

# **Report of the Expert Group on Repossessions**

December 2013

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## **Chapter 1 - Introduction**

### **Expert Group on Repossession**

1. The Expert Group on Repossessions was established in September 2013 in response to the following commitment to the Troika contained in the 9<sup>th</sup> review of the Memorandum of Economic and Financial Policies (MEFP):

*“As part of our ongoing review of the effectiveness of statutory repossession arrangements as set out in the MEFP for the 9th review, we will define, in consultation with the staff of the EC, ECB, and IMF, terms of reference by mid-August for an expert group to review by end-2013 the length, predictability and cost of proceedings, including relative to peer jurisdictions, and propose, where necessary, appropriate measures to be brought forward quickly to deal with any problems arising.”*

2. The Terms of Reference for the Expert Group, chaired by the Department of Justice and Equality, were agreed in consultation with the Department of Finance and the Troika (Appendix A). A list of members of the Expert Group is attached (Appendix B).

### **Establishment of the Expert Group**

3. During earlier discussions with the Troika, it became clear that it was concerned with what it saw as the abnormally low rate of repossessions in Ireland. In addition, the Troika was concerned that the court repossession system in Ireland was lengthy, complicated and expensive. The role of the Expert Group, as agreed with the Troika, was to examine the system, identify any shortcomings and make recommendations.

### **Mortgage Arrears Crisis**

4. Since the onset of the financial crisis, there has been a significant increase in the number of mortgages which have fallen into arrears. In September 2009, Central Bank data showed that some 26,000 mortgages on private residences

were in arrears of over 90 days. The equivalent figure for September 2013 was 99,189.

5. The Programme for Government (October 2009) recognised the seriousness of the situation and indicated that the Government would examine the options available for dealing with mortgage arrears and would promote the possibility of flexible mechanisms to avoid the repossession of private residences. At the same time, the Government recognised that, in a minority of cases, there would be no alternative to repossession as a last resort.
6. Two separate Government Reports – the Cooney Report in 2010 and the Keane Report in 2011 – made recommendations regarding the development of a mortgage arrears resolution process and encouraged lenders to engage with borrowers in an effort to forestall repossessions.
7. Arising from these Reports, there have been a number of key developments in dealing with mortgage arrears, including:
  - The Central Bank’s Code of Conduct on Mortgage Arrears (CCMA) contains a structured framework which lenders must follow when dealing with mortgage arrears. The Central Bank has also set targets for the putting in place of sustainable solutions and is now stepping up its monitoring and enforcement activities;
  - The Personal Insolvency Act 2012 which has modernised the State’s insolvency laws and has put in place new mechanisms to resolve personal debt problems. It has also established the Insolvency Service of Ireland;
  - The Land and Conveyancing Law Reform Act 2013 provides that applications for the repossession of private residences, irrespective of whether the mortgage was created before or after 1 December 2009, may be adjourned to allow the parties to explore the possibility of applying for a Personal

Insolvency Arrangement (PIA) under the 2012 Act as an alternative to repossession.

These developments will be discussed in more detail in later chapters.

### **Dunne Judgment**

8. The Land and Conveyancing Law Reform Act 2009 repealed numerous pre-1922 statutes, including mortgage-related provisions in the Conveyancing Acts 1881 to 1911 and charge-related provisions in the Registration of Title Act 1964, and replaced them with updated provisions. The repealed provisions were intended to continue to apply to mortgages and charges created prior to the 2009 Act's commencement date, i.e. 1 December 2009. The 2009 Act proceeded on the understanding that lenders' powers under the repealed statutory provisions would be saved under section 27 of the Interpretation Act 2005. The prevailing legal view was that lending institutions acquired statutory rights under a 'money due' clause when the mortgage was created (or shortly afterwards if the mortgage contained a 'legal date of redemption' clause) but could only exercise these rights (e.g. repossession, appointment of a receiver) in the event of default.
  
9. In *Start Mortgages & Ors v Gunn & Ors*<sup>1</sup> (more commonly known as the 'Dunne judgment'), cases in which sub-prime lenders had sought repossession, the High Court appeared to take the view that the lending institutions' rights were acquired only when default had occurred and demand for payment had been made. In the specific cases before the Court, Dunne J. concluded that the lenders' right to apply in a summary manner for repossession under section 62(7) of the Registration of Title Act 1964, which had been repealed by the 2009 Act, continued to apply only where—
  - the charge had been registered in the Land Registry before 1 December 2009;

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<sup>1</sup> *Start Mortgages & Ors v Gunn & Ors* [2011] IEHC 275

- default had occurred before that date, and
- demand for payment had also been made before that date.

This judgment has been appealed to the Supreme Court and a ruling is expected in 2014.

10. While the Dunne judgment was not subsequently followed in other broadly-similar cases, there was much legal uncertainty and lenders decided not to pursue repossession activity until the law was clarified. This decision has contributed to the low numbers of repossession actions in the courts since mid-2011.
11. The Land and Conveyancing Law Reform Act 2013 was enacted to ensure the continued application of certain repealed provisions of the Conveyancing Acts 1881 to 1911 and the Registration of Title Act 1964 to mortgages created prior to 1 December 2009, the date on which the repeals took effect on commencement of the 2009 Act. The purpose of the Act was to remove the uncertainty which had arisen following the Dunne judgment.
12. It is noticeable that since the entry into force of the 2013 Act there has been a marked increase in the number of repossession actions initiated in the courts.

### **Structure of Report**

13. Chapter 2 contains a short overview of the development of mortgage law in this jurisdiction and describes the context in which courts deal with applications for repossession of mortgaged property in cases of default. In addition, the Chapter gives further information on how the statutory framework has recently been strengthened in order to underpin Government policy to protect a borrower's private residence.
14. Chapter 3 looks in more detail at mortgage arrears and sets out the most up-to-date data supplied by the Central Bank. In addition, the Expert Group looks at the issue of the mortgage arrears resolution targets (MART) imposed by the

Central Bank on financial institutions and changes in legislation designed to assist distressed borrowers.

15. Chapter 4 examines in some detail the procedures which apply when a repossession action is initiated in the courts. It also contains sample statistical data on repossession cases over the past four years, together with four case studies.
16. Chapter 5 outlines the repossession procedure that applies in Northern Ireland. An attached appendix (Appendix L) outlines the procedures which exist in England and Wales, New Zealand, Australia and Canada. It has proven extremely difficult to obtain reliable statistical data on the implementation of procedures in these jurisdictions and the Expert Group has, therefore, not drawn any specific conclusions.
17. Chapter 6 examines a number of specific issues in response to a Troika request.
18. Chapter 7 sets out the conclusions and recommendations of the Expert Group. While the Expert Group has been unable to establish a clear picture of the costs involved in repossession hearings, not least because of the number of variables which may apply in a particular case, it believes that implementation of its recommendations would lead to improved case management, more streamlined procedures and lower costs.
19. The Expert Group wishes to thank the Courts Service and the Central Bank for their input and also those who responded to the Group's enquiries, including lending institutions, the legal professions, the County Registrar's Association and the Money Advice and Budgeting Service.

## Chapter 2 – Mortgage Law in Ireland

### Introduction

1. Part 1 of this chapter contains a short overview of the development of mortgage law in this jurisdiction and describes the context in which courts deal with applications for repossession of mortgaged property in cases of default. Part 2 describes how the statutory framework has recently been strengthened in order to underpin Government policy to protect a borrower's private residence.

### Part 1 – Overview of development of mortgage law

#### Common law provisions

2. The decline of feudalism and development of capitalism witnessed the emergence of the mortgage as a financial instrument which facilitated the advancing of loans against the security of land. For many centuries, mortgages were principally used to raise capital for commercial purposes; the common use of mortgages for the purchase of residential property emerged much later in the 20<sup>th</sup> century. The main benefit of a mortgage for the lender is that the security takes precedence over the borrower's unsecured creditors in the event of insolvency.
3. Originally, a mortgage involved the conveyance of ownership of the land from the borrower (mortgagor) to the lender (mortgagee), normally subject to a provision for redemption, i.e. a condition in the mortgage document that the land would be re-conveyed to the borrower upon repayment of the loan.<sup>2</sup> Under the common law, rules tended to be applied strictly by the courts; in the case of mortgages, this meant that if the legal repayment deadline (the so-called 'legal date of redemption') was missed, the borrower would lose ownership of the land notwithstanding that a very substantial part of the loan had already been repaid.

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<sup>2</sup> Originally, lenders entered into possession of the land and used income derived from the land to pay off the interest and loan or, in certain cases, only the interest. This mechanism also shielded lenders from any taint of usury, a practice disapproved of by both State and Church.



### **Influence of equity**

4. Over time, the rigid application of strict common law rules to mortgages by the courts began to be tempered, as in other areas of the law, by the application of equitable principles in the chancery courts. So, despite the formal legal transfer of ownership of the mortgaged land to the lender, by the late 17<sup>th</sup> century chancery courts had begun to recognise mortgages as a form of secured loan and to act accordingly.<sup>3</sup> This resulted in recognition of a borrower's 'equitable right to redeem', i.e. a more flexible right by means of which the borrower could redeem the mortgaged property free from restrictive conditions on repayment of the loan and interest, even where the strict legal date of redemption had not been respected.
  
5. The broader 'equity' concept – often referred to simply as the borrower's 'equity' in the property – derives from the same source. It means that where the market value of a property exceeds the value of any existing loan secured on it, the property will provide adequate security for a further loan up to the value of the difference between the market value and the outstanding balance. It also means that where land values are increasing, the borrower retains for his or her use the full capital appreciation of the land concerned. However, where the opposite occurs and the value of outstanding loans exceeds the market value of the property, the shortfall is referred to as the borrower's 'negative equity'.
  
6. Chancery courts were guided by notions of fairness and this resulted in the development of equitable principles and discretionary remedies which take account of the conduct of the parties to the proceedings and are still applied by courts in this jurisdiction.<sup>4</sup> Deadlines may, for example, be applied more flexibly and repossession orders may be 'stayed' in order to allow alternative accommodation arrangements to be made by the borrower. Where the borrower is attempting to sell the property, the court may delay granting

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<sup>3</sup> In 1677, Lord Nottingham stated in *Thornborough–v–Baker* "In natural justice and equity the principal right of the mortgagee [lender] is to the money, and his right to the land is only as security for the money." 1677, 3 Swanst. 628, at p. 629. Quoted in Lyall's 'Land Law in Ireland' at 771.

<sup>4</sup> Since the Judicature (Ireland) Act 1877, courts have been required to resolve conflicts between common law and equity in favour of equity.

repossession in order to allow the sale to proceed. In extreme cases, transactions can be set aside on grounds of undue influence arising from imbalances between the respective positions of the parties.<sup>5</sup> These are rare occurrences, however, because courts do not readily allow parties to withdraw from contracts into which they have willingly entered.

### **No defence of reckless lending**

7. In several recent cases, the validity of the security has been called into question by borrowers resisting repossession orders on the ground that the lender had engaged in 'reckless lending'. The courts have not, however, recognised this as a valid defence. In *ICS Building Society–v–Grant*,<sup>6</sup> Charleton J stated: "Contract law assumes that those entering into an agreement intend that it should be legally enforceable and, unless the contrary is shown, have acted in relation to each other by their mutual choice and not out of compulsion. People can enter into bad bargains." In *McConnon -v- President of Ireland & Ors*,<sup>7</sup> Kelly J stated his belief that a tort of reckless lending does not exist as a civil wrong in Irish law.

### **Statute law on mortgages**

#### ➤ Mortgages of unregistered land

8. The Conveyancing Act 1881, which was enacted in order to simplify and improve conveyancing practice, contains important statutory provisions applicable to mortgages. These provisions, together with related provisions in the later Conveyancing Acts 1882 and 1911, continue to apply to mortgages on unregistered land created before 1 December 2009. Section 1 of the Land and Conveyancing Law Reform Act 2013 was enacted in order to restore legal certainty on this point. As mentioned earlier, a mortgage of unregistered land involved, in strict legal terms, the conveyance of ownership of the land from the borrower to the lender subject to a proviso of redemption.

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<sup>5</sup> *Bank of Nova Scotia–v–Hogan* [1996] 3 IR 239. In the Supreme Court, Murphy J stated that where a wife, under the undue influence or misrepresentation by her husband, acts as surety for a loan by the bank to him and the bank had notice, actual or constructive, of the undue influence or misrepresentation, her right to set aside the transaction will be enforceable against the bank.

<sup>6</sup> [2010] IEHC 17

<sup>7</sup> [2012] IEHC 184

➤ Mortgages of registered land

9. The Local Registration of Title (Ireland) Act 1891 established the Land Registry and introduced a system of registration of land titles. In effect, it introduced a State guarantee for titles entered on the land register. This Act was later repealed and replaced by the Registration of Title Act 1964.
  
10. Section 62 of the 1964 Act permits loans to owners of registered land to be entered in the land register as charges on the owners' titles. Registration of a charge has the same legal effect as the creation of a mortgage on unregistered land; the lenders' rights and remedies are similar in both cases.
  
11. Despite the application of different legal principles, from the borrower's perspective there were few differences in practice between a mortgage of unregistered land and a registered charge.<sup>8</sup> In both cases, the repossession remedy became exercisable by the lender in the event of default.

➤ Land and Conveyancing Law Reform Act 2009

12. The Land and Conveyancing Law Reform Act 2009, which entered into force on 1 December 2009, has modernised and streamlined mortgage law. Under section 89 of the 2009 Act, the law applicable to a mortgage on unregistered land created after 1 December 2009 has now been largely assimilated to that applicable to a registered charge; in both cases, the loan operates as a charge on the land and common remedies are available to the lender in cases of default. In the remainder of this report the term 'mortgage' will cover both mortgages of unregistered land and registered charges.

**Lender remedies**

13. The primary purpose of a mortgage is to provide security for a loan by giving the lender an interest in or claim against the mortgaged property; various remedies may then be invoked by the lender if the borrower falls into arrears or otherwise

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<sup>8</sup> In *Irish Life and Permanent PLC-v – Duff*, Hogan J referred to the "legal fiction" whereby a mortgage of unregistered land transferred ownership to the lender and commented that even in the case of unregistered land, the practice with regard to repossessions "had de facto assimilated itself to that of registered land ..." [2013] IEHC 43, paragraph.

fails to repay the loan. Repossession of the mortgaged property by the lender, normally as a prelude to its sale with vacant possession, is one of the most common of these remedies. It is worth noting that if the best price reasonably obtainable on sale is insufficient to cover the entire value of the outstanding balance of the loan, the borrower remains liable for the outstanding balance.<sup>9</sup>

14. Prior to enactment of the Land and Conveyancing Law Reform Act 2009, lenders may have had the power to sell the mortgaged property without court intervention in cases where the mortgage was made by deed but where they did not have vacant possession, difficulties would have been encountered in selling it at the best price reasonable obtainable.<sup>10</sup> In the majority of cases, the purpose of obtaining possession was, therefore, to sell the property with vacant possession. The option of selling without a court order is no longer possible in the absence of consent by virtue of section 97 of the 2009 Act in the case of housing loan mortgages. However, section 98 of the 2009 Act does provide for a lender to apply to the District Court for a possession order where the lender has reason to believe that the borrower has abandoned the property and urgent steps are required to prevent deterioration or damage.
15. An alternative remedy, the use of which is more common in the case of commercial premises, is the appointment of a receiver. The lender may decide to appoint the receiver in order, for example, to protect the value of the security by improving management of the business in cases where the mortgaged property is a hotel or licensed premises or, in the case of 'Buy-to-Let' (BTL) properties which have been leased and are occupied, to receive rents from the tenants and thereby service the loan.

### **Court jurisdiction**

16. Under section 101 of the 2009 Act, all applications for repossession in cases of 'housing loan' mortgages created after 1 December 2009 must be made in the

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<sup>9</sup> *ICS Building Society–v–Grant* [2010] IEHC 17; see also section 104(2)(b) of 2009 Act.

<sup>10</sup> *Holohan–v–Friends Provident and Century Life Group* [1966] IR 1; see now section 103(1) of 2009 Act.

Circuit Court.<sup>11</sup> Under section 3 of the Land and Conveyancing Law Reform Act 2013, all applications for repossession in cases of mortgages created before 1 December 2009 on private residences or family homes must also be made in the Circuit Court. All other repossession proceedings may continue to be brought in the High Court.<sup>12</sup>

➤ Court rules

17. Unlike substantive law which is derived from the common law and legislation, the practice and procedure applicable to proceedings coming before the courts are set out in rules of court.<sup>13</sup> The purpose of these rules is to—

- give all parties to the proceedings adequate notice of the proceedings and time to prepare their responses;
- clarify the issues to be decided by the court; and
- ensure efficient discharge of court business.

18. As regards the High Court and the Supreme Court, section 36 of The Courts of Justice Act 1926 originally empowered the Minister for Justice to make rules of court in respect of various matters, including pleading, practice and procedure generally in civil and criminal cases. This power was removed from the Minister in section 68 of the Courts of Justice Act 1936 and the power to annul or amend existing rules and to make new rules became exercisable instead by the Superior Courts Rules Committee with the concurrence of the Minister for Justice.

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<sup>11</sup> “housing loan mortgage’ means a mortgage to secure a housing loan and ‘housing loan’ has the meaning given to it in section 2(1) of the Consumer Credit Act 1995, as substituted by section 33 of, and Part 12 of Schedule 3 to, the Central Bank and Financial Services Authority of Ireland Act 2004.

<sup>12</sup> It should be noted, however, that under section 17 of the Courts Act 1981, as substituted in section 14 of the Courts Act 1991, the lender may not be entitled to recover more costs than would have been allowed if the proceedings had been commenced in the Circuit Court.

<sup>13</sup> In *O’Flaherty–v–O’Flóinn*, Kingsmill Moore J defined ‘practice and procedure’ as “the manner in which, or the machinery whereby, effect is given to a substantive power which is either conferred on a Court by statute or inherent in its jurisdiction.” [1954] I.R. 295

19. In the case of the Circuit Court, the rules of court are now made by the Circuit Court Rules Committee, with the concurrence of the Minister for Justice, under section 70 of the Courts of Justice Act 1936.

➤ Practice directions

20. Rules of court may, in certain cases, be complemented by practice directions containing a greater level of practical detail and more detailed guidance issued by the President of the court concerned or the Central Office. For example, CC 11 – Actions for possession of the Circuit Court (Appendix C) issued by the President of the Circuit Court in November 2009 complements Circuit Court Rules (Actions for Possession and Well-charging Relief) 2009 (Appendix D) which inserted a new Order 5B, providing for new procedures in respect of such actions.

## **Part 2 – Government Policy**

21. The Government’s paramount objective in the context of resolving the mortgage arrears problem is to keep borrowers in their homes wherever feasible; repossession of private residences is a last resort when all other options have failed. The statutory and regulatory frameworks have already been strengthened in order to achieve this objective. Key developments include the following:

- The Central Bank’s **Code of Conduct on Mortgage Arrears** (CCMA) contains a structured framework which lenders must follow when dealing with mortgage arrears. The Central Bank has also set targets for the putting in place of sustainable solutions and is stepping up its monitoring and enforcement activities;
- The **Personal Insolvency Act 2012** has modernised the State’s insolvency laws and has put in place new mechanisms to resolve personal debt problems. It has also established the Insolvency Service of Ireland;
- The **Land and Conveyancing Law Reform Act 2013** provides that in applications for the repossession of private residences, irrespective of

whether the mortgage was created before or after 1 December 2009, the proceedings may be adjourned to allow the parties to explore the possibility of applying for a PIA under the 2012 Act as an alternative to repossession.

### **Code of Conduct on Mortgage Arrears**

22. A revised Code of Conduct on Mortgage Arrears (CCMA) drawn up by the Central Bank entered into force on 1 July 2013. It continues to provide a strong consumer protection framework for borrowers who are in mortgage arrears in respect of their primary residence and who are cooperating with their lenders while, at the same time, encouraging lenders, where appropriate, to agree long-term sustainable solutions with such borrowers.
23. The CCMA, which is issued under section 117 of the Central Bank Act 1989, applies only to any mortgage secured on the borrower's primary residence by a lender regulated by the Central Bank; it does not cover mortgages of commercial premises or BTL properties.<sup>14</sup> It requires each lending institution to put in place a Mortgage Arrears Resolution Process (MARP) which must contain provisions for—
- communicating with the borrower;
  - obtaining financial information from the borrower;
  - assessing the borrower's circumstances; and
  - wherever feasible, resolution by means of alternative repayment arrangements.

An appeals process must also be put in place.

The Code, moreover, provides that a lender may only commence legal proceedings for repossession—

- where the lender has made every reasonable effort to agree an alternative repayment arrangement with the borrower, and

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<sup>14</sup> The separate Consumer Protection Code applies in these cases.

- where a period of 8 months has passed from the date the arrears arose (subject also to at least a formal 3-month notification period).
24. The Central Bank has set resolution targets for lenders and is actively monitoring their compliance with the CCMA; this includes an audit of the sustainable solutions being proposed by the lenders. As regards the legal status of the Code and the consequences of non-compliance, the introduction to the Code states that the Central Bank has the power to administer sanctions for contraventions of its provisions under Part IIIC of the Central Bank Act 1942 (as amended by section 10(1) of the Central Bank and Financial Services Authority of Ireland Act 2004). Non-compliance by lenders may, therefore, result in the imposition of sanctions by the Central Bank.
25. The courts have displayed a willingness to acknowledge the Code's role and to have regard to a lender's compliance with its provisions in repossession proceedings. In *Stepstone Mortgage Funding Ltd–v–Fitzell*,<sup>15</sup> Laffoy J refused to grant an order for possession of a borrower's primary residence on the ground that the borrower had not been given any adequate opportunity to appeal a decision of the lender to an Appeals Board in the manner required by the Code. The lender had not, therefore, complied with the Code. In a subsequent case, *Irish Life and Permanent–v–Duff*,<sup>16</sup> Hogan J also considered, among other factors, whether the lender had complied with the Code. Having regard to the fact that the borrower had apparently tried to offer the lender 'interest only' repayments but had been rejected, Hogan J concluded that rebuffing the borrower's efforts to make an offer to pay on an 'interest only' basis amounted to failure to comply with the Code's requirements. In the circumstances where every reasonable effort to agree an alternative repayment arrangement was not made, he refused to grant an order for possession.
26. In *Duff*, Hogan J considered the meaning of "reasonable" in the context of the lender's duty to make "every reasonable effort" to agree an alternative

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<sup>15</sup> [2012] IEHC 142

<sup>16</sup> [2013] IEHC 43



repayment arrangement with the borrower. However, while he noted the absence of readily cognisable legal criteria to determine the matter, and was conscious also that refusal to grant the requested possession order would risk giving the Code a legal status which it did not necessarily merit, he nonetheless felt obliged to follow the earlier judgment of Laffoy J in *Fitzell* and not exercise his judicial discretion in favour of granting an order for possession.

27. It appears, therefore, that under the law as it currently stands, compliance with the CCMA is a necessary condition for lenders seeking to obtain court orders for repossession of primary residences.

### **Personal Insolvency Act 2012**

28. The Personal Insolvency Act 2012 has introduced new debt resolution mechanisms to help mortgage-holders and others with unsustainable debt to reach sustainable agreements with their creditors. In this context, the Act draws a distinction between secured and unsecured debt. The new mechanisms are:

- a Debt Relief Notice (DRN) to allow for the write-off of debt up to €20,000 subject to a 3-year supervision period;
- a Debt Settlement Arrangement (DSA) for the agreed settlement of unsecured debt, with no limit involved, normally over 5 years;
- a Personal Insolvency Arrangement (PIA) for the agreed settlement of secured debt up to €3 million (though this can be increased) and unsecured debt with no limit involved, normally over 6 years

➤ Personal Insolvency Arrangement (PIA)

29. This procedure is available in respect of secured debts up to €3 million in aggregate (but without limit if every secured creditor agrees) and unsecured debts (without limit). A Personal Insolvency Practitioner (PIP) may propose a PIA on behalf of a borrower who owes a debt to at least one creditor (typically, a mortgage lender) with security over property of the borrower located in the

State and in respect of whom, the PIP has completed a report confirming, amongst other things, that there is no likelihood of the borrower becoming solvent within five years. The borrower must also have cooperated for a period of at least six months with the secured lender in respect to his or her private residence in accordance with any process relating to mortgage arrears approved or required by the Central Bank of Ireland (such as the CCMA).

30. The steps leading to a PIA require the borrower, in the first instance, to make a detailed financial disclosure to the PIP. Insofar as practicable, the PIP must structure the PIA on terms that avoid the borrower being required to sell or vacate his or her private residence. If the application meets all the criteria and is accepted by the Insolvency Service, it will be transferred to a specialist judge of the Circuit Court who may then issue a 70-day protective certificate (which may be extended in certain circumstances) which imposes a moratorium on the enforcement of the relevant debts, including the mortgage.
31. With the borrower's consent, a PIP may then call a creditors' meeting to vote on the PIA proposal. It will be approved where a qualified majority of 65% in value of all creditors participating in the meeting and voting have voted in favour of it, subject to support from more than 50% (in value) of unsecured creditors and more than 50% (in value of the lesser of the debt or the security) of secured creditors. Creditors may challenge the PIA in the Circuit Court within a prescribed period. However, if no creditor objects, the specialist judge will consider whether to approve the coming into effect of the PIA and, where necessary, may decide to hold a hearing for that purpose.
32. If the specialist judge approves the PIA, relevant details will be entered in a public register and the arrangement will bind every creditor whose debt is covered by the arrangement. They will not be permitted to take any steps to enforce or recover the debts (including any realisation of security). At the end of the PIA period, provided it has been implemented in accordance with its terms, the borrower will be discharged fully from the unsecured debts and to the extent provided for under the terms of the PIA in the case of the secured debts.

33. The Act imposes conditions and limits on the manner in which secured debt can be modified under a PIA. These include a 'clawback' mechanism whereby a borrower who has benefitted from a write-down may have to repay the secured lender some or all of that written-down amount where he or she sells the secured property within 20 years of the PIA coming into effect. The Act prescribes a valuation mechanism for the valuation of security and, for this purpose, provides for the appointment of an independent expert in certain circumstances.

### **Land and Conveyancing Law Reform Act 2013**

34. Section 2 of this Act provides that in repossession proceedings involving a private residence, irrespective of whether the mortgage was created before or after 1 December 2009, a court may, where it considers it appropriate or on application by the borrower, adjourn the proceedings to enable the parties to consider whether a PIA under the Personal Insolvency Act 2012 would be a more appropriate alternative to repossession. The intention behind this provision is to ensure that lenders do not resort to the repossession remedy without fully considering the alternative PIA option.
35. Section 2 applies only to private residences, including family homes under the Family Home Protection Act 1976 and shared homes under the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. It allows the court to consider an adjournment, initially for a period of two months, to enable the parties to explore a PIA as an alternative to repossession. Without limiting exercise of the courts' discretion in the matter, it outlines certain factors which the courts may take into account when considering such an adjournment. These include whether the borrower has engaged in a process relating to mortgage arrears; whether any payments have been made by the borrower in the 12 months immediately preceding the application; whether the proceedings has been adjourned previously and the number of such adjournments; and conduct of the parties in any attempts to find a resolution to the arrears problem.

36. The provision whereby the courts may have regard to the conduct of the parties means that any lack of meaningful engagement by the borrower or the lender in attempts to resolve the arrears problem may weigh heavily with the court when deciding whether an adjournment is justified. Moreover, if the court considers that the application for an adjournment appears to be primarily for the purpose of delaying proceedings rather than resolving the arrears problem, it may also take that into account.
  
37. Section 2 also provides that at the end of the initial adjournment period the court may grant a further adjournment if it considers that progress has been made in preparing a PIA. Where a second adjournment is granted, the length of such an adjournment will be at the discretion of the court and the initial 2-month limit does not apply.

## Chapter 3 – Mortgage Arrears in Ireland

1. In this chapter, the Expert Group sets out the most up-to-date data on mortgage arrears as provided by the Central Bank. In addition, the Expert Group looks at the issue of the mortgage arrears resolution targets (MART) imposed by the Central Bank on financial institutions.

### 1. Mortgage arrears in Ireland

#### A. Principal Dwelling Houses (PHD)

2. According to the Central Bank statistics (TABLE 1), at the end of September 2013, there were 768,136 private residential mortgage accounts for principal dwellings. Of these, 141,520 accounts were in arrears, and 99,189 (12.9 per cent) were in arrears of more than 90 days.
3. Early arrears declined significantly during the third quarter of the year. However, longer-term arrears continued to increase as the number of accounts in arrears over 360 days reached 59,844 at end-September. (TABLE 2 outlines trends in mortgage arrears, repossessions and restructuring arrangements over the last four quarters).

#### B. BTL Properties

4. At end-September 2013 (TABLE 1) there were 147,610 residential mortgage accounts for BTL properties. Some 40,426 (27.4 per cent) of these accounts were in arrears and 31,227 (21.2 per cent), were in arrears of more than 90 days.
5. The number of BTL accounts that were in arrears of more than 180 days was 26,675 at end-September 2013, reflecting a quarter-on-quarter increase of 4.3 per cent.
6. Meanwhile, the number of accounts in arrears of over 360 days increased by 5.5 per cent during Q3 2013. At end-September 2013, 20,272 BTL accounts, or 13.7 per cent of the total stock, were in arrears of over 360 days (TABLE 2).

## **2. Restructuring Arrangements**

### **A. Principal Dwelling Houses (PDH)**

7. Restructuring arrangements include the following: a switch to 'interest only' payment; a reduction in the payment amount; a temporary deferral of payment; extending the term of the mortgage; and capitalising arrears amounts and related interest. The figures also include a small number of modification options such as split mortgages and 'trade-down' mortgages, which have been introduced to provide more long-term solutions for borrowers in difficulty.
8. A total stock of 80,555 PDH mortgage accounts were categorised as restructured at end-September 2013. Of the total stock of restructured accounts at end-September, 53.4 per cent were not in arrears.
9. Restructured accounts in arrears include accounts that were in arrears prior to restructuring where the arrears balance has not yet been eliminated, as well as accounts that are in arrears on the current restructuring arrangement.
10. At end-September, 78.9 per cent of restructured PDH accounts were deemed to be meeting the terms of their arrangement. This means that the borrower is, at a minimum, meeting the agreed monthly repayments according to the restructure arrangement. It is important to note that 'meeting the terms of the arrangement' is not a measure of sustainability, as not all restructure types represent longer-term sustainable solutions
11. A total of 23,776 new restructure arrangements were agreed during the third quarter of the year. The share of interest only arrangements and reduced payment arrangements (interest plus some capital) fell further during Q3, to 41.4 per cent from 49.7 per cent at end Q2 indicating a move out of short-term arrangements.

## **B. BTL Properties**

12. A total stock of 21,607 BTL mortgage accounts were categorised as restructured at end-September 2013. Of the total stock of restructured accounts recorded at end-September, 60.9 per cent were not in arrears, while 77.9 per cent were meeting the terms of their restructure arrangement.
13. A total of 5,399 new restructure arrangements were agreed during the third quarter of the year. Interest only arrangements and reduced payment arrangements (interest plus some capital) continued to account for the majority of restructures in place for BTL mortgages, although their share fell to 58.8 per cent from 62.9 per cent at end-June.
14. The data on arrears and restructures indicate that of the total stock of 40,426 BTL accounts that were in arrears at end-September, 8,455, or 20.9 per cent, were classified as restructured at that time.

## **3. Legal Proceedings and Possession**

### **A. Principal Dwelling Houses (PDH)**

15. During the third quarter of 2013, legal proceedings were initiated to enforce the security on private dwelling mortgages in 1,830 cases. Court proceedings concluded in 361 cases during the quarter, and in 89 of these cases the courts granted an order for repossession or sale of the property. There were 1,002 such properties in the possession of lenders at the beginning of the quarter.
16. A total of 209 properties were taken into possession by lenders during the quarter, of which 76 were repossessed on foot of a court order, while the remaining 133 were voluntarily surrendered or abandoned. During the quarter 158 properties were disposed of. As a result, lenders were in possession of 1,050 private dwelling properties at end-September 2013.

## **B. BTL Properties**

17. There were 502 BTL properties in the possession of lenders at the beginning of Q3 2013.
18. A total of 62 properties were taken into possession by lenders during the quarter, of which 31 were repossessed on foot of a court order, while the remaining 31 were voluntarily surrendered or abandoned. During the quarter 47 properties were disposed of. As a result, lenders were in possession of 516 BTL properties at end-September 2013.

## **Personal Insolvency Act 2012**

19. As outlined in Chapter 2 (paragraphs 28 to 33), the Personal Insolvency Act 2012 introduces 3 new debt resolution mechanisms to help mortgage-holders and others with unsustainable debt to reach agreements with their creditors. The new mechanisms offer different solutions to meet the needs of different situations.
20. The main mechanism of relevance with regard to mortgage arrears and sustainable solutions is the Personal Insolvency Arrangement (PIA). This is available in respect of secured debts up to €3 million in aggregate (but without limit if every secured creditor agrees) and unsecured debts (without limit of value).
21. A key feature of the PIA procedure is its capacity, subject to the requirements of the Act, to affect secured debts and the right of a secured creditor to enforce or otherwise deal with his or her security. The Act does not impose a 'one-size-fits-all' solution for dealing with secured debt. A tailored solution can be designed by a PIP to accommodate the particular circumstances of each debtor on a case-by-case basis. However, insofar as practicable, the PIP must formulate the arrangement on terms that avoid the debtor being required to sell or vacate his or her private residence and the PIP must consider any appropriate alternatives. Three important options for dealing with secured debt under a PIA are likely to be:



- *sale of the property* the subject of the security and write-down of any shortfall balance;
- *restructuring of the secured debt* to make it more affordable (*e.g.* ‘interest-only’ payments for a certain period); and
- *write-down* of some or all of the negative equity but without sale of the property the subject of the security.

### **Land and Conveyancing Law Reform Act 2013**

22. Section 2 of the Land and Conveyancing Law Reform Act 2013 (Appendix E) provides that where land which is the private residence of—

- (a) the mortgagor of the land concerned, or
- (b) a person without whose consent a conveyance of that land would be void by reason of:
  - (i) the Family Home Protection Act 1976 or
  - (ii) the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010

in any proceedings brought by a mortgagee seeking an order for possession, the court may;

- (a) of its own motion, if it considers it appropriate to do so, or
- (b) on application being made to the court by a relevant person

adjourn the proceedings for a period not exceeding 2 months to enable the relevant person to consult a PIP regarding, or instruct that PIP to make, a

proposal for PIA. The court, in considering an application, must have regard to such matters as it considers appropriate and, in particular, to—

- (a) whether the borrower has participated in any relevant process relating to mortgage arrears operated by the lending institution concerned which has been approved or required by the Central Bank of Ireland;
  - (b) whether the borrower has made any payments to the lender in respect of monies advanced on foot of or secured by the mortgage in the 12 months immediately preceding the application and, if so, the amount of such payments and the proportion which the amounts paid bear to the amount of any regular payments which the borrower was required to make under the terms of the mortgage or any associated loan agreement;
  - (c) whether the proceedings have been adjourned on any previous occasion at the request of the borrower, and, if so, the number of any such adjournments and the period of such adjournments and the reason for such adjournments;
  - (d) the conduct of the borrower and lender in any attempt to find a resolution to the issue of dealing with arrears of payments due on foot of the mortgage; and
  - (e) whether, having regard to the circumstances of the case, the application for an adjournment appears to the court to be primarily for the purpose of delaying progress in the proceedings.
23. On the expiry of a period of adjournment, the court may grant a further adjournment of the proceedings where it considers that significant progress has been made in the preparation of a proposal for a PIA.

24. The 2013 Act, by providing for a process of adjournment for the investigation of the possibility of a PIA, creates, in effect, two separate statutory 'tracks' for repossession proceedings in respect of private residences and BTL properties since the latter will not have access to this statutory adjournment provision.

#### **Mortgage Arrears Resolution Targets**

25. In March 2013, the Central Bank of Ireland published its framework for setting performance targets for mortgage arrears resolution for six Irish mortgage lending institutions. The lending institutions specified in the framework were set common public targets regarding their performance in resolving, on a sustainable basis, those arrears cases which are 90 days or more overdue. In addition, they were set other institution-specific targets at a more operational level which were internal to each institution, as part of on-going supervisory engagement, principally concerning handling of early arrears cases.
26. The Public Targets have the following elements:
- quarterly targets will be set in relation to the number of sustainable solutions proposed to borrowers. These will become progressively more demanding over time. These apply for the quarter ending 30th June 2013 onwards;
  - progressively more demanding quarterly targets will be set for the conclusion of sustainable solutions. These apply for the quarter ending 31st December 2013 onwards; and
  - targets regarding subsequent performance of these solutions will be set.
27. Within the context of the targets set, it is recognised that in some cases alternative arrangements may not be agreed, or are not appropriate, and therefore voluntary surrender, voluntary sale or legal action for repossession may be required or personal insolvency proceedings may be initiated.

28. The lending institutions are required to make public disclosure of their performance against these targets. The Central Bank will periodically audit performance against the targets, including whether arrangements have been made on a sustainable basis. The Central Bank will consider regulatory action, including the imposition of additional capital requirements, for lending institutions that fail to meet targets or which demonstrate poor resolution strategies or poor execution against their strategies. The Central Bank is also setting out its plans to require more rigorous provisioning for mortgage loans in arrears greater than 90 days which have not been subject to a sustainable solution.

#### **Audit**

29. The Central Bank recently published the outcome of the Mortgage Arrears Resolution Targets for Quarter 2 and Quarter 3 of 2013. In line with requirements, all the lenders have reported sufficient proposed solutions to meet the target of 20% proposed sustainable solutions in Quarter 2 and 30% in Quarter 3.
30. The Central Bank conducted an audit of the banks' Quarter 2 results which examined the lenders' processes of determining and proposing sustainable solutions against the Central Bank's sustainability guidelines. A number of issues were identified which will need to be addressed by the lenders to ensure that the solutions being proposed are sustainable in the long term. However it was found that the issues arising would not have resulted in any of the lenders' failing to reach the Quarter 2 target of 20% proposed sustainable solutions.
31. Key issues identified include—
- Short-term loan modifications were proposed in some cases where there was:
    - no tangible evidence of a borrower's circumstances improving

- no clarity on the ultimate long-term solution;
  - An absence of requisite information, such as verification of borrower income or property value; and
  - A lack of evidence of legal follow up in cases counted under legal heading.
32. One issue that needs to be addressed concerns the state of preparedness of the some of the lending institutions to pursue proceedings. Evidence from the County Registrar's Association indicates that a very high proportion of adjournments in repossession proceedings are granted at the request of the lenders. The Expert Group is concerned that, given the likelihood of increased numbers of Civil Bills for possession being issued in 2014, the Circuit Court may be left with an overhang of new proceedings where some lending institutions are not ready to proceed and that this may result in longer waiting times for cases to proceed.
33. The Expert Group also met with two lending institutions which reported that a relatively low percentage of borrowers re-engage with lenders after receiving letters threatening legal action to repossess property (less than 25%). This compares with a reported 70% re-engagement rate in England and Wales. While it remains to be seen whether this disparity will continue, another lending institution has suggested that a higher re-engagement rate will result from the new CCMA rules which require lenders to provide notice of non-cooperation and which removes borrowers from the Mortgage Arrears Resolution Process (MARP).

## **Chapter 4 – Repossession Procedures in Ireland.**

### **Introduction**

1. In this Chapter, the Expert Group outlines the procedures which can lead to repossession in Ireland.
2. The Expert Group also provides sample statistics from the Courts Service with regard to repossession applications taken in the past four years together with case studies which illustrate the issues which may be encountered.

#### **A. Application for repossession in the Circuit Court**

3. Under section 101 of the Land and Conveyancing Law Reform Act 2009, all applications for repossession in cases of 'housing loan' mortgages created after 1 December 2009 must be made in the Circuit Court.
4. Under section 3 of the Land and Conveyancing Law Reform Act 2013, with effect from 31 July 2013, all applications for repossession in cases of mortgages created before 1 December 2009 on private residences or family homes must also be made in the Circuit Court.

#### **B. Application for repossession in the High Court**

5. All other repossession proceedings, including proceedings relating to BLT properties, may be brought in the High Court although a lender may also opt to bring such proceedings to the Circuit Court.

#### **C. Appointment of a receiver**

6. In the case of BTL properties, a lender may, where the mortgage documentation permits, opt to appoint a receiver rather than initiate the court repossession process. Where there are tenants in occupation of the property, the receiver receives the rent and services the mortgage. In such cases, the lender is relieved of the responsibility of securing the property pending sale. When the lease expires, the receiver may, depending on prevailing property market conditions, opt to sell the property. Alternatively, the bank may opt to re-let the property.

Where a lender's mortgage documentation does not permit the appointment of a receiver to sell a BTL property, it should be noted that, notwithstanding the dual track approach mentioned in Chapter 3, the lender must follow the same route as for a private residence.

**A. Procedures in the Circuit Court**

7. The Circuit Court consists of the President and thirty seven ordinary judges. The President of the District Court is, by virtue of his/her office, an additional judge of the Circuit Court. The country is divided into eight circuits with one judge assigned to each circuit, except in Dublin where ten judges may be assigned and the Southern Circuit where there is provision for three judges. There are twenty-six Circuit Court offices throughout the country with a County Registrar assigned to each office. The Circuit Court is a court of limited and local jurisdiction. Its work can be divided into three main areas: civil, criminal and family law. The Circuit Court sits in venues in each circuit. Sittings vary in length from one day to three weeks and are generally held every 2 to 4 months in each venue in the circuit. Dublin and Cork have continual sittings throughout each legal term.
8. The updated procedures applicable to repossession cases in the Circuit Court are governed by Order 5B of the Circuit Court Rules (Procedure in Certain Actions for Possession and Well Charging Relief) 2009 (S.I. No. 264 of 2009) as amended by Circuit Court Rules (Actions for Possession and Well Charging Relief) 2012 (S.I. No. 356 of 2012) – Appendix D.
9. The manner in which proceedings are taken is as follows:
  - Proceedings must be commenced by Civil Bill (prescribed in the Schedule of Forms in the Circuit Court Rules – Form 2R – Appendix F). The endorsement of claim in the Civil Bill must state specifically, and with all necessary details, the relief claimed and the supporting grounds.
  - In contrast with other types of proceeding commenced in the Circuit Court by Civil Bill, these proceedings are given a return date – which is entered on

the Civil Bill – before the County Registrar, i.e. the legal professional officer in the Circuit Court. Under the Practice Direction of the President of the Circuit Court of 12 November 2009 (“the Practice Direction” – Appendix C), the return date is fixed for a date not earlier than eight weeks from the date of issue of the Civil Bill. This is intended to facilitate the parties in their preparations for the proceedings.

- The Civil Bill, together with a copy of an affidavit and any exhibits sworn on behalf of the lender verifying the claim, must be served on the borrower not later than 21 days before the return date. The Practice Direction requires that the Civil Bill, when served on the borrower, should be accompanied by a letter from the lender or the lender’s solicitor stating –
  - (a) that, except with the consent of the borrower, no order for possession will be made on the initial return date before the County Registrar and that the proceedings will be adjourned to such later date as the County Registrar considers just in the circumstances;
  - (b) the importance of the borrower or his or her legal representative attending before the County Registrar on the return date and on any date to which the proceedings are adjourned, should the borrower wish to make any representations to the County Registrar concerning the proceedings; and
  - (c) that a borrower not intending to enter a defence is not required to file and serve on the lender a replying affidavit.
- A borrower intending to defend the proceedings must enter an appearance (Form 5 – Appendix G) within 10 days of service of the Civil Bill. The borrower must submit a replying affidavit setting out the defence not later than 4 days before the return date.



- Evidence is adduced by affidavit except that—
  - (a) oral evidence may be adduced by leave of the Judge;
  - (b) evidence of failure to enter non-appearance or file an affidavit may be given by a certificate or by such other means as the County Registrar permits;
  - (c) where an issue is directed to be tried, evidence as to matters of fact may be adduced orally where the Judge directs.
  
- The County Registrar, in addition to any other order which he or she has power to make, may—
  - (a) order service of the Civil Bill on any other party;
  - (b) make an order extending the time for entry of appearance;
  - (c) give directions and fix time limits for the filing and delivery of any affidavits by any party;
  - (d) give any other directions for the preparation of the proceedings for trial;
  - (e) where an appearance has not been entered, or an affidavit setting out a defence has not been filed and delivered, make an order for possession (the power to make an order for possession has been given to the County Registrar by primary legislation, viz. section 34 and paragraphs (xxxiii) and (xxxiv) of the 2<sup>nd</sup> Schedule to the Court and Court Officers Act 1995 (Appendix H) as inserted by section 22 of the Courts and Court Officers Act 2002). There is an appeal from such an order.

- Where an affidavit setting out a defence has been filed, the County Registrar transfers the Civil Bill, when in order for hearing, to the Judge’s list on the first opportunity.
- The Judge, where he or she considers it appropriate, may adjourn a Civil Bill for “plenary hearing” (i.e. hearing on oral evidence) with such directions as to pleadings or discovery as may be appropriate.
- The Judge or the County Registrar may make such order as to costs as he or she thinks just, including an order for any costs awarded.

#### **CIRCUIT COURT RULES COMMITTEE**

10. The rule-making authority for the Circuit Court is the Circuit Court Rules Committee established under section 69 of the Courts of Justice Act 1936. The remit of the Committee is fixed partly by section 66 of the Courts of Justice Act 1924 which empowers it to annul or alter rules and make new rules with the agreement of the Minister for Justice and Equality, including rules for regulating the practice, pleading and procedure generally (including liability of parties as to costs and also the granting of summary judgment in appropriate cases) of the Circuit Court. The membership of the Circuit Court Rules Committee to end 31 December, 2013 is shown in Appendix I.

#### **B. Procedures in the High Court**

11. The Master of the High Court has a broadly similar role as the County Registrar in the Circuit Court. The procedure is set out in Order 38 of the Rules of the Superior Courts (Appendix J).
12. The process involves the lender issuing a special summons which sets a return date which may not be less than 7 days after the issuing of the summons. The summons must then be served on the borrower at least 4 days before the return date. The lender must file an affidavit setting out the facts of the claim in the Central Office of the High Court. The hearing may be on affidavit only or oral evidence may also be adduced.

## **SUPERIOR COURTS RULES COMMITTEE**

13. The Superior Courts Rules Committee was established by section 67 of the Courts of Justice Act 1936. Under section 68 of the 1936 Act, the power to make, annul or alter rules of court is exercisable by the Rules Committee with the agreement of the Minister for Justice and Equality. The membership of the Superior Court Rules Committee to end 31 December, 2013 is shown in Appendix K.

### **Service of Notice**

14. The service of documents in court proceedings is a fundamental requirement of the justice system. The right of a person to defend themselves is an essential part of due process. The High and Circuit Courts currently require service on individuals to be effected by registered post or by personal service. Where an individual cannot be served by these means, courts at present grant applications to serve documentation by other means including—

- by ordinary post
- by e-mail
- by publication in a newspaper
- by posting on a social media page
- by the placing of an advertisement in a newspaper
- by pinning of a notice to a door

### **Execution Orders**

15. The principal method for obtaining enforcement of a court possession order where possession has not been yielded up voluntarily by the borrower is to obtain an execution order from the court office (known as 'habere' or in earlier times 'habere facias possessionem'). Until enactment of the Enforcement of Court Orders Act 1926, the enforcement of court orders in civil proceedings was

the responsibility of sheriffs. Under section 8 of the 1926 Act these functions were transferred to the county registrars, except in counties Dublin and Cork where the office of sheriff remains. The Execution Order directs the county registrar or sheriff to put the lender in possession of the property without delay.

16. The 1926 Act also provides for the appointment of an official known as the 'court messenger'. The role of the court messenger under legislation is to act for and otherwise assist the County Registrar or Sheriff in the execution of execution orders.

17. Principal features of Execution Order:

- The order continues in force for one year but may be renewed by application to the County Registrar or to the Central Office of the High Court;
- The Execution Order may not be renewed after a period of six years without the permission of the court;
- The sheriff is required to execute the order within a reasonable period from the date of receipt;
- The lender, or a representative, is required to be present to identify the property which is the subject-matter of the order and to receive possession; the sheriff may use reasonable force to gain access to the property;
- Where property, including residential property, is occupied by tenants, they may 'attorn' themselves, i.e. acknowledge themselves as tenants, and agree to remain as tenants after transfer of ownership of the property.

18. Execution Orders on foot of orders for possession are available year round from High and Circuit Court offices and do not require lenders to make a further application to court. The decision to apply for an execution order depends on whether or not the borrower has surrendered the property.

19. According to the County Registrar's Association, some lending institutions appear to be unaware of the need for a representative of the lending institution to be physically present to identify the property for repossession. The presence of an unauthorised person on behalf of the lending institution, e.g. a locksmith with instructions to change the locks, is not sufficient and will inevitably lead to execution delays.

**C. Appointment of Receivers**

20. An alternative method of repossession, and one which is generally used in relation to BTL properties, is the appointment of a receiver. In general, mortgage documents provide that a receiver may be appointed in cases of default.

20. Under the mortgage, a receiver appointed by the lending institution has a number of powers. They generally include—

- the power to take possession of and enter the property;
- the power to protect and insure the property;
- the power to let any property for a specified period and at a specified rent;
- the power to do other things that he or she may consider to be incidental or conducive to any of the matters or powers contained in the mortgage documentation.

22. The Expert Group has been informed that some mortgage documents issued by certain lending institutions have omitted the power of the receiver to sell the property. In such cases, sale of the property by the lender can only be effected through the courts system.

### **3. Court Statistics**

#### **A. Judge's List**

23. The Courts Service has provided a sample of 195 cases across 20 Circuit Court jurisdictions where Possession Orders were granted following listing in the Circuit Court Judges List. Cases are referred to the Judge's list where they are defended since the County Registrars only have jurisdiction to deal with consent or default cases. The cases on which the following statistics are drawn are cases selected at random across different counties covering the period 2009 to 2013. Consequently, they cover the period before and after the enactment of the Land and Conveyancing Law Reform Act 2013.
24. The attached table (Table 3) summarises data provided by the Courts Service and gives a breakdown by Circuit Court jurisdiction rather than by case number.
25. Points to note:
- Of the 195 cases, 151 properties were identified as private residences, 16 as BTL properties and the status of the remaining 28 was unknown.
  - The average time from the issue of a Civil Bill to the grant of a Possession Order was 517 days.
  - The average time from the first entry of the matter on the Judge's List to the grant of a Possession Order was 105 days.
  - The average time taken from the grant of a Possession Order to the grant of an Execution Order was 262 days. However, in over 60 cases an Execution Order had not been sought.
  - The average number of adjournments before the County Registrar was 3.23.
  - The average number of adjournments before a judge was 1.05.

**B. Possession Orders granted on Consent**

26. The Courts Service has provided a sample of 222 cases across 21 Circuit Court jurisdictions where Possession Orders were granted on consent. Again, these are historical cases from 2009 to 2013.
27. The attached table (Table 4) synthesises the information contained in the more detailed list provided by the Courts Service and gives a breakdown by Circuit Court jurisdiction rather than by case number.
28. Points to note:
- Of the 222 cases, 181 properties were identified as private residences, 14 as BTL properties and the status of the remaining 27 was unknown.
  - The average time from the issue of a Civil Bill to the grant of a Possession Order was 385 days.
  - The average time taken from the grant of a Possession Order to the grant of an Execution Order was 234 days. However, in over 100 cases an Execution Order had not been sought. This is not surprising since an execution order is only required where the borrower will not vacate a property and the services of a sheriff are required.
  - The average number of adjournments before the County Registrar was 2.9.

**C. Adjournments**

29. There are a number of factors which can lead to the granting of adjournments.
- (a) Under the Practice Direction in the Circuit Court, there is an automatic adjournment on the initial return date, except where the Court is informed that the order can be made with the consent of the borrower.
- (b) Cases arise where the lenders have experienced problems with service of notice on the borrower. In such circumstances the lender may be

granted a new return date on the first return date. In addition, there may be an application for substituted service (this could be dealt with on the first return date if the lender was ready to request it as it is an *ex parte* procedure); on the new return date, assuming that service of the Civil Bill has been effected, the case will fall into either of the scenarios listed at (c) and (d) below. It appears from recent cases before the Circuit Court in various counties that in a high proportion of cases, lenders only enquire into the whereabouts of borrowers after rather than before the issue of the Civil Bill.

- (c) Cases where the proceedings were served but the borrower has taken no action. These need to be adjourned in accordance with the practice direction and given a date that suits the lender, usually 2 or 3 weeks later. If there is no appearance then by the borrower, an order for possession can be made on that date by the County Registrar.
- (d) Cases where discussions are taking place with the lender and the parties need more time to reach an agreement. These are adjourned to a date that suits the parties and allows time for agreement to be reached.
- (e) Cases where, for whatever reason, the lending institutions are requested to file further affidavits before an order can be made.
- (f) Cases where an arrangement has been made between lender and borrower outside the court process. Typically, these cases are adjourned for 3 to 6 months to ensure the borrower keeps up the agreed payments.
- (g) Cases that are being defended. These cases are usually adjourned for 3 to 4 weeks to allow for replying affidavits to be furnished and are then transferred to the Judge's list for hearing.



- (h) Cases where there is consent to order repossession. These are adjourned on the first return date in accordance with the Practice Direction and the order is made on the second date.

**D. Court Sittings**

30. The Expert Group has received information from the County Registrar's Association in relation to recent court sittings on possession applications.
31. At Dundalk Circuit Court, a total of 49 cases were listed for hearing on 4 November 2013; 2 were automatically adjourned as it was the first return date; 24 cases were adjourned at the request of the lender; 10 cases were adjourned with the consent of the parties, and 13 were adjourned because the requisite documents had not been served on the borrowers. No Possession Orders were granted at this sitting.
32. At Trim Circuit Court, a total of 59 cases were listed for hearing on 25 November 2013; 28 cases were adjourned at the request of the lender; 16 cases were adjourned with the consent of the parties, and 12 were adjourned because the requisite documents had not been served on the borrowers. 2 cases were adjourned generally with leave to re-enter and one case was transferred to the Judge's list on receipt of a defence. No Possession Orders were granted at this sitting.
33. At a special repossession sitting at Galway Circuit Court on 26 November 2013, 64 cases were listed for hearing. The majority of the cases were adjourned automatically as it was the first return date. However, 15 cases were adjourned as the borrowers had not been served with notice and a further 7 were adjourned generally with leave to re-enter. No Possession Orders were granted at this sitting.
34. It should be noted that the County Registrar in Galway has reported that in a number of cases an adjournment was sought by the lender due to engagement with the borrower. However, in two cases the borrowers were present in Court

and said there had been no engagement by the lender other than computerised letters; even though they had tried to telephone and speak with the signatory of the letter, they were unsuccessful in doing so. Other borrowers who attended confirmed that there was no engagement by lenders and indeed none of the borrowers seemed to be aware of the Revised Code of Conduct on Mortgage Arrears.

35. A similar pattern was seen in Mayo Circuit Court in November 2013, where 56 cases were listed for hearing. Again, the majority of the cases were automatically adjourned as it was the first date. Again, no Possession Orders were granted at this sitting.

**E. Case Studies**

36. Three types of repossession procedure are settled by the County Registrar: orders where repossession is by consent of the parties; orders in default of a defence, and orders where the defendant(s) have left the jurisdiction. Where the borrower enters a defence, the case is put on the Judge's list for determination.
  
37. The following case studies have been provided by the Courts Service in respect of each of the types of repossession listed above. Case studies 1 and 2 were chosen as being close to the norm for consent or default orders. Case studies 3 and 4 were chosen at random and the description of the issues is indicative of cases where the borrowers have left the jurisdiction or look to defend cases themselves, without legal representation.

## CASE STUDY 1 – CONSENT ORDER – CIRCUIT COURT

### **Bank v. two co-defendants**

The solicitor for the bank issued the proceedings in November 2012 and was given a return date for the proceedings 33 court sitting days later (the court was on holidays for three weeks during that period so the more correct measure might be 19 court sitting days later).

On the first return date, at the bank's request, the County Registrar granted a new return date in respect of the second defendant to a date 7 weeks later to allow for service of the proceedings. The proceedings against the first defendant were adjourned to the same date. There was no appearance by the defendants.

On the second return date, counsel for the bank was granted a new return date in respect of the first defendant 14 court sitting days later and there was an adjournment granted to the bank in respect of the second defendant also.

On the third return date, counsel for the Bank and the first defendant were present but there was no appearance in respect of the second defendant. The matter was further adjourned to a date 22 court sitting days later to allow the first defendant to be served, the Court having been advised that a solicitor for the first defendant had come on record and was prepared to accept service on his client's behalf.

On the fourth return date, solicitors for the Bank and two co-defendants appeared and the matter was further adjourned by consent to a date 8 weeks later. The County Registrar agreed to adjourn the matter to facilitate discussions between the parties.

On the fifth return date, the County Registrar made the possession order by consent but put a stay on execution for 3 months. In attendance were solicitors for the Banks and the second defendant. The solicitors for the first defendant indicated their consent to the making of the Order by email and this email was before the court. To date, the solicitors for the Bank have not applied for an Execution Order.

Total number of adjournments – 4

Total number of days between date of issue of proceedings and making of possession order – 238 days.

## CASE STUDY 2 – DEFAULT ORDER – CIRCUIT COURT

### **Bank vs. two co-defendants**

The solicitor for the Bank issued the proceedings in August 2010 and was given a return date for the proceedings 63 court sitting days later (the court was on holiday for 5 weeks during the period so the more correct measure might be 35 court sitting days later).

The files shows that the property was a family home and the bank is one that might be described as a sub-prime lender.

On the first return date, Counsel for the Bank and a solicitor for the defendants appeared. The County Registrar granted an adjournment to a date 36 court sitting days later.

On the second return date, Counsel appeared for the Bank and solicitor attended for the defendants. The Court granted a further adjournment on that date on consent of both sides. The new date was a further 29 court sitting days later.

On the third return date, Counsel for the Bank attended as did the male co-defendant. He gave evidence that he was unemployed and that he hoped to return to employment within two weeks, at which point he proposed to commence payment of instalments on the arrears. The Court heard also that the property was not in negative equity. A further adjournment was granted to a date 17 court sitting days later.

On the fourth return date, a solicitor for the co-defendants appeared along with Counsel for the Bank. On that date, the court granted a further adjournment of 2 weeks to allow the defendants to file an appearance. The Court was told that the parties were likely to consent to an order for possession.

On the fifth return date, the solicitor for the co-defendants again appeared along with Counsel for the Bank. The matter was further adjourned for mention to a date 3 months later that was 15 court sitting days after the adjournment date.

On the sixth return date, the court was attended by Counsel for the Bank, the solicitor for the co-defendants and the male co-defendant. On that date the County Registrar made the order for possession in default of defence. A stay of 6 months on the proceedings was given with liberty to apply during the period of the stay. No order was made for costs.

29 working weeks later, the Bank applied for an Execution Order and no applications were made to the court in the interim.

Total Number of adjournments – 5

Total number of days between date of issue of proceedings and making of possession order – 420 days.

### **CASE STUDY 3 – DEFENDANTS HAVE LEFT THE JURISDICTION – CIRCUIT COURT**

#### **Bank vs. two co-defendants**

Proceedings issued in February 2012 with a return date in April, 2012 , 50 court sitting days later.

Service having been effected on both defendants by registered post and not returned undelivered, the matter was adjourned on the first return date in accordance with the Practice Direction to a date 42 court sitting days later, the date fixed at the request of the Bank. There was no appearance by the defendants.

On the second return date, there was no appearance by the Defendants. The Bank sought and obtained an adjournment to a date 20 court sitting days later.

On the third return date, there was an issue over who was in actual occupation of the property which led to a further adjournment to a date 17 court sitting days later which, with holidays, resulted in a 2 and a half month adjournment. There was no appearance by the defendants.

On the fourth return date, occupation was still a live issue necessitating a further adjournment to a date 58 court sitting days later. There was no appearance by the defendants.

On the fifth return date, it appeared there were tenants in occupation and there was also an issue over the current location of the defendants and whether they were aware of the adjourned dates. There was no appearance by the defendants.

An affidavit sought at the previous listing was not lodged before the next (sixth) return date and the matter was adjourned again to a date 24 court sitting days later to allow the solicitor for the bank to complete the affidavit.

On the seventh return date there was an affidavit before the court outlining efforts made by the Bank's agent in October, November and December 2012 to establish who was in occupation and evidencing the contact had with the occupiers in January 2013 when the agent was informed by the tenant husband that all post had been sent by the tenant to the landlord and when the tenant wife confirmed that she was aware of the hearing date in January 2013. A private investigator employed by the Bank had failed to locate the defendants.

Based on the documents furnished and the submissions made for the Bank, the County Registrar made an order for possession in April 2013 with a stay on the order for a date 5 weeks later. On that date, the stay on the order was lifted but a stay of execution of 8 weeks was granted with liberty to apply in order to give the occupiers time to relocate.

Over 4 months have elapsed since the expiration of the stay and the Bank has not applied in this period for an Execution Order.

Total number of adjournments – 6

Total number of days between date of issue of proceedings and making of possession order – 431 days

## CASE STUDY 4 – DEFENDED CASE – CIRCUIT COURT

The solicitor for the Bank issued the proceedings in April 2012 and was given a return date for the proceedings 56 court sitting days later.

On the first return date, a solicitor for the Bank appeared as did the defendant in person. The matter was adjourned 27 court sitting days and over 3 calendar months in accordance with the Practice Direction and with the consent of the parties.

On the second date, the defendant again appeared as did the Bank's solicitor. A further adjournment was sought by the distressed defendant (single parent) and was granted to a date 61 court working days later. The property is the principal residence of the defendant and the defendant's children.

On the third return date, another adjournment was granted to a date 49 court sitting days in advance.

On the fourth return date, the defendant again appeared in person and informed the court that the defendant had been in contact with an advocacy group in the intervening period but that it had declined to take on the case. The matter was again adjourned to a date 36 days in later to see whether legal assistance could be obtained for the defendant.

On the fifth return date, the County Registrar extended the time by 3 weeks for the defendant to file and serve an appearance to the proceedings and a supplemental affidavit was to be sworn by the Bank. The matter was adjourned again by the County Registrar to a date 25 court sitting days later.

On the sixth date, following oral submissions from the Bank and the defendant, the County Registrar ordered that the matter be transferred to the Judge's list on a date 10 court sitting days later.

On the seventh return date, the Judge adjourned the matter to a sitting of the Court one month later, ordering that the Bank serve and file a further affidavit within two weeks to confirm the extent of the arrears.

This target was met but subsequent to that and before the next Court date, the defendant lodged an appearance, two affidavits and a covering letter outlining a defence. The basis for the defence was that the financial institution which granted the mortgage was not the lending institution that was seeking to repossess the property.

At the eight return date, upon reading the affidavits and hearing from counsel for the Bank and the defendant in person, the Judge granted the order for possession with a 6 month stay on execution.

Total number of adjournments – 7

Total number of days between date of issue of proceedings and making of possession order – 503 days.

## **Chapter 5 – Repossession procedures in other Jurisdictions**

### **Introduction**

1. The Expert Group concentrated its attention on the procedures which apply in Northern Ireland given its proximity and the fact that many lending institutions operate in both jurisdictions. It noted the repossession procedures in England and Wales, New Zealand, Australia and Canada but did not have sufficient data on their operation to draw any conclusions (Appendix L).

### **Repossession in Northern Ireland**

#### **Pre-Action Protocol**

3. In common with England and Wales, a pre-action protocol operates in Northern Ireland. It describes the conduct a court will normally expect of the parties prior to the start of a possession claim. Specifically, the aims of the Protocol are to:
  - (a) ensure that a lender and a borrower act fairly and reasonably towards each other in resolving any matter concerning mortgage arrears; and
  - (b) encourage more pre-action contact between the lender and the borrower in an effort to seek agreement between the parties, and where this cannot be reached, to enable efficient use of the court's time and resources.

The Protocol goes on to outline a number of areas where specific matters must be addressed before the possession claim can be decided. These include requirements regarding communication between the lender and borrower and the efforts made by the parties to resolve the matter. Parties are required to explain the actions they have taken to comply with the Protocol.

#### **Court Procedures**

4. The hearing of an action for repossession comes before the courts in Northern Ireland is normally in private before a High Court Master. At the hearing a borrower is expected to bring the following documentation:

- (a) all letters from the lender;
- (b) any notes of telephone calls or meetings with the lender;
- (c) a completed budget form;
- (d) proof of salary or benefits;
- (e) a letter from the estate agent if the house is being sold;
- (f) a letter from the new lender if the borrower has applied for a remortgage;
- (g) proof of a change of circumstances such as a job offer;
- (h) proof of money owing to the borrower;
- (i) if arrears have arisen because of illness a letter from a GP, consultant or medical social worker explaining the condition or conditions (if available);

5. The Master of the High Court has the following powers in relations to an action for repossession. He or she may:

- Adjourn the case for a time to allow borrowers to make payments or engage with the lender.
- Make an order for possession but suspend it so that it will not take effect without another application to the Court and for as long as agreed payments are being met.
- Make an order for possession but stay the order for a period of time.



- On application from a party, vary the terms of a suspension of an order due to changed circumstances
- On application from a party, stay enforcement of a Possession Order due to changed circumstances

### **Number of Repossessions in Northern Ireland**

6. Since the onset of the recession in 2007, the number of court orders for the repossession of properties in Northern Ireland has tripled (711 in 2007 increasing to 2,216 in 2012). The number of new repossession cases lodged with the Enforcement of Judgments Office (EJO) continues to increase significantly (643 in 2007 increasing to 1,826 in 2012). All indications suggest that this trend will continue for the foreseeable future.

### **Statutory Authority**

7. The Enforcement of Judgments Office (EJO) is part of the Northern Ireland Courts & Tribunal Service (NICTS). The EJO provide a centralised service for the enforcement of civil court judgments relating to money, goods and property.
8. The EJO operates under the Judgments Enforcement (NI) Order 1981(the 1981 Order) and is supported by the Judgments Enforcement Rules (NI) 1981 (the 1981 Rules).
9. The EJO is currently examining the repossession process and also reviewing the need to physically remove the goods of borrowers from properties and store them in 'a place of safety'.

### **Lenders' Expectations**

10. Many cases are listed for repossession on a specific date but discussions between the lender and borrower often leads to an agreement and repossession is then postponed indefinitely. It appears that during recent discussions between the EJO and the Council of Mortgage Lenders (CML), the latter has expressed concerns that there is a significant disparity in repossession practices between

Northern Ireland and other parts of the UK. In Northern Ireland at present a lender may wait between 6 and 9 months after the case has been accepted for enforcement to obtain possession of the property.

### **Execution of Possession Orders by EJO**

11. If the borrowers(s) do not adhere to the order of the court, the lender may make application to the EJO to enforce the order of the court.

12. The application is made up of 2 stages:

**Stage 1** is to give notice to the borrower that the lender will enforce their court order if the borrower continues to ignore it. The EJO serve a copy of the notice on the borrower(s) and confirm service to the lender.

**Stage 2** – if the borrower continues to ignore the court order, the lender may make application to enforce their court order.

15. Once the application is accepted, enforcement of the court order can be broken down into 3 stages.

#### **A. The Pre-Repossession Stage**

- EJO issue a Notice of Intent to make an order for delivery of possession of the property.
- If an objection is made, the matter is listed before the EJO Master for adjudication. The Master will decide whether the objection is upheld or overruled.
- If no objections are made or an objection is overruled, the EJO will issue an order for delivery of possession of the property.
- A repossession date is set by the EJO and this is communicated to the lender.

**B. The Repossession Stage**

- An Enforcement Officer (EO) (who will manage the repossession) serves the order personally on each borrower (and other persons of residence in the property).
- The EO will explain to each person served the process of repossession and what consequences may arise if they continue disobey the court order and fail to move out voluntarily.
- Nearer the repossession date, final visits are made by the EO. Arrangements are made with the contractor contacted by the EJO (to make provisions to assist the EJO in removing the borrower's goods from the property to a place of safety).
- On the repossession day, an EO will instruct the contractor to remove any goods from the property. Once cleared, the lender (or his agent) signs to confirm that the property has been repossessed and handed over to them.

**C. Post Repossession Stage**

- The goods taken are stored in a place of safety, i.e. a storage site which is managed under an EJO contract with an out-sourced and service.
- The borrower is contacted by the EJO and made aware of the costs of repossession and that they should be paid. If they are not paid, their goods will be sold to off-set against any expenses incurred by the EJO on the day the repossession took place.
- If the costs are not paid within 1 calendar month, the EJO will instruct the contractor to have the goods valued and auction the goods to off-set any expenses incurred.

16. Any monies recouped are allocated to the case to off-set the costs incurred by the EJO on the day of the repossession and thereafter.

**Expert Group conclusions**

17. The Expert Group notes that the procedures applicable in Northern Ireland are broadly similar to those that apply in this jurisdiction, in particular that an order for possession must be obtained from the relevant court and execution of the order for possession may follow.
  
18. There are some notable differences, however, particularly in relation to the documentation which a borrower must bring to a hearing before a Master of the High Court. The Group believes that efficiencies could to be achieved from the introduction of standard documentation requirements in repossession actions in this jurisdiction. In addition, the Group believes that further efficiencies could be made by providing that borrowers should, where entering a defence, be required to furnish certain particulars at the first hearing before the judge.

## **Chapter 6 – Examination of Specific Issues requested by Troika**

### **Introduction**

1. This chapter examines five specific issues which were identified for examination by the Troika during the course of the deliberation of the Expert Group.

### **Issue 1 – Introduction of threshold criteria for the adjournment of cases, in particular with regard to token payments made by borrowers**

2. The Expert Group considered the suggestion that threshold criteria for the adjournment of cases should be introduced into the repossession system, in particular with regard to token payments made by borrowers.
3. In examining this suggestion the Expert Group was conscious that there is limited detailed information available on the reasons why adjournments are granted in repossession cases. Accordingly, at the commencement of the work of the Expert Group it was not possible to provide information on matters such as the number of adjournments granted on repossession proceedings, the party that requested the adjournment, the reason for the adjournment and the duration of adjournments.
4. However, recent discussions with the County Registrar's Association has indicated that, in two circuit court areas in November 2013 a total of 108 cases were listed for hearing. Of these:
  - 52 cases were adjourned at the request of the lender;
  - 26 cases were adjourned with the consent of the parties;
  - 25 cases were adjourned because the requisite papers had not been served on the borrowers;
  - 2 cases were adjourned automatically as it was the first return date;

- 2 cases were adjourned generally with leave to re-enter; and
  - 1 case had been transferred to the judge's list as a defence had been entered.
5. There have also been cases before the Courts where borrowers have reported problems making contact with officials in lending institutions with whom they could discuss their arrears problem. It appears that there are questions about the capacity of some of the lending institutions to process large numbers of queries from borrowers. The effect on their inability to do this is to delay engagement until court proceedings have already been commenced.
  6. The Group noted that, in many cases, no particular reason for the adjournment had been offered by the solicitor for the lender and that the duration of the adjournment was requested by the lender. While the request for an adjournment is usually granted, the County Registrars stated that the manner in which adjournments are sought by the lenders makes case management of repossessions more difficult.
  7. On the other hand, the Irish Mortgage Council has signalled its members' dissatisfaction and frustration with what they see as the granting of a series of adjournments at the request of the borrower. In particular, they cite examples of where a borrower makes an offer while in court to pay all or a portion of the arrears. Lending institutions state that, in some circumstances, they are aware that the commitment being entered into by the borrower in court is not realistic but, despite objections, the adjournment is granted anyway.
  8. The Expert Group also noted that the Land and Conveyancing Law Reform Act 2009 now provides a statutory basis for a Court to adjourn a repossession hearing where it appears to the court that the mortgagor is likely to be able within a reasonable period of time to pay any arrears, including interest, due under the mortgage or to remedy any other breach of obligation arising under the mortgage. Furthermore, section 2 of the Land and Conveyancing Law

Reform Act 2013 provides a further statutory power to a court to adjourn proceedings in relation to the repossession of a private residence for a period not exceeding two months to enable a person consult and if appropriate instruct a Personal Insolvency Practitioner to make a Personal Insolvency Arrangement proposal to creditors.

**Conclusion:**

9. The Expert Group considers that legislation now sets out the appropriate factors that a court should take into consideration in considering an application for an adjournment in a repossession hearing. Within that context, the Group notes that is a matter for the court to consider whether an adjournment should be granted in a particular cases having regard to the particular circumstances of that individual case.
10. It is not considered, however, that the setting of specific repayment amounts or specifically indicating what would be a “reasonable period” in legislation without regard to the circumstances of an individual case would be a fair or even an efficient approach.
11. Indeed, the Expert Group is of the opinion that the introduction of such criteria would, in effect, limit judicial discretion in determining cases and, therefore, does not consider this to be an appropriate course of action.

**Issue 2 – Merging of Possession and Execution Orders, and administrative guidelines for the timely execution of evictions if needed**

12. Where a Possession Order is granted and served on a borrower, in most cases the borrower surrenders the property on foot of the order. In some cases, the property is not surrendered and enforcement proceedings are required. The Expert Group notes that the principal method for obtaining enforcement of a court possession order where possession has not been yielded up voluntarily by the borrower is to obtain an execution order from the court office (known as 'habere' or in earlier times 'habere facias possessionem').

13. Until enactment of the Enforcement of Court Orders Act 1926, the enforcement of court orders in civil proceedings was the responsibility of sheriffs. Under section 8 of the 1926 Act these functions were transferred to the county registrars, except in counties outside Dublin and Cork where the office of sheriff remains. The execution order directs the county registrar or sheriff to put the lender in possession of the property without delay. The 1926 Act also provides for the appointment of an official known as the 'court messenger' to carry out the county registrar's functions as sheriff.

### **Conclusion**

14. There is some evidence that while the administrative process of obtaining an Execution Order is quite streamlined, the actual execution of evictions on foot of the Order can take some time. Having said this, the Expert Group found that that lenders have to date been slow to apply for execution orders (between an average of 234 and 250 days after the date of grant of the order for possession).
15. While the Expert Group believes that the merging of the Possession Order and the Execution Order would have a marginal impact on efficiency, it concludes that Court Rules could be amended to provide for the issue of a Possession Order and an Execution Order on the same day or, where a stay has been granted, upon expiry of the stay.

### **Issue 3 – Introduction of alternative ways to serve notices, such as by means of publication in newspapers or ordinary mail.**

16. The Expert Group considered this issue in the light of comments from both lending institutions and the Courts Service. Lenders had indicated that service of documents on persons outside the jurisdiction was time consuming and expensive and wanted to have a statutory provision introduced whereby persons could be served by fixing a copy of the Civil Bill to the property. The Courts Service noted that in many cases coming the courts on the first return date, service had not been effected and that insufficient efforts had been made



by lenders to correctly identify the whereabouts of the borrower and serve notices.

### **Conclusion**

17. The Expert Group considers that service of documents in court proceedings is a fundamental requirement of the justice system. The High and Circuit Courts currently require service on individuals to be effected by registered post or by personal service. Where an individual cannot be served by these means, courts at present grant applications to serve documentation:
  - by ordinary post
  - by e-mail
  - by publication in a newspaper
  - by posting on a social media page
  - by the placing of an advertisement in a newspaper
  - by pinning of a notice to a door
  
18. The Expert Group further notes that it is possible for a lender to apply for a substituted service order at the first return date but that lenders are often not in a position to provide sufficient evidence of their efforts to trace the borrower at this date, and that this may remain the case at the second return date. The Expert Group considers that, before proceeding with the issue of a Civil Bill, lenders should put on record their efforts to locate the borrower and be in a position to apply for a substituted service order at the first return date. This would have the effect of reducing the need for adjournments caused by notice not having been served on the borrower.

**Issue 4 – Delegation of functions within the Courts system, for instance expanding the responsibilities of registrar or clerks**

19. The Expert Group notes that current legislation, in particular the Courts and Courts Officers Acts, provides that a County Registrar (who is an office holder with statutory and adjudicative functions as opposed to a Judge) may make certain orders as provided for by law. In relation to a repossession case, the County Registrar may make an order for possession if the borrower has not made an appearance in response to the service of the Civil Bill. Furthermore, even if an appearance has been entered and a replying affidavit has been filed by the borrower, the County Registrar can also make an order for possession if the affidavit does not show any obvious defence. However, any order made by a County Registrar is subject to appeal to the Circuit Court.

**Conclusion**

20. The Expert Group has considered the suggestion made that the functions of the County Registrars and Court Registrars should be expanded. The Group noted that the responsibilities of County Registrars are determined by legislation which currently provides that County Registrars have the power, in certain circumstances, to make Possession Orders. Court Registrars and other employees of the Courts Service do not at present have any jurisdiction in this area. However, to date, the Group noted that access to the Courts has not been a barrier for lenders wishing to obtain orders for possession and, therefore, that there was no immediate need to pursue this course of action. Accordingly, the Group considers that it would not be appropriate to recommend legislative change on this issue at this time.

**Issue 5 – Put in place a monitoring and regular reporting system on the status of repossession cases within the legal system.**

21. The Expert Group recognises that it would be useful to have timely data on the status of repossession cases within the legal system. In particular, it would be useful to have information on:

- the number of cases initiated;
- the types of property involved;
- the duration of each step of the courts process;
- the number of adjournments – party requesting adjournment, reason for adjournment, duration of adjournments etc.
- the number of repossession orders granted;
- the number of execution orders granted;
- the number of repossession effected.

22. However, the Expert Group is also conscious that the introduction of such a data collection system would have significant resource implications for the Courts Service.

### **Conclusion**

23. The Expert Group is of the opinion that a new system of data collection regarding court repossession statistics should be put in place and that sufficient resources should assigned to the Courts Service to implement and maintain the system.

## **Chapter 7 – Conclusions and Recommendations**

### **Introduction**

1. In this Chapter, the Expert Group summarises the conclusions it has reached in relation to the repossession system in Ireland and sets out some recommendations designed to make the system more efficient and less frustrating for the parties and, not least, for the courts themselves.
2. The Expert Group acknowledges that while the law must seek proportionately to safeguard the interests of borrowers, especially those who may be in default (and some of whom also find themselves in negative equity), there is a strong countervailing public interest in protecting the interests of lenders, not least in order to ensure that funding continues to be made available for the purchase of residential and other property and also where there is an equity in property, to release funding for other productive purposes. The Expert Group acknowledges the need for a properly functioning mortgage market in which the rights of both lenders and borrowers under their mortgage contracts are seen, subject to appropriate public policy regulation, to be enforceable.

### **Conclusions**

3. The Expert Group has examined the functioning of the repossession system, including the manner in which applications for possession orders are presented to, and processed, in the courts system. It has concluded that significant efficiencies could be achieved through more effective case management by lenders, harmonised documentation standards and a more structured framework for borrowers entering defences in repossession proceedings.

### **Case management**

4. According to the County Registrar's Association, the case management standards of lenders vary greatly, with some operating at sub-optimal level. The service of notice on borrowers presents particular difficulties. It appears that in many cases, lenders have not sought to locate defaulting borrowers prior to the commencement of proceedings or even during the early period following such commencement. The opportunity available to the lender to seek to obtain a

substituted service order on the return date is not used and the difficulty may not be brought to attention until the next hearing date.

*The Expert Group recommends therefore that a lender seeking a repossession order should make sufficient efforts to locate the defaulting borrower prior to, or in the period immediately following, the commencement of proceedings so that an application for substituted service order can, where necessary, be obtained on the return date.*

### **Standard documentation**

6. It has come to the Expert Group's attention that there are no harmonised documentation standards in operation. Not only do different lenders submit different documents, it appears that the documentation submitted by a lending institution may vary depending on the legal firm being used in the case.

*The Expert Group recommends that consideration be given to amending Court Rules so as to specify more precisely the documentation, including format, required to be submitted by lenders in repossession proceedings.*

7. In order to apply the provisions in section 2 of the Land and Conveyancing Law Reform Act 2013 and the Code of Conduct on Mortgage Arrears (CCMA), the Expert Group believes that it is necessary to identify from the outset whether the property concerned is a private residence or a BTL property.

*The Expert Group recommends that the Civil Bill for possession and the documentation submitted by lenders must clearly identify private residences and, in cases where the borrower has been co-operating with the lender, include a standard form of certification of compliance with the CCMA.*

### **Defended proceedings**

8. The Expert Group has become aware of the difficulties which arise, and which often result in further adjournments, where the grounds for forbearance pleaded by the borrower in defended cases evolve over time. The Expert Group

considers that this could be addressed by requiring the borrower to complete a standard form which would outline the grounds on which repossession is being contested and which would be accompanied by a statement of means.

*The Expert Group recommends, therefore, that in defended proceedings, the borrower must complete a standard form and a statement of means approved under relevant court rules.*

#### **Enforcement of orders**

9. The Expert Group has noted considerable delays in some cases between the granting of the repossession order to the lender and the lender's later request for an execution order. Since the issuing of execution orders by court officials on production by the lender of the relevant repossession order is an administrative rather than judicial function, the Group considers that efficiencies could be achieved by issuing an execution order at the same time as the repossession order; the execution order would, where relevant, enter into force on the expiry of any stay on the repossession order.

*The Expert Group recommends that consideration be given to the issuing of an execution order when the court grants a repossession order, or where a stay has been granted by the court, on expiry of the stay.*

10. The Expert Group has been informed of the difficulties which sheriffs experience where an authorised representative of the lender does not attend to identify property which is subject to an execution order.

*The Expert Group recommends that lenders adhere strictly to the rule which requires a lender's representative to be physically present to formally identify property which is subject to an execution order.*

## General

11. The Expert Group regrets the data deficit in relation to repossession proceedings and considers that more detailed and timely data are required to inform policy development.

*The Expert Group recommends implementation of a detailed data collection strategy in respect of repossession proceedings.*

12. The Expert Group considers that the efficiencies which can be achieved through implementation of its recommendations will enable the existing court structures to deal with the current levels of demand. However, any substantial and sustained increase in future demand for repossession orders would require further consideration of the system's capacity to operate effectively.

*The Expert Group recommends that the Courts system's capacity to operate effectively in light of any increased demand be kept under review. This should include judicial, administrative and sheriff's functions.*

## **APPENDICES**

### **Appendix**

- A. Terms of Reference of Expert Group**
- B. Membership of Expert Group**
- C. Practice Direction - Actions for possession**
- D. Order: 5B – Actions for Possession and Well-charging Reliefs: S.I. No. 264 of 2009**
- E. Land and Conveyancing Law Reform Act 2013**
- F. Form: 2R Civil Bill for Possession / Well-charging Relief**
- G. Form: 5 Entry of appearance**
- H. Section 34 of the Court and Court Officers Act 1995**
- I. Membership of the Circuit Court Rules Committee at end 2013**
- J. Rules of the Superior Courts - Order: 38  
Hearing of proceedings commenced by special summons**
- K. Membership of the Superior Courts Rules Committee at end 2013**
- L. Repossession Procedures in other jurisdictions**



**Terms of Reference of Expert Group**

1. **Outline the current repossession framework in Ireland.**
2. **Review the length, predictability and cost of repossession proceedings in Ireland.**

Provide an evaluation of the length as well as, to the extent possible, the costs associated with the repossession process. Having regard to available data compare the repossession system and the length and cost of repossession process with peer countries. Consult and obtain external stakeholder views. Set out a number of case studies to provide representative examples of the issues that arise in repossession cases.

3. **Assess the expected case load and the adequacy of the currently available capacity.**

Assess the early emerging pattern of repossession cases with a view, if possible, to identifying volume implications, and assess the adequacy of current capacity of the system (incorporating the Courts the courts offices and the mechanisms for the execution of court orders for repossession) to deal with expected case load.

4. **Evaluate the effectiveness and efficiency of Ireland's statutory repossession arrangements and propose, where necessary, appropriate measures.**

Drawing on above assessments, international best practice, and the submissions of external stakeholders, provide proposals, where necessary, to enhance the efficiency of Ireland's repossession framework in terms of timeliness, predictability, and cost. Evaluate the merit and detail the necessary steps for implementation of any such proposals.

5. **Prepare final report.**

Conclude the expert group report entailing analysis, assessment, and recommendations by end-2013 in line with programme commitments.

**Membership of Expert Group**

Anne Barron, Office of the Attorney General

Angela Black, Department of Finance

Seamus Carroll, Department of Justice and Equality (Chair)

James Connolly, Central Bank of Ireland

Michael Layde, Department of the Environment, Community and Local Government

Barry Vaughan, Department of the Taoiseach

Tom Ward, Courts Service of Ireland

Secretary to the Expert Group: Michael Holohan, Department of Justice and Equality

**Practice Direction - Actions for possession**

1. Reference is made to the Circuit Court Rules (Actions for Possession and Well-charging Relief) 2009 (S.I. No. 264 of 2009), which insert a new Order 5B in those Rules, providing for new procedures in respect of such actions.
2. In proceedings in which a claim for recovery of possession of land on foot of a legal mortgage or charge is made, the return date of the Civil Bill shall be fixed not earlier than eight weeks from the date of issue of the Civil Bill. Except with the consent of each defendant in the proceedings, no order for possession shall be made on the return date. The proceedings shall be adjourned to such later date as the County Registrar considers just in the circumstances.
3. The Civil Bill, when being served on each defendant, should be accompanied by a letter from the plaintiff or the plaintiff's solicitor addressed to the defendant stating:
  - (a) that, except with the consent of each defendant in the proceedings, no order for possession will be made on the initial return date before the County Registrar and that the proceedings will be adjourned to such later date as the County Registrar considers just in the circumstances;
  - (b) the importance of the defendant or his legal representative attending before the County Registrar on the return date and on any date to which the proceedings are adjourned, should the defendant wish to make any representations to the County Registrar concerning the proceedings; and
  - (c) that a defendant not intending to enter a defence is not required to file and serve on the plaintiff a replying affidavit.
4. Where a defendant is not present or represented on the initial return date when proceedings are adjourned in accordance with paragraph 2, the plaintiff should notify the defendant by letter of the adjournment forthwith in such manner as may be directed by the County Registrar.

Dated this 12th day of November 2009

Matthew Deery  
President of the Circuit Court

**Order: 5B**

**Actions for Possession and Well-charging Reliefs : S.I. No. 264 of 2009**

1. This Order applies to any proceedings in which the plaintiff claims any of the following reliefs:
  - (a) recovery of possession of any land on foot of a legal mortgage or charge;
  - (b) an order declaring the amount due on foot of a mortgage to be well charged on land.
2. Save where otherwise expressly provided by this Order, in the event that any conflict shall arise between the provision of any rule of this Order and any other provision of these Rules, the provision of the rule of this Order shall, in respect of any proceedings to which this Order applies, prevail.
3.
  - (1) Proceedings to which this Order applies shall be commenced by a Civil Bill in Form 2R of the Schedule of Forms. The special indorsement of claim in such Civil Bill shall state specifically and with all necessary particulars the relief claimed and the grounds thereof.
  - (2) A Civil Bill to which this Order applies shall be served, together with a copy of the affidavit mentioned in rule 5, on each defendant not later than 21 days before the return date mentioned in rule 4.
4. Every Civil Bill to which this Order applies shall, upon being issued, be assigned a return date before the County Registrar, which date shall be entered in the Civil Bill.
5.
  - (1) There shall be served with the Civil Bill a copy of an affidavit (and copies of any exhibits to that affidavit) sworn by or on behalf of the plaintiff, verifying the claim indorsed on the Civil Bill.
  - (2) A defendant intending to defend proceedings to which this Order applies shall enter an Appearance in the Office in Form 5 in the Schedule of Forms within ten days of the service upon him of the Civil Bill and shall defend the plaintiff's claim by filing a replying affidavit to the plaintiff's affidavit setting out the defendant's defence and serving a copy of that affidavit (and copies of any exhibits to that affidavit) on the plaintiff not later than four days before the return date.
6.
  - (1) No party shall have the right in proceedings to which this Order applies to adduce any evidence otherwise than by affidavit, except—

- (a) by leave of the Judge,
- (b) where permitted in accordance with rule 7(4) or rule 8(1), or
- (c) where the proceedings have been adjourned for plenary hearing in accordance with rule 8(2).

(2) Any party desiring to cross-examine a deponent who has sworn an affidavit filed on behalf of the opposite party may serve upon the party by whom such affidavit has been filed a notice in writing requiring the production of the deponent for cross-examination, and unless such deponent is produced accordingly his affidavit shall not be used as evidence unless by the special leave of the Court.

7. (1) On the return date of the Civil Bill (or on any adjournment from such date), the County Registrar may, in addition to any other order which the County Registrar has power to make:

- (a) order service of the Civil Bill on any other person;
- (b) make an order enlarging the time for entry of an appearance;
- (c) give directions and fix time limits for the filing and delivery of any further affidavits by any party or parties;
- (d) give any other directions for the preparation of the proceedings for trial;
- (e) where an appearance has not been entered or an affidavit in accordance with rule 5(2) setting out a defence has not been filed and delivered, make an order for possession in accordance with paragraph (xxxiii) or (xxxiv) of the Second Schedule to the Courts and Courts Officers Act 1995;
- (f) where the parties are sui juris, make an order to receive a consent and make the same a rule of court.

(2) Where an affidavit setting out a defence has been filed in accordance with rule 5(2) the County Registrar shall transfer the Civil Bill, when in order for hearing, to the Judge's list on the first opportunity.

(3) For the purposes of this rule, or for the purpose of any hearing before himself, the County Registrar may extend the time for filing affidavits and give such directions and adjourn the case before himself as he thinks fit.

(4) Evidence as to failure to enter an appearance or to file an affidavit within the time permitted by these Rules may be given by production of a certificate of non-appearance issuing from the Office or otherwise as where the County Registrar permits.

8. (1) If at any stage during the course of proceedings instituted by Civil Bill in accordance with this Order it appears to the Judge or the County Registrar that the determination of any issue is necessary for the proper decision or ruling as to the relief to be granted in such proceedings or as to any matter arising therein, the Judge may, or the County Registrar may on consent, settle such issue to be tried, and evidence as to any issue of fact may be given either orally or by affidavit or partly orally and partly by affidavit as the Judge in the circumstances thinks proper.

(2) The Judge may, where he considers it appropriate, adjourn a Civil Bill listed before him under this Order for plenary hearing as if the proceedings had been originated otherwise than in accordance with this Order, with such directions as to pleadings or discovery as may be appropriate.

9. On the hearing of any Civil Bill to which this Order applies, the Judge may give judgment for the relief to which the plaintiff appears to be entitled.

10. (1) The Judge may give any special directions touching the carriage or execution of any judgment or order, or the service thereof upon persons not parties, as he thinks just.

(2) The Judge or the County Registrar may make such order as to costs as he considers just, including an order measuring any costs awarded.”

The Form 2R annexed hereto shall be added to the Schedule of Forms annexed to the Circuit Court Rules immediately following Form 2Q.

## Land and Conveyancing Law Reform Act 2013

An Act to provide that certain statutory provisions apply to mortgages of a particular class notwithstanding the repeal and amendment of those statutory provisions by the Land and Conveyancing Law Reform Act 2009, to provide for the adjournment of legal proceedings in certain cases and to provide for related matters. [24<sup>th</sup> July, 2013]

**Be it enacted by the Oireachtas as follows:**

### Application of certain statutory provisions

1. (1) This section applies to a mortgage created prior to 1 December 2009.
- (2) As respects a mortgage to which this section applies, the statutory provisions apply and may be invoked or exercised by any person as if those provisions had not been repealed by section 8(3) and Schedule 2 of the Act of 2009.
- (3) As respects a mortgage to which this section applies the amended provisions apply and may be invoked or exercised by any person as if those provisions had not been amended by section 8(1) and Schedule 1 of the Act of 2009.
- (4) *Subsections (1) to (3)* are without prejudice to any right or entitlement which a person may otherwise have to rely on the statutory provisions or the amended provisions.
- (5) This section does not apply to proceedings initiated before the coming into operation of this section.
- (6) In this section—
  - “Act of 1964” means the Registration of Title Act 1964;
  - “Act of 2009” means the Land and Conveyancing Law Reform Act 2009;
  - “amended provisions” means section 62(2) and (6) of the Act of 1964;
  - “mortgage” has the same meaning as it has in the Conveyancing Act 1881;
  - “statutory provisions” means sections 2 and 18 to 24 of the Conveyancing Act 1881, sections 3, 4 and 5 of the Conveyancing Act 1911 and section 62(3), (7) and (8) of the Act of 1964.

## Adjournment of proceedings to facilitate making of proposal for Personal Insolvency Arrangement

2. (1) This section applies to land which is the principal private residence of—
- (a) the mortgagor of the land concerned, or
  - (b) a person without whose consent a conveyance of that land would be void by reason of—
    - (i) the Family Home Protection Act 1976, or
    - (ii) the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.
- (2) In any proceedings brought by a mortgagee seeking an order for possession of land to which the mortgage relates and which land is land to which this section applies, the court, without prejudice to any other power which a court may have to adjourn proceedings, may—
- (a) of its own motion, if it considers it appropriate to do so,
  - (b) on application being made to the court by a relevant person and, having regard to the matters specified in *subsection (3)*, if it considers it appropriate to do so,
- adjourn the proceedings for a period not exceeding 2 months to enable the relevant person—
- (i) to consult with a personal insolvency practitioner with a view to the making of a proposal for a Personal Insolvency Arrangement, and
  - (ii) where appropriate, to instruct the personal insolvency practitioner to make a proposal for a Personal Insolvency Arrangement under the Act of 2012.
- (3) The court in considering an application under *subsection (2)(b)* shall have regard to such matters as it considers appropriate and in particular shall have regard to the following:
- (a) whether the mortgagor has participated in any process relating to mortgage arrears operated by the mortgagee concerned which has been approved or required by the Central Bank of Ireland and which process relates to the land the subject of the mortgage;
  - (b) whether the mortgagor has made any payments to the mortgagee in respect of monies advanced on foot of or secured



by the mortgage in the 12 months immediately preceding the application and, if so, the amount of any such payments, the number and frequency of such payments, and the proportion which the amounts paid bear to the amount of any regular payments which the mortgagor was required to make under the terms of the mortgage or any associated loan agreement;

- (c) whether the proceedings have been adjourned on any previous occasion at the request of the mortgagor, and, if so, the number of any such adjournments and the period of such adjournments and the reasons for such adjournments;
  - (d) the conduct of the parties to the mortgage in any attempt to find a resolution to the issue of dealing with arrears of payments due on foot of the mortgage; and
  - (e) whether, having regard to the circumstances of the case, the application for an adjournment appears to the court to be primarily for the purpose of delaying the progress of the proceedings.
- (4) On the expiry of any period of adjournment granted under *subsection (2)*, the court may grant a further adjournment of the proceedings concerned where it considers that significant progress has been made in the preparation of a proposal for a Personal Insolvency Arrangement.
- (5) Where the court adjourns proceedings under this section, the court may, where it considers it appropriate to do so, direct that the proceedings stand adjourned to another venue within the same circuit of the Circuit Court.
- (6) This section applies as respects mortgages created before or after the coming into operation of Part 10 of the Land and Conveyancing Law Reform Act 2009.
- (7) In this section and *section 3*—

“Act of 2012” means the Personal Insolvency Act 2012;

“conveyance”<sup>7</sup> has the same meaning as it has in the Family Home Protection Act 1976;

“mortgage” means a deed of mortgage and includes a charge;

“mortgagee” includes a person deriving title from a mortgagee and a receiver appointed by the mortgagee;

“Personal Insolvency Arrangement” has the same meaning as it has in the Act of 2012;

“personal insolvency practitioner” has the same meaning as it has in the Act of 2012;

“relevant person” means a person—

- (a) who is a party to the proceedings referred to in *subsection (2)*, and
- (b) who is a person who may, under the provisions of the Act of 2012, make a proposal for a Personal Insolvency Arrangement.

### **Proceedings relating to certain mortgages to be brought in Circuit Court**

3. (1) This section applies to land which is the principal private residence of—
- (a) the mortgagor of the land concerned, or
  - (b) a person without whose consent a conveyance of that land would be void by reason of—
    - (i) the Family Home Protection Act 1976, or
    - (ii) the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010,
- and the mortgage concerned was created prior to 1 December 2009.
- (2) Subject to *subsection (4)*, proceedings brought by a mortgagee seeking an order for possession of land to which the mortgage relates and which land is land to which this section applies shall be brought in the Circuit Court.
- (3) The jurisdiction of the Circuit Court to hear and determine proceedings referred to in *subsection (2)* where the land concerned is land to which this section applies shall be exercised by the judge of the circuit where the land or any part of it is situated.
- (4) *Subsection (2)* does not preclude a person initiating proceedings in the High Court where other proceedings relating to the enforcement of the mortgagee’s rights under the mortgage concerned have been commenced in that court prior to the coming into operation of this section where those other proceedings have not been determined.

### **Provision in respect of certain proceedings**

4. (1) Where after the coming into operation of this section a mortgagee commences proceedings seeking possession of land in which they rely upon the statutory provisions or the amended provisions, the

proceedings shall be deemed to be commenced within time for the purposes of section 9 of the Civil Liability Act 1961 where the conditions specified in *subsection (2)* are met.

- (2) The conditions referred to in *subsection (1)* are that—
- (a) prior to the coming into operation of this section the mortgagee had commenced proceedings seeking possession of land relying on the statutory provisions or the amended provisions,
  - (b) the proceedings concerned were commenced within the time limit applicable for the purposes of section 9(2) of the Civil Liability Act 1961,
  - (c) the proceedings concerned were not determined before the coming into operation of this section,
  - (d) the mortgage concerned was created prior to 1 December 2009,
  - (e) the land the subject of the proceedings referred to in *subsection (1)* is the same land or a part of the same land as the land the subject of the proceedings referred to in *paragraph (a)*.
- (3) *Subsection (1)* shall only apply to proceedings issued within 6 months from the coming into operation of this section.

- (4) In this section—

“Act of 2009” means the Land and Conveyancing Law Reform Act 2009;

“amended provisions” means section 62(2) and (6) of the Act of 1964 as those provisions stood immediately prior to the coming into operation of section 8(1) and Schedule 1 of the Act of 2009;

“mortgage” has the same meaning as it has in the Conveyancing Act 1881;

“mortgagee” includes a person deriving title from a mortgagee and a receiver appointed by a mortgagee;

“statutory provisions” means sections 2 and 18 to 24 of the Conveyancing Act 1881, sections 3, 4 and 5 of the Conveyancing Act 1911 and section 62(3), (7) and (8) of the Act of 1964.

#### **Short title and commencement**

5. (1) This Act may be cited as the Land and Conveyancing Law Reform Act 2013.

- (2) *Sections 2 and 3* come into operation on such day or days as the Minister for Justice and Equality may by order or orders appoint and different days may be so appointed for different purposes or provisions

**Schedule: B - Forms**

**Form: 2R Civil Bill for Possession / Well-charging Relief**

S.I. No. 264 of 2009:

**Form 2R**  
**AN CHÚIRT CHUARDA**  
**THE CIRCUIT COURT**  
**CIRCUIT**  
**COUNTY OF**

BETWEEN

Plaintiff

AND

Defendant

**CIVIL BILL FOR \*[POSSESSION]\*[WELL-CHARGING RELIEF]**

To ..... of ..... in the County of ..... the defendant

This Civil Bill is to require you to attend before the County Registrar at ..... on ..... 20.... at .....o'clock in the forenoon at the hearing of this Civil Bill issued on ..... 20.... by/on behalf of ..... of ....., the Plaintiff.

AND TAKE NOTICE that if you wish to attend and to be heard, you should within ten days after the service of this Civil Bill upon you enter or cause to be entered with the County Registrar at his Office at ..... an Appearance to answer the claim of the Plaintiff.

AND TAKE NOTICE that if you intend to defend the proceeding on any grounds, you must not only enter an Appearance, but also file with the County Registrar and deliver to the \*[Plaintiff]\*[Plaintiff's Solicitor] a replying affidavit setting out the nature and grounds of your defence not later than four days before the return day mentioned above.

AND TAKE NOTICE that unless you enter an Appearance and file a replying affidavit, you will be held to have admitted the said claim, and the Plaintiff may proceed therein and judgment may be given against you in your absence without further notice.

The Appearance may be entered and replying affidavit filed by posting same to the County Registrar's Office, and by giving copies thereof to the Plaintiff or his solicitor by post.

SPECIAL INDORSEMENT OF CLAIM

*[Insert the relief claimed specifically and with all necessary particulars, the grounds thereof and the basis upon which jurisdiction is claimed]*

The plaintiff will rely at the hearing of this Civil Bill on the following affidavit(s):

1. Affidavit of ..... sworn on ..... 20....
2. etc

Copies of the above affidavit(s) and exhibit(s) are served herewith.

N.B. This Civil Bill is to be served not less than 21 days before the return day mentioned above (exclusive of the day of service). Dated the .....20.....

Signed: .....

Plaintiff/Solicitor for the Plaintiff

To: .....

Defendant/ Solicitor for the Defendant

And To: The County Registrar

\*delete where inapplicable

**Schedule: B - Forms**

**Form: 5 Entry of appearance**

**FORM 5  
AN CHÚIRT CHUARDA  
THE CIRCUIT COURT**

**CIRCUIT  
COUNTY OF**

**ENTRY OF APPEARANCE**

BETWEEN

..... Plaintiff

AND

..... Defendant

1. To the County Registrar ..... at ..... I request you will enter an Appearance herein on behalf of the Defendant to the Civil Bill served upon him on .....

Dated this ... day of .....

Signed .....

Defendant/Solicitors for the Defendant

2. To the Plaintiff/Solicitor for the Plaintiff ..... The Appearance mentioned above was this day lodged by hand (sent by post) and the said Defendant intends to defend this proceeding.

Dated this ... day of .....

Signed .....

Defendant/Solicitors for the Defendant

**Section 34 of the Court and Court Officers Act 1995**

**Hearings by County Registrar**

- 34.—(1)** Without prejudice to any powers, authorities, duties or functions that may be exercised by or conferred by statute or by rules of court on a County Registrar, a County Registrar may make any of the orders mentioned in the Second Schedule to this Act.
- (2) All orders of a County Registrar shall be subject to appeal to the Circuit Court.

**Second Schedule to the Court and Court Officers Act 1995**

- (xxxiii) An order for possession of any land within the meaning of section 3 of the Registration of Title Act, 1964 , in proceedings for an application under section 62(7) of that Act in which an appearance has not been entered or a defence has not been delivered.

*(inserted by section 22 of the Court and Court Officers Act 1995)*

- (xxxiv) An order for the recovery of possession of any land on foot of a legal mortgage or charge in proceedings in which no other relief is claimed and an appearance has not been entered or a defence has not been delivered.

*(inserted by section 22 of the Court and Court Officers Act 1995)*



**MEMBERSHIP OF THE CIRCUIT COURT RULES COMMITTEE AT YEAR  
ENDING 31ST DECEMBER, 2013:**

The Hon. Mr. Justice Raymond Groarke, President of the Circuit Court (Chairman)

Her Honour Judge Alison Lindsay, judge of the Circuit Court

His Honour Judge Tony Hunt, judge of the Circuit Court

Ms. Dervla Browne S.C., nominated by the Council of the Bar of Ireland

Mr. David Dodd B.L., nominated by the Council of the Bar of Ireland

Mr. Gerard J. Doherty, solicitor, nominated by the Council of the Law Society of Ireland

Ms. Fiona Duffy Coady, solicitor, nominated by the Council of the Law Society of Ireland

Mr. Ronan Boylan, Office of the Chief State Solicitor – appointed to act in place of the Attorney General under section 36(4) of the Courts and Court Officers Act 2002

Mr. Noel Rubotham, Director of Reform and Development, Courts Service, to whom membership has been delegated by the Chief Executive Officer of the Courts Service under section 30(2) of the Courts Service Act 1998

Vacancy, County Registrar, Dublin

Ms. Patricia Casey, County Registrar, Carlow, nominated by the Chief Executive Officer of the Courts Service under Section 69(4)(d) of the Courts of Justice Act 1936, as amended.

**Rules of the Superior Courts**

**Order: 38**

**Hearing of proceedings commenced by special summons**

1. Every special summons shall be returnable for such day as the Master shall fix, which, except in such cases where the parties consent to an earlier date, or where no service is required, shall be not less than seven days from the date of issue, and shall, where necessary, be served on the parties concerned at least four days before the return day. An affidavit verifying the claim indorsed on the summons shall be filed in the Central Office and notice of such filing shall be given to the parties concerned.
2. The Court may direct such other persons to be served with the summons as it may think fit.
3. Save in so far as the Court shall otherwise order, proceedings commenced by special summons shall be heard on affidavit: provided that any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party may serve upon the party by whom such affidavit has been filed a notice in writing requiring the production of the deponent for cross-examination, and unless such deponent is produced accordingly his affidavit shall not be used as evidence unless by the special leave of the Court.
4. In cases in which the Master has jurisdiction, he shall have the same power as the Court to hear oral evidence or to direct additional service.
5. In all cases in which he shall have jurisdiction, the Master may decide the matter himself or put it in the Court list for hearing.
6. In all cases in which he shall not have jurisdiction, and in all such other cases which he shall decide to put in the Court list for hearing, the Master shall transfer the summons, when in order for hearing, to the Court list for hearing on the first opportunity.
7. For the purposes of rule 6, or for the purpose of any hearing before himself, the Master may extend the time for filing affidavits and give such directions and adjourn the case before himself as he shall think fit.
8. If at any stage during the course of proceedings instituted by special summons it shall appear to the Court that the determination of some question or questions of fact is necessary for the proper decision or ruling as to the relief to be granted in such proceedings or as to any matter arising therein, the Court may determine such question or questions of fact either by directing the trial of issues in regard thereto or in such other manner (whether summary or otherwise) as may seem convenient for doing justice between the parties; and evidence as to the said

question or questions of fact may be given either orally or by affidavit or partly orally and partly by affidavit as the Court may in the circumstances think proper.

9. On the hearing of any special summons, the Master, in a case within his jurisdiction, or the Court, as the case may be, may give judgement for the relief to which the plaintiff may appear to be entitled or may dismiss the action or matter or may adjourn the case for plenary hearing as if the proceedings had been originated by plenary summons with such directions as to pleadings or discovery or settlement of issues or otherwise as may be appropriate, and generally may make such order for determination of the questions in issue in the action or matter as may seem just.
10. The Court may give any special directions touching the carriage or execution of the order, or the service thereof upon persons not parties, as it may think just.

**MEMBERSHIP OF THE SUPERIOR COURT RULES COMMITTEE AT YEAR  
ENDING 31ST DECEMBER 2013:**

The Chief Justice, the Hon. Mrs Justice Susan Denham (Chairperson)

The President of the High Court, the Hon. Mr. Justice Nicholas Kearns (Vice Chairman)

The Hon. Mr. Justice Donal O'Donnell, judge of the Supreme Court

The Hon. Mr. Justice William McKechnie, judge of the Supreme Court

The Hon. Mr. Justice John Edwards, judge of the High Court

The Hon. Mr. Justice Anthony Barr, judge of the High Court

The Master of the High Court, Mr. Edmund W. Honohan S.C.

Mr. Paul McGarry S.C., nominated by the Council of the Bar of Ireland

Mr. Gerard Meehan B.L., nominated by the Council of the Bar of Ireland

Mr. Stuart Gilhooly, solicitor, nominated by the Council of the Law Society of Ireland

Mr. Michael Kavanagh , solicitor, nominated by the Council of the Law Society of Ireland

Mr. Noel Rubotham, Director of Reform and Development, Courts Service, to whom membership has been delegated by the Chief Executive Officer of the Courts Service under section 30(2) of the Courts Service Act 1998

Ms. Mary Cummins, Office of the Chief State Solicitor – appointed to act in place of the Attorney General under section 36(4) of the Courts and Court Officers Act 2002

Mr. John Mahon, Registrar of the Supreme Court

## REPOSSESSION PROCEDURES IN OTHER JURISDICTIONS

### A. Repossession in the UK

1. Borrowers who fail to make mortgage payments or repayments on any loan secured on their property in time run the risk of falling into arrears. If the situation continues to escalate then they could be in danger of having their property repossessed.
2. Under the terms of the mortgage contract, lenders have the power to take back control of the property and sell it on to recover any arrears and outstanding balances. However, a lender will normally only resort to such action if all other means of retrieving their money have failed. There are, however, several stages where borrowers have the opportunity to prevent this from happening.
3. The following is a general overview of the stages involved with the repossession process:

#### **Stage 1: Missed Payments**

At the first stage, the lender will contact their customer in writing or by telephone to query and chase up missed payments.

At this point, borrowers are advised to talk to their lender and inform them of their situation. Some lenders may agree to let their customers make additional monthly payments to pay off the arrears over a set period. Borrowers should also make notes about any conversations they have, including the date and time of the conversation, the name of the person they spoke to and the outcome of the discussion, and ask for details of any agreements reached to be sent in writing.

#### **Stage 2: Solicitors Notice**

Lenders will usually wait until 3 months to see if any efforts have been made to pay the arrears before referring the case to their solicitors. The solicitors representing the lender will write to the borrower and demand full reimbursement of all missed payments.

They will also inform them that failure to make these payments and improve their account could result in repossession of their property.

Borrowers in this situation should talk to the solicitors and follow the same process as with Stage 1 – i.e. reach an agreement on how to catch up with the missed payments over a period of time in addition to meeting the regular monthly payment. Notes should again be taken regarding any discussions that take place and details of any agreements reached should be requested to be sent in writing.

### **Stage 3: Proceedings Begin**

If after 4-6 months a borrower is still in arrears, the lenders' solicitors will begin proceedings for repossession by seeking a possession hearing at the County Court local to the borrower.

On filing a request for issue, the matter will ordinarily be listed for a hearing date 4-6 weeks from that point, although it usually depends on how busy the court's hearings schedule is.

At this stage, borrowers must complete and promptly return the reply form received from the Court, stating their intentions and including as much detail as possible about their income and expenditure so that the court can determine whether they can meet the current monthly instalment and pay an amount towards the arrears. A letter and a copy of any supporting information that they may feel is relevant, such as attempted negotiations to reach an agreement with their lender, should also be attached. Borrowers should also make a copy of the Court summons for their records.

If a borrower can afford to pay the current monthly instalment together with a contribution towards the arrears before the hearing date, then the lender may be willing to suspend proceedings.

Although some lenders will inform their customers that there is no chance of this happening, the final decision rests with the District Judge. The judge will give the borrower an opportunity to make an offer to pay the full monthly amount, along with an additional monthly amount to clear the arrears. If the court is satisfied that payment can be maintained, the judge will grant a Suspended Possession Order, allowing the borrower to remain in their home.

### **Stage 4: Court Hearing**

A possession hearing takes place in private chambers and often lasts no more than 10-20 minutes. The District Judge will help the borrower by asking them simple relevant questions, which the borrowers should use to explain their situation and clearly state how they intend to go about fixing the situation.

If the borrower can demonstrate their ability to meet the current monthly mortgage payment and pay a contribution towards the arrears, such that the arrears will be paid over the remaining mortgage term, the court will in almost every instance make a Suspended Possession Order. This arrangement basically means that the borrower will be allowed to remain in the property so long as they maintain monthly payments and arrears contributions agreed by all parties. But if the repayments towards the mortgage arrears are not maintained then the lender has the right to seek possession by eviction (Possession Warrant) without a further hearing.

### **Stage 5: Eviction Notice**

If a Possession Order is granted and the borrower does not leave by the set date or the borrower defaults on a Suspended Order for Possession, the lender will apply to the court for a formal eviction without a hearing and a Possession

Warrant will be obtained. Obtaining a Possession Warrant can take between 2-3 weeks, depending upon the court's backlog and the bailiff's work load. The borrower will receive a letter from the court showing the exact date and time by which they must vacate the property - generally 7-14 days from the date that the eviction notice is granted.

At the notified date and time, a court bailiff representing the lender and a locksmith will arrive to formally take back control and possession of the property. Residents are generally given around 10 minutes to collect their belongings and leave before the locks are changed. The borrower is allowed one further visit to collect any remaining belongings, which usually takes place around two weeks after they have been evicted.

If the borrower fails to leave the house by the set date, the lender will issue the Possession Warrant and the resident(s) will be forcibly removed from the property.

Even at this stage borrowers can still make efforts to stop their home from being repossessed. This can be achieved by suspending the Possession Warrant, which can be done in the following ways:

- **Clearing arrears and making ongoing mortgage payments** - If the arrears are cleared, the court will no longer see any reason to proceed with the possession action, and will allow the borrower to remain. Payment of the arrears can be achieved by paying an Option Fee. In order to ensure ongoing mortgage payments are maintained, direct payments can be set up through the bank/building society so long as they have given permission to do so.
  - **Straight Purchase (with or without rent back, and with or without an Option to buy back)** – In order to do this, the borrower needs to show strong evidence to the court that the deal has been agreed and that it is from a proceedable buyer. The court should be presented with an application consisting of a letter confirming the offer to purchase the property, a letter from the seller's solicitors confirming that they have orders to sell, and a letter from the purchaser's solicitors confirming the purchase. Prior to the application to the court, the vendor is also advised to make the most recent monthly payment and to make any further monthly payments that are due until the sale is completed.
4. It is also vital for borrowers to attend the Court hearing with all documentation in hand. The more evidence a borrower has to show the judge that every effort has been made to meet obligations then the more chance they have in getting a better result in court.

## **B. Repossession in New Zealand**

### **Introduction**

1. Foreclosure is the process where a lender (mortgage holder) gains ownership of a property in New Zealand, is given the legal right to sell the property and uses the proceeds to pay off the mortgage. This usually happens when the borrower is in default on his/her mortgage payments. The lender can generally initiate foreclosure any time after a default on the mortgage. However, there are numerous state laws and regulations that govern foreclosure to protect both the home owner and the lender.

### **Types of Foreclosure in New Zealand**

2. There are two main types of foreclosure. The first is foreclosure by judicial sale. This is available in every state and is the required method in many. A foreclosure by judicial sale is the sale of the property under the supervision of a court in New Zealand, with the proceeds going first to satisfy the mortgage, and then to satisfy other lien holders, and finally to the borrower. Because it is a legal action, all the proper parties must be notified of the foreclosure, and there will be both pleadings and some sort of judicial decision, usually after a short trial.
3. The second type of foreclosure in New Zealand, foreclosure by power of sale, involves the sale of the property by the lender, though not through a court. This type of foreclosure is generally faster than a foreclosure by judicial sale, but it is not available in every state.
4. There are other types of foreclosures also available in certain states. For example, some states allow strict foreclosure which gives the property to the lender with no obligation to sell.

### **Procedures**

5. Before taking action the lender must serve a borrower with a notice under section 119 of the Property Law Act 2007. This notice must adequately inform the borrower of:
  - the nature and extent of the default complained of (that is, the amount by which the borrower is in default)
  - the date by which the borrower must remedy the default
  - the rights that the lender is entitled to exercise if the borrower does not remedy the default by the specified date
6. The date specified must be at least four weeks from the date on which the notice is given. But if the mortgage contract specifies a period for this that is longer than four weeks, the date specified in the notice cannot be earlier than the end of that longer period.
7. If a borrower receives a notice from a lender that does not comply with the legal requirements, he/she may be able to apply to the court for an injunction to



prevent the sale going ahead. Further, if the lender exercises the power of sale before the date specified in the notice, the borrower may also be able to apply to the court for a remedy.

#### **The mortgagee's duty to obtain the best price**

8. The lender has a statutory duty to take reasonable care to obtain the best price reasonably obtainable as at the time of sale. If the lender breaches this duty, the borrower can apply to the court for a remedy.
9. To satisfy the duty the lender must adequately market the property, which may involve advertising outside the local area, giving notice of the property's advantages (including the potential for any development), and setting a realistic reserve price based on the property's valuation.

#### **Three ways of exercising the power of sale**

10. The lender can exercise the power of sale in one of three ways:
  - sale through the High Court Registrar
  - sale through public auction
  - a private sale

#### **Sale through the Registrar**

11. If the lender chooses to exercise its power of sale through the High Court Registrar, it must apply to the Registrar and notify the Registrar of the name and address of the borrower and of any other served lender. The Registrar must be satisfied that the lender is entitled to exercise its power of sale. A lender is entitled to buy the mortgaged property only if the sale is conducted through the Registrar.

#### **Borrower's right to redeem the property**

12. There is a small degree of protection afforded to the borrower, through the "redemption price" this is the price at which he or she may redeem the land to be sold. At any time before the Registrar's sale the borrower may pay the redemption price or the amount due and owing under the mortgage; the lender must then release the mortgage.
13. The redemption price is set by the lender, and must be specified in the lender's application to the Registrar to conduct the sale. Any advertisement for the lender sale must state that the redemption price is available at the Registrar's office and can be obtained before the auction.

### **C. Repossession in Australia**

1. In Australia, there are legislative provisions that protect borrowers who enter into a loan contract.

- Hardship provisions are mandatory in loan contracts and it is always appropriate to review that contract when entering into a loan agreement.
- If a borrower feels they are approaching a difficult financial time and may not be able to make their loan repayments - they should approach their lender – there may be a simple solution in terms of 'rearranging' the loan to reduce the repayment.
- If not, the lender may enter into an agreement with the borrower for a repayment holiday (where the interest is capitalised) or part payments for a limited time.
- If no arrangement can be made, the owner will be given time to sell the property and pay out the debt. It is rare that the situation will move to mortgagee in possession - where the lender will sell the property - but it happens.
- To foreclose on a loan the lender will make application to the courts for repossession. They will have to prove their case to the court to get the order granted. This may involve detailing the amount of arrears, the timeframe the loan has been in arrears, what notifications have been sent to the borrowers about the arrears and what attempts they have made to assist the customer bringing the loan back in to order.
- Usually, lenders will have sent out letters advising of loan arrears starting at 7 days and continuing at 14 days, 21 days and then monthly. Depending on the amount and history of the loan they will also attempt to contact the customer by phone at any time a loan is in arrears in order to make arrangements for payment.
- Once the property is in the possession of the lender they will make arrangements for it to be sold in order to recover their funds. Again times and laws have changed. The days of a property being sold for an amount just to cover the loan is unlikely to happen. Lenders have to show they have not taken advantage of the situation.
- Most lenders will put the sale of the property out to tender by real estate agents in order to get a fair market price. They may even contract someone to fix things up on a property if it will improve the anticipated sale price. Of course, all of the costs in repossessing the property and selling it will come out of the sale price.
- Should the property not sell for enough to cover the loan and all the costs, the borrower is still liable for the shortfall. The lender, or if the loan was insured, the lenders mortgage insurer may still then pursue the borrower in the courts to recover the shortfall.

## 2. Main steps in repossession process

**Step 1 – Lender** sends borrower a letter or otherwise contacts the lender when a repayment is missed.

At this stage, the **Borrower** can contact the lender who must assess and respond to the request. Borrower should explain how the missed repayment came about, how he plans to catch up on repayments and seek advice on what the lender can do to help.

**Step 2 – Lender** sends borrower a default notice which will give the borrower at least 30 days to catch up on the missed repayments.

At this stage the **Borrower** may:

- pay the arrears and usual repayment – lender cannot start legal action in this scenario.
- Ask lender to reduce or delay repayments. If lender refuses borrower may appeal to lender’s internal complaints section. If still unhappy borrower can lodge a dispute with the Financial Ombudsman Service or Credit Ombudsman Service
- Consider selling house to repay the debt.

**Step 3 – Lender** serves borrower with a Statement of Claim or Summons for the debt or for the repossession of the house. **Borrower** is advised to seek legal advice.

**Step 4 – Lender** applies for a writ (an order) to take possession of the home. **Borrower** advised to seek legal advice.

**Step 5 – Lender** sends borrower a letter telling him when a Sheriff will come to change the locks. This is also known as a Notice to Vacate. **Borrower** advised to seek legal advice.

**Step 6 – Lender** sends a Sheriff to the borrower’s house to evict and change the locks. **Borrower** advised to seek legal advice.

### E. Repossession in Canada

1. The Foreclosure Process in Canada varies from province to province. There are two main ways a lender can recover a mortgage debt when a borrower defaults.
2. Judicial Sale. A judicial sale is conducted under the supervision and authority of the court system. A lender must apply to the court for the court’s permission to sell a property. The Judicial Sale method has been adopted as the primary debt recovery vehicle in British Columbia, Alberta, Manitoba, Saskatchewan and Quebec.

3. The main features of the judicial sale process are:
  - It is conducted under the supervision and authority of the Court;
  - The lender must apply to the court to get permission to sell property;
  - There is extensive Court involvement in every step of the process;
  - The process involves bringing an action against borrower and other liable parties.
4. Power of Sale. A power of sale allows a lender to sell a property without the involvement of the court. The lender has the right to sell the property according to the terms set out in the mortgage document or according to provincial legislation that authorizes “power of sale” within that province. In Ontario the “Power of Sale” is used as the lenders primary method of recovery. The same method is used in Newfoundland, New Brunswick and Prince Edward Island. Lenders in Ontario may use the Judicial Sale method or the Power of Sale, however, almost 99% of all foreclosures are Power of Sale because it is less expensive than the judicial process and it is much faster – the lender gets their money quicker.
5. Features of power of sale procedure:
  - It allows lender to sell property without the involvement of the court.
  - The Process is started by sending a notice to the borrower.
  - The lender must seek action against borrower after property has been sold and the amount garnered is less than that owed.
6. Difference between the Judicial Sale and a Power of Sale procedures

There are three basic differences between the Judicial Sale and the Power of Sale:

- The extent of Court involvement is the first major difference. In Judicial Sale Provinces, the court is extensively involved in the entire process. e.g. ordering the property to be sold, confirmation of the sale procedure and hearing any application for a deficiency judgment. In contrast to this, there is virtually NO court involvement in the “Power of Sale” Provinces.
- The Instigation of Proceedings. The way in which the Foreclosure process is started in the Power of Sale Provinces is simply by way of sending a notice to the borrower and current owner of the property. This “notice” starts the process. In contrast, the Judicial Sale Provinces start the process by way of a lawsuit against the borrower and all who may be liable.

- Where the sale of a property does not cover all the outstanding mortgage a “deficiency judgment” action is commenced. In Judicial Sale Provinces, the deficiency judgment action is started as part of the main action, or suing of the borrower via the initial law suit. In Power of Sale Provinces, a lender seeking a deficiency judgment must start an action against the borrower “after” the property has been sold. So even if the borrower loses his house, if there isn’t enough equity to cover all the costs, he will still be liable for the outstanding debts.

7. **Time frames.**

In general, the Judicial Sale process usually can take about six months or so before it is all over. To contrast this, a Power of Sale foreclosure (particularly in Ontario) can be over in only 45 days from the time the “notice” has been given.

8. **British Columbia Foreclosure Process**

The foreclosure process in British Columbia is controlled by the BC Supreme Court. What it means to the home owners is that each step of the foreclosure process has to be approved by the Supreme Court including when to start selling, the purchase price, the terms of sale, and any commission paid.

9. Following are the main steps of the foreclosure process:

- If a borrower stops paying the mortgage, he will initially get a letter from the bank or maybe even a phone call. The bank is making sure this is not a simple error of some sort and is giving the borrower a little while to fix the problem.
- After 2~3 months the borrower will receive a letter from the bank asking you to pay the arrears in full before a certain date and informing him that a lawyer will be hired to start foreclosure proceedings if you do not.
- If the borrower does not pay the arrears as required, the lender will ask a lawyer to start the foreclosure process. The borrower will receive a letter from the lawyer demanding payment of the full amount owing on the mortgage or only the arrears. The borrower is given a deadline after which the foreclosure process will start.
- The first step in the foreclosure process is for the lawyer to file a document named “foreclosure petition”. Within few days after the petition is filed in the court the borrower will be served with a copy. The petition is sent to all interested parties including other mortgage holders, tenants in the property, other lien holders etc. The borrower should follow the instruction of how to file a response to the petition
- About a month later there will be the first hearing in the court. At the hearing the judge will give the lender an “order nisi”, and in most cases, it will also give the borrower time to “redeem” the mortgage by paying the full amount owed, plus interest, costs and taxes. This time is called

the “redemption period” and it’s usually 6 months. But sometimes the lender will ask the court for a shorter redemption period.

- Following the redemption period of typically six months, the lender may choose to have the property listed for sale by the court or seek an “Absolute Order of Foreclosure” from the court.
- In the case of the property being listed for sale by the court, the court approves the sale of the property. If the sale does not generate sufficient money to pay the petitioner in full, the petitioner can then seek a deficiency judgment from the court against the borrower.
- In the case where an Absolute Order of Foreclosure is granted the petitioner becomes the new registered owner of the property and all other respondents are removed from the title. Once this order has been given by the court, no further action can be taken against the borrower, These Absolute Orders of Foreclosure take place only if the property value equals or exceeds the debt, and the borrower has no assets to apply toward any deficiency.

#### **The Foreclosure Process in Ontario**

10. In Ontario, the foreclosure process is very fast, as the proceedings are typically laid out in the mortgage documents.
11. Power of sale was initially developed in Ontario by lenders who wanted a faster way to dispose of defaulted property and recover debt. As a result, they began to include power of sale as provisions in their mortgages and mortgage contracts. Under this the lender would allow them to dispose of property under the borrower's default and without having to resort to the courts. Power of sale is now part of the current Ontario Mortgages Act.
12. In the Mortgages Act there are two types of power of sale: Contractual and Statutory.
  - Contractual power of sale is when the mortgage documents have included power of sale provisions in their mortgage contract.
  - Statutory power of sale is when the mortgage documents have not included power of sale provisions. Statutory powers of sale are very rare because the lender will commonly have the provisions in the mortgage contract. However in the case of statutory power of sale the lender can still exercise power of sale as long as the borrower has defaulted for three months or more.
13. Both types of power of sale are started by the lender giving the defaulter a notice after 15 days of non-payment. The notice is given to all parties having a vested interest in the property. This includes subsequent encumbrances, statutory lien holders, or people who have advised the lender in writing, that they have an interest in the property.

14. The notice is attached to the Mortgages Act, and is called a Notice of Sale Under Mortgage. It advises of the lender's intention to exercise the power of sale, and includes details of the mortgage, such as:
  - The date in which the mortgage was made.
  - The parties in the mortgage and the property mortgaged.
  - The amount owing.
  - A warning that if the amount owing is not paid by a specified date, the lender will exercise the sale of the property.
15. If this is a power of sale that is contractual, the borrower will have 35 days to pay, unless otherwise stated in the mortgage agreement.
16. If this is a power of sale that is statutory, the borrower will have 45 days to make payment.
17. The lender cannot do anything further within this redemption period, but by paying the amounts owing, the borrower can redeem the mortgage and save their home from foreclosure.
18. If the redemption period has passed without the borrower making the payment then the lender is legally allowed to foreclose on the property. Under power of sale, the bank has the right to sell the property by auction, private contract, or tender. Usually the property is listed with a real estate agent and placed on the market for sale. This is because the bank has noticed that they can get more for the home at the lowest cost to the bank.
19. Once the property is sold and if there is any surplus, the lender must account to the borrower or borrowers, and other parties with vested interests. In the Mortgage Act it requires that the proceeds of the sale first be applied to the cost of conducting the sale, then to interest and cost owing under the mortgage, then to principal money owing under the mortgage, next to pay any amounts due to outside parties, and finally to pay tenants' security deposits.

## **TABLES**

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- 1. Mortgage Statistics – End Quarter 2 2013**
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- 4. Sample Statistics – Possession Order granted on consent – 2009 to 2013**



**TABLE 1 - Mortgage Statistics – End Quarter 3 2013**

|   | Residential | Buy to Let | Total   |
|---|-------------|------------|---------|
| <b>Mortgage Arrears</b>                             |             |            |         |
| Total No. of Accounts                               | 768,136     | 147,610    | 915,746 |
| Total in Arrears                                    | 141,520     | 40,426     | 181,946 |
| Under 90 days                                       | 42,331      | 9,199      | 51,530  |
| Over 90 days  | 99,189      | 31,247     | 130,436 |
| <b>Repossessions</b>                                |             |            |         |
| On Hand (start Quarter)                             | 1,002       | 502        | 1,504   |
| Repossessed on foot of Court Order during quarter   | 76          | 31         | 107     |
| Voluntarily surrendered or abandoned during quarter | 133         | 31         | 164     |
| Sold during quarter                                 | 158         | 47         | 205     |
| On Hand (end Quarter)                               | 1,050       | 516        | 1,566   |
| <b>Restructured</b>                                 |             |            |         |
| Total   | 80,555      | 21,607     | 102,162 |
| Not in arrears                                      | 43,034      | 13,152     | 56,186  |
| <b>Type of restructuring</b>                        |             |            |         |
| Interest only (up to 1 year)                        | 14,903      | 6,490      | 21,393  |
| Interest only (over 1 year)                         | 2,341       | 1,942      | 4,283   |
| Reduced payment (more than interest only)           | 16,068      | 4,273      | 20,361  |
| Reduced payment (less than interest only)           | 4,331       | 306        | 4,637   |
| Term extension                                      | 15,447      | 2,747      | 18,194  |
| Arrears Capitalisation                              | 16,146      | 3,695      | 19,839  |
| Payment Moratorium                                  | 2,242       | 261        | 2,503   |
| Deferred Interest Scheme                            | 143         | 3          | 146     |
| Permanent Interest Rate Reduction                   | 16          | 27         | 43      |
| Split Mortgage                                      | 1,154       | 100        | 1,254   |
| Trade Down Mortgage                                 | 13          | 0          | 13      |
| Temporary Interest Rate Reduction                   | 1,426       | 27         | 1,453   |
| Other   | 6,325       | 1,763      | 8,088   |

**TABLE 2 – Trends in Mortgage Arrears, Repossessions and Restructures**

|  | Principal Dwelling Houses |         |         |         | Buy to Let Properties |         |         |         |
|--|---------------------------|---------|---------|---------|-----------------------|---------|---------|---------|
|  | Q4 2012                   | Q1 2013 | Q2 2013 | Q3 2013 | Q4 2012               | Q1 2013 | Q2 2013 | Q3 2013 |
| Total no of Mortgages                            | 778,375                   | 774,109 | 770,610 | 768,136 | 150,124               | 149,395 | 148,529 | 147,610 |
| Total no of mortgages in arrears                 | 139,224                   | 142,118 | 142,892 | 141,520 | 37,878                | 39,371  | 39,948  | 40,426  |
| Up to 90 days                                    | 46,875                    | 46,564  | 45,108  | 42,331  | 9,512                 | 10,002  | 9,622   | 9,199   |
| 91 to 180 days                                   | 18,521                    | 18,205  | 17,612  | 16,680  | 4,752                 | 4,609   | 4,739   | 4,552   |
| Over 180 days of which:                          | 73,828                    | 77,349  | 80,262  | 82,509  | 23,614                | 24,760  | 28,587  | 26,675  |
| 181 to 360 days                                  | 23,443                    | 23,214  | 23,099  | 22,665  | 6,822                 | 6,561   | 6,369   | 6,403   |
| 361 to 720 days                                  | 27,212                    | 28,195  | 28,303  | 28,010  | 9,058                 | 9,267   | 8,985   | 8,657   |
| over 720 days                                    | 23,173                    | 25,940  | 28,860  | 31,834  | 8,932                 | 8,932   | 10,233  | 11,597  |
| Total arrears cases > 90 days                    | 92,349                    | 95,554  | 97,874  | 99,189  | 28,366                | 29,369  | 30,326  | 31,227  |
| Residential properties in possession             | 893                       | 910     | 1,001   | 1,050   | 454                   | 479     | 502     | 516     |
| Total no of mortgages classified as restructured | 78,279                    | 79,658  | 79,357  | 80,555  | 21,748                | 21,504  | 21,563  | 31,607  |
| of which are not in arrears                      | 41,474                    | 42,237  | 42,309  | 43,034  | 13,346                | 13,141  | 13,182  | 13,152  |

**TABLE 3 – Sample cases where Possession Order granted following listing in Circuit Court Judges List – 2009 to 2013**

| Circuit      | No. sample cases | No. Residential        | No. Buy to Let         | Ave. No. of days between Civil Bill and grant of Possession Order | Ave No. of days between Possession Order and Execution Order | Ave. No. of adjournments before County Registrar | Ave. no of adjournments before judge |
|--------------|------------------|------------------------|------------------------|---|--|--|--------------------------------------|
| Carlow       | 10               | n/a                    | n/a                    | 946   | 278  | 2.9  | 0.8                                  |
| Cavan        | 10               | 7                      | 3                      | 422   | 352  | 3.5  | 0.5                                  |
| Clare        | 5                | 4                      | 1                      | 723   | 203  | 2.6  | 3.6                                  |
| Cork         | 8                | 4                      | n/a                    | 389   | 252  | 2.6  | 0.6                                  |
| Dublin       | 44               | 43                     | 1                      | 432   | 264  | 3.8  | 0.4                                  |
| Galway       | 5                | 2                      | 3                      | 417   | n/a  | 2.4  | 0.4                                  |
| Kerry        | 11               | 9                      | 2                      | 289   | 294  | 2.1  | 0.5                                  |
| Kildare      | 10               | 9                      | 1                      | 673   | 305  | 3.5  | 3.0                                  |
| Laois        | 8                | n/a                    | n/a                    | 465   | 194  | 4.9  | 0.5                                  |
| Limerick     | 4                | 3                      | 1                      | 412   | 172  | 1.5  | 1.0                                  |
| Longford     | 10               | 10                     | 0                      | 489   | 328  | 2.8  | 2.3                                  |
| Louth        | 3                | 3                      | 0                      | 517   | 202  | 2.2  | 0.7                                  |
| Mayo         | 2                | 2                      | 0                      | 1020  | 179  | 2.0  | 0.5                                  |
| Meath        | 9                | 2                      | 1                      | 665   | 259  | 3.1  | 0.5                                  |
| Offaly       | 10               | 10                     | 0                      | 209   | 440  | 4.8  | 0.9                                  |
| Roscommon    | 8                | 8                      | 0                      | 215   | 108  | 2.1  | 0.5                                  |
| Tipperary    | 9                | 8                      | 1                      | 663   | 114  | 1.6  | 1.5                                  |
| Westmeath    | 15               | 13                     | 2                      | 326   | 256  | 2.3  | 0.5                                  |
| Wexford      | 10               | 10                     | 0                      | 1039  | 188  | 5.0  | 2.6                                  |
| Wicklow      | 4                | 4                      | 0                      | 534   | 547  | 3.5  | n/a                                  |
| <b>Total</b> | <b>195</b>       | <b>151</b>             | <b>16</b>              | <b>517</b>  | <b>262</b>   | <b>3.23</b>                                      | <b>1.05</b>                          |
|              |                  | <b>Unknown:<br/>28</b> | <b>Unknown:<br/>28</b> |   |  |  |                                      |
|              |                  |                        |                        |   |  |  |                                      |

**TABLE 4 – Sample cases where Possession Order granted on consent – 2009 to 2013**

| Circuit      | No. sample cases | No. Residential    | No. Buy to Let     | Ave. No. of days between Civil Bill and grant of Possession Order | Ave No. of days between Possession Order and Execution Order | Ave. No. of adjournments before County Registrar |
|--------------|------------------|--------------------|--------------------|---|--|--|
| Carlow       | 9                | n/a                | n/a                | 447   | 216  | 2.0  |
| Cavan        | 10               | 4                  | 6                  | 207   | 145  | 2.1  |
| Clare        | 10               | 6                  | 4                  | 408   | 156  | 4.8  |
| Cork         | 10               | 3                  | n/a                | 282   | 147  | 1.5  |
| Dublin       | 9                | 9                  | 0                  | 291   | 179  | 2.1  |
| Galway       | 6                | 5                  | 1                  | 160   | n/a  | 1.5  |
| Kerry        | 16               | 15                 | 1                  | 307   | 326  | 3.7  |
| Kildare      | 10               | 10                 | 1                  | 313   | 122  | 4.1  |
| Kilkenny     | 15               | 15                 | 0                  | 451   | n/a  | 2.0  |
| Laois        | 10               | n/a                | n/a                | 598   | 216  | 8.1  |
| Limerick     | 13               | 12                 | 1                  | 216   | 164  | 2.3  |
| Longford     | 10               | 10                 | 0                  | 439   | 271  | 4.4  |
| Louth        | 10               | 10                 | 0                  | 221   | 121  | 1.9  |
| Mayo         | 10               | 10                 | 0                  | 711   | 99   | 4.1  |
| Meath        | 10               | 8                  | n/a                | 352   | 520  | 2.1  |
| Offaly       | 9                | 9                  | 0                  | 329   | 140  | 2.1  |
| Roscommon    | 5                | 5                  | 0                  | 171   | 510  | 1.6  |
| Tipperary    | 10               | 10                 | 0                  | 591   | 278  | 2.2  |
| Westmeath    | 10               | 10                 | 0                  | 328   | 169  | 2.4  |
| Wexford      | 10               | 10                 | 0                  | 596   | 194  | 4.2  |
| Wicklow      | 20               | 20                 | 0                  | 455   | 121  | 3.4  |
| <b>Total</b> | <b>222</b>       | <b>181</b>         | <b>14</b>          | <b>385</b>  | <b>234</b>   | <b>2.9</b>                                       |
|              |                  | <b>Unknown: 27</b> | <b>Unknown: 27</b> |   |  |  |