Title to Land Charges in Ireland:

A Legal Fiction?

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Judge Antonin Scalia: "Administrative law is not for sissies - so you should lean back, clutch the sides of your chairs, and steel yourselves for a pretty dull time"

A lecture to students on the Chevron judgement - 1984

"Et auxint le Roi defende of nully desore face entree en aucones tres & tenz sinous encas ou entree est donc p la loy, & en cell cas nemye a forte main ne a multitude des gentz, einz tantsoulement en lisible aisee mane, et si nully desore face a contraire & ent dilloeqs soit convict duement soit puniz p em prisonement de son corps & reint a la voluntee le roy"

Forcible Entry Act 1381

Clarence Darrow's "Easy Lessons in Law" include the stories of "the Doctrine of fellow Servants“, “the Doctrine of Assumed Risk" and "The Breaker Boy": the story of Johnny Mc Caffery who goes to work as a breaker boy at the age of eleven because his father is killed in the mines. The McCaffery family had emigrated from Ireland because they had heard that "*America had no English landlords, no rack-rented tenants, no hopeless men and gagged women and hungry boys or girls*"

The Chicago Evening American 1901
(Darrow was General Counsel for Randolph Hearst)

TITLE TO LAND CHARGES IN IRELAND:

A LEGAL FICTION?

- Consumer law: from "soft law" to “hard law”
- The emergence of a "family home" exception
- Commodification of debt - title meltdown?
- If proportionality and forbearance are prescribed for distressed debt, which is relevant: face value or book value?

"The State shall, in particular, direct its policy towards securing that in what pertains to the control of credit the constant and predominant aim shall be the welfare of the people as a whole "

(Article 45(2)(iv) of the Irish Constitution)

"Directive Principles of Social Policy"

"DEANFAR ÁRDLEIBHÉAL COSANTA DO THOMHALTOÍRÍ A AIRITHIU I MBEARTAIS AN AONTAIS"

Art.38 Cairt um Chearta Bunúsacha an Aontais Eorpaigh

(Nice 7.11.2000)

Central Bank Act 1942 (as amended)

S.5A (11) "Subject to subsection (10), the Bank shall perform its functions and exercise its powers in a way that is consistent with

A. The orderly and proper functions, of financial markets
B. The prudential supervision of providers of finance services, and
C. The public interest and the interest of consumers.

Central Bank (Supervision and Enforcement) Act 2013 S.45(2)(d)
"Where the Bank is satisfied that the regulated financial service provider, or related undertaking, is conducting business in such a manner, as to jeopardise or prejudice... (ii) the rights and interests of consumers, ... the Bank may give a direction in writing….. etc." (see subsection (3)).

STATUTORY INSTRUMENT 14 of 2020

Regulation 4: The public authority or public authorities, as the case may be, specified in column 4 of the Schedule at a particular reference number designed as the competent authority or competent authorities under Article of the Council Regulation for the enforcement of those laws that protect consumers interests specified in column 3 of the Schedule at that reference number are designated

Schedule

Regulation 4: Reference no 1

Column 3: European Communities (Unfair Terms in Consumer Contracts) Regulations 1995

Column 4: Commission

Commission for Communications Regulation

Central Bank of Ireland

Explanatory Note: *Designated competent authorities responsible for the enforcement of the Union Laws. Listed…. in order to ensure compliance with those laws which will enhance then protection of consumers economic interests and ensure the smooth functioning of the internal market.*


IT'S TIME OUR GUESTS WENT. WHY DON'T YOU START EXPLAINING BARRIER OPTION TECHNOLOGY TO THEM?
ROGER REEVE

ASSESSING RMBS INVESTMENT RISK

- A — Insolvency – cramdown
- B — Defences in law - factual issues in instant case
- C — Unfair terms - case by case review
- D — Forbearance - loan modification
- E — Possession – proportionality
- F — Title – registration uncertainty
- G — "Due" process A6 equality of arms
- H — Execution - ejectment

X — Fraud – (Or tax evasion?)

S 115A (9) of THE PERSONAL INSOLVENCY ACT 2012-2015

The discretion of the Count envisaged by s. 115A (9) requires that the Court be satisfied that the proposed PIA enables a creditor to recover debts due to them to the extent that the means of the debtor reasonably provide, and that the proposal will enable the debtor not to dispose of or interest in, or not to seize to occupy his or her principal private residence, and that the costs of enabling to continue to reside in that' premises are not disproportionately large. The Court must be satisfied that the proposed arrangement is "fair and equitable" in relation to each class of creditors that has not approved the proposal.

BAKER J at par 77 of Re Hayes, a debtor [2017] IEHC 657

"Equally, the Court in considering whether a proposed PIA is unfairly prejudicial must examine the actual circumstances of the creditor, and in the present case a particular focus of the argument arose from the evidence adduced on the part of Shoreline regarding likely lending rates in the Irish market in near and not so near future. However, Shoreline is not a lender, and accordingly the test of unfair prejudice regarding its interest must be seen in the light of investment returns and not the cost of the capital needs of the creditor in the future. The examination of the fairness is conducted in the circumstances of the case and having regard to the financial profile of the objecting creditor and the means of the debtor."

(outcome: Shoreline owed €324K, to receive 3.65% pa interest only for six years, the twenty one years principle and interest)

(Note: Shoreline owed the collateral, not Pepper, the servicer)

A "return" on face value or book value?: not explored

THE PROCESS IS ONLY PROVED BY REVIEWING THE OUTCOME

1. Will the servicer, and the purchaser, and the originator all be obliged to complete a SFS-style recital of loan history including pre assignment facts?

2. Following the judgment in the insolvency case, will the loan purchaser be required to prove its investment and cost of funds?

3. Will the servicers have to account for any alleged RSG style engineering of default?

FIRST THE LIE, THEN THE COVER UP?
NDA 1 and NDA 2

Many and varied are the formulae used to rubbish a defendant's narrative (e.g. "the bank would never do such a thing") including the “bald" assertion that "in the deponent's belief there is no defence" (NDA #1)

[quaere: shouldn't a servicer's failure to complete The Directive's forbearance process now rank as a "defence"?

Then, when a defendant starts probing and finds evidential gold he gets a settlement, complete with a non-disclosure agreement chilling other challenges and denying the court an opportunity to clarify the law. (NDA #2)

[*quaere: presumably, the Central Bank will be informed, (for the purposes of monitoring compliance) exactly what evidential gold prompted the settlement?*

[Sed quaere: Will the Central Bank see to it that other defendants, unaware of the new evidence, are not sandbagged by continued obfuscation on the servicer’s part?

LOUGH NEAGH FISHERIES:
The "GREAT FRAUD OF ULSTER"

T. M. Healy, who represented the fisherman against Lord Donegall outlined, inter alia, the evidence he had accumulated concerning an 1805 lease of the Bann, but having lost the case in the House of Lands, complained: *"No Memorial had ever before been discredited in the centuries since registration was established. The manner of their preparation and lodgement, as a system of verification of the contents of deeds, is one prescribed by Statute to prevent fraud, or to detect it if committed. Lord Donegall's Memorial branded the so-called original as a counterfeit. That was the function which the law assigned to it, and it fulfilled its duty. Still the imputation of forgery was too rude and uncourtly for the twentieth century. A theory of inadvertence and mistake was preferred. "Forgery" is a hard saying, and any suggestion to explain it away attracts an honest mind. So the "memorial" was said to be inconclusive and the counterfeit genuine by Mr Justice Ross.*

"The law of consumer contracts must be seen nowadays as a regulatory regime in its own right, severable for the most part from the general laws of contract"

Brownsword
Contract Law Themes for the Twenty First Century 2000, Butterworths

UNFAIR TERMS: A TONE-DEAF JUDICIARY?

ln his 2001 book on Contract Law, Paul Mc Dermott, SC, wrote (p435) that "judges are bound by precedent and therefore, there is a limit to what they can do to protect consumers from being held to unfair bargains. In addition, within the classical model of Contract Law, the relative bargaining strengths of the parties is not of concern to the Courts "

He proves the point when, as McDermott J. in his judgment Grant v Laois Co Reg 2019, he creates his own precedent holding, apparently on the basis of judicial knowledge, that interest rate changes by mortgagees are for "valid" reasons, as follows:

Referring to paragraph 2(b) of the annex to the Directive “financial services... alter the rate of interest... valid reason" at par 111 of the judgment "*I am satisfied that the variable interest term is one that is regularly used in legal relations in similar contracts in this state and that there is an objective reason for the existence of such a term..... There are protections against the abuse of such terms by the institutions* and... it is subject to an implied contractual term that it will not be exercised "dishonestly” for an improper purpose, capriciously or arbitrarily”*

UNFAIR TERMS: A TONE-DEAF JUDICIARY?

NOTE The refrain in both the above quotes to text book contract law principles

NOTE The failure to investigate the calculations of the lender which prompted the change. It's a carte blanche

NOTE But note also the suggestion that unfair terms might fail on the basis of mala fides even if the unfair terms Directive was not engaged
(But see, to the contrary, Flynn v Breccia 2017 IECA 74)

QUAERE: Is there ever a "valid" reason for super normal profits?

Is the "BLIND" ASSIGNMENT CONSENT another carte blanche or is Schedule 3 1(p) of the 1995 Unfair Terms Regulations effective?

Arguably, the CONSENT is the first cousin of the classic "unreasonable" consumer contract term, the EXCLUSION OF LIABILITY CLAUSE

Is it in good faith for an originator to use the assignment option to sell in the market overt to a connected but unregulated purchaser? How can a borrower's consent be considered as fully informed?

Nemo

Dat

Quod

Non

Habet

THE SWORD BLADE COMPANY'S IRISH TROUBLE

(from the South Sea Bubble by John Carswell page 32)

> *"It's lrish business was not prospering. The trouble here was title. Professedly loyal Relatives of the Original Jacobite owners of land owned by or mortgaged to the Company kept on making their appearance with title deeds which seemed to have been assigned to them before the forfeiture came into force; and when the Company tried to enforce their rights the Irish courts and Parliament were unsympathetic. The company managed to get an Act from the British Parliament in the spring of 1708, setting a time limit on the Right to Raise these disputes as to title; but in April of that year its stock was down to fifty one."*

It took the Sword Blade partners nearly four years to extricate themselves from their Irish venture, and in the process, they come perilously near bankruptcy.

"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"

Freeman v Bank of Scotland 2014 IEHC 284

"Recently, arguments have been raised in foreclosure litigation about whether the notes and mortgages were in fact properly transferred to the securitization trusts. This is a critical issue because the trust has standing to foreclosure if and only if it is the mortgagee. If the notes and mortgages were not transferred to the trust, then the trust lacks standing to foreclose".

Professor Levitin, evidence to Congressional hearing 18 11 2010

and, as for "CONCLUSIVITY" of the evidence

Do we have here a prime example of COMMUNIS ERROR FACIT IUS?.

In Kelly's 1892 book on the 1891 Act he described the mischief and scheme of the Act in this way:

> *"A more obviously common sense principle will henceforth prevail, and for the future the lands and not the owner will be the basis and groundwork of registration. The cost of the old search system was simply ruinous; the present, it is to be hoped, changes all that."*

REGISTERABLE vs REGISTERED

From a 1981 lecture to the Institute of Bankers in Ireland..

> *"The decision in the celebrated lrish case of Fullerton v Provincial Bank of Ireland Limited [1903] A.C. 309 commonly referred to as "Colonel Stevenson's case"... had a profound effect on banking practice in Ireland. Thereafter when taking an equitable mortgage by deposit of title deeds, written communications ("registerable documents under the Registration of Deeds (Ireland) Act 1707") referring to the proposed security were discouraged and indeed if discovered were frequently destroyed and a fresh deposit taken. The principle, and the ensuing practice is no less valid today"*

E Rory O Connor, solicitor,
Allied Irish Banks Ltd

LOCAL REGISTRATION OF TITLE (IRELAND) ACT 1891

34. (1.) The register shall be conclusive evidence of the title of the owner to the land as appearing thereon; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document, or matter relating to the land; but nothing in this Act shall interfere with the jurisdiction of any court of competent jurisdiction based on the ground of actual fraud or mistake, and any such court may upon such ground make an order directing the register to be rectified in such manner and on such terms as it thinks just.

REGISTRATION OF TITLE ACT 1964

31. (1.) The register shall be conclusive evidence of the title of the owner to the land as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner of having notice of any deed, document, or matter relating to the land; but nothing in this Act shall interfere with the jurisdiction of any court of competent jurisdiction based on the ground of actual fraud or mistake, and any such court may upon such ground make an order directing the register to be rectified in such manner and on such terms as it thinks just.

SCANNING SECTION 31

The missing “to”

In her introduction to the former registrar’s authoritative book on Registration of Title, former AG Maire Whelan refers to conclusivity of the register as "evidence of title to property and any... burden appearing thereon”

But Section 31 refers to "evidence (a) **of** title to property and (b) **of** any burden." The book's author agrees. Back in 1891 it was just (a). Phrase (b) was inserted in 1964 (even though the margin note in the 1963 Bill conveyed the impression that no change was proposed)

CONTEMPORANEA EXPOSITIO ("originalism")

> *"It is obvious that the language of a Statute must be understood in the sense in which it was understood when it was passed, and by those who lived at or near the time when it was passed. The meaning publicly given by contemporary or long professional usage is presumed to be the true one"*
>
> R v Casement 1917 1KB 98
>
> The Court of Criminal Appeal

See the 1911 case of *Murphy v The King* [1911] 2.1.R 89 (affirmed [1911] AC 401). Mrs Murphy (now deceased) had been "finally and conclusively" awarded the pension and drew down £5.5.0 But a review by the authorities concluded that the award was not warranted after all. Too young! Her estate had to repay the sum.

Shortly put the new scheme confirms the title conclusively against all claimants, but only until the registration is updated. Conclusivity is final but not eternal. Assignment, error or fraud will change the registered ownership when the registrar or the Court so determines. It's open to challenge. Courts seem to think otherwise.

CRASHING THE REGISTRATION SYSTEM

Are we back to pre 1891 conditions? We now have registered, registerable but unregulated and unregisterable burdens. What now for the bona fide purchaser for value without notice?

1. Possession orders in favour of credit servicers
2. Unexecuted possession orders (abuse of process)
3. Trading in possession orders. Chose in action. 2018 IEHC 390

OWNERSHIP OF THE BURDEN

Whatever about ownership of the land, it is not part of the scheme or the Act (nor does it address any mischief) that ownership of a burden should be recorded formally and beyond dispute.

Registering a burden is an unconstitutional interference with the property rights of the land owner, if it's "conclusive"?

"Conclusive evidence of ownership of the burden"

HOW TO BAR THE ENTAIL:
Williams on Real Properly (1844)

"Since De Donis Conditionalibus, 1285, an estate given to a man and the heirs of his body has always been called on estate tail. The word "tail" is derived from the french word "tailler", to cut, the inheritance being, by the statute De Donis, cut down and confined to the heir of the body strictly. When the statute began to operate the inconvenience of the strict entails, created under its authority, became sensibly felt: children, it is said, grew disobedient when they knew they could not be set aside, creditors were defrauded of their debts... treasons were also encouraged as estates tail were not liable to forfeiture longer than for the tenant's life."

HOW TO BAR THE ENTAIL:

Williams on Real Properly (1844)

The nobility, however, would not consent to a repeal which was many times attempted by the Commons. At length the power of alienation was once more introduced, by means of a quiet decision of the judges, in judicial proceedings collusively taken against a tenant in tail for the recovery of the loans entailed. The law would not allow the entail to be destroyed simply by the recovery of the lands entailed, by a friendly plaintiff on a fictitious title; this would have been too barefaced. (Instead) *the alienation was affected by a more circuitous made which afterwards came into frequent and open use, and had same little show of justice to the issue, though without any of its reality. The tenant in tail brought some third person into court (the crier of the court was usually employed) and alleged that he had warranted the title. But being a "party to the scheme" the defaulter allowed judgement to go against him by default, and was held liable to make recompense in lands of equal value. But as he has no such lands, the issue "still have the judgement of the Court in their favour" but against the wrong person. "Not only where the issue barred of their right but the donor had his reversion barred at the same time. The demandant, in whose favour judgement was given, being a friend of the tenant in tail, of course disposed of the estate in fee simple, according to his wishes"*

17th Century folk poem:

"The Law locks up the man or woman,

who steals the goose off the common,

But leaves the greater villain loose,

who steals the common from the goose"

18th Century

20th Century

THE HALF LIFE OF COMMODIFIED DEBT

Some have speculated that the concern to focus on legal title at loan originator level chills discussion of earlier debt collateralisation at the time of the bank bailout post Lehmans. Commodified debt instruments have long since lost touch with the lawyers' world of real property title. The attempt by credit purchasers to persuade Revenue that loans secured on property should not be considered as “interests in land” (the attempt failed: 72 TACD 2023) trading in which would attract CGT points to an industrial re-badging of secured debt as wholly divorced from the underlining security (note: “favourable” exemption from registration of charges under the Companies Act). The potential for double dipping by a registered "legal" owner of the security is obvious, while investors in debt derivatives often have to suffer halflife write offs (priced in / or not)

Following SPV Osus vs HSBC litigants before Irish counts have the benefit of clarity as to the circumstances in which the assignment of a cause of action will be found to be valid or invalid. The rule under Irish law is accordingly that such an assignment will be valid only if the assignee has a genuine pre-existing commercial interest in receiving the assignment.

(Extract from an article in the Hibernian Law Journal 2019)

"For public policy reasons, Common Law Courts have, however, been more united their approach to, and universally more suspicious of outright assignments of 'bare' causes of action for consideration when compared to the mere funding off a plaintiff's claim, such assignments are considered to be infinitely more offensive than maintenance or champerty because the plaintiff in whom a lawful claim originally vested is entirely removed from the litigation in place of an unconnected profit motive assignee who has purchased a contractual right to run the litigation"

"The practice of utilising the concept of the trust as a means of avoiding the privity doctrine has fallen into disfavour, because it strikes many judges as intellectually dishonest. In the case of O'Leary v Irish National Insurance Co Ltd the court left open the question of whether an intention to create a trust must be shown before a third party can recover, but Barrington J. in Cadbury Ireland v Kerry Co-op Creameries Ltd, [1982] ILRM 77, held that such an intention must be present"

Clark's Contract Law Ireland 1992
Sweet and Maxwell:
Chapter 17 "Privity of Contract"
But see Wylie, chapter 19.

"If it is offensive to public policy to permit a person to fund a plaintiff's litigation in return for some part of the proceedings, then the same public policy must apply with more force where the third party purchases the claim outright, removes the party from his or her proceedings, and converts them into a mere witness"

(William Fry & Co. August 16 2018)

"It would harm the reputation of English law among commercial people, and possibly also harm the place of London as a financial centre, if the courts were seen not to make on award to a bank which the banks had expected"

Lord Woolf

Westdeutsche Lenderbank vs Islington [1996] AC 669

SECURING THE ACTIVITY FRAMEWORK OF ENABLES (SAFE)

The SAFE Directive proposed June 2023

> *"To prohibit enablers who design, market and/or assist in the creation of tax arrangements or schemes in non-EU countries that lead to tax evasion or aggressive tax planning for the EU member states"*

The ATAD Directive

PARENTAL LIABILITY OF INVESTORS

see Goldman Sachs T-419/14 12 July 2018

EU General Court

END