Presentation to

Joint Oireachtas Committee on Finance, Public Expenditure & Reform on

Resolution Process for Mortgage Arrears

FLAC

2 April 2014

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FLAC (Free Legal Advice Centres) is a non-governmental, voluntary organisation which exists to promote the fundamental human right of access to justice. As an organisation, FLAC focuses on the use of law as a tool for social change and on the right of equal access to justice for all. We work particularly on the protection of economic, social and cultural rights.

In our work, we identify and make policy proposals on how the law excludes marginalised and disadvantaged people, principally around social welfare law, personal debt & credit law and civil legal aid. We advance the use of law in the public interest and we co-ordinate and support the delivery of basic legal information and advice to the public for free and in confidence.

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PRESENTATION TO JOINT OIREACHTAS COMMITTEE ON FINANCE, PUBLIC EXPENDITURE AND REFORM ON THE RESOLUTION PROCESSES FOR MORTGAGE ARREARS

FREE LEGAL ADVICE CENTRES, APRIL 2ND 2014

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1. Current statistics on mortgage debt

a) Central Bank

According to Central Bank statistics, the total number of accounts either in arrears or restructured had continued to increase quarter on quarter, and stood at 185,554 (24% of the then total) at the end of Quarter 3, 2013 – 141,520 in arrears and 43,034 restructured but not in arrears.

By the end of Q.4 2013 however, that number had fallen very slightly to 182,401 (23.86% of the then total) – 136,564 in arrears and 45,637 restructured but not in arrears.

It is however the growth in the incidence and amount of long-term arrears that is of particular concern.[1] For example, again at the end of Quarter 3, 2013, some 31,834 accounts had been in arrears for over 720 days (or two years). By Q.4 this had increased to 33,589, an increase of 5.5%.

It should be noted that this does not mean that each of these accounts were over two years behind in payments. It refers to the amount of time the account has been in arrears for. However, when the number of such accounts is divided into the total arrears figure, it is clear that the average arrears figure was of the order of €41,224 at the end of Q.3 and €41650 at the end of Q.4.

So what does this tell us? Perhaps on the positive side, it may appear that the problem is finite. The number of new cases of arrears is decreasing – for example at the end of Q.3; there were 42,331 accounts in arrears for less than 90 days; by Q.4 that had decreased to 40,090. On the negative side, it would appear that there is a 'hard core' of intractable cases for whom solutions will be difficult to find.

b) Department of Finance

More recently, the Department of Finance has begun to separately publish 'Mortgage Restructures Data', described as a 'Dataset for 6 main lenders covered by the Central Bank of Ireland Mortgage Arrears Resolution Targets',[2] It is worth noting that the Department now publishes this data set on a monthly basis and, at the time of writing, the latest set was released in February covering December 2013, approximately six weeks in arrears. This data set is a clear improvement on what has gone before, in particular as it now tracks on a monthly basis the increase in the number of restructures of mortgages on principal dwelling houses (PDH) that have been in arrears for over 90 days. It also provides an ongoing breakdown on a monthly basis of the types of restructures taking place.

However, it should be noted that the data has not gone through the lender's quality control processes and is unaudited.

This data however also reveals the slow rate of current progress (after five years of comparative inertia) and the extent of the challenges facing the authorities and these six lenders in getting on top the problem in 2014 and beyond. For example, in the three months between the end of September 2013 and the end of December 2013, the number of restructures of mortgages in the 90-day plus arrears category had grown from 18,513 (22.8% of the total) to 20,556 (25.8% of the total), an increase of just over 2,000 accounts.

At the end of December, there were still a total of 79,782 PDH accounts with these six lenders that had been in arrears for over 90 days. That leaves 59,226 (79,782 minus 20,556) that have still to be restructured. Although such an increase in restructures is welcome, this means that almost three out of four mortgages in this 90 day

[1] Cental Bank of Ireland: Residential Mortgage Arrears and Repossessions Statistics Q3 2013 and Q.4 2014.

[2] AIB, Bank of Ireland, PTSB, ACC, KBC Ireland and Ulster Bank.

plus category were still not restructured at the end of 2013. Of the 25% that had been restructured, almost one in every three is only a temporary, as opposed to a permanent restructure, with all the uncertainty that this implies for the borrower into the future.

There is also a lack of clarity around some of the terms used in these figures. For example, one of the permanent restructure options is described as 'Interest Only (for a period)'. In the absence of a specific explanation, it is difficult to see how 'interest only' could constitute a viable permanent restructure. Equally, the category described as 'Hybrid (Combination of Treatments)/Other requires some explanation and there is still no mention of debt write-down as a category, despite it being specifically listed in the revised 2013 Code of Conduct on Mortgage Arrears as an alternative repayment option.

There are also some significant omissions in this data set that might be addressed and these include the following:

a) There is still no breakdown of the reschedules agreed by individual lenders in terms of numbers and type or of proposed reschedules that were rejected by borrowers.
b) The figures only include the six principal mortgage lenders; thus no information is available for the remaining sub-prime lenders.

Finally, it should be noted that these figures only cover the six main lenders. The latest Central Bank figures indicate that 96,474 PDH accounts in total are in arrears of 90 days plus; if 79,782 are with the six main lenders, that leaves 16,692 belonging to other lenders. This category will include the 'debt purchase' companies that have bought the loan books of other lenders.[3] From a legal perspective, it is clear that the CCMA/MARP process does not automatically apply to these mortgages at all now that they have been sold on to what are unregulated entities, unless like IBRC they voluntarily decided to apply the Code.[4] In addition, there is still no information on the unsecured debt profile of accounts in arrears over 90 days; the absence of data in this respect hinders an appropriate policy response.

c) Current statistics on repossession proceedings

During Q.3 2013, the Central Bank records that 1,830 new legal proceedings to 'enforce the debt/security on a PDH mortgage' were brought. During Q.4 2013, 1,491 such proceedings were lodged. That is a total of 3,321 new cases in the last six months of 2013 and these figures amount to a major ramping up of activity in the repossession area.

[3] For example, the Pepper Group acquired the share capital of GE Capital Woodchester Homeloans in September 2012 including approximately 3,500 Irish mortgage accounts with over €600 million in receivables. The mortgage book of Bank of Scotland (Ireland) PLC was acquired by Tanager Ltd in December 2013.

[4] On this issue, the Government's legislative programme for the Spring/Summer session 2014 lists under the heading of Bills in respect of which heads have yet to be approved by Government at No.93 "Sale of Loan Books to Unregulated Third Parties Bill - To introduce legislation to cater for the sale of loan books by regulated financial institutions to **unregulated** financial institutions - Publication expected in 2015".

By contrast, during Q.3 2013, 209 properties went back to lenders – 76 were repossessed on foot of a court order and 133 were voluntarily surrendered or abandoned. During Q.4 2013, 168 properties went back to lenders – 63 were repossessed on foot of a court order and 105 were voluntarily surrendered or abandoned.

2. The revision of the CCMA in 2013

Since the publication of the 2010 edition of the CCMA, the Central Bank has felt the need to issue 'clarification' letters to industry on specific aspects of the Code. This is principally, it would appear, to facilitate lenders to make increased contact with borrowers it views as being uncooperative.[5] The effect of these clarifications was arguably twofold: first they ostensibly diminished the protections available to consumers in arrears from unwelcome or excessive contacts by lenders; and second, they reaffirmed that the Code is basically a template drawn up by the Central Bank to regulate the collection practices of the mortgage lenders which it will adjust when it sees fit and as it believes, in conjunction with government, circumstances dictate.

The publication of the Central Bank's *Consultation Paper 63 – Review of the Code of Conduct on Mortgage Arrears* in March 2013 illustrates this. This review of the CCMA was stated to be with the aim of *'strengthening the protections in place for borrowers, where necessary, while ensuring that the framework is facilitating and promoting the effective and timely resolution, by lenders, of each borrower's arrears situation'*. It is doubtful that it will achieve this basic objective, primarily because it is mainly focused on industry rather than consumers. However, FLAC would certainly ask: should the Central Bank be given or take upon itself the role of legislator or quasi-legislator in this manner in the first place, on a matter of such fundamental importance to so many households in this country? Who elected it to put these rules in place and what role, if any, have the Houses of the Oireachtas had in approving the various incarnations of the Code, given that, the sole power for making laws under Article 15 (2) of Bunreacht na hEireann 1937 vests in those Houses of the Oireachtas?

Crucially, though the Bank is obliged to consult with the Minister for Finance prior to drawing up or amending a Code, no parliamentary scrutiny appears to apply when the Bank sets about a revision, a fact that we strongly argue affects the admissibility of this and other codes in legal proceedings. It is not as if the subject matter of this Code is an excessively technical area of financial services. On the contrary, it is, at least on the surface, about trying to ensure that family homes are not unnecessarily repossessed. This is a social issue of fundamental importance to Irish society and should surely one for our elected representatives to determine. As with previous code revisions, the Central Bank sought submissions to be made by 'stakeholders', in this case by a closing date of 10 April 2013. The short window afforded was explained by the fact that so called 'pre-consultation' meetings with these stakeholders (stated to be both industry and consumer) had taken place in advance of the review, although details of who was met, when and how frequently are not provided.[6] The Consultation Paper closed with a full draft revision of the Code, which when combined with the short timeframe

[5] Clarification letters were issued by the Bank on 30 April 2012 and 21 December 2012.

[6] For the record, FLAC was invited to a short meeting with the Bank that took place on 12 March 2013, a month before the publication of the Consultation Paper.

for submissions, may have conveyed the message to some that any changes subsequently made might be minimal. Ultimately, the revision that was eventually announced constituted, in our view, a substantial disimprovement in the protections provided to borrowers in arrears.

3. Reduced protections for borrowers under the CCMA/MARP

There follows a discussion of a number of specific areas where we believe the rights of borrowers in arrears have actually worsened as a result of the revision of the Code, leaving such borrowers more vulnerable to legal proceedings for repossession of their family homes. We should emphasise that we do not believe that all mortgage holders in arrears should (or even necessarily want) to hold on to their family homes, given the scale of arrears that is apparent in many instances. It is also unclear as of yet, however, whether mortgage lenders will necessarily always want to exercise the enhanced powers that they have arguably been provided with, as chronic negative equity stills bedevils many properties substantially in arrears. Nonetheless, we believe that any borrower should be afforded a coherent and unbiased system that allows for such an opportunity, before appearing (almost inevitably unrepresented) before the courts. Either that or abandon any pretence at fairly codifying the area and properly legislate for the circumstances under which family homes may be repossessed and leave the courts to interpret and apply such legislation.

The areas considered may be summarised as follows:

a) Relaxed requirements in relation to unsolicited contacts with borrowers
b) The imbalance of power in the decision-making process
c) Appeals/complaints and the moratorium on legal proceedings
d) Legal proceedings and borrowers not co-operating
e) The limited role of the Financial Services Ombudsman under external MARP appeals

a) Relaxed requirements in relation to unsolicited contacts with borrowers

Prior to the proposed revision of the Code, there had already been a loosening of the rules which had restricted lenders' contact with borrowers and, in particular, the protections around unsolicited communications and unsolicited visits had been significantly diluted. The rationale for this dilution is stated in the Central Bank's 'clarification' letters of 30 April and 21 December 2012.[7] We understand these to have been sent as a consequence of pressure from mortgage lenders.[8]

A revised section on 'communication with borrowers' was then included in the proposed draft revision of the Code of Conduct on Mortgage Arrears in July 2013. This proposed to remove the limit of three unsolicited communications per month that had existed in the 2010 Code and proposed to expressly allow for unsolicited

[7] Entitled "Re: Contact provisions of the Consumer Protection Code 2012 and the Code of Conduct on Mortgage Arrears" and "Re: Clarifications on the Code of Conduct on Mortgage Arrears" respectively.

[8] See Chapter 1, Section 2.5.

personal visits to be made to the borrower's primary residence when all other attempts at contact have failed and immediately prior to classifying a borrower as not co-operating. The rationale for this inclusion was said to be due to "*feedback from industry that would indicate that the current requirements, particularly the limit of three successful contacts, are preventing lenders from making contact and engaging with borrowers and are therefore impeding the consideration and resolution of borrower's cases. The Central Bank does not believe that this is in the best interests of borrowers*".[9]

Ultimately, it is hard to believe that the adjustments made by the Bank prior to and for the purpose of revising the Code in this regard were not in some way influenced by a belief that many borrowers were deliberately refusing to realistically engage with their lender in relation to their arrears situation, even though they had the capacity to service their mortgage commitments. There is, however, no reliable evidence base for such concerns, and estimates of so-called 'strategic default' amongst mortgage holders by a small number of academics have been strongly challenged by others.[10] In addition, the appearances by the principal mortgage lenders in September 2013 before your committee were long on allegations of 'strategic default' but short on concrete evidence, prompting the Governor of the Central Bank, Patrick Honohan, at his subsequent appearance before you to say that strategic default is a "phoney concept" and that it is actually a consequence of people prioritising what debts they repay, rather than not paying any.[11] Few would argue that 'won't pay' cases do not exist and there will always be some who will try to game the system. However, assumptions made about the level of such default, in the absence of a reliable definition and in the absence of evidence that can only be by definition in the possession of the mortgage lenders themselves, form an extremely dubious basis for altering existing policy.

Perhaps what is most worrying here is not the changes that have been made so much as an apparent failure to grasp the reality that debt collection is an unpleasant business. Some credit institutions and the debt collection companies they employ - if unchecked - will seek to bully and intimidate those in debt in order to recover money, just as when unchecked they lent more money than was prudent or reasonable. Unless the Central Bank monitors and inspects tirelessly and adopts an 'in your face' attitude to policing compliance by lenders with the contact rules in the Code, advantage will be taken of the loosening of those rules. In this regard, a meeting that FLAC attended with the Bank in late 2013 does not bode well.[12] At this meeting, the Bank stated that it did not intend to commence inspections of compliance with the Code until an unspecified time in 2014. While it stated that it had held meetings with the mortgage lenders in relation to the new Code, it accepted that it had not looked at any client/lender files and it appeared to be comparatively unaware of trends and developments on the ground with its own Code, almost five months after it had amended it.

b) The imbalance of power in the decision-making process

[9] Consultation Paper 63 – Page 8.

[10] See for example: http://brianmlucey.wordpress.com/2013/07/30/strategic-defaults-in-irish-mortgages-what-do-and-dont-we-know/

[11] 'Honohan says strategic default is a phoney concept' as reported in the *Irish Times* online, 25 September 2013.

[12] Meeting with officials of the Consumer Protection Section of the Central Bank, 19 November 2013

The basic purpose of the Code is to oblige a mortgage lender to ensure that it has an accurate account of the borrower's financial details in the form of an up-to-date Standard Financial Statement (SFS) before it assesses how an arrears case might be resolved by putting in place an alternative repayment arrangement.

At first glance, the revised Code seems to expand the range of alternative repayment arrangements that a lender is obliged to consider in respect of a borrower in arrears. Significant new options include split mortgages and reducing the principal sum to be paid (in other words, debt write-down). However, a closer look reveals that the revision may indeed have served to reduce the range of such options. Whereas under the 2010 version, a lender was obliged to "explore all options for alternative repayment arrangements"[13], a lender is now only obliged to consider 'all of the options for alternative repayment arrangements ***offered by that lender***' [emphasis added]. [14] Thus, if a lender decides as a matter of policy, for example, that it is not going to offer a reduction in the principal amount owed as one of its options, then it does not even have to consider it.

In response to a specific query in this regard from FLAC, the Central Bank confirmed that:

> *The Central Bank does not have the power to compel lenders to offer specific products…(and) it remains the case that it is at the discretion of each lender which alternative repayment arrangements it offers to borrowers in arrears.*[15]

If the Central Bank does not have such powers, might it be doing more harm than good for consumers by prescribing rules on how cases of mortgage arrears are to be potentially resolved? In particular, by prescribing such rules, is the Bank providing any given lender with a strong justification for arguing before a court that a repossession case should proceed without opposition, once it can be shown that the lender complied with the mechanics of the process?

The 2010 Code of Conduct on Mortgage Arrears provided that a lender must document its consideration of each of the options examined and why the option(s) offered to the borrower are appropriate for his/her individual circumstances.[16] However, no specific obligation was imposed on lenders to provide a borrower with these details, in order for a borrower to have the requisite information to inform an appeal, and some lenders withheld this information on the basis that they believed they were only obliged to provide it to the Central Bank, their regulator.

The 2013 revision presented a perfect opportunity for the bank to rectify this omission but it failed to do so. Instead, the lender, though under an obligation to document its consideration of each option it has examined,[17]

[13] Rule 33, 2010 Code

[14] Rule 39, 2013 Code

[15] Email response by Central Bank of 11 July 2013 to queries posed by FLAC by email of 3 July 2013.

[16] Rule 34, 2010 Code

[17] Rule 40, 2013 Code

is only obliged to inform the borrower of the reasons why a particular arrangement is considered to be appropriate and sustainable for his or her circumstances where it has chosen to offer one to him or her.[18]

Under the revised code, where a lender does not offer a repayment arrangement and concludes that a borrower's mortgage is unsustainable, it must provide reasons.[19] However it only has to keep a documentary record of its decisions in respect of those options it considers worthy of consideration (presumably in the event that the Bank undertakes a Themed Inspection of the CCMA) and does not have to document why certain options were not deemed worthy of contemplation in the first place. Equally, a lender is still under no explicit obligation to inform the borrower why specific options that were examined were ruled out, even though it will have already 'documented' the reasons.

To questions on this issue, the Central Bank responded as follows:

> *The basis of an appeal (or a complaint to the lender or FSO that a particular provision of the Code has not been followed) will differ from case to case and the CCMA is not prescriptive as to the grounds of appeal which an individual borrower may raise. While it may be that you [FLAC] consider that knowledge of the lender's consideration of other options not offered to a borrower is relevant to a given appeal (and it will be open to your client to make that case to the Appeals Board), Provision 42 does not require disclosure of such information as a matter of course.*[20]

It is tempting to translate this response into fairly simple language – you can ask your lender for all the factors it considered in arriving at its decisions, but it is not obliged to provide this to you. In terms of a borrower seeking a more favourable repayment option on appeal than what has been offered, a lender's reasons for ruling out specific repayment options may be as important as the explanation for offering others in terms of understanding the rationale for its ultimate decision. Equally, if no alternative payment arrangement at all is offered, a borrower will need to know how and why each option was considered and rejected.

Simply put, it is the future of the borrower's family home that is at stake here. The borrower/s in question will often have made enormous sacrifices, undergone difficult struggles and made considerable interest-laden payments to try to keep the mortgage going. In declining to oblige a lender to provide the borrower with the fullest possible information, the Central Bank arguably demonstrates a lack of knowledge and understanding of the basic rules of fair procedures. This includes the requirement in law that all parties to a dispute are entitled to be heard and have the opportunity to defend their position, including being provided with sufficient information of the decision-making process to do so.

c) Appeals/complaints and the moratorium on legal proceedings

[18] Rule 42, 2013 Code

[19] Rule 45, 2013 Code

[20] Email response by Central Bank of 11 July 2013 to queries posed by FLAC by email of 3 July 2013.

The 2010 Code provided that where a borrower co-operated with the lender, the lender had to wait 12 months from the date the borrower was classified as a MARP case arrears before commencing any legal proceedings for repossession.[21] Crucially, any time during which the borrower was complying with the terms of any alternative repayment arrangement did not count for the purpose of the 12-month moratorium. Thus, even if the arrangement broke down, for example because of a decrease in the borrower's payment capacity, he or she would have whatever remained of the 12 month moratorium at that point to renegotiate. Equally significant was that time in which the borrower was engaged in an appeal against an unfavourable decision of a lender under the MARP, either to the lender's Appeals Board or on to the Financial Service Ombudsman, did not count for the purposes of the moratorium either.

The revision of the Code in July 2013 significantly altered the rules on appeals and complaints. Rules 49 to 55 now distinguish between appeals on the one hand and complaints on the other. In summary, a borrower may now *appeal* three types of decisions made by a lender's Arrears Support Unit (ASU) to its Appeals Board. These are:

- A declaration that the mortgage is unsustainable and that no alternative repayment arrangement is suitable;
- An alternative repayment arrangement proposed by the lender that the borrower considers unsuitable from his or her perspective;
- A declaration that the borrower is not co-operating.

Where a borrower is unhappy about how the lender has treated his or her case or about whether a lender has complied with the requirements of the Code, this is now referred to as a *complaint*. It is to be dealt with under the lender's general complaints process which must comply with the principles set out in Chapter 8 of the Central Bank's Consumer Protection Code.

The other alteration of considerable significance is the *removal* of the 12-month moratorium. Thus, where a mortgage is declared unsustainable or the borrower rejects an alternative repayment arrangement proposed by the lender, he or she immediately loses the protection of the MARP. The Code now provides that within *three* months of the date the mortgage is declared unsustainable (or eight months from the time arrears first arose, whichever is later)[22] or within three months of the lender writing back to the borrower following his or her rejection of the proposed repayment arrangement (or eight months from the time arrears first arose, whichever is later), legal proceedings to attempt to repossess the property may be served.

Not only do we now have a three-month moratorium, but lodging an appeal does not stop the clock from running either. In reply to a further question from FLAC, the Central Bank said:

[21] Rule 47, 2010 Code

[22] In practice many mortgages in difficulty have been in arrears for over eight months so the three month limit is far more likely to be the relevant marker here.

A borrower's decision to appeal does not suspend the three month period referred to in provisions 45 and 47. A lender must consider and adjudicate on an appeal within 40 business days of receiving the appeal and must notify the borrower within five business days of the decision of the Appeals Board. How long a borrower would have left at the end of the process will be dependent on when the appeal was submitted by the borrower and how long it has taken the lender to consider.[23]

When the 20 business days that a lender must (at least) allow a borrower to appeal from the date of the notification of the lender's decision is added to the 40 business days that the lender has to consider and adjudicate on an appeal, it is clear that once the internal appeals procedure is concluded, the borrower will now in all likelihood be close to, at or more likely beyond the three month protection period and thereby at the mercy of the creditor in relation to the instigation of repossession proceedings.

Given the fact that a borrower's decision to appeal does not suspend the three month period, one would expect that the Bank is closely monitoring the time a lender takes to process an appeal now becomes a more important question. So far there appears to be little evidence of this happening. Should a borrower then wish to refer the matter on to the FSO (considered in more detail below), the three month period will definitely have elapsed by the time that office gets to consider the matter. Thus, we face the ludicrous situation where a lender is within its rights to serve legal proceedings to repossess a family home whilst the borrower is still trying to exercise his or her rights of appeal or complaint under the Code.

We are not suggesting that lenders are currently straining at the leash to repossess once the three months period elapses, at least not as of yet. However, there is a sense that in framing these internal appeals rules, the Central Bank is sending out a strong signal that will encourage lenders to get on with the business of repossession where it is suits. The message for borrowers and their representatives in terms of how these rules are framed seems correspondingly stark. Even as you exercise a distinctly qualified right of appeal from a decision of your lender Arrears Support Unit to your lender's Appeals Board and onto the FSO, time is rapidly slipping away.

d) Legal proceedings and borrowers not co-operating

Finally, it is worth noting here that once a lender declares a borrower not to be co-operating under Rule 29 of the Code, no three-month moratorium exists and legal proceedings may commence *immediately*, notwithstanding that the borrower has a right of appeal. The definition of not co-operating in the revised Code is so convoluted and in parts so subjective that it could easily be manipulated. For example, not co-operating includes 'failing to make a full and honest disclosure of information to the lender, that would have a significant impact on his/her financial situation'. There is already some evidence from the FLAC phone line and from MABS that some declarations of not co-operating by lenders are being made on flimsy grounds and that the threat of

[23] Email response by Central Bank of 11 July 2013 to queries posed by FLAC by email of 3 July 2013.

being declared not co-operative is being used to pressurise borrowers into accepting potentially unsuitable proposals.

e) The limited role of the Financial Services Ombudsman under external MARP appeals

Against the backdrop of this far stricter process, the role of the Financial Services Ombudsman as the avenue for external MARP appeals and complaints becomes increasingly important from the perspective of the borrower, as the FSO may in effect be the last chance a borrower may have of saving his or her family home.

Where a referral had been made by a borrower to the FSO under the previous version of the CCMA, it had already been our understanding prior to the revision of the Code in July 2013 and to an announcement made by the FSO in August 2013 (considered in detail below) that the FSO did not consider it had the power to overturn the decision of a lender's Arrears Support Unit or its Appeals Board not to offer any particular repayment arrangement. The Central Bank clearly takes the view that although the Code envisages a unique role for the FSO in terms both of process and outcome; it is up to the FSO to decide its specific jurisdiction in this regard.[24]

Following the revision of the Code, FLAC further wrote to the Central Bank querying what merit there was in appealing decisions of the ASU to the FSO, given the position that the FSO appeared to have already taken on not interfering with the substantive decisions of lenders under the MARP. The Bank responded as follows:

> *The role of the FSO is separately provided for under the Central Bank Act 1942 and **the complaints which it will consider is a matter for the FSO to decide**.*
>
> *If a borrower is not satisfied with the outcome of an appeal and refers the matter to the FSO, the FSO has advised that it will consider **whether the lender complied with the CCMA in reaching the decision** (our emphasis) and may direct a lender to re-assess the borrower's case.[25] [Our emphasis added]*

At the end of August 2013, the FSO overhauled its website and complaints procedures. On the front page of the revised website under the heading 'Mortgage Arrears Resolution process' the FSO posted the following notice:

> *Mortgages Arrears*
>
> *Inability to Meet Mortgage Repayments*
>
> *Where a complaint relates to a mortgage arrears situation with a Provider and a proposal has been made by a Complainant to the Provider with regard to the mortgage repayment obligations, which the Provider*

[24] Interview with the Central Bank, January 2013.

[25] Email response by Central Bank of 11 July 2013 to queries posed by FLAC by email of 3 July 2013.

has rejected, mortgage holders should be aware of the limitations of the jurisdiction of the Financial Services Ombudsman.

In relation to Mortgage Arrears Resolution Process (MARP) complaints, where issues of sustainability/repayment capacity are in dispute, the Financial Services Ombudsman is only in a position to investigate a complaint as to whether the Provider, in handling a mortgage arrears issue, correctly adhered to its obligations pursuant to the Central Bank's Code of Conduct on Mortgage Arrears (CCMA).

The Financial Services Ombudsman can investigate the procedures undertaken by the Provider regarding the MARP process, but will not investigate the details of any renegotiation of the commercial terms of a mortgage which is a matter between the Provider and the customer, and does not involve this Office as an impartial adjudicator of complaints. The Financial Services Ombudsman will not interfere with the commercial discretion of a financial service provider, unless the conduct complained of is unreasonable, unjust, oppressive or improperly discriminatory in its application to a Complainant, within the meaning of Section 57 CI (2) (b) of the Central Bank and Financial Services Authority of Ireland Act 2004.

By virtue of this statement, the FSO has dampened down any expectation amongst borrowers in arrears with mortgages on principal dwelling houses (and their advocates) that it would act as a full avenue of appeal against the substantive decisions of lenders under the MARP, now that the CCMA has been revised and the spectre of repossession looms. The language seems carefully chosen – the FSO has a 'limitation of jurisdiction'; it can only check 'whether the Provider correctly adhered to its obligations', including *'*investigating the procedures undertaken by the Provider regarding the MARP process'*;* but it 'will not interfere with the commercial discretion of a financial service provider*'.*

4. **Statistical information and research into the functioning of the MARP**

Despite the fact that it is the key feature of the State's response to the mortgage arrears crisis, there does not appear to be any comprehensive database recording the outcome of all MARP cases in terms of the alternative repayment arrangements offered, accepted or refused, broken down by lender and type of arrangement, and how those arrangements were sustained or otherwise over time. Similarly there is no information accessible to the public on rates of appeals and their outcomes. As we have seen, the Central Bank does publish figures on mortgage arrears on a quarterly basis and these figures also contain details of the type of rescheduling arrangements that are in place between lenders and borrowers at the end of each quarter but these are not broken down any further. Equally, the Department of Finance now publishes monthly rescheduling figures for the six main lenders.

In 2012, a mainly quantitative study was carried out by the Central Bank into the circumstances of mortgage holders, including the impact of the MARP on 209 borrowers engaging with a limited number of institutions in this regard. The Bank issued a press release in connection with this study suggests that whilst the MARP may be

working for some, it is not working as well for considerable numbers of borrowers. [26] Substantial percentages for example claimed that their lender did not discuss their other (unsecured) debts with them (around one third) or did not enter into an alternative arrangement (again, about 3 in 10); and only 64% noted their lender's helpfulness which implies that 36% did not.

The Central Bank did not ultimately publish this research in report form; hence it is difficult to critique the findings to any significant degree. However, the research appears to have been somewhat of a 'tick-box' nature, as opposed to a more in-depth qualitative enquiry with these borrowers, as suggested by the following response from the Bank to a query from FLAC in respect of the research:

> *We are only aware of what type of arrangements the borrowers entered into. We have no information on how these borrowers are faring or details on those who did not enter into an alternative arrangement.*[27]

5. Report of the Expert Group on Repossessions

According to its final report,[28] the Expert Group on Repossessions was established in September 2013 in response to the following commitment to the Troika contained in the 9th 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.*

The group completed its work by end 2013 and reported its conclusions to the Troika, but its final report was only released to the wider public on 14 January 2014. This report sketches the history of the mortgage arrears problem in Ireland and the measures taken to alleviate it, as well as summarising the legal position in relation to repossession actions in the Irish system. The context for its deliberations is the Troika's concerns with what it saw as the abnormally low rate of repossessions in Ireland and the lengthy, complicated and expensive court repossession system. The role of the group was therefore to examine that system, to identify any shortcomings and to make recommendations. It should be noted that this group was composed exclusively of civil servants representing: the Office of the Attorney General; the Departments of Finance, Justice, the Taoiseach and the Environment, the Central Bank of Ireland; and the Courts Service. It would also appear that the Group consulted

[26] See Central Bank press release,' Research highlights positive experience of borrowers engaged in the mortgage arrears resolution process', 21 February 2013, at http://www.centralbank.ie/press-area/pressreleases/pages/research%20highlights%20positive%20experience%20of%20borrowers%20engaged%20in%20marp.aspx, last viewed February 2014.

[27] Email from Central Bank to FLAC, 22 February 2013.

[28] See page 3, *Report of the Expert Group on Repossessions*, December 2013 - see www.finance.gov.ie

a limited number of other bodies, as it thanks those who responded to the Group's enquiries, namely lending institutions, the legal professions, the County Registrar's Association and the Money Advice and Budgeting Service.[29]

Following its analysis, the broad thrust of the Group's conclusions might be summarised as follows:

- 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.[our emphasis added]
- 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.

The report then goes on to make a number of recommendations for reform, broadly consisting of technical issues concerning harmonisation of documentation and more streamlined processes for the service of legal documents, the granting of adjournments, the filing of defences, the eventual enforcement of orders and the collation of data.[30]

The nature of this report and the timing of its publication is further proof that despite the government's stated desire to avoid the repossession of family homes wherever possible, a substantial rise in repossession rates is likely in 2014. The Troika's position would seem to be crystal clear – there are too few repossession orders given the scale of the arrears problem and the system is inefficient. The request for an investigation clearly presages a ramping-up of repossession activity and the review group does not demur; its carefully worded conclusion that there is "a strong countervailing public interest in protecting the interests of lenders" whilst safeguarding those of borrowers is something of a green light. Indeed the report itself notes that 1,830 new actions for repossession were brought in Quarter Three of 2013, an increase in activity largely attributable to the overturning of the Dunne judgment in the Land and Conveyancing Law Reform Act 2013 and the setting of MARS targets.

In seeking to protect the interests of lenders at the potential expense of borrowers, the report of the Expert Group on Repossessions is very short on analysing the causes of the mortgage arrears and debt crisis generally. The issue of reckless lending gets a very curt dismissal, with the report finding refuge in two High Court decisions that confirm that neither contract nor tort law in Ireland provide any such defence for indebted borrowers, when in fact it was the legislature and the regulatory authorities (both national and European) that failed to provide for more rigorous lending controls.[31] Implicit too in this conclusion is that in seeking to establish a

[29] See page 7, *Report of the Expert Group on Repossessions,* December 2013.

[30] See generally Pages 60 – 63 *Report of the Expert Group on Repossessions,* December 2013.

[31] See Page 10 *Report of the Expert Group on Repossessions,* December 2013.

properly functioning mortgage market, the casualties of the previous dysfunctional one will take the hit so that the economy can move on.

Unfortunately, some mortgages are so damaged and impaired that they cannot reasonably survive. The danger now is that many others who were encouraged to climb onto an increasingly escalating property ladder may ultimately be deemed dispensable, when a structured write-down of their mortgage might ensure its survival. It is regularly reported that around 100,000 families are currently waiting on social housing, with little sign of a social housing dividend from the National Asset Management Agency (NAMA). The Department of Environment's Mortgage-to-Rent scheme seems to have yielded little in terms of concrete success, with a reported 60 successful conclusions from 1,332 applications as of August 2013.[32] Is the State prepared for the social and other consequences of a spate of repossessions were that to materialise?

6. Status of Central Bank Codes in legal proceedings

Of crucial importance to borrowers in arrears and their advocates is whether Central Bank Codes such as the Code of Conduct on Mortgage Arrears are admissible in legal proceedings. The CCMA states that "lenders are reminded that they are required to comply with this code as a matter of law"[33] and that the Central Bank "has the power to administer sanctions for a contravention of this Code under part 111C of the Central Bank Act 1942". None of the Central Bank codes however amount to a secondary piece of legislation in the form of a ministerial regulation issued by the relevant Minister, in this case the Minister for Finance.

The critical question from the borrower perspective is, therefore, whether a breach of the terms of these codes is a matter that a consumer can raise in his or her defence in any legal proceedings brought by a lender to repossess a family home. Generally speaking, Central Bank codes are issued under the terms of Section 117 of the Central Bank Act 1989. This section authorises the Central Bank, after consultation with the Minister (for Finance), "from time to time, to draw up, amend or revoke" such codes. Thus, the Bank is the author of a code which it alone has the power to amend.

The most recent High Court case to our knowledge that considers this matter in some detail is that of ***Irish Life and Permanent v. Duff*** [2013] IEHC 43.This case involved a claim by the plaintiff lender to recover possession of the defendant's family home. The defendants argued that the plaintiff had generally failed to comply with the 2009 edition of the CCMA prior to seeking to repossess in the High Court. In his examination of what he described as "the somewhat troublesome issue of the precise legal status of the Code of Conduct", Mr Justice Hogan noted the contrasting approach in the two previous High Court decisions of note concerning Central Bank codes, that of Mr Justice Birmingham in *Zurich Bank v McConnon* and the more recent decision of Ms Justice Laffoy in *Stepstone Mortgage Funding v Fitzell*, both referred to above.

[32] As reported by Louise Mc Bride, Sunday Independent, August 2013

[33] Page 1 CCMA 2013

In the former case, Mr Justice Birmingham held that codes issued under the Central Bank Acts did not create any justiciable rights at the hands of a consumer, whereas Ms Justice Laffoy in the latter held that:

> *To take what is perhaps the best known provision of the Current Code, the imposition of a moratorium on the initiation of proceedings, which is now contained in provision 47 of the Current Code (and which is also to be found in the earlier codes, although the moratorium period in the case of the earliest code was six months, rather than twelve months), surely a court which is being asked to make an order which will, in all probability, result in a person being evicted from his or her home, is entitled to know that the requirement in provision 47, which has been imposed pursuant to statutory authority, is being complied with. Moreover, it is likely that it would render the enforcement of provision 47 nugatory* (i.e. worthless)*, if a lender did not have to adduce evidence to demonstrate that the moratorium period had expired.*

Ultimately, Mr Justice Hogan decided that he must "nonetheless follow the most recent pronouncement of this court in *Fitzell*, given that it was the most recent and authoritative analysis of this question where the judicial comments formed part of the ratio" of the decision and he thus refused to grant an order for possession in this case.[34] However, this was not before he sounded something of a warning note on how a court might attempt to decide what constitutes every reasonable effort by a lender to agree an alternative repayment schedule before resorting to repossession proceedings under Clause 6 of the 2009 edition of the Code, as well as on the questionable legal status of the Code. He said as follows:

> *The question, for example, of what constitutes a "reasonable effort" on the part of the lender does not easily lend itself to judicial analysis by readily recognisable legal criteria. How, for example, are "reasonable efforts" to be measured and ascertained? If, moreover, non-compliance with the Code resulted in the courts declining to make orders for possession to which (as here) the lenders were otherwise apparently justified in seeking and obtaining, there would be a risk that by promulgating the Code and giving it a status that it did not otherwise legally merit, the courts would, in effect, be permitting the Central Bank unconstitutionally to change the law in this fashion.*

The Code of Conduct on Mortgage Arrears is a document created by the Central Bank of Ireland and sanctions may be imposed on lenders who do not apply and adhere to the Bank's rules. They do not, however, have the status of legislation and neither do they provide for any type of relief for the borrower in arrears or consumer, apart from incomplete appeals processes. The uncertain legal status of these Codes is reinforced both by the guidance and clarifications provided by the Central Bank regarding some of their terms and by its respective revisions of them.[35] Clearly, if the Code wa legislation, it would be the role of the courts to clarify or interpret

[34] The *ratio decidendi* is a Latin legal term meaning literally 'the reasons for the decision'. In the system of binding precedent used in our superior courts, these are the parts of the decision that a future court must follow when the same issue arises in a subsequent case. They should be contrasted with what a judge says *obiter dicta*, meaning literally 'other things said' in the course of a decision that may be persuasive in a future case but are not binding. For the sake of completeness, the remarks on Central Bank codes made by Mr Justice Birmingham in the *Zurich Bank* case were *obiter dicta*.

[35] A further concern is that the terms of the Code itself have not been amended in any way to reflect these clarifications, and the clarification that has been provided (by way of a guidance document which is somewhat hidden within the contents of the Central Bank's website) has been primarily issued for the benefit of providers.

their provisions, and not their author.[36] Equally, it would be the Executive and the Houses of the Oireachtas that would initiate and complete legislative amendments to them.

Laffoy J held in the *Fitzell* case that non-adherence by the lender with the CCMA should preclude that lender from obtaining an order for possession, and this would appear to be the both the fairest approach and the morally correct one; what is the point in having a MARP process if it cannot be challenged when lenders refuse to abide by it? Mr Justice Hogan followed the decision in *Fitzell* in the *Duff* case but clearly had misgivings in doing so, particularly in terms of his remarks concerning the constitutional ramifications of allowing a non-statutory code to be afforded legislative status.
We believe that there is a relatively straightforward way around this. The Central Bank could be mandated to prepare draft codes of practice concerning financial services for submission to the Minister for Finance and the views of stakeholders could be sought in advance. The Minister might then declare the draft code to be a code of practice for the purposes of the Central Bank Act 1989**,** which might be laid before the Houses of the Oireachtas. Such a code would be expressly admissible in any proceedings before a court and relevant provisions might be used to determine any question arising in such proceedings, such as whether a Possession Order should be granted in a mortgage arrears case. The Minister for Finance might then, at the request of or after consultation with the Central Bank, revoke or amend a code of practice by Ministerial Order.

As far back as July 2010, the Mortgage Arrears and Personal Debt Group (or 'Cooney Group') recommended in its interim report that the Code of Conduct on Mortgage Arrears should be admissible in legal proceedings and this recommendation is also reflected in the final report of the group.[37] If the State is really serious about repossession being a last resort, and in a scenario where it has reversed the Dunne judgment and reopened the summary procedure for the potential repossession of properties, this must be done. We would then at least have a Code that lenders would have to follow to the letter so that borrowers could rely upon having a real chance of demonstrating their ability to service a sustainable alternative arrangement on their mortgage that would keep them in their homes. Failure to allow the borrower this opportunity, and to accord the borrower the right to fair procedures and fair decision-making, could then clearly be challenged in the courts.

7. Mortgage Arrears and the Personal Insolvency Act 2012

Where the lender's Arrears Support Unit refuses to offer an alternative repayment option or offers one that a borrower does not consider workable, the borrower does not necessarily have to appeal to the Appeals Board and/or refer the matter to the FSO. The lender is obliged to inform the borrower of his/her right to consult with a Personal Insolvency Practitioner (PIP) (see rules 45 (g) and 47 (g). Through the PIP, the borrower can apply

[36] In December 2012, following on from the two clarifications to the financial services industry, the Central Bank published an extensive guidance document (consisting of 24 pages, amounting to nearly a third of the size of the Code itself) clarifying some of its key provisions. The 2012 Code had been published after extensive consultation; however, it now appears that as a result of lobbying from the financial service industry, some protections for the consumer have been diluted (see discussion above in relation to contacts under both the CPC and the CCMA).

[37] Mortgage Arrears and Personal Debt Group, *Final Report,* 16 November 2010, p6.

under the Personal Insolvency Act 2012 for a Personal Insolvency Arrangement (PIA) which may involve a proposal to seek a write-down of the capital sum owed on the mortgage.

To apply for a PIA,

- An insolvent debtor must declare in writing that s/he has already co-operated for a period of at least 6 months with the mortgage lender under the terms of the CCMA (for example by paying agreed interest-only for 6 months)
  and that despite this co-operation,
- s/he either has not been able to agree an alternative repayment arrangement with the lender or the lender has confirmed it is not willing to enter into an alternative repayment arrangement (see Section 91 (1) (g)).

Any PIA application must be approved by creditors as follows:

- At least 65% of creditors (secured and unsecured) in value vote in favour at the meeting;
- At least 50% of secured creditors in value vote in favour at the meeting;
- At least 50% of unsecured creditors in value vote in favour at the meeting.

If the relevant voting thresholds are not met, the proposal fails and the borrower has no rights of appeal or review, no matter how reasonable the proposal may have been. Bankruptcy is the next option and it may be unlikely (though not impossible) that a borrower will be able to hold onto his/her home in the bankruptcy process.

It has become increasingly clear that insolvency arrangements, while useful to some who have access to a fairly high income or other assets, is a remedy which does not benefit those who are on lower incomes or whose income just covers their outgoings. Similarly, bankruptcy is a an option which is only suitable to a limited group of people and which has adverse consequences way beyond crystallising debt. Many of those whom FLAC encounters are seeking to restructure and manage their debt and work hard to do so, but the current infrastructure does not allow for a solution in their cases. .

8. Services to assist borrowers in financial difficulty

Many people are struggling alone to deal with the increasingly complex financial and legal situations that they face. FLAC receives a significant number of calls daily to its legal information and referral line from mortgage holders in difficulty.[38] Many will also obtain basic legal advice by attending one of FLAC's volunteer staffed legal advice centres across the country.[39]

[38] The Information and Referral Phone line dealt with 1,626 specific debt calls in 2013, almost a 10% increase on 2012.

[39] In 2013, FLAC's legal advice centres dealt with 1567 debt queries, an increase of almost 25% on 2012 figures.

The queries that debtors present with are often very complex and many have already exhausted the round of helplines by the time they call the FLAC phone line or visit a FLAC centre. The other non-governmental organisations represented at these hearings also do their best to provide debtors with varying types of legal assistance from similarly limited resources but this is no substitute for a properly resourced and integrated system

The legal assistance for impoverished borrowers to challenge the decisions and processes of lenders in the courts is very thin on the ground and many borrowers will be faced with doing the job themselves. Many will thankfully have the ongoing support of MABS money advisors or other advocate. However, the MABS service is under huge pressure of demand and it cannot possibly deliver on the remit expected of it with its current resources.

In theory, people in arrears potentially facing repossession may also be entitled to legal advice and/or representation from the state funded civil legal aid scheme operated by Legal Aid Board. However, some debtors may fail the means test (allowances are strict) and even if they do qualify, they will go to the end of the list. At the end of January 2013, only 7 of the Board's 29 Law Centres had waiting times for an appointment of four months or less and waiting times in some centres were up to 22 months for a first appointment. The Legal Aid Board law centres also face huge demand, particularly in the area of family law. A narrow application of the Board's "merits" test therefore – you are in breach of contract by failing to pay your mortgage so there is no legal merit to your defence – may be applied. Realistically therefore, civil legal aid is unlikely to be provided in repossession actions in the courts.

Free professional financial information is potentially available to borrowers in mortgage distress, as a result of a scheme announced by the Minister for Social Protection, Joan Burton, TD in September, 2012.[40] When a lender is proposing an alternative repayment arrangement, the borrower is entitled to obtain the services of a participating practitioner on the accountant's panel and the lender must pay €250 to the selected accountant. Further details of this scheme, called the Mortgage Arrears Information and Advice Service (MAIAS), and a list of the accountants who have signed up to it may be found at www.keepingyourhome.ie. That website also provides some other useful information on options for borrowers in mortgage arrears.

However, this scheme is very limited in that borrowers can only potentially access it after a proposal for a long term sustainable arrangement has been made by the lender. The information given by any accountant on the relevant panel is limited to explaining the proposal made by the lender and its consequences for the borrower. There is no ongoing support available to a borrower to initiate, conduct and conclude negotiations. The accountant cannot go back to the lender to seek a variation or make alternative proposals.

[40] Part of the Mortgage Arrears Information and Advice Service – for further information see www.keepingyourhome.ie. The Citizens Information Board also operates a website offering information on many areas of public service at www.citizensinformation.ie and has a dedicated telephone helpline offering mortgage information at 0761 07 4050.

A review of this scheme has recently taken place and was published in December 2013.[41] . Based on the frustration, lack of knowledge and despair that borrowers who contacted us were encountering, FLAC contributed to that review proposing a nationwide, lender funded, scheme of access to financial and legal advice, operated through MABS and the Legal Aid Board, so that distressed borrowers would have adequate support in their negotiations with lenders, to even up, to some extent, the imbalance between the negotiating strengths of commercial lenders and individual borrowers negotiating for their family home.

The published report confirmed that a low number of offers to access the service have been made by lenders since its inception. This is thought to be due principally to the failure by lenders in many instances to draw the borrower's attention to their right to access the scheme in the documentation accompanying the offer of an alternative repayment arrangement. For example, although 11,000 borrowers had apparently been informed of the availability of the independent financial advice service by the end of September 2013, lenders had received fewer than 200 invoices from accountants for the provision of the advice at the time of the report. The report did not seek the views of any of those who had availed of the scheme.

Ultimately, however, the review generally confined itself to recommending improvements to the existing service in terms of increased information obligations imposed on lenders and the possibility of expanding the range of advice to be provided when long term forbearance is offered to a borrower under the terms of the MARP. Critically, it stopped short of recommending that advice be made available to borrowers in difficulty at an earlier stage of the process and '*concluded that the provision of the independent financial advice service should at this point remain as it is, pending a further review of the service'*.[42]

However, comments made by the Minister Burton at a subsequent seminar in mid-January 2012 held to discuss the review suggested that this approach was being revised, with the Minister proposing that the service operate in two stages – access to the assistance of an accountant to fill out the Standard Financial Statement (SFS) at the initial engagement with the lender, as well as advice following receipt by the borrower of a long-term debt resolution offer. In addition, the Minister is said to be considering how legal advice may be made available to those facing the loss of their homes through the declaration of a mortgage as unsustainable.[43] However, no changes have been made to the scheme to date.

9. Repossession in the courts

Legal proceedings to repossess family homes must now be brought exclusively in the Circuit Court as a result of amendments made in the Land and Conveyancing Law Reform Acts 2009 and 2013 respectively. All Circuit Court cases are held at a large town in the borrower's locality. The Circuit Court rules set out the basic rules of engagement for such cases; in particular **Statutory Instrument 264/2009 – Circuit Court Rules (Actions for**

[41] Mortgage Arrears Information and Advice Service – Review of the Independent Financial Advice Service, Report, December 2013

[42] Mortgage Arrears Information and Advice Service, Review of the Independent Financial Advice Service Report; December 2013 - Page 23

[43] As reported by *Epoch Times*, 26 January 2014.

Possession and Well-Charging Relief) as amended by **Statutory Instrument 358/2012 - Circuit Court Rules (Actions for Possession and Well-Charging Relief).**

The lender's application to repossess must be initiated by a Civil Bill for Possession and this must be served (generally by registered post), together with the lender's affidavit (or sworn statement) verifying the claim together with any exhibits, on the defendant borrower **not later than 21 days** before the return date on the Civil Bill. The return date is the date that the matter comes before the County Registrar (the Court official who processes cases and organises hearings).

If a defendant borrower wishes to defend his or her position, s/he must first enter an 'appearance' **within 10 days of service of the Civil Bill** upon him or her. This document may be found at www.courts.ie at Court forms – Circuit Court and is Form 5 in the Schedule of forms.

The filing of the appearance must be followed by a defence in the form of a replying affidavit to the lender's affidavit and, in theory at least, that affidavit has to be filed **not later than four days** before the return date on the Civil Bill.

On the return date, the County Registrar has a wide array of powers that s/he can exercise under the regulations. These include:

- Ordering service of the Civil Bill on another person
- Enlarging the time for the entry of an appearance (for example where the defendant borrower turns up but was not aware that s/he had to enter an appearance)
- Give directions and fix time limits for further affidavits (for example where more information is required)
- Give any other directions to prepare the case for a hearing before a judge
- The County Registrar also appears to have a residual power to make other orders and this could allow for additional time to be granted to file a defence in the form of a replying affidavit (for example where the defendant borrower was not aware that this was necessary to defend his/her position

Where an affidavit setting out a defence has been filed, the County Registrar must transfer the matter to the judges list for hearing when the matter is ready and may extend the time for filing further affidavits, give such directions as are appropriate and adjourn for this purpose.
Where a defendant has not entered an appearance or an affidavit setting out a defence has not been filed, the County Registrar may make an order for Possession and does not have to put the matter before a judge. It is likely in an increasing number of cases that lender's legal representatives will put greater pressure on County Registrar's to grant Possession Orders in this manner in 2014.