arms"* (see C-600/19 *Ibercaja Banco* in regard to the financial resources of debtors in default) the principle of effective *judicial* protection applies.

There is another way. In the Consumer Rights Act 2022, the Central Bank, as regulator, is equipped with the tools to raise these issues in court. A hands-on approach by the regulator could raise issues of substance in regard to contract terms in suits seeking declaratory reliefs against credit purchasers and/or credit servicers. It is also to be hoped that the Central Bank will be proactive in holding the servicers to account if they continue to assert legal ownership. The securitisation paperwork says otherwise.

The plain-to-see risk here is that, absent a proactive *"legitimus contradictor,"* the Central Bank will think that the court is across this, while the court will assume it's a regulator's job for the Bank, in due course. Sometime.

Central Bank published (in 2019) analysis of the use of derivatives by securitisation special-purpose-vehicles showed that over forty percent of assets of SPV's domiciled in Ireland are of SPV sponsored by banks, but *"both derivative user and non user vehicles are predominantly orphan entities (set up by charitable trust),"* and that *"consequently, there is no direct liability of the* sponsor." But the report concluded that *"the nexus of reliance on debt finance, strong interconnectedness with the banking system, reinforces the importance of close monitoring and macroprudential surveillance of SPV's."*

The bank's macroprudential concern is, as always, contagion spreading from SPV *"credit purchasers"* to the general retail banking system. The retail banks have exposure to counterparty risk where the credit purchasers' funding has been leveraged with retail bank lending.

But under the new Directive the Central Bank now has a more hands on role in protecting mortgage consumers. Systemic and/or institutional malpractice by credit servicers must be sanctioned even where prudential concerns are triggered. The bank is on both sides of the trade.
(Also, the bank may now also find itself regulating servicers which are domiciled here but ply their trade elsewhere using new passporting mechanisms.)

<u>The Ombudsman</u>

It may be helpful to clarify that the Oireachtas is the forum to which all Statutory Regulators must account, and the Ombudsman is the actor to report on maladministration. As a matter of law, the Courts are likely to follow English judgements which re-direct maladministration claims, declining particularly where the regulator has a liability shield in its statute.

After the publication of the UK Ombudsman's report into the collapse of Equitable Life (entitled *"A Decade of Regulatory Failure"*) blaming financial services regulator FCA, the Court declined to overturn the Government's refusal to follow through on the Ombudsman's recommendations, quoting this rationale: *"The role of the Ombudsman under the 1967 Act is not only to report to Parliament, but, where appropriate, vigorously to alert Parliament to an injustice which has occurred through maladministration."* (Ultimately the UK government made *ex gratia* payments to pensioners whose savings had been lost.).

Edmund Honohan
The Master of the High Court

P.S. If you get the chance, please try to dissuade your constituents from taking out "reverse mortgages," cashing in some of their equity for some short-term retirement bucket list. In my experience, they live to regret it down the line, often leave suspicion and bitterness between offspring and their in-laws, and sometimes costly litigation.

PTD - The Portable Trade Down

YOU can afford to pay the mortgage now, but not the arrears?
Carry the loan (and a mortgage to secure it) to a trade-down home.

Happy days: you do not need to fit in with Central Bank guidelines because the Vulture Fund is not a bank!
Go to over 100% LTV if necessary. Build in an equity release to cover other creditors (if any). A fresh start!

Bring into court the exact plan: "This is the house we could move to, and we can do this if the court agrees."
Your winning argument should be: This gets the Vulture Fund a better deal than in an Insolvency Arrangement.

Difficult to prove, but also difficult to disprove.
If the Vulture Fund tries, argue back: the current arrears will be paid, and the mortgage payments will resume.

The 'MTR' Put Option

BET you didn't know that you're a 'receivable'! Every NET cent the Vulture Fund hopes to generate from your situation is, for them, a 'receivable'.

The issue for the court is that in order to assess 'proportionality', it needs to know what figure the Vulture Fund has pencilled in.

If they expect say, 100, from the sale, with the then unsecured deficit written off, (and can prove it), then you may be able to meet that by offering to pay a rent which, as a stream of future payments discounted to its Present Value (PV), at a specified and reasonable rate of interest, is equivalent to 100.

You can do this by offering to pay annual rent to the Vulture Fund as your landlord, and you get to remain in your home as a long-term tenant.

That Landlord/Tenant deal has a capital value of 100, which the Vulture Fund can sell on.
And the put option? Pay a little extra to buy the right to buy your home back, whenever (within 21 years).

Rent unpaid? Lose the house, lose the option.

BCF - The Bailout Carried Forward

MOST of us remember the crazy junior bondholder decision (pay them 100%).

It is a fact that your mortgage loan has been securitised, collateralised, sold on, reinsured and assigned by subrogation and so forth, again and again, to the point where its core asset value, resting finally in some balance sheet, has shrunk to the grade of junk bond.

Discounted many times, losses absorbed and risks priced in, the ultimate owner is the 'junior bondholder' of this transaction.
Ask the court to presume (unless its proved otherwise) that the beneficial owner is offshore, not Irish.

Offer a full and final 50% to buy out the nominal debt.
That's TWICE the asset value in the owner's balance sheet, and HALF what you owe.
That's proportionality. (And an offshore owner doesn't have Constitutional rights here).

CMR - The Court Managed Receivership

NOMINATE a trusted but independent third party to be a Court Supervised Receiver of the home, pending further Order.

To conduct a sale by public auction (with "vacant possession" but with the option of renting to you), and in the meantime (until completion) to allow your continued occupation as a licensee. (Pay a market rent to the Receiver).
Court directions to place a reserve on it, namely the sum which you, or your VBF or PRF, are able to raise to buy it.

Do not attempt to rig the auction: stay well away (this isn't John B Keane's The Field).
If you don't get to buy, offer the new owner to rent the place from him even if only on a temporary convenience basis.
Knowing how keen you are to stay, he may realise you'll be a long-term and paying tenant, with or without HAP.

ERO - The Extended Redemption Option

THINK ten years. Afforded monthly payments are not credited to your mortgage loan account, but instead held in escrow, and at the end of that period the total paid is returned to you as your deposit when you go to get a mortgage from a bank to buy back ("redeem") the house at it's market value.

The deposit lump sum "rests in your account", and is then paid again to the Vulture Fund as part of a "full and final" redemption. (You can assign your right to redeem at this point).

Residual arrears (if any) on the mortgage account are written off. The ten year deposit period will be cut short if you default at any point, and your savings will be forfeit.

AN ARD CHÚIRT
Na Ceithre Chúirt
Baile Átha Cliath 7
☎ (01) 888 6000

THE HIGH COURT
The Four Courts
Dublin 7.
Fax: (01) 872 5669

20th April 2022

Dr. Gabriel Makhlouf,
Governor,
Central Bank of Ireland,
North Wall Quay,
Dublin 1.

Re: Integrity of Registration of Land Title,
Ownership of collateral in securitisation,
Promontoria v Gethins.

Dear Governor Makhlouf,

Greetings from the Four Courts.

Many collateral recovery cases where the loan originator has sold its nonperforming loan portfolio are throwing into sharp relief an issue regarding the accuracy of title to land, and burdens specifically, recorded in the LRA's Register. As you will appreciate, the integrity of land title registration is of systemic importance, and it is threatened when there are unanswered questions. This is collateral damage caused by securitisation.

In a single sentence, the following is the query:

Is there any form of asset based securitisation in which ownership of the asset is NOT transferred as collateral ?

If it's a true sale, the fact that the loan originator remains on the Register as owner of the "burden" would be of concern to the SSPE investors. Of even greater concern, I would think, would be the insistence by lawyers for the loan originator (after securitisation, only a mere manager) that the registration aforesaid is "conclusive evidence" of ownership, and good against all claimants to the contrary.

For a proxy for the SSPE to make such a claim would undermine the essential bankruptcy remoteness of the securitisation. I'm sure securitisation investors want a bankruptcy remote construct, and I'm sure that's what they've bought. But the transaction documents come to us heavily redacted, and we don't know what we should be looking for.

If, in law, only the mortgagee can sue for foreclosure (possession or "repossession", in colloquial terms), and only the mortgagee can give good receipt to a redeeming mortgagor, we have a problem. Who is the mortgagee ? (A proxy for the mortgagee cannot make the claim on its own behalf; to do so involves deceiving the court.)

In a true sale, it is not open to the loan originator to claim (as frequently happens) to be "conclusive" owner of the charge SOLELY on the basis that the burden, as registered, refers to it as the party claiming the benefit. The loan originator's status as registered owner of the charge is consistent with a true sale securitisation ONLY in the sense that it is only recorded as such in the register, and where such registration as *evidence of ownership* is not conclusive.

There's a tension between shadow banking's understanding of ownership of collateral, on the one hand and, on the other, the law's view as asserted by loan originators. The SSPE investors think their vehicle (the one which receives the receivables) owns the mortgage. The loan originators tell the court they are still "entitled" to collect because their registration as owner is "conclusive." If the former is correct, the formal statutory registration of title is corrupted by a false assertion, and is no longer accurate.

1. *Can a loan originator validly claim "conclusive "ownership of collateral after a true sale securitisation ?*

2. *Will the books of the loan originator, completed to IAS 39, reveal the truth ? (And is there any awareness of non-compliance with the registration requirements set out in Section 7 (1)(f) of the Credit Reporting Act, 2013 ?),*

3. *Doesn't the Asset Covered Securities Act, 2001 define "Commercial Property" as excluding Agricultural land ? What, then, are the consequences when farmland collateral is securitised ? Is the true sale void ?*

4. *Is it only since Regulation 2017/2402 that non-performing loans may be included in securitisation ? Section 35(2) of the 2001 Act was applicable up to that point ?*

5. *What will the effect on our land titles be when synthetic securitisation is included in the EU's STS ?*

Can you please clarify and/or elaborate and could you please release your response into the public domain ? There is only one way that a court can be kept abreast of your expert views, and that is if and when a litigant is able to exhibit your written, and published, response to the queries raised.

I am enclosing a copy of the case documents in Promontoria v Gethins which was in my list recently, and was the subject of some press coverage, including reference to my comment to the effect that I intended to refer the papers to you. As it happens, the angle the media picked out was in regard to the plaintiff's claim to recover a portion of the folio which had not actually been mortgaged. It was not my intention to ask for your reaction to that part of the story, but only in regard to the general concerns in regard to the integrity of the Register. Anyhow, one way or another, the case is no longer *sub iudice*, as I struck out the Summons last month.

Also enclosed is a copy of my Decision in the case which you may find useful in understanding the issues raised in this letter.

Kind regards,

Edmund Honohan

Edmund Honohan
The Master of the High Court

Banc Ceannais na hÉireann
Central Bank of Ireland
Eurosystem

T +353 (0)1 224 5000

Bosca PO 559
Baile Átha Cliath 1

PO Box 559
Dublin 1

www.centralbank.ie

Edmund Honohan
The High Court
The Four Courts
Dublin 7.

9 June 2022

Dear Mr. Honohan,

I refer to your correspondence dated 20 April 2022, relating to: (i) the integrity of registration of land title, (ii) ownership of collateral in security, and (iii) Promontoria v Gethins, addressed to the Governor of the Central Bank of Ireland (the Central Bank). The Governor has asked me to respond on his behalf.

The Central Bank serves the public interest by maintaining monetary and financial stability while ensuring that the financial system operates in the best interests of consumers and the wider economy. The Central Bank is also a competent authority with responsibility for prudential and conduct regulation of regulated financial service providers.

Our responses below, to the questions raised in your correspondence, speak to those areas where the Central Bank acts as a competent authority and/or falls within the Central Bank's mandate. The Central Bank cannot comment on the contents of your correspondence as it relates to Promontoria, as the Central Bank is bound by strict confidentiality obligations as set out in Section 33AK of the Central Bank Act 1942. The Central Bank can, however, confirm that we have, further to your correspondence, engaged with Promontoria in relation to this matter.

By way of a general remark, I note that your letter refers to two separate legal frameworks that apply to different financial instruments under Irish and European law. The Asset Covered Securities Act 2001 (the 2001 Act) regulates the issuance of asset covered securities (ACS) in Ireland (also known as "covered bonds").[1] ACS are a distinct form of collateralised funding instrument, and are subject to a range of requirements in the 2001 Act. Most notably, ACS can only be issued by specialist credit institutions that are authorised by the Central Bank. The use

[1] The 2001 Act has been amended by way of the European Union (Covered Bonds) Regulations 2021 (the 2021 Regulations) in order to give effect to Directive (EU) 2019/2162 of the European Parliament and of the Council of 27 November 2019 on the issue of covered bonds and covered bond public supervision. The 2021 Regulation will commence on 8 July 2022.

of Special Purpose Vehicles (SPVs) is not a feature of ACS issuance in Ireland and the loans that collateralise ACS (generally residential mortgages, per current market practice) are usually originated directly from the balance sheet of the specialist ACS bank. As such, the question of "true sale" would not typically arise in the context of ACS issuance activity in Ireland, although it remains possible for parent credit institutions to transfer loans from their balance to that of their subsidiary specialist ACS bank.

By contrast, Regulation (EU) 2017/2402, which lays down a general framework for securitisation and creates a specific framework for simple, transparent and standardised (STS) securitisation (the Securitisation Regulation), regulates a separate (albeit similar) collateralised funding instrument known as securitisation. The scope of the Securitisation Regulation is set with reference to the definition of securitisation in Article 2(1) of the Securitisation Regulation, and a crucial feature for determining whether a financial instrument constitutes a securitisation in this context is whether there is "tranching" of credit risk in the structure[2]. This contrasts with covered bonds/ACS, where no such tranching is present and hence such instruments do not fall under the scope of the Securitisation Regulation in Ireland. In addition, securitisations are generally structured in a manner whereby an SPV[3] is set up to isolate the securitised loans from the originating bank. Where this practice is present in a transaction, then considerations around true sale will be relevant for the transacting parties.

Turning to the specific questions outlined in your correspondence.

1. *Can a loan originator validly claim "conclusive" ownership of collateral after a true sale securitisation?*

We would note that the transfer of loans can take a number of forms such as securitisation or a non-securitised loan sale. Securitisations are contractual agreements between the relevant parties and accordingly need to be considered on a case-by-case basis to determine the applicable terms. The Securitisation Regulation is the EU regulatory framework for securitisation.

As you are aware, a true-sale analysis is a legal test developed by the courts to determine whether a transaction is properly characterised as a sale or secured loan. Where necessary, originators will need to consider with their legal advisors whether a relevant transaction satisfied the true-sale legal tests. A true-sale analysis is most relevant to transactions where there is a sale of the relevant assets from the originator to a special purpose vehicle. As each securitisation can be structured differently and take different forms, the question of the conclusive ownership of assets after a true-sale securitisation must be assessed on a case-by-case basis. Questions as to ownership of title by reference to land registration laws fall outside of the competence of the Central Bank.

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[2] That is, whether the credit risk of the transaction is segmented into different tranches with various levels of seniority (e.g. senior, mezzanine, junior) which dictate how losses are distributed to investors in such tranches.

[3] Defined as an SSPE per Article 2(2) of the Securitisation Regulation.

2. *Will the books of the loan originator, completed to IAS 39, reveal the truth? (And is there any awareness of non-compliance with the registration requirements set out in Section 7 (1)(f) of the Credit Reporting Act, 2013?)*

Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards and the Companies Act 2014 require listed entities to prepare their group financial statements in accordance with International Financial Reporting Standards (IFRS) as adopted by the EU. All other entities have the option to adopt either local Generally Accepted Accounting Principles (GAAP) or IFRS as adopted by the EU or standards deemed equivalent. While the Central Bank is not the competent authority for accounting standards, the Central Bank expects all regulated entities to adhere to the law and to prepare their accounts in accordance with the applicable accounting standards.

It is worth noting that in April 2009 the G20 leaders called on "the accounting standard setters to work urgently with supervisors and regulators to improve standards on valuation and provisioning and achieve a single set of high-quality global accounting standards". In this regard the International Accounting Standards Board (IASB) issued a new accounting standard for Financial Instruments, IFRS 9, which replaces IAS 39. IFRS 9 is applicable for accounting periods starting on or after 1 January 2018. IFRS 9 introduced a new regime for impairment provisioning and imposes an Expected Credit Loss approach to provisioning as opposed to the incurred loss approach that was required by IAS 39.

In relation to Section 7(1)(f) of the Credit Reporting Act 2013, whether a credit agreement has been securitised was not included in the list of attributes collected by the Central Bank upon operationalising the Central Credit Register (CCR).

3. *Doesn't the Asset Covered Securities Act, 2001, define "Commercial Property" as excluding Agricultural land? What, then, are the consequences when farmland collateral is securitised? Is the true sale void?*

The definition of "commercial property" in the 2001 Act is only relevant in the context of the issuance of ACS/covered bonds. In this respect, Section 3(1) of the 2001 Act defines commercial property as excluding a building or part of a building that is fixed on land that is used, or is set aside to be used, primarily for the purpose of any mine, quarry or agriculture.

However, it is important to note that the 2001 Act does not regulate securitisation activity as defined by the Securitisation Regulation. As such, this definition of "commercial property", in the 2001 Act, will not dictate whether agricultural land can be "securitised", in the context of securitisation activity under the scope of the Securitisation Regulation. Furthermore, the Securitisation Regulation does not prohibit the securitisation of agricultural or farmland and, accordingly, it would not impact on the "true sale" of such collateral.

4. *Is it only since Regulation 2017/2402 that non-performing loans may be included in securitisation? Section 35(2) of the 2001 Act was applicable up to that point?*

As previously noted, the Securitisation Regulation and the 2001 Act regulate different financial instruments. Prior to the Securitisation Regulation entering into effect as of 1 January 2019, a

more limited set of EU regulatory rules applied to securitisation. These EU rules did not prohibit the inclusion of non-performing loans in securitisations.

Under Section 32(5)(b) of the 2001 Act a designated mortgage credit institution (i.e. an ACS bank) may not include a mortgage credit asset or substitution asset in a cover assets pool, in the circumstances referred to in subsection (2) or (3) of that Section, if the mortgage credit asset or substitution asset is non-performing.

The 2001 Act applies to covered bonds but does not apply to securitisations.

5. *What will the effect of our land titles be when synthetic securitisation is included in the EU's STS?*

The EU's 'Simple, Transparent, and Standardised' (STS) criteria are set out in the Securitisation Regulation[4]. Regulation (EU) 2021/557 (which entered into force on 9th April 2021) amended the Securitisation Regulation in order to create a specific framework for STS on-balance-sheet securitisations (otherwise known as synthetic securitisations). In synthetic securitisations, risk transfer is achieved via a credit protection agreement instead of a sale of the underlying assets. Assets in a synthetic securitisation remain on the balance sheet of the originator and there is typically no true-sale to an SPV.

The Central Bank is not, however, in a position to comment upon any effect of synthetic securitisation upon land titles, as questions as to ownership of title by reference to land registration laws falls outside of the competence of the Central Bank.

To reply to your question on the first page of your letter, "*Is there any form of asset based securitisation in which ownership of the asset is NOT transferred as collateral*", synthetic securitisation would take this form.

We hope the above responses will be useful to you in your consideration of these issues. Should you have any further queries on the above, please do not hesitate to contact me.

Kind regards,

Gina Fitzgerald

Gina Fitzgerald

Head of Division (Financial Risks and Governance Policy Division)

[4] Broadly speaking, non-performing loans cannot be included in STS securitisations under strict criteria that are set out in Articles 20(11), 24(9) and 26b(11) of the Securitisation Regulation.

AN ARD CHÚIRT
Na Ceithre Chúirt
Baile Átha Cliath 7
☎ (01) 888 6000

THE HIGH COURT
The Four Courts
Dublin 7.
Fax: (01) 872 5669

Dr. Gabriel Makhlouf,
Governor,
Central Bank of Ireland,
North Wall Quay,
Dublin 1

Re: Integrity of Registration of Land Title;
Ownership of collateral in securitization

Dear Governor Makhlouf,

First, I must, of course, acknowledge the letter to me of 9th June last, and thank you for same.

The issue of loan originators (or loan holders "in due course") as plaintiffs, notwithstanding a "true sale" securitisation, continuing to assert legal ownership employing the status of registered owner of the mortgage charge, has again been receiving attention in the Courts, and I have been asked to release my correspondence with you on the subject, comprising my letter to you of 20th April last, and your reply (from Gina Fitzgerald, Head of Division, Financial Risks and Governance Policy Division), dated 9th June.

The sole purpose of this letter is to request that you would permit me to release the June letter, which is marked "restricted".

In particular, the secretariat of the Oireachtas Finance Committee has deferred consideration of the issue raised by me (and any decision to list same on the Committee's agenda) until they have had an opportunity to read the Central Bank's reply, which I have not copied to them.

I am sending a copy of this letter to Paul Ng, Clerk to the Committee, (Paul.Ng@oireachtas.ie, or at the address below), and would ask that you contact him to confirm clearance as requested. Indeed, you might think of sending him a copy of the June letter just to prove the point !

However, that said, it has occurred to me that, as this letter is likely to be included in briefing material for the members of the Committee, if it is decided to examine the issue in open session at a later date, I can perhaps usefully add a few additional observations which may be of use to them in understanding the problem.

So what follows is addressed to them, and is being included as a part of my letter to you only as a courtesy, and not at all in the expectation that you might respond with further written comments. Where the Committee choses to go with this is entirely for them to decide. It is, of course, always possible that they might raise it at your next live session with them. Perhaps useful, therefore, for you to have had prior notice!

In the same way that borrowers think that they "own" their home, even though the bank has the title deeds, most TDs (and journalists) are only dimly aware of the workings of "securitisation" and shadow banking. They remember mutual building societies. What's changed? I haven't come across a more succinct description of the modern process in the liquidity marketplace than this passage in Anatole Kaletsky's 2010 book "*Capitalism 4.0*" at page 134 :

"This build-up of financial debt can be illustrated by contrasting two situations. The first situation is an old-fashioned home mortgage transaction, whereby a homeowner borrows $1m dollars from a commercial bank such as J.P.Morgan. The second is a borrowing chain, which works like this: The homeowner (0) borrows $1 million from a mortgage bank (1), which borrows from an SIV (2) which borrows from a hedge fund (3), which borrows from a prime broker (4), which borrows from an investment bank (5), which borrows from a bank (6) such as J.P.Morgan. As a result of this borrowing chain, a $1 million mortgage loan has created $6 million in total debt: $1 million in debt in the household sector plus $5 million of purely financial debt."

In her 2019 book, "*The Code of Capital*", (Princeton University Press), Katharina Pistor of Columbia, having outlined at page 94 that *"In 1968, an amendment to the US Federal Housing Act empowered the GSEs (Fannie Mae and Freddie Mac) to securitize loans backed by mortgages they bought from private banks and that...when private players took over the market for residential mortgage backed securities (RMBS) the GSEs also assumed the role of buyers of tranches in securitization structures private parties had created*, observes that *"The fact that the securitization of mortgages took off, notwithstanding legal obstacles in the way, is remarkable."*

She goes on to observe at page 95 that *"Land law was designed to leave little doubt about who owns a given piece of land at any moment in time, or who might hold a quasi-property right, such as a mortgage, against it. These rules were not made for a mass market in tradable MBS. The private sector used stopgap measures to get around these obstacles....*

And at page 97: *"The finance industry accused the courts of being overly formalistic and of failing to understand that modern markets for debt finance require different rules....In effect, the conflict boils down to the fundamental question: Who should guard the credibility of legal priority rights"?*

"The finance industry devised its own solution: it created a dummy company to pose as the mortgage holder from beginning to end, even as the loans themselves switched hands."

Pistor comments: *"As much as the financial industry needs "clear property rights" to sustain a market in MBS, this can hardly mean that it gets to set the rules for who might claim a collateral or title to the land."*

Now let us look at Professor Adam Levitin's hilarious 2013 article *"The Paper Chase: Securitization, Foreclosure and the Uncertainty of Mortgage Title,"* Duke Law Journal, volume 63 (98 thrilling pages describing hit and miss), which may be accessed at the link below, and which I will produce for perusal if requested. Levitin, Professor of Law at Georgetown University Law Centre, had made a presentation to the US Congress in 2010 which I referred to in an earlier Decision. Skip to page 648 of the 2013 article for its essence. Read onwards from the mid-660s. Check out footnote 144.

And note that in the abstract heading of the article Levitin refers to the controversies as a *"too big to fail"* problem for the courts ! The problem for MBS is the cardinal rule of property law: only the legal owner of the collateral may foreclose.

In Ireland, the problem for the "repossession" plaintiffs was "solved" not by the creation of a dummy company, but by chicanery around an alleged ambiguity in Registration of Title to Land legislation. Instead of having to prove title, a plaintiff, whether he had title as loan originator or successor owner, simply points to his registration as chargeholder, and asserts that the law declares him to be the owner, because the Registrar has registered him as such "conclusively."

A plaintiff, knowing that title has long since passed to the next player in the chain, but who still claims the benefit of the (alleged) conclusivity of the Register, is deceiving the court. He is also in breach of the Statutory requirement that changes of ownership be registered. (Failure to do so is an offence. Otherwise, the great scheme of registration of title fails, destroyed by the existence of incorrect ownership registration).

But this isn't a "barefaced" lie. It is not a failure to tell the truth; it is a failure to tell the *whole* truth. It is obvious that no lawyer, knowing his "instructions" could not be true, would still attempt to push on with the case. However, few lawyers know enough about the securitization paper trail and its financial DNA to question the instructions he is given. And there is no incentive to question.

Furthermore, none of the judges have any past experience in practice, or training, in the mechanisms employed in shadow banking. Does any judge know that after Basel 11 liquidity cannot be "manufactured" other than by a "true sale" securitisation ? This is (I am led to believe) because of the rigour of a strict condition of *"significant and effective risk transfer"* in order to exclude exposure from risk-weighted assets, a condition imposed, not for legal reasons, but in the interest of prudential regulation. In other words, a Central Bank concern.

So, if the investor loses direct contact with the collateral because of a "conveyancers' artifice," it points to a regulatory breach which cannot be tolerated by the regulator. (It is the "true sale" principle which ensures that the securitisation is Basel 11 compliant !) Conversely, compliance with Basel 11 confirms that legal title rests with the note holder "in due course," even though the Register of Charges on the Title states otherwise.

I am adding at the foot of this letter the link to a 2015 paper by Allessandro Scopelliti of Warwick and Reggio Calabria Universities, (only 48 pages plus addenda – see link below) which, as far as I can understand it, explores the various banking capital requirements set for prudential purposes, and describes the variety of uses and abuses which abode in this area. Nowhere in it is there any suggestion that risk transfer by collateralisation (even if there is partial retention) can co-exist with the asset remaining as the legal property, and on the balance sheet, of the loan originator.

Of passing interest, perhaps, and especially after the Minister has recently invited comments on the transposition of the 2019 EU Directive on Debt Servicers, is the question of whether the Central Bank here is in any sense guarantor for US investors in a US investment vehicle that Irish law will be followed when receivables are being collected here. By that I mean to include the behaviour of the entity which purports to appoint the debt servicer, by the debt servicer as (soon-to-be) regulated under the EU Directive, and by receivers who are frequently appointed by entities who are not entitled to trigger the mechanism which is provided for in the deed of mortgage.

In Neil Barofsky's interesting 2012 book about TARP, *"Bailout: how Washington abandoned Main Street while rescuing Wall Street,"* the author, who was then Inspector General of the quantitative easing largesse starting in the US in 2008 (you should read what he has to say about Ireland's friend Timothy Geithner !) comments, at page 125, that *"though there is a good chance that investors will lose a significant amount of money in the foreclosure of a home, the servicers are in a much better position to recoup their fees and expenses. In that way, the economic interests of the investors and the servicers often clash. Though it may be better for an investor if a mortgage is modified, the servicer may be better off if a home goes into foreclosure."*

(Perhaps we need to look more closely at the basis of the CB's concerns about contagion starting in MBS trading. Is there much exposure of regulated banks to dangerous leverage, even in facilities extended to Irish investors?)

Kind regards,

Edmund Honohan

https://dlj.law.duke.edu/article/the-paper-chase-securitization-foreclosure-and-the-uncertainty-of-mortgage-title/

https://www.eba.europa.eu/sites/default/documents/files/documents/10180/1018121/b29b8d37-65df-4054-99b5-87481e6ea724/Scopelliti%20-%20Securitisation%2C%20Bank%20Capital%20and%20Financial%20Regulation.%20Evidence%20from%20European%20Banks%20-%20Paper.pdf?retry=1

c.c. Paul Ng,
Clerk to the Committee on Finance, Public Expenditure and Reform, and Taoiseach,
Kildare House,
Kildare Street,
Dublin 2, D02XR20

Banc Ceannais na hÉireann
Central Bank of Ireland
Eurosystem

T +353 (0)1 224 6000

Bosca PO 559
Baile Átha Cliath 1

[illegible]
Dublin 1

www.centralbank.ie

Mr. Edmund Honohan
The High Court
The Four Courts
Dublin 7.

20 March 2023

Dear Mr. Honohan,

I refer to your correspondence dated 26 January 2023, relating to the integrity of registration of land title and ownership of collateral in security, as well as the release of previous correspondence with the Central Bank of Ireland on such matters. The Governor has asked me to respond on his behalf.

In your letter, you requested permission to provide the Central Bank's letter dated 9 June 2022 ("the Letter") to the Oireachtas Committee on Finance, Public Expenditure & Reform and Taoiseach. Following a separate request submitted to the Central Bank under the Freedom of Information Act 2014, the Central Bank has released redacted versions of the Letter and your original letter dated 20 April 2022. These versions of the letters are now published on the Media Requests section of the Central Bank website at the below address. As such, these versions of the letters are now in the public domain and can be freely distributed. As requested, we are also sending a copy of this current letter to the clerk of the Oireachtas Committee (Mr. Paul Ng), so that he is aware of where to access the above correspondence on the Central Bank website if needed.

https://www.centralbank.ie/about/freedom-of-information/freedom-of-information-publication-scheme/foi-disclosure-log/media-requests

In addition to the above, your letter raised issues in relation to legal clarity regarding the registration of title of securitised loans and the potential interaction of same with certain regulatory rules such as those governing "significant risk transfer"[1]. As advised in our correspondence on 9 June 2022, questions as to ownership of title by reference to land registration laws fall outside of the competence of the Central Bank. Insofar as such matters impact on the so-called "true sale" of loans to a securitisation special purpose vehicle (SPV), we would also reiterate that a true-sale analysis is a legal test developed by the courts to determine whether a transaction is properly characterised as a sale or secured loan. Where necessary, originators will need to consider with their legal advisors whether a relevant transaction satisfied the true-sale legal test. As each securitisation can be structured differently and take different forms, the question of the conclusive ownership of assets after a true-sale securitisation must be assessed on a case-by-case basis. Where the Central Bank becomes

aware of any breaches of the Securitisation Regulation (2017/2402) or Capital Requirements Regulation (575/2013) (as well as related requirements) by market participants, the Central Bank will investigate the issue as a matter of priority and take all appropriate steps within its power to address any breaches.

Your letter also raises broader concerns in relation to securitisation practices, linked to the role of securitisation in the global financial crisis 2008/2009. On this point, it is worth noting that the regulatory framework for securitisation in the EU has been comprehensively overhauled since the global financial crisis, notably via two EU regulations: the Securitisation Regulation (as referenced above) and Amending CRR Regulation (2017/2401). The latter implemented relevant Basel Committee standards related to securitisation[2] in the EU and substantially increased prudential capital requirements related to securitisation exposures on bank balance sheets. A broader set of rules is contained in the Securitisation Regulation including requirements that originating entities have 'skin in the game' in relation to their securitisation transactions, by retaining 5% of the risk. Resecuritisation has also been banned in the EU, subject to limited carve outs, and investor transparency rules have been strengthened, notably regarding the provision of loan-level data via European Securitises and Markets Association (ESMA) authorised and supervised data repositories. Finally, the introduction of the Simple, Transparent and Standardised (STS) securitisation framework creates a segment of the market that is clearly distinguished from other forms of more innovative or exotic securitisation, through the application of detailed rules in relation to eligible securitised loans and the structuring of transactions.

Finally, your letter refers to the EU Directive on Credit Servicers and Credit Purchasers (2021/2167) ("the Directive"). In January, the Department of Finance launched a public consultation on the transposition of this Directive into Irish law. The Central Bank continues to assist the Department of Finance with the transposition and implementation of this Directive. It is worth noting that there is an existing regime for the regulation of credit servicing under the Central Bank Act, 1997 ("the Act"). The Act was amended by the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 to introduce a regulatory regime in respect of Credit Servicing Firms bringing such firms within scope of regulation by the Central Bank. The Consumer Protection (Regulation of Credit Servicing Firms) Act 2018 further amended the Act to expand the activity of credit servicing, as defined in the Act, to include holding the legal title to credit granted under a credit agreement and associated ownership activities.

We hope the above information will be useful to you in your consideration of these issues.

Yours Sincerely,

Gina Fitzgerald
Head of Division (Financial Risks and Governance Policy Division)

AN ARD CHÚIRT
Na Ceithre Chúirt
Baile Átha Cliath 7
☎ (01) 888 6000

THE HIGH COURT
The Four Courts
Dublin 7
Fax: (01) 872 5669

Paul Ng,
Clerk to the Committee on Finance, Public Expenditure and Reform, and Taoiseach,
Kildare House,
Kildare Street,
Dublin 2. D02XR20

Re: Integrity of Registration of Land Title;
Ownership of collateral in securitisation

Dear Mr. Ng,

As of March 20th, the Central Bank has cleared for circulation to your committee its letter of last June to me. In writing to confirm that to me,(attached) the Bank advised me that they had also written to like effect to your goodself. To be precise, the Bank has released a redacted version of its letter, namely the version posted on the net.

Moving on, and with apologies for yet another substantive letter from myself to the Committee, I now enclose the Bank's letter to me of 20th March. You will see that, although I had ventured some observations to them when requesting their permission to release their first letter, and although I had advised that I was not inviting any response to such observations, the Bank has, in fact, developed some points, presumably to assist the Committee in further exploration of the issues I have raised. In similar vein, can I comment further ?

Here is the nub of my argument:
unless SPV ownership of the charge is registered, there is no "true sale"
..... and the securitisation is therefore void ab initio.

Not to put too fine a point on it, originating lenders (or their successors in title) have been coming to Court and *concealing* the fact that their loan book has been the subject of securitisation. They seek possession of the collateral and point to their original registration as owners of the charge as prima facie evidence. And of course that *is* what is registered, but it's not the *whole* truth.

Because if it *was* the whole truth, the MBS SPV investors would not have bankruptcy remote collateral, and could unwind the securitisation.

There is no Delaware-style collateral title "safe harbor" here for ABS investors !

There are other practices of questionable legality on the part of so-called "credit purchasers" (colloquially, "vulture" mortgagees) which should be of concern. I could list them. One example: claims by their agents, the "credit servicers" to be owners, not agents, are often encountered. Surely a case for the regulatory "comply or explain" memo ?

Could it also be the case that some loan originators have opted to retain title to collateral (while securitising nominally on a true sale basis) in order in due course to prosecute money claims for the unpaid residue after sale of collateral *without* allowing for the 90% writedown and limitation of recourse to 10% only of the balance, as would be the case if a true sale had been properly transacted? A double dip ? The securitization counterparty will never know!

I believe it is not open to the Central Bank only to say that they will deal with any regulatory breach to which their attention is drawn. This, at a time when the courts are taking mortgagees' paperwork at face value relying, in effect, on the Central Bank to intervene if the paperwork is irregular on an institutional and/or industrial scale, in regard to those specialised matters which are the purview of the Bank. Even a defendant with full legal team is unlikely to probe behind the initial concealment.

Nationally – as a nation – we are in a most unsatisfactory position if some legal infringement can have consequences both regulatory AND in civil law, and the authorities enforcing one is content to leave it to the other, and vice versa.

Some have usefully characterised regulatory requirements as scoping the legal "capacity" of the regulated entity. I can see merit in viewing regulatory infringement as the key to avoidability on simple civil law ultra vires grounds, but the court will not often discern the small print in, for example, the relevant Statutory Instruments or in third party contracts and deeds (and will often have refused discovery of documents anyway) and, even if discerned, may be inclined to default to some vague "justice and equity" basis for enforcement (without any Statutory basis here along the lines of the UK's FSMA 2000 Section 28(3) – a "harbor", perhaps, but not quite "safe".) "Equity" cannot supplement capacity.

Certainly, to the extent that Irish regulated banks have exposure to MBS lending settlement risk (whether in proprietary trading, in off-balance sheet subsidiaries, or loans either to leverage SPV own capital or individual SPV investors) the Central Bank should not default to regulation activated only on receipt of a complaint. The high-level principles of EU securities directives should inform regulation on a case-by-case basis.

Is there not also a direct regulatory concern for the Central Bank in regard to regulated banks' capital adequacy, measurement of VAR (value at risk, or its current iteration), etc., when the regulated banks MBS SPV related lending is for assets which are not bankruptcy remote (effectively unsecured) because the underlying securitisation is not "True Sale"? I think there is. Perhaps the Governor is thinking along the same lines ? One can only imagine the contagion which might envelope the banks if the securitisation business model here is found to be flawed.

<u>The Credit Purchasers' and Credit Servicers' Directive</u>

In the Bank's letter to me of 20th March, above referred to, the Bank notes that the Consumer Protection (Regulation of Credit Servicing Firms) Acts 2015 and 2018 describe the existing scheme of regulation of such firms by the Bank, and confirms that the Bank

"continues to assist the Department of Finance with the transposition and implementation of the Directive."

Full disclosure here. I, myself, have written to the Minister concerning the public consultation exercise in regard to transposition, and perhaps it is as well for me to let you have a copy of this letter together with the Minister's reply. (both attached)

In case this matter is under discussion in the Committee, I might, with respect, suggest that you could do worse than review the submission on the subject prepared by Professor McKenna in UCG (at my urging, I should point out) which ranges well beyond the issues mentioned in my letter to the Minister. I am attaching this also: it's 45 pages long, but a mine of information and comment which the Committee members will appreciate.

Professor McKenna is particularly concerned at our ability (perhaps even our reluctance ?) to follow through on the new "passporting" arrangements. We have a poor history of regulating passported entities operating out of Dublin. I have no hesitation in mentioning in this context the handling of the Jonathan Sugarman disclosures.

Coming now to Article 28a (the amendment to the 2014 Directive), while the Department is correct in inviting comments about the discretion to extend or be more prescriptive of the listed factors - a sovereign, member state discretion – it is clear that, come December, it will be EU law that the State must "require creditors to exercise reasonable forbearance", and that, as a matter of logic, compliance with the "policies and procedures" will have to be monitored by the State so that the State's compliance with its new role may be demonstrated. Non-compliance would be actionable.

It is to be hoped that the obligation to take the consumer's circumstances into account (perhaps a new obligation to assess an SFS) will, in the case of vulture mortgagees, result in the correction of the mortgage "prisoner" issue.

As for the discretion to further develop the "elements" of forbearance, the law's approach – unconscionability - would allow for the introduction of a review of the credit purchaser's "circumstances" and to correct for extractive supernormal profits, the "risk" of which never featured in the consumer's calculations at the time of contract. Failure by the credit purchaser (or its agent, the credit servicer) to engage bona fide with the consumer in "fresh start" restructure and/or partial debt forgiveness should in future be a good defence against foreclosure/possession.

With apologies for the length of this letter,

Kind regards,

Edmund Honohan

THE HIGH COURT

[2019 415 Sp]

BETWEEN

PROMONTORIA (Oyster) DAC

PLAINTIFF

AND

JOHN GETHINS

DEFENDANT

DECISION of the MASTER of the HIGH COURT delivered on the 22nd day of March, 2022

TITLE TO LAND

1. Yes, of course, a functioning society needs a system of ownership of property and housing. The title to land needs to be readily ascertainable. We started the switch from documentary title to a statutory register over a century ago, and a register of this sort is of systemic importance. But, after the spread of securitisation over the past quarter of a century, the system here is now damaged to the point of dysfunctionality. (That means it doesn't work as intended.)

2. From time immemorial, possession of land was best title, and the law enforced it. Hence the maxim: *"possession is nine parts of the law."* Some mistakenly read that in the sense that possession can trump the law, defeating legal title, but not so. The ownership of land is found in the legal enforceability of the right to possession of those in actual possession.

3. As far back as the reign of Richard II we find a Statute warning of the consequences of taking possession by force *"none make entry into lands and tenements, and where entry is given by law... not with strong hand nor with multitude of people but only in peaceable and easy manner."* (The Forcible Entry Act 1381): *"he shall be punished by imprisonment of his body, and thereof ransomed at the King's will."* The right to quiet enjoyment of land by those in possession has continued over the centuries, into various Human Rights Charters, and is even found in our own Supreme Court's recent judgment (citing "proportionality") in *Clare County Council v. McDonagh and others,* 31st January 2022. In particular, the guidelines of Equity trench on a mortgagee's right to "repossess", by insisting on the mortgagor's right to "redeem" until the moment of execution.

4. Over time, proof of ownership changed from actual possession to formal documents ("deeds") recording transactions. A documentary title to an asset could, in turn, be a

collateral or security for a credit transaction, on the basis that the borrower could repay and recover the asset. That transaction could itself be recorded in a deed of mortgage or instead be effected by a deposit of the title deeds creating a mortgage enforceable in the Chancery courts.

5. When the great registration of title project got underway in the late 19th century, the hope was that documents of title could be a thing of the past. The annotated edition of the latest Registration legislation, the 2006 Registration of Deeds and Title Act, describes the statutory system as *"a superior and more modern system which permits the registration of ownership and certain land burdens in the Land Registry and greatly simplifies the investigation of such titles for conveyancing Solicitors."*

6. In *Hannon's* case in 2019, Clarke C.J. said of the register that *"a person who consults the register ought to be able to know who owns what interest in the land and who may have the benefit of charges or burdens over the land."* (emphasis added).

7. The problem is that the register no longer contains accurate data and has been corrupted by the evolution of a capital market intent on liquidity and arbitrage trading. The unthinkable has occurred: burdens which are the essence of mortgage lending have themselves been re-mortgaged by the originators and the register is silent on this "*securitisation*" of the mortgagees' assets.

8. So, we now come across registered owners of land - whose title, it must be recalled, is, by law, "conclusive" (see s31 of the 1964 Act) - finding that some unregistered entity has sold the land.

9. Equally concerning, especially for purchasers of land at distressed sales, is the realisation that their acquired title has a part unregistered chain, and is not therefore beyond dispute: time to purchase title insurance? The SPV hedge fund purchasers of nonperforming loans and security collateral may also have to consider demanding the return of their investors' capital.

10. Even more unsettling is the use of "conveyancers' artifices", contrivances employed in the mortgage industry to take advantage of the shortcomings of the register in order to fast-track collateral recovery, usually by "badging" a registered entity with a fake I.D. while doing business off register. Professor Adam J. Levitin of Georgetown University, Washington has described securitisation as "*the apotheosis of form over substance.*"

11. SHORTCOMINGS OF THE REGISTER

i. The widespread assumption that the owner of a registered charge is "conclusively registered" as owner of the charge.

ii. The subterfuge that the loan originator can sell beneficial ownership of the charge to investors (via a Special Purpose Vehicle for tax "neutral" capital intermediation) but still claim to be entitled to possession as before.

iii. Failure to require updating of the register when securitisation alters the ownership status of the loan originator.

iv. The strange notion that a "bare" trustee can, as such, initiate proceedings for repossession (as a bare trustee, it cannot even give good receipt). Or that a bare trustee can acquire or trade in court possession orders.

v. The assertion that an off-register bare trust can be created without a formal settlement by the legal owner of the charge.

vi. Avoiding the bar on registering co-owners as new owners of the charge by just not bothering to let the Registrar know about any securitisation which splits title in this way.

vii. Dodging the Companies Acts' requirement to register charges on assets.

viii. The use of Swiss bank style secret Central Bank registering of Section 110 SPVs, (including AIFs, QIAIFs and, latterly, ICAVs) as true owners of repossessed Irish homes and lands.

ix. Including agricultural land in the portfolio being securitised when this is prohibited by the 2001 Asset Covered Securities Act, (and not telling the judge).

x. And let no one assume that the asset class of receivables sold to the SPV includes third party collateral which has not then crystallised: check the small print.

12. The UK Court of Appeal in Paragon Finance v Pender and anor. [2005] 1 WLR 3412, par 14, describes *securitisation* in the following passage:

"Since early 1987 Paragon has been party to what are known as "securitisation" arrangements. Such arrangements typically involve (and the instant case is a typical case) the transfer by way of sale of a portfolio of mortgages (I use the word mortgages to include charges) to a "special purpose vehicle" ("SPV") in consideration of a sum which is funded by the issue by the SPV of listed bonds carrying an entitlement to interest at a floating rate. In order to attract investors the bonds must carry a credit rating which is acceptable to the market, for example a rating from a well known credit agency such as Standard & Poor's. Interest payable on the bonds is in turn funded from the income generated by the mortgages transferred. The sale is non-recourse, in that the transferor is not liable for losses incurred by holders of the bonds. The transfers of the mortgages may or may not be completed by the vesting of the legal title in the SPV. In the case of a mortgage of registered land, vesting of the legal title will occur by the registration of the SPV as proprietor of the mortgage, in the case of a mortgage of unregistered land, vesting of the legal title will occur on the execution of an appropriate deed of transfer."

13. Alistair Hudson, in his book *The Law of Finance*, Sweet and Maxwell, 2013 notes at paragraph 44-10 that "*because the assets are transferred outright to the SPV, the investors have the security of knowing that they can receive what they are entitled to from the SPV*". He goes on in paragraph 44-15, under the heading:

"*the originator divests itself of all rights in the receivables*":

"As has been set out above, the originator is intended to divest itself of all the property rights it held in the receivables. This has two purposes. First, the investors must know that all of the rights to the receivables have been transferred to the SPV, that there is no encumbrance with the income stream passing through into the bonds as intended, and that the originator cannot recover title in those assets. Secondly, the outright transfer of the assets to the SPV, in such a way that the originator has no property right in them nor any contingent right to them, means that the assets are put beyond the reach of the originator in the event that the originator should subsequently go into insolvency".

14. Once you have grasped the essentials it becomes difficult to understand how our own McGovern J. in Freeman v Bank of Scotland 2014 IRHC 284 stated at Para. 8:

"It is an important principle in securitisation transactions that the originating bank that sells the mortgages to the SPV, under an equitable assignment, continues to service the mortgages and the legal title remains with the originating bank."

Somebody must have misled the judge. I do not think it is likely to have been the plaintiff. His comment was *obiter* (not a judicial determination of an issue in the case) but has been quoted up and down the country, with unfortunate results.

15. I could go on. There is an amusing ruling by the Revenue Appeal Commissioners in the matter of a claim by Y limited, formerly a mortgage provider, latterly a mere servicer after securitisation, to carry forward its historic losses into later trading periods. The Appeal Commissioners disallowed the €129 Million claim holding that the mortgage provision business had ceased. One of the points made most frequently in the hearing was that Y had sold the loans but had retained legal title. This was used to illustrate the continuity of the business being transacted. At the same time, Y sought to explain the importance, before and after securitisation, of "bankruptcy remoteness", clearly failing to grasp that the construct was only of practical use to investors in the event of Y's own insolvency (see above) if title ended up as an asset in the liquidation. (In the event the legal title point was not explored). (The losses were disallowed)

OWNERSHIP OF THE CHARGE

16. Judicial comments about the post-securitisation legal title of the loan originator, which are clearly wrong, have been welded onto the notion, also wrong, that the ownership of a registered burden is established "conclusively" by its registration as such. Combine the two errors: that securitisation requires that the loan originator retains the legal title and, two, that the registered ownership thereof is beyond dispute. The reality, instead, is that the loan originator was never *conclusively* the owner of the charge and has, in securitising it, sold the legal title to the charge to the SPV.

17. It is a mistake to think that, just because the ownership of the land is conclusive when registered, the same is true of ownership of a registered burden. It's not. The title of a mortgagee as a burden holder is its deed of legal mortgage or its possession of the title deeds. There may be issues as to the validity or legal effect of either, and the Court will have to resolve these prior to declaring the mortgage "well charged."

18. The underlying contractual position is much less certain with equitable mortgages by deposit than with legal deeds of mortgage. Nevertheless, both must be resolved, employing standard contract principles, before ownership of the charge can be declared by the Court. It is not the role of the Registrar to resolve contract disputes. He just keeps a register.

19. Chief Baron Palles wrote in *McKay v. McNally*, 1896, at page 450:

> *"What is the effect of the transaction? It passed no legal estate in the demised premises. It was nothing but an agreement, to which effect would have been given in a Court of Equity, that the mortgagor should have a lien upon the lease for certain advances; and, possibly, an agreement that the lessees would, when required, execute a legal mortgage. I think it unnecessary to consider what would have been the exact relief afforded – whether it should necessarily have been confined to a sale. Or whether, if the mortgagee preferred, he could have had a decree for the execution of a legal mortgage. What I deem material is, that the whole matter rests in contract; that the action of the Court of Equity would have been founded on the contract."*

20. *United Bank of Kuwait v Sahib* 1996 3 All ER 215 concerned a deposit of a land certificate which was not effective since it post dated the UK's 1989 Act. The UK Court of Appeal observed that since Russel v Russel 1783 "*a deposit of title deeds relating to a property by way of security has been taken to create an equitable mortgage of the property without any writing, notwithstanding s.4 of the Statute of Frauds (1677).*" At p.221 Peter Gibson L.J. adopts this passage from the judgment of the trial judge: "*In all those cases, the Court was concerned to establish, by presumption, inference, or evidence, what the parties intended and then to enforce their common intention as an agreement*". He continued at p.223: *"It is clear from the authorities that the deposit is treated as rebuttable evidence of a contract to mortgage".*

21. In his 2014 book *The Registration of Deeds and Title in Ireland, ("A textbook of definitive authority", per* Maire Whelan, AG, 2014), John Deeny, former deputy registrar, writes at para. 21.04 that "*Registration of a charge as a burden on registered land is not evidence of ownership, it is evidence only that the charge is an encumbrance on the estate of the registered owner of the land."*

22. In the Court of Appeal's recent exploration of the significance of the registration of a burden (such as a mortgage), *Promontoria v Greene* [2021] IECA 93,, the court does not significantly deviate from that description, though Collins J. disagrees with the High Court's (Simons J.) description of it as "merely an administrative function." In fact, the disagreement is not serious. Collins J's view is at odds also with Professor Cretney's (of Oxford, late deceased) description of the Registrar's function as *"purely ministerial, as no proof of entitlement is required."* ("Land Charges" NLJ, vol.118, 1167) Collins J. has, in my view, painted a picture of the "weight of the statutory role of the Registrar" which bears little resemblance to the actual business of the Registry: there isn't even an affidavit required to register a burden, a signature on a form will suffice.

23. But at par. 42 of his judgment, Collins J. confirms the essence of the matter in writing that *"Upon registration Section 31 of the 1964 Act applies to the lien. In other words, the register is conclusive evidence that the title of the registered owner is subject to such lien."* The comment is about liens but applies to all registerable charges. Note, this is the only conclusive effect; the registered ownership of the charge is not to be read as "conclusive" under Section 31. Why, then, are judges hearing cases up and down the country being told otherwise?

24. No one is likely to suggest that a *lis pendens* on the folio confirms, ipso facto, the incontrovertibility of the plaintiff's claim. Likewise, registration of a charge is merely a record (and notice to prospective purchasers) that the chargee is staking a claim to ownership of the land as security. The stake is not automatically converted into ownership by registration because underlying issues of contract have not yet been determined. (And it's not deemed "conclusive" just because the mortgagor was on notice of the application to register, as some judges have suggested.)

25. Section 73 of the 2006 Act, which was designed to streamline the enforcement of equitable mortgages by deposit of title deeds, was yet another example of legislation being fast tracked to deal with creditors' problems with awkward factual disputes and to facilitate securitisation. It scrapped the old Land Certificate and allowed mortgagees instead to register a lien to like effect (on or before 31/12/2009).

26. No one could seriously imagine that the register could "conclusively" register an applicant as *owner* of property on the strength of an (unsworn) PRA Form A submitted (along with the original Land Certificate) "stating" that we hold the land certificate "under lien created by deposit of the said certificate as security for advances made" and "are entitled to register a lien as a burden on the property". (Service of a Form B Notice is claimed, but without sworn evidence of same, and Form A is signed but not witnessed.) The lien may be registered on the strength of Form A but you cannot leapfrog the step of proving the contractual context just by filing Form A.

27. Two interesting conclusions emerge from the foregoing analysis. First, insofar as the register contains an entry pertaining to a charge which is, on examination, found to be in breach of the terms of the underlying contract, that entry is now obviously wrong. It follows that, far from being a conclusive entitlement because it appears on the register, the registration of some charges may be erroneous. The second item of note is that the appointment of a receiver supposedly appointed under the terms of such a charge will not be valid. Any such receiver purporting to sell using the charge as the basis of his title cannot give good title. Unsuspecting purchasers of distressed assets beware.

COMPLEXITY

28. I see that Collins J. is of the view that "*Section 73 of the 2006 Act cannot properly be understood without understanding the position prior to the enactment*". (*Promontoria v Greene* IECA 93 at par. 25). I'm not sure he is right about that: normal interpretative principles prefer the literal meaning rule, do they not? Anyhow, did Parliament intend us to read up on old law? I doubt that too. Let's not overcomplicate the Acts of the Oireachtas, if at all possible, please.

29. On 2nd February 2010 Lord Myners, then UK Financial Services Secretary, giving evidence to a House of Commons committee which was examining the future regulation of derivatives said that he "was reminded of the comment made by one of the non-executives of one of our major banks to a Treasury official about a year ago: *"In the future, he said, we are only going to do things we understand!"* Lord Myners probably didn't have Y Ltd in mind, but the free for all which is facilitated by complexity in the law does no one any favours, least of all the reputation of law.

30. Writing extra judicially on an unrelated topic in 2018 (Judicial Power in Ireland, IPA, ed Carolan) O'Donnell J., now Chief Justice, wrote that: *"some of the changes in the law are extraordinarily complex, and I suspect that the number of people in the State who truly understand them is limited, and that they are on first name terms with each other."* Our legislators need to think about that for a moment. Did they understand what they enacted when the Asset Covered Securities Act was voted through in 2001? Or when it was amended in 2007? Or the now notorious 2014 amendments to s.110 of the Finance Acts which were supposed to curb "aggressive" tax avoidance. Is this not a form of corruption of the Oireachtas? It is not for nothing, then, that ODonnell J. has written (same article) that the Court is the <u>only</u> *"check and balance"* on the executive? *"We do not in truth have a system of constitutional equilibrium created by tripartite checks and balances between equal and largely separate branches: in many cases we have a check and a balance in the shape of an independent judiciary; the executive and parliamentary branches are not accustomed to exercising checks on each other."*

31. Do the legislators know that the Central Bank now operates as Ireland's Swiss bank cloak of anonymity? And how that prevents us from knowing who actually owns Irish land and housing? So much for the Registration of Title project? The suggestion that a court might be easily distracted from its core task of interrogating the issues before it because they are "complex" is a concern.

32. Look at *AIB v Registration of Title Act* [2006] IEHC 483, for an example of a sort of *"you can rely on the lawyers"* proposal to a judge, Abbott J. (It failed). The judge was told that the Asset Covered Securities Act 2001 was *"a complex and technical piece of legislation containing 106 Sections"* meaning: much too long to read. The judge was also told that *the Act allowed credit institutions in Ireland to create a new form of security over their assets with the same characteristics as a security familiar to German law known as Pfandbriefz "bonds"*. Meaning: its ok by German law, so just

rubberstamp it here, don't bother checking. (The outcome of the case was that the Registrar was not authorised to register co-owners of a charge when *"the instruments proposed to effect the charge of the two banks in this case envisage provision for future advances and differential interest rates between the two co-owners.")*

33. There is a tendency now for deponents in these cases to offer their personal understanding of an exhibited deed. This is just not appropriate. It suggests that it is expected that the judge will not himself read the deed. (That's probably especially true when it's heavily redacted). Perhaps this attempt to "help" the judge is what caused McGovern J. to reach the wrong conclusion in *Freeman* (see above). Particularly when one party is on the sharp end of an inequality of arms, it is Counsel's duty to the court (even if at odds with his duty to his client) to explain the law to the court even where that law is not in his client's favour. See to it.

34. Vice Chancellor of the Delaware Court of Chancery, Travis Laster., recently offered these thoughts on the rise of aggressive lawyering:

> "*Business pressure is part of it. But so is the general polarisation of society. There is an ambient negativity in our discourse that has seeped into professional interactions. Seeing yourself as the champion of the client also plays a major role. The notion that you are acting for someone else can create a feeling of moral license that loosens constraints.*"
>
> He added: *"The clients that the big firms represent are another piece of the puzzle. They have a goal they want to achieve, and they want a lawyer to help them achieve it. That is how the lawyer adds value. The role of the lawyer as conscience, as a wise counsellor, has been de-emphasised. The role of the advocate, the enabler, has been accentuated."*

35. We have seen our own example of engineered default in the case of *O'Flynn and others v. Carbon Finance Limited and others* 2014 6669P in which the O'Flynn group injuncted an attempt by Blackrock (immediately after acquiring the loans from NAMA) to call in personal debts offering little or no time to pay.

36. There certainly is a triumphalism in the blogs posted by some of the major solicitor firms specialising in debt collection, which seems to foreshadow a culture of aggressive lawyers. After the judgment in *Pepper Finance v Jenkins* 2018 IEHC 485, one such firm blogged (MHC Sept 19 2018) that the court *"rejected yet another novel procedural challenge to the enforcement of loans"* and that *"this decision is a welcome development for current and prospective purchasers of debt and security in the Irish market"*. (Incidentally, this appears to be a judgment which turned on the affidavit deponents' interpretation of the Mortgage Sale Deed.)

37. Or this snide comment by solicitors McCann Fitzgerald (17 July 2020) in their blog on the High Court (missing evidence) judgment in *Promontoria v McKenna*, under the heading *"Purchasers Proofs fail to pass High Court Scrutiny."* They commented, after first noting that "where that information (sic) is not available, however, it may be difficult to obtain the required court assistance (sic) to allow enforcement of the mortgage"): *"It will be interesting to see how case law on this issue develops and whether the courts may offer any flexibility on the level of information required."* Who can read this as anything other than a broad hint to their client base (and to the certifiers and title insurers who also have "skin in the game") that they have reason to believe the courts will "assist" them to fix this?

THIS CASE

38. In this case, the plaintiff has chosen to ignore s. 15 of the Civil Law and Criminal Law (Miscellaneous Provisions) Act, 2020. The plaintiff (which apparently likes to refer to itself as "Oyster" (see exhibit JB5) asserts that it has acquired Ulster Bank's rights over folio 3540F County Sligo. (The special summons is headed wrongly *"In the Matter of an Application for Well Charging Relief"* and also *"On the Application of Promontoria (Oyster) DAC"*, neither required by the Rules) *Inter alia*, Oyster asks for a "well charging" order over the entirety on the folio, even though Ulster Bank's lien was registered as a burden on property no. 1 only, and not over the 12 hectare parcel at Knocknageeha or the undivided moiety of the 0.4 hectare parcel at Carricknagat.

39. At the time Ulster Bank registered a lien in 2009, it did so over the 25 acres at Ardleebeg only (property no. 1 in the folio) but we have no evidence as to what indebtedness was thereby secured. Then we come to the 2013 loan of €52,750 repayable in six months. The security for that loan was specified in the facility letters as to be a "requirement" that the land certificate be deposited, but of course that cert would have been cancelled by the PRA back in 2009. The lien Oyster relies on was referable to the 2009 loan and not the 2013 and the latter loan was effectively unsecured. Maybe there is evidence otherwise but, if so, it is not before the court.

40. But never mind all that, Oyster's supplemental deponent, Brendan Campbell, is *"satisfied that the form of proceedings herein are* (sic) *correct and the necessary proofs are before the court to support the reliefs sought"* (para. 17) and *"as a result... the defendant has no defence to the within proceedings"* (para. 18). Mr. Campbell is not a director of Oyster, he is an agent of a "servicer".

41. As to the form of the proceedings, I beg to differ. You cannot seek, on a Special Summons, a well charging order in respect of a specified sum. The sum charged will, in due course, be determined by the Examiner. Evidence of the debt will have to be furnished. In this case, as of now, all we have is a letter specifying the view of Oyster that the balance due on 28th May, 2019 was €65,104.46 (exhibit JB5).

42. Although the borrower is said to have been in default as of July, 2013, the proceedings did not issue until September, 2019. Oyster must surely realise that, unless Ulster Bank obtained security back in 2013, the limitations period is six years from default, and without security, the claim is *prima facie* barred.

43. Mr. Campbell quotes paras. 2, 3 and 4 of the General Conditions of the facility, at para. 8 of the affidavit, but then goes on, at para. 10, to assert that the General Conditions expressly allow for the charging of interest by stating *"...interest shall accrue and be payable on such liability/ies on a compound basis until its/their* (sic) *fully discharged"*. I cannot find that passage anywhere in the facility letter.

44. Helpfully, Mr. Campbell states in para. 13, that he *"understands that the AA I interest rates were as follows"*. And he sets out a table. Looks good, but it is not a business record, and it is clear hearsay. In pars 8 and 9, he suggests that pars. 2, 3 and 4 specify the surcharge and that the defendant was adequately informed. Actually, the surcharge was to apply only when (a) he failed to provide financial information and/or (b)failed to complete an annual review. Is Mr. Campbell being deliberately obtuse?

45. Mr. Burke's affidavit is not much better. He starts by stating that he *"makes this affidavit for the purpose of verifying the contents of the said special summons"*. Of itself, that is probative of nothing specific.

46. He then goes on to aver (para. 2.3) that *"the facility letter expressly provided that the bank held (my emphasis) inter alia the following security...."* It did not. It stipulated a requirement that the title deeds *be* (future tense) deposited. He says (para. 2.6) that the defendant's signature was 4th January, 2013. That is his personal interpretation of the date the defendant signed. It could also be 9th January.

47. He says that the registration of the lien in April, 2010 *"operated to create a charge..."* in respect of the monies due and owing against the defendant's interest in the property (not only the 25 acre parcel at Ardleebeg) but doesn't say that the monies secured were those advanced *before* that registration. You have to read between the lines.

48. He says (para. 2.4) that *"it was expressly stated that the term of the facility was 6 months"* from January, 2013 but then goes on to say (para. 7.1) that the monies due on foot of the facility became due *"as a result of the demand letter dated 31 May 2019"*. Again, not so. An attempt to restart the clock perhaps?

49. At para. 5, Mr. Burke asserts a commercial sensitivity of redacted material and banker/client confidentiality. Mr. Burke's company is not a bank. He is *"advised that the redacted portions are not relevant"* but does not tell us who advised him.

50. Collins J. describes in *Greene* (at para's 4-6) how Promontoria "*had to establish that those sums were secured by the lien*" ("what will constitute such proper evidence will vary from case to case"). Collins J. labels the issue as the "*relation of the debt to the deposit*".

51. In this case, the lien registered as of 31/12/2009 pertains to the loan advanced sometime prior to December 2009. Any advance after 31/12/2009 was not secured by any "*piece of paper with no legal effect and only of historical interest*" (Clarke CJ's description of a land certificate after the 31/12/2009, in *Promontoria v Hannon* 2019 IESC 49).

52. In the *Greene* case, the Court of Appeal commented that "*there is an error in Mr Prendiville's affidavit (in fact, more than one) and it is right that it should be corrected*". (A "*costs thrown away order*" was suggested by Collins J.) I am not sure that the material deposed to by Mr Burke in this case can easily be corrected. He tries to insinuate the case that the original deposit covered the later facility, but the facility letter clearly requires a fresh deposit by the borrower.

53. The plaintiff is seeking possession of the property described in the schedule to the Summons : that's ALL of Folio 3540F, not just the 25 acre parcel. Check the Register !

54. The affidavit "evidence" in this case is a bit of an "omnishambles." Mr Burke says the 2013 loan was secured by the pre-2009 deposit of title deeds, but that's just not true.

55. It gets worse. "*The Facility Letter expressly provided that the Bank* held *(my emphasis) inter alia the following security...*" It clearly didn't say that: it said that the "following items of security *are* (my emphasis again) required (future tense): equitable deposit..." Also, the sequencing of the paragraphs is designed to lead the reader from 2013 and *on* to the creation of the lien, as if that postdated the loan drawdown: "A lien was registered on Folio 3540F County Sligo..." (it wasn't; it was only on the 25 acres!). Paragraph 2.5 also misdescribes paragraph 4 of the schedule attached to the facility letter.

56. We would do well to revisit the judgment of Sanfey J. in *Promontoria v. Jaszai Limited and anor.* [2021] IEHC 250, "*both affidavits comprise inadmissible hearsay: certificates are utterly inadequate to establish the debt due; the failure on the part of the plaintiff to observe basic principles of summary procedure and presentation of evidence.*"

DEADBEATS

57. Professor Levitin, in his evidence to Congress, recognises that there is a widespread collateral recovery industry view that "deadbeats" are collateral damage. He quotes Jamie Dimon of JPMorgan Chase "*For the most part by the time you get to the end of the process we're not evicting people who deserve to stay in their house*", and counters with the argument that

> *"To argue that problems in the foreclosure process are irrelevant because the homeowner owes someone a debt is to declare that banks are above the law. The most basic rule of real estate law is that only the mortgagee may foreclose.... Ultimately, the "no harm, no foul" argument is a claim that the rule of law should yield to banks' convenience."*

58. Of course, a court is obliged to give effect to a clear contractual statement, but it should probably read the small print first, the redacted small print perhaps especially. CSR and ESG now frequently influence contracts, and "badging" is the latest form of mis-selling. The marketplace for working capital has been transformed, risk can be priced in, credit default "swapped" and business and finance can venture jointly. It seems the judiciary is tone deaf to the twenty first century's new realities in financial markets and, in particular, to the new ability of capital to hedge against losses caused by economic shocks.

59. This case appears to me to be a carbon copy of *Hannon*. Probably equally fatal to it is the recent judgment in *Promontoria v Fox* [2022] IEHC 97. If nothing else, it should be thrown out because it is a blatant attempt to seize much more land than was originally secured for the old Ulster Bank loan. Also, the fact that the 2013 loan was never secured. Take your pick.

60. But there's a broader issue, namely, that this agricultural land was probably securitised, and the 2001 Asset Covered Securities Act precludes the securitisation of agricultural land. This is more small print stuff. Given our experience with complexities and judicial differences of opinion on the interpretation of legislation, I have decided to refer the papers to the Governor of the Central Bank for his urgent attention. He will know whether Promontoria has wrongly participated in a securitisation SPV. And he will know what to do if so. That's his job.