



NUI Galway
OÉ Gaillimh

A Lost Decade - Study on Mortgage Possession Court Lists in Ireland



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1. Introduction – A Lost Decade

COVID-19 will inevitably result in a new round of mortgage arrears, and many of the challenges of the last decade will re-emerge.¹ Since the crash of 2008, and the subsequent recession, however, homeloan borrower protections have been slowly developed in Ireland, with Central Bank Codes of Conduct for lenders², State funded mediation services, personal insolvency arrangements,³ a mortgage-to-rent scheme, and new legislation on the proportionality of repossessions. While the ‘foreclosure echo’ from the banking crisis of 2008 still resounds in Irish courtrooms, those at risk of losing their homes as a result of COVID-19 can rely on harmonised mortgage law regulations,⁴ EU consumer and human rights law,⁵ as well as the protection of the Land and Conveyancing Law Reform (Amendment) Act 2019 (see Section 7 below). In force since August 2019, this Irish legislation obliges Irish courts to carry out a proportionality assessment of the interference with the right to respect for home, taking into account the circumstances of all household members.

Before COVID-19 there were already some 27,000 mortgage accounts related to principal dwellings in arrears over two years, in Ireland, with over 85,000 mortgages restructured as a result of payment difficulties. Despite the success of State initiatives, such as MABS,⁶ *Abhaile*, and revised personal insolvency arrangements, many households in long term arrears still fear loss of home. Regulated and unregulated financial entities still present long lists of possession cases to courts, as Judges and County Registrars deal with the major inequality between the parties. The personal and social costs to these households, the fear of losing their homes, associated illness and unbearable pressure on relationships has never been quantified.

While the Courts Service publish the numbers of possession orders granted and new cases initiated, there is anecdotal evidence of large numbers of cases being adjourned repeatedly. Equally, there are many claims of a tsunami of home possessions arising from court orders already granted.

Central Bank of Ireland research showed a high representation among distressed borrowers of single parent (invariably women) borrowers with three or more children, many relying on State supports. While part of government policy is ensuring that households can remain in the family home, and that the interests of children are prioritised, the circumstances of household members does not feature highly in Irish

¹ See Jack Horgan-Jones, Eoin Burke-Kennedy and Laura Slattery, ‘Banks wary of Covid-19 Impact on Non-Performing Loans Levels’ *The Irish Times*, 14 March 2020.

² Although this provides very limited legal protection in the courts– see *Irish Life and Permanent v Dunne* [2015] IESC 64.

³ Personal Insolvency Act 2012; Bankruptcy (Amendment) Act 2015.

⁴ See Directive 2014/17/EU, of 4 February 2014, on credit agreements for consumers relating to residential immovable property harmonising many aspects of mortgage law in the EU, including arrears write offs etc.

⁵ It is now clearly established in Irish courts that mortgage terms must comply with EU Directive 93/13/EEC on unfair terms in consumer contracts, and in possession cases Irish courts must examine mortgages, of their own motion, for such terms, striking out any unfair terms. See *Pepper Finance Corp. v Cannon* [2020] IESC 2. See also Open Society Justice Initiative/ Centre for Housing Law, Rights & Policy NUI Galway, *Your EU Consumer and Human Rights A Guide for People in Mortgage Distress in Ireland:*

https://abusivelending.org/sites/default/files/A%20GUIDE%20FOR%20PEOPLE%20IN%20MORTGAGE%20DISTRESS%20IN%20IRELAND_JAN2020.pdf

⁶ See https://www.mabs.ie/en/how_we_help/mortgage_arrears.html

case law in this area. Indeed, anecdotal evidence would suggest that in many of the cases Listed here, there were concurrent family law proceedings under way, and the fear of loss of home compounded the difficulties faced.

Independent socio-legal research in this field is sparse and poorly funded. The area is highly charged economically, socially, politically and emotionally. Data is controlled by the financial entities, and only shared with State agencies at a limited level. Of course, the overall context is framed by the significant and unique nature of the Irish State relationship with financial institutions. Ireland provides a base for global financial entities and hedge funds managing €4 trillion – 40 times the magnitude of home loan mortgage lending.⁷ This may have an effect on Irish court treatment of relatively small 'property' or 'contract' law issues, whereby perceived economic consequences could ensue from any 'judicial activist' approaches.⁸

Pistor describes how property rights are coded at a global level – especially financial or intangible capital ownership rights. But this requires national and local courts and laws to recognize and uphold these codings, policing the boundaries of 'private' law, and insulating these codings from local or national political contestation.⁹ For instance, in Ireland, courts accept and prioritise the 'bona fides' of offshore registered equity funds as holders of the security of mortgages on Irish homes, over the housing rights of occupiers. The details of the beneficial owner of the security is not examined, even for purposes of combatting money laundering.¹⁰ Irish courts have interpreted the constitutional protection of property rights of the Irish 'citizen' to include both natural and legal persons, and a company registered outside the jurisdiction.¹¹

At the same time, Article 40.5. of *Bunreacht na hÉireann* states: *The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law.* This requires court supervision of any forcible evictions from home regardless of who is enforcing the security of a mortgage. In *Irish Life and Permanent PLC v. Duff*¹² Hogan J. stated:

... those elements of formal notice, foreseeability and an independent determination of the objective necessity for possession of the dwelling are presupposed by the guarantee of inviolability and these protections cannot be

⁷ Ireland is the 3rd largest global investment funds domicile, the largest European domicile for exchange-traded funds (ETF)s, and a leading location worldwide for hedge fund administration. See *IRELAND FOR FINANCE The strategy for the development of Ireland's international financial services sector to 2025*: (April 2019) <https://assets.gov.ie/24482/278893738e764db79c43eada83c030e3.pdf>

⁸ "A reliable and efficient legal system is essential for any jurisdiction's development of a thriving, internationally competitive financial services industry. The Irish judiciary is widely regarded as having a record of integrity, commercial awareness, fairness, and impartiality." *Ibid.*, p. 27.

⁹ See Pistor, K. (2019) *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press, Princeton). Pistor suggests that creating or understanding these codings requires a knowledge of the common law of England and Wales, or law of New York State.

¹⁰ "Europe warns Ireland faces 'inherent money laundering risks'" *Sunday Business Post*, 1 March 2020.

¹¹ See *Iarnrod Eireann v. Ireland* [1996] 3 IR 321; *Shirley & ors -v- A. O'Gorman & Company Limited & ors* [2006] IEHC 27.

¹² [2013] IEHC 43

*assured outside the judicial process or, at least, something akin to the judicial process.*¹³

This quandary is expressed in a Supreme Court decision in 2015:

*If it is regarded, as a matter of policy, that the law governing the circumstances in which financial institutions may be entitled to possession is too heavily weighted in favour of those financial institutions then it is, in accordance with the separation of powers, a matter for the Oireachtas to recalibrate those laws. No such formal recalibration has yet taken place. The courts have not yet been given any express power to consider the merits or otherwise of proposals put forward by those in mortgage arrears to solve their problems....*¹⁴

Ireland has accepted housing right obligations under the United Nations International Covenant on Economic, Social and Cultural Rights¹⁵ and the European Social Charter of the Council of Europe.¹⁶ Of course, today, in Europe, access to new homes is facilitated by industrialised mortgage lending, regulated at EU level,¹⁷ combined with standardised non-negotiable contracts, regulated by (post completion) EU consumer law.¹⁸ Irish courts are slowly accepting this consumer law aspect to homeloan mortgages.

According to the Central Bank of Ireland, of the homes repossessed by financial entities between 2009 and 2016, some 66 per cent were repossessed after voluntary 'surrender' or abandonment.¹⁹ However, excluding those cases where homes are 'surrendered' (possibly as a result of relationship breakdown), where no judicial supervision is involved, Irish courts handle the complexities and legal arrangements which facilitate globalised finance, exercising due diligence, Irish constitutional protection and judicial independence, in their treatment of home possession cases.

¹³ Para 50. See also *Launceston Property Finance Ltd v. Burke and Burke* [2017] IESC 62.

¹⁴ *Irish Life and Permanent v Dunne and Irish Life and Permanent v Dunphy* [2015] IESC 64, para 5.21. In fact, since then, the Irish State has recalibrated these laws through changes to the personal insolvency legislation, supervisory actions to restructure mortgage contracts, and the Land and Conveyancing Law Reform (Amendment) Act 2019. See also Domurath, I. 'Mortgage Debt and the Social Function of Contract' *European Law Journal*, Vol, 22, No. 6, November 2016, pp. 758-771, which shows that in many EU Member States unforeseen circumstances could trigger a modification of contract terms—either through re-negotiation or a court ruling: if the change was unforeseen by the parties, and has caused a material change (Germany); an excessive burden or imbalance in the rights and obligations of the parties (excessive onerousness: Italy, Spain); a 'radical' or 'fundamental' change in the contractual equilibrium (France, Belgium); or has the effect that the contract no longer complies with the parties' expectations (Slovenia).

¹⁵ Art 11 International Covenant on Economic, Social and Cultural Rights (1966) UN Doc. A/6316. There are also a range of housing rights in relation to children, persons with disabilities, migrants and others groups at risk of eviction .

¹⁶ Council of Europe, European Treaty Series – No 35: European Social Charter, Turin, 18 October 1961. (Revised) Council of Europe, Strasbourg 3 May 1996.

¹⁷ See Directive 2014/17/EU, of 4 February 2014, on credit agreements for consumers relating to residential immovable property harmonising many aspects of mortgage law in the EU.

¹⁸ Kenna, P. (2019) 'Mortgage Law Developments in the European Union', 4 *Journal of Law, Property and Society*, 45.

https://static.wixstatic.com/ugd/d91411_6743920d872d4ecc900e4a3044a75f0b.pdf

¹⁹ Department of Finance/ Central Bank of Ireland, *Report on Mortgage Arrears* (Dublin, Central Bank of Ireland 2016) 33. <https://www.centralbank.ie/docs/default-source/publications/correspondence/finance-reports/mortgage-arrears-report.pdf?sfvrsn=2>

They do so without relying explicitly on international human rights approaches,²⁰ or referring to other EU Member State approaches, largely focusing on precedents from the law of England and Wales. At the same time, they seek to achieve ‘equitable’ outcomes, operating in the context of Irish State policies on financial markets, but also recognising the social protection objectives of the Irish State. Yet, the gender aspect of this process of repossession of homes is largely ignored. This is significant, given that women as home-makers, as heads of household, or main providers of support, are more heavily impacted by the actions of financial entities.²¹

This research is based on an examination of a large sample of 12,650 mortgage possession cases listed by the Courts Service between April and December 2019. It is not possible to give the outcomes of these cases, and many may be settled or adjourned during and after this period, although as a guide, the Central Bank of Ireland Mortgage Arrears Statistical report showed that a possession order was granted, in the period, in relation to 420 mortgage accounts on principal private dwellings.²² The numbers are reducing annually, although in most cases a possession order is not granted as shown in Table 1.

Table 1. Possession orders granted and refused in Circuit Courts, and incoming cases (Source: Court Service Annual Reports)²³

	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Possession Order granted	304	306	353	258	363	1,063	1,284	1,088	878	700
Possession Order not granted							1,454	1,904	1,153	1,113
Incoming cases						8,164	5,021	3,679	3,055	1,433

This pattern of courts refusing three possession orders for every two granted has not changed since 2013, as shown by the Department of Finance/Central Bank Report on mortgage arrears in 2016.

²⁰ For instance, the UN Special Rapporteur on adequate housing has called for a ban on evictions in the context of COVID-19 – “no evictions of anyone, anywhere for any reason - simply put, a global ban on evictions will save lives” (April 2020). See also UN Doc. E/C.12/2020/1. UN Committee on Economic, Social and Cultural Rights, *Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights*, para 15. ‘All States parties should, as a matter of urgency, adopt special targeted measures....imposing a moratorium on evictions or mortgage bond foreclosures against people’s homes during the pandemic...’

https://www.ohchr.org/_layouts/15/WopiFrame.aspx?sourcedoc=/Documents/HRBodies/CE/SCR/STM_COVID19.DOCX&action=default&DefaultItemOpen=1

²¹ Fox, L, “The Meaning of Home: A Chimerical Concept or a Legal Challenge?” *Journal of Law and Society*, (2002) Vol. 29, No. 4, 580-610.

²² The Courts Service statistics for 2019 were not yet available at time of writing.

²³ Note that these figures do not include possession orders made in the High Court, or “Other property cases include ‘mortgage suits’ (cases where the creditor has a mortgage on the property in which the defendant has an interest but does not have power to sell that property unless the court declares the mortgage well-charged on the debtor’s interest)”. <http://www.courts.ie/Courts.ie/Library3.nsf/pagecurrent/D171C224DF0083D180257FB10043BD33?opendocument&l=en#Courts%20Service%20Annual%20Report&l=en>

2. Main Findings

a. Summary

- Of the 12,650 cases Listed - half were taken by ECB directly supervised lenders - AIB, Bank of Ireland, Ulster Bank and KBC.
- One fifth of cases were taken by Permanent TSB.
- One third of cases were taken by 'vulture' funds.
- Only one quarter of borrowers had any Listed legal representation.
- 7% of borrowers represented themselves.
- One quarter of cases were concluded in the period, with one third resulting in court orders for possession or sale, and two thirds concluded, but with arrears remaining.
- The numbers of possession orders being granted is reducing every year, although for every two orders granted, three are refused by the Courts, for a variety of reasons. Some 15% of the Listed cases originated in 2014; 14% in 2015; 17% in 2016; 23% in 2017; 17% in 2018; and 8% in 2019. This shows that there are significant numbers of cases in the legal system - possibly reflecting the 20,000 households in arrears over 720 days.
- There are higher numbers of cases in the South East and Midland Circuits.
- One of the most glaring aspects of all the reports is the absence of a gender dimension. Women as home-makers, heads of household, or main providers of support, are more heavily impacted by these actions of financial entities, and yet, despite legal obligations on equality no State agency addresses gender in its reports.

This research is based on a sample of 12,650 cases, between April and December 2019, comprising 8,505 (67%) on the County Registrars Lists, 1,467 (12%) on the Callover Lists, and some 2,678 (21%) on the Circuit Court Judges List.

There were 5,340 unique cases (excluding duplicate Listings) in the period. This duplication of Listing occurs due to adjournments, or separate hearings, and Listings in the each of the Registrars, Callover or Judges Lists, in the period.

The numbers of Possession Orders being granted is reducing every year, although for every two Orders granted, three are refused by the Courts, for a variety of reasons.²⁴

The data shows that only 26% of borrowers had any Listed legal representation, and 7% were Listed as lay litigants or self-representing.

²⁴ This has been the pattern throughout, with the Department of Finance/Central Bank Report on Mortgage Arrears (2016), p. 33, stating that of the 8,600 cases examined from Q1 2013 just over 40% of legal proceedings are concluded due to an order for possession or sale being granted. Terms and conditions were renegotiated (i.e. restructuring) in 19 per cent of cases concluded. The remaining 33 per cent were settled on other terms.

The ECB directly supervised entities are Allied Irish Banks (AIB) (which includes EBS and Haven), Bank of Ireland, Ulster Bank and KBC,²⁵ which together accounted for 5,801 (46%) of all Listed cases in the period. Some 1,495 (28%) unique cases were taken by AIB (including its subsidiaries); 581 (11%) by Bank of Ireland; 456 (9%) by Ulster Bank; 272 (5%) by KBC.

Permanent TSB, as a “less significant institutions”, is supervised by the Central Bank of Ireland, and was involved in some 2,366 (19%) of all Listed cases, and 1,012 (19%) unique cases in the period examined. Important questions arise about the high level of possession proceedings (19%) being taken by one relatively small financial entity (Permanent TSB) which is 75% State owned, and the level of supervision being exercised by the Central Bank of Ireland in this case.

Non Irish bank entities were involved in some 4,347 (34%) of Listed cases, and in 1,524 unique cases (29%) in the period. The high level of court activity by Start Mortgages is significant. Non Irish bank entities were involved in roughly one third of possession cases before Irish courts in 2019.

There are higher numbers of cases in the South East and Midlands Circuits compared with other Circuits.

Ten law firms handled some 70% of the possession proceedings on behalf of the financial entities seeking possession of homes – but local solicitors often act as agents for these in Circuit Courts.

Some 15% of the Listed cases originated in 2014; 14% in 2015; 17% in 2016; 23% in 2017, 17% in 2018 and some 8% in 2019. This shows that there are significant numbers of cases in the legal system - possibly reflecting the 20,000 households in arrears over 720 days and confirming reports of a slowly moving potential social crisis.

There is some difference in the relative numbers of cases on the Registrars and Judges Lists before, and after, 1st August 2019, when new legislation on proportionality assessments came into force. Some 70% of Listed cases before that date were recorded in the Registrars Lists and 19% in the Judges Lists. After that date, some 64% of cases were recorded in the Registrars Lists, and 23% in the Judges Lists. Without more detailed research it is not possible to state that this is related to the legislation, or increasing referral by Registrars of cases to the Judges Lists. But it does mean that more households are having the opportunity for a judicial assessment of the proportionality of the interference with their rights to home.

Based on the limited data published by State agencies, combined with the analysis of this research, it is tentatively and broadly possible to state that about one quarter of cases before the Irish courts (including the County Registrar) were concluded in the period. One third of these resulted in an Order for Possession or Sale, and in two-thirds of cases proceedings were concluded, but arrears remained. A decade after the Irish State €40bn. banking bailouts the saga continues. Perhaps, it is now time to end the ‘social misery’²⁶ of a lost decade.

²⁵ See ECB List of Significant Supervised Entities February 1 2020:

<https://www.bankingsupervision.europa.eu/banking/list/who/html/index.en.html>

²⁶ The term was used in the European Court of Human Rights case of *Bäck v Finland* (App. No. 37598/97) Judgment 20 July 2004 dealing with loan write-offs after the Finnish financial crash of the 1990s.

b. Only a quarter of borrowers facing home loss have legal representation

The analysis of the 12,650 listed cases across all Circuits shows that only 26% of borrowers had any Listed legal representation. For ECB directly supervised institutions only 30% of homeloan borrowers had any recorded legal representation.

Borrowers were Listed as representing themselves in 7% of cases, and a tiny number of cases involved a Legal Aid Centre representing borrowers. Of course, the fact that no representation was Listed does not mean that representation was not available on the day, either from a solicitor, MABS, or other agency.

The *Abhaile* Court Mentor service provided by MABS, and the Duty Solicitor service provided by Legal Aid Board at all repossession court hearings before the County Registrar provide support and advice (but not representation) to distressed borrowers facing court proceedings. During the period 1 July 2016 to 30 June 2018, some 7,191 borrowers facing repossession proceedings received advice and support at court from a Court Mentor. Some 4,788 borrowers facing repossession proceedings received legal assistance court from an *Abhaile* Duty Solicitor during the period 1 July 2016 to 30 June 2018.²⁷

County Registrars and Circuit Court Judges make valiant efforts to explain procedures, processes and even the meaning of legal terms to people who are at best anxious and nervous, and at worst suffering from illness, are disorientated, emotionally vulnerable and fragile, or experiencing relationship breakdown.

Table 2. Total Cases Listed - April – December 2019 by Circuit and Court²⁸

Circuit	Total Mortgage Cases Examined	Borrowers Legally Represented	Self/In person/ "lay/litigant"	ECB Directly Supervised Lender – Debtor with legal representation ²⁹
Dublin	1,445	341	92	496
Eastern	2,307	630	184	629
Cork	1,058	317	107	327
Northern	1,534	372	119	469
Western	945	240	75	253
Midland	1,797	423	82	529
South West	1,168	308	124	299
South East	2,396	650	97	731
Total	12,650	3,281	880	3,733

In terms of legal firms representing borrowers, these were local solicitor firms, possibly with a long-term relationship with the household at risk of home loss. There is much anecdotal evidence that much of this work is carried out *pro bono*. Legal Aid is provided only to a tiny number of people, and the result is that many are left to represent themselves.

²⁷ See *Abhaile Second Annual Report* (November 2018) The Report points out that *Abhaile* is reaching its key target group, of distressed borrowers in more than 720 days mortgage arrears.

https://www.mabs.ie/downloads/reports_submissions/Abhaile_Second_Annual_Report.pdf

²⁸ Note - one Callover List in Kilkenny on 17/4/2019 containing 77 cases did not list any details of representation.

²⁹ This includes cases where the debtor is listed as representing themselves.

c. Who is taking the cases

The Department of Finance/Central bank report on mortgage arrears 2016 stated that, based on Q2 2016 data, there were 14,134 accounts for which court proceedings had been issued to enforce the debt/security on a mortgage. Approximately 12,000 related to the retail banks with the remainder attributable to other banks no longer actively lending in the Irish market and non-bank entities.³⁰ The pattern has changed since then.

However, there is little independent published data on the comparative level of court proceedings for homeloan possession orders taken by the various financial entities in Ireland. The Central Bank publishes aggregated data provided by the supervised financial institutions, but no figures are attributed to any institution.

The various entities seeking possession in these cases comprise a mix of ECB defined “significant” supervised entities and their subsidiaries, “less significant” entities and non Irish bank entities. Many of the entities examined here have purchased mortgages from the main regulated lenders.³¹ Indeed, one problematic supervisory issue arises where “significant” supervised entities have sold on mortgages to investment funds, who then continue the case in the name of the ECB directly supervised entity in possession proceedings.³² In Ireland, the ECB directly supervised entities in this area are AIB (and its subsidiaries), Bank of Ireland, Ulster Bank and KBC.³³ Together, these accounted for 5,801 (46%) of Listed cases in the period, and some 2,804 (53%) of unique cases. “Less significant institutions”, such as Permanent TSB, are regulated by the Central Bank of Ireland. This entity was involved in some 2,366 (19%) of all Listed cases, and an equal proportion of unique cases.

Non Irish bank entities taking cases through Irish courts include non-bank mortgage entities and retail credit firms, and those often colloquially referred to as ‘vulture funds’ i.e. private equity funds, often from the United States (US) who have bought mortgage loan books at a discount, and are seeking to evict the occupiers before selling the home.³⁴ Sometimes, these entities are continuing the proceedings in the name of the

³⁰ Department of Finance/ Central Bank (2016) *Report on Mortgage Arrears*, Dublin: Central Bank of Ireland, p. 32. <https://www.centralbank.ie/docs/default-source/publications/correspondence/finance-reports/mortgage-arrears-report.pdf?sfvrsn=2>

³¹ Indeed, there are a great many cases involving these ‘vulture’ funds in the High Court, Court of Appeal and Supreme Court which involved commercial loans, but these cases are not included here. See Byrne, M. (2016) *From Puerto Rico to the Dublin Docklands – Vulture funds and debt in Ireland and the Global South* (Debt and Development Coalition Ireland) https://www.indymedia.ie/attachments/may2016/ddci_vulture_funds_report_2016.pdf

³² Transfers of mortgages can take various forms, including agreements of trust and subordination, whereby the name of the originator of the mortgage remains on official court records. It is not known how many of the cases listed under the original lenders name are being progressed by non-bank entities who have acquired the beneficial interest of the original loan.

³³ See ECB List of Significant Supervised Entities February 1 2020: <https://www.bankingsupervision.europa.eu/banking/list/who/html/index.en.html>

³⁴ A European Commission report showed that of the ten largest investors in global distressed debt, nine were domiciled in the US and one in Canada. See Commission Staff Working Paper, Impact Assessment, *The development of secondary markets for non-performing loans by removing undue impediments to loan servicing by third parties and the transfer of loans (Part 1/2) and Accelerated extrajudicial collateral enforcement (Part 2/2)*, accompanying the *Proposal for a directive of the European Parliament and of the Council on credit servicers, credit purchasers and the recovery of collateral*. 14.3.2018 SWD (2018) 75 Final.

original lender. The homeloan borrower may be dealing with a 'call centre' in the US when seeking information on their case. Credit servicing firms listed in line with the Consumer Protection (Regulation of Credit Servicing Firms) Act 2018³⁵ provide back-office servicing on behalf of the financial entity.

The non Irish bank entities, which include, ACC (sic), Bank of Scotland, Bluestone Finance, Cabot, Capital, Capri Asset Management, Carlisle Mortgages, Danske Bank, Elstree Mortgages, Ennis Property, First Active, Havbel, Irish Bank Resolution Corporation (sic), Irish Nationwide Building Society (sic), Kenmare, Leeds Building Society, Mars, Pentire, Pepper, Promontoria (with various sub names), Shoreline, Springboard, Stapleford, Start Mortgages, Stepstone, Tanager and Vivier Mortgages. In addition, a number of other entities were involved in 137 homeloan possession cases.

The non Irish bank group were involved in some 4,347 of Listed cases, or 34% of the total and some 1,524 unique cases - 29% of the total. The high level of possession proceedings by Start Mortgages with 13% of Listed cases is significant in the context of its size. Promontoria, with 6% of Listed cases also shows an active court profile.

Table 3. Numbers of Cases Listed and Unique Cases by Financial Entity.

Financial Entity	Number of cases Listed	County Registrar cases Listed	Callover cases Listed	Circuit Court cases Listed	Unique cases - excluding all duplicate Listings
Permanent TSB	2,366	1,843	160	363	1,012
EBS	1,479	1,030	149	300	762
Start Mortgages	1,707	1,103	236	368	422
AIB	1,235	771	160	304	669
Bank of Ireland	1,174	605	207	362	581
KBC	688	361	140	187	272
Ulster Bank	1,084	852	72	160	456
Promontoria	798	556	75	167	300
Mars Capital	565	332	86	147	229
Pepper	438	300	44	94	197
Tanager	284	217	32	35	120
Shoreline	289	206	25	58	76
Haven	141	89	21	31	64
Stepstone	50	33	10	7	13
Havbel	79	44	12	23	34
Springboard	55	33	7	15	22
Bluestone Finance	36	31	1	4	15
Bank of Scotland	19	6	5	8	11
Others	137	93	25	45	85
Total	12,650	8,505	1,467	2,678	5,340

³⁵ <http://registers.centralbank.ie/DownloadsPage.aspx> - Credit Servicing Firms. This Central Bank Report of 25 March 2020 shows that there are 34 transitional Credit Servicing Firms recorded at the time, with only 7 authorised Credit Servicing Firms at that date – Cabot Financial (Ireland) Ltd, Fitzwilliam Loan Management Unlimited, Lapithus Management DAC, Link ASI Ltd, Mars Capital Finance Ireland DAC, Mount Street Mortgage Servicing Limited and Situs Asset Management Ireland DAC. This amounts to a significant regulatory problem.

The surprising figure from the data is the high level of proceedings being taken by the relatively small Permanent TSB (19% of all cases), which is 75% owned by the Minister for Finance of Ireland, and supervised by the Central Bank of Ireland. With all the social and economic costs of these home loan possession cases, as well as the State costs in addressing the consequences of evictions. There are questions as to the effectiveness of the supervision of this institution. Some 71% of shares in AIB are owned by the Minister for Finance of Ireland, as well as 14% of shares in Bank of Ireland. This raises questions about the use of resources to pursue possession proceedings, when there are many other solutions now in place to deal with distressed mortgages. There are also questions about the non-compliance with Irish legislation on the human rights public sector duty by the Central Bank of Ireland, Courts Service and other public bodies, including State owned financial institutions, including record keeping and reporting.

Chart 1. Listed Cases by Financial Entity

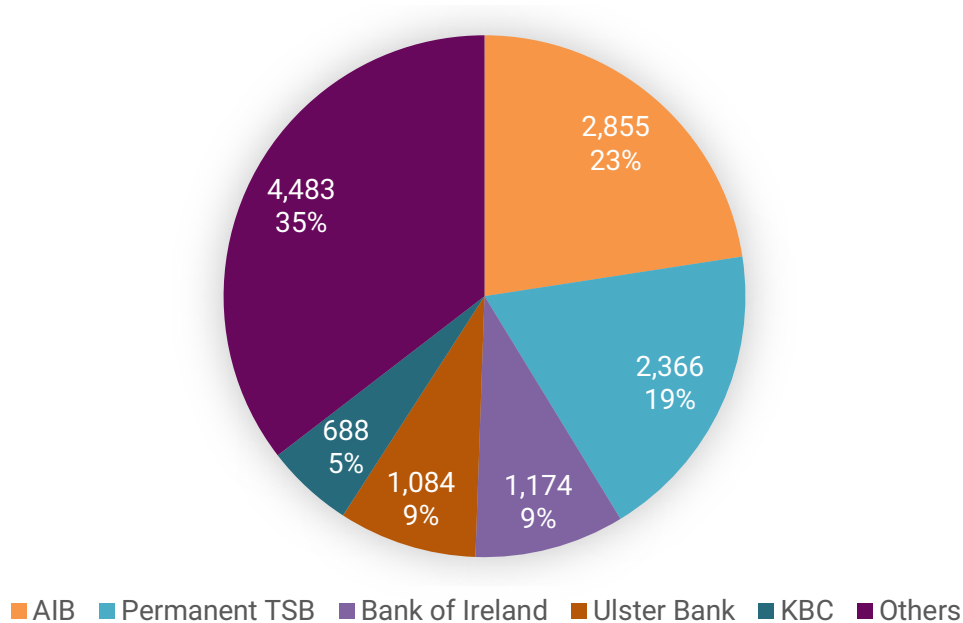
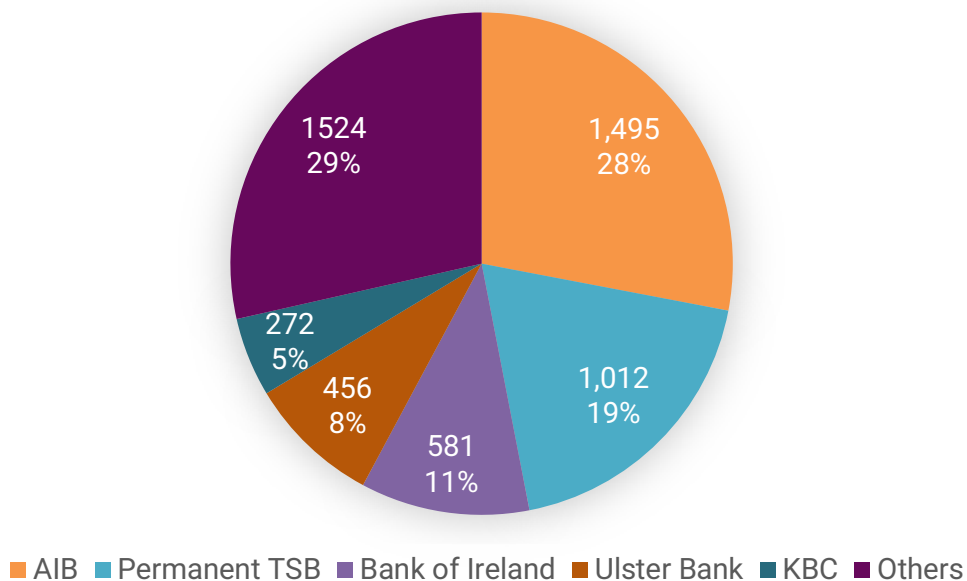


Chart 2. Unique Cases by Financial Entity



d. Most cases are dealt with by the County Registrar rather than the Judge

Table 4. Monthly Pattern of Cases Listed by County Registrar Lists, Callover Lists, and Judges Lists.

Month	April	May	June	July	Aug.	Sept.	Oct	Nov.	Dec.	Total
Registrar	682	1100	1337	1417	0	1449	1252	1053	215	8,505
Callover	375	146	107	46	0	355	120	74	244	1,467
Court	167	403	231	452	0	140	611	493	181	2,678

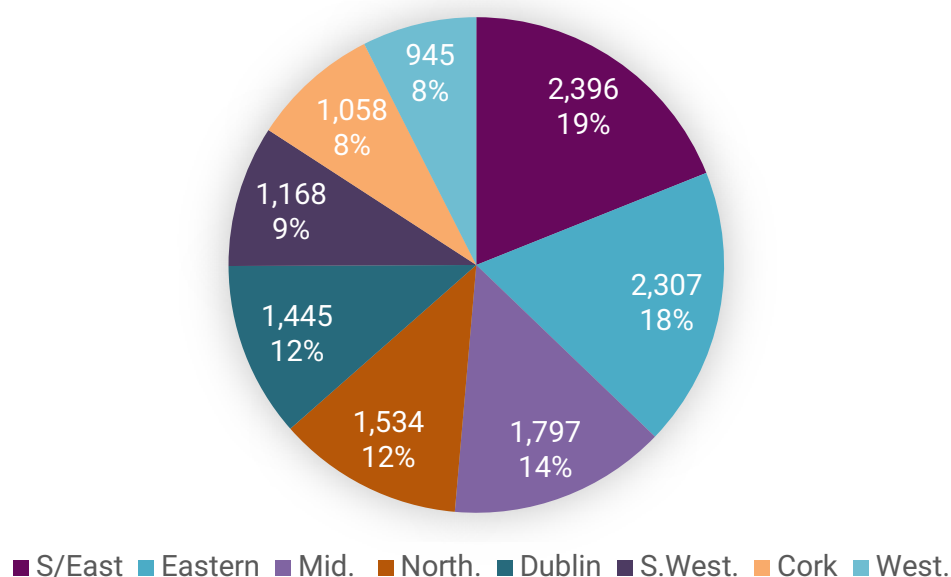
County Registrars dealt with most mortgage possession cases both on the Registrars Lists (67%) and during Callovers (12%), while some 21% of Listed cases were on the Judges List. The pattern of cases listed over the nine - month period studied show that numbers varied considerably with reductions in April and December to coincide with holiday periods, and the closure of the courts in August. Of course, there are many more cases in the system, as it were, which have not been Listed in the period studied. These include those where a Personal Insolvency Arrangement (PIA) is being prepared, and those which have been adjourned or suspended outside the period, including an unknown number of the 85,000 mortgage accounts which are being restructured.

e. There are higher proportions of cases in the South East and Midland Circuits

Table 5. Numbers of Cases Listed by Circuit.

Circuit	Dublin	Eastern	Cork	North.	West.	Mid.	S/West.	S/East
Registrar	1,318	1,028	701	883	762	1,674	743	1,396
Callover	76	392	118	254	183	123	131	190
Court	51	887	239	397	0	0	294	810
Total	1,445	2,307	1,058	1,534	945	1,797	1,168	2,396

Chart 3. Numbers/Percentage of Cases Listed by Circuit



The numbers cases listed varied across the eight Circuits with significantly high numbers for the South Eastern and Midlands Circuits.

f. Most cases originated in the past 5 years

Media reports of high profile evictions mask what is really a lengthy social and legal process. People almost always avoid the trauma of a physical eviction. As the Central Bank of Ireland describes it, they "surrender" their homes and leave.³⁶ Thus, forcible removal is not usually necessary for an eviction to occur.

EU research³⁷ identified three phases to evictions in mortgage possession cases, starting with a legally recognised formal instruction to leave. This first, or pre-court stage, involves exchanges of letters, procedures (codes of conduct) and meetings. Most people leave their homes at this stage, yet, none of these removals are recorded officially as evictions. The second or court phase can involve lengthy proceedings, adjournments, strike outs, settlements, suspensions or court orders. The third phase is between the court order for possession and the actual physical eviction or execution of the order (if it actually takes place). Thus, most actual evictions do not involve court appearances, or physical removals, but are "involuntary" or forced "surrenders" of rights of occupation, to avoid the ordeal of the eviction process.

While there is little research on the length of time taken in the first two phases, or the numbers who 'surrender' their homes without any court approved process, there are important questions about the length of time these cases are taking in the courts system. The uncertainty and worry attached to proceedings which may involve a loss of home can create serious health problems for households. Regular comments by Anglo-American oriented economists, and banking sector commentators, complain that the process is too slow. Yet Irish court times compare well with EU counterparts in Belgium, France, Italy, Luxembourg, Poland, Portugal, Spain and many other countries – with Ireland situated in the middle of the length of court times for resolving contract and mortgage disputes. Banking industry sponsored economists often compare Ireland only with parts of the UK and ignore the European context, where courts consider rehousing options as part of the possession process, especially in relation to the rights of children. Indeed, the importance of due process and the obligations on courts as guardians of the law to protect the rights of all parties, requires that careful and considered decisions are taken. Respect for the independence of the judiciary within the legal liberal model requires that courts are not viewed as mere local administrators for large financial entities (Where the beneficial interest is often obscure).

The sale of mortgage books to offshore registered equity funds and the use of secondary credit servicing firms lengthens the chain of communication between the decision maker and the distressed borrowers. The chain of communication often leads to confusion or difficulties in reaching a legally acceptable solution which

³⁶ <https://www.centralbank.ie/news/article/speech-building-financial-resilience-ed-sibley-5-nov-2019>. Indeed, the Central Bank records the numbers of households who "surrender" their homes in its Quarterly Statistics. See Kenna, P. RTE Brainstorm. The significant human rights issues around evictions in Ireland:

<https://www.rte.ie/brainstorm/2020/0115/1107596-evictions-ireland/>

³⁷

<https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7892&type=2&furtherPubS=yes>

respects the law. There are many anecdotal reports of continuous adjournments being sought by financial entities where paperwork is not in order, and other reasons. The recent Court of Appeal decision in *Promontoria (Aran) Ltd v Burns* [2020] IECA 87 illustrated the current problems, where sworn statements by staff of credit servicing firms cannot be relied on as evidence, in all cases.

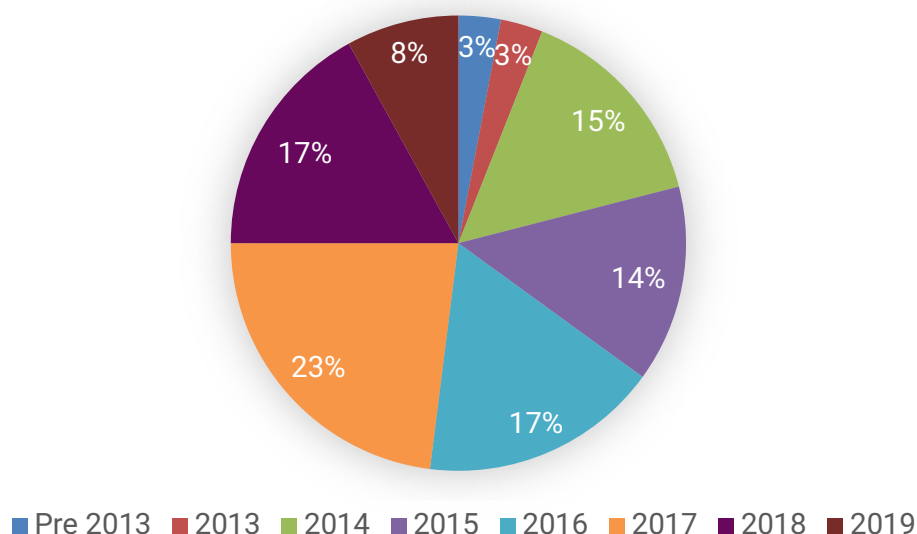
Table 6. Date of Origination of Cases Listed.³⁸

Origination year/by case number	Number of cases Listed
1998	1
2003	3
2004	7
2005	11
2006	17
2007	25
2008	62
2009	43
2010	27
2011	35
2012	92
2013	398
2014	1,895
2015	1,710
2016	2,185
2017	2,927
2018	2,190
2019	1,022
Total	12,650

Table 6 shows that for the Listed cases in the period April to December 2019, most originated in the previous five years. Some 15% originated in 2014; some 14% in 2015; some 17% in 2016; some 23% in 2017, some 17% in 2018 and some 8% in 2019.

³⁸ This data is based on the unique case number given to each case Listed. It is not the complete data set, as cases many have been struck out and re-entered with a new case number – thus many may actually be older than appear. However, there is no other available data.

Chart 4. Date of Origination of Cases Listed



This does show that a significant number of cases are being regularly adjourned, and this can take place for a variety of reasons.

Table 7. Legal Activity and Repossessions - Central Bank of Ireland Reports (2019)³⁹

	Qtr 2	Qtr 3	Qtr 4	Total
Mortgage accounts where court orders granted for repossession or sale	120	150	150	420
Mortgage accounts where legal proceedings were concluded but arrears remained outstanding	341	302	315	958

Table 7 shows that even when cases are concluded or settled a possession order or indeed a ‘fresh start’ for the borrowers was not always the outcome.⁴⁰ It does indicate a high level of mortgage contract restructuring as a result of court proceedings. Significantly, the figures for personal insolvency arrangements approved for these three quarters are 255, 195 and 348 respectively.⁴¹

³⁹ This relates only to principal dwellings and not buy to let mortgages.

<https://www.centralbank.ie/statistics/data-and-analysis/credit-and-banking-statistics/mortgage-arrears/previous-statistical-releases>

⁴⁰ This has been the pattern throughout, with the Department of Finance/Central Bank Report on Mortgage Arrears (2016), p. 33, stating that of the 8,600 cases examined from Q1 2013 just over 40% of legal proceedings are concluded due to an order for possession or sale being granted. Terms and conditions were renegotiated (i.e. restructuring) in 19 per cent of cases concluded. The remaining 33 per cent were settled on other terms.

⁴¹ Since 2013 a total of 4,189 Personal Insolvency Arrangements have been approved. See Insolvency Service of Ireland Statistics: <https://www.isi.gov.ie/en/ISI/2019%20Q4%20ISI%20Statistics%20Report.pdf/Files/2019%20Q4%20ISI%20Statistics%20Report.pdf>

g. Ten law firms handled some 70% of cases for the financial entities.

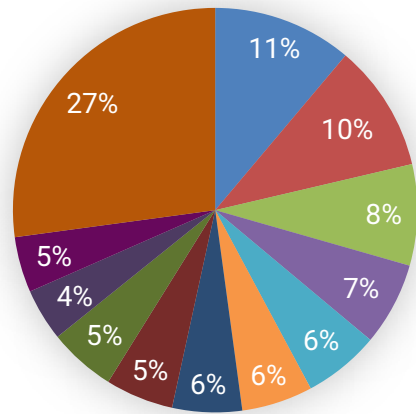
It is important to recognize that while these law firms are listed in Court Lists, in reality, local solicitors often act as agents for these firms in Circuit Courts, although the larger firm remains named on the Lists.

Table 8. Cases Listed by Legal Firm representing financial entities

Legal Firm	Number of cases listed
AB Wolfe ⁴²	782
AC Forde	182
AMOSS	70
Baily Holman Smyth McVeigh	576
Beauchamps	749
Belgard	1,534
Dillon Eustace	93
Eversheds Sutherland	1,403
Field Fisher	155
Hugh J. Ward & Co	767
Ivor Fitzpatrick	916
Joynt & Crawford	838
Kane Tuohy	221
Keating Connolly Sellors	239
Lavelle	738
Lyons	296
Mason Hayes & Curran	364
McDowell Purcell	133
O' Brien Lynam	162
O' Connor	438
Ronan Daly Jermyn	612
Whitney Moore	269
Others	1,113
Total	12,650

⁴² AB Wolfe & Co is the debt recovery division of Matheson.

Chart 5. Share of Total Cases Listed by Legal Firm representing financial entities (Top 10 Firms)



- Belgard
- Eversheds Sutherland
- Others
- Ivor Fitzpatrick
- Joynt & Crawford
- AB Wolfe
- Hugh J. Ward & Co
- Beauchamps
- Lavelle
- Baily Holman Smyth McVeigh
- Ronan Daly Jermyn
- Others

3. Recommendations

- The problem of non-performing loans held by households is a European problem, and a legacy of the banking and financial crash of 2008. After 10 years it is now time to ensure a fresh start for indebted households and ensure that those now facing mortgage payment problems post COVID-19 can avail of the State mediation, personal insolvency and legislation on statutory proportionality assessments which now exists.
- The ECB and other EU institutions must fully respect EU consumer and human rights law, including the Charter of Fundamental Rights, in their direct supervision of mortgage lenders in Ireland, as part of the SSM framework, as they finance legal proceedings to repossess mortgaged properties and evict households in arrears, particularly where children are being made homeless.
- The complicated nature of mortgage possession proceedings requires that appropriate legal representation be made available by the Irish State in order to comply with the standards set out in *Airey v Ireland* (ECHR judgment of 9 October 1979, Airey, Series A, Volume 32).
- There were 1,425 cases on the Judges Lists after August 2019 when the Land and Conveyancing Law Reform (Amendment) Act 2019 had come into force. Potentially, all of the cases could have been resolved through the application of the statutory proportionality assessment set out in the Act. Anecdotal evidence suggest that the legislation was applied in only a small number of courts. **Training on this and other legislation is urgently required for lawyers and judges**, to ensure that citizens are in a position to enjoy their legal rights in Ireland.
- Whereas there is public openness, transparency, justification and media scrutiny of court decisions involving home loss, no such transparency or scrutiny takes place in relation to the decision making of the Directors and managers of the Central Bank, or the financial entities which direct court proceedings for home loss. It is recommended that human rights and equality training be undertaken by the Directors of the Central Bank and the publicly appoint directors of the financial entities with State shareholding.
- A quarterly report from the Central Bank on the impact on housing rights issues of its decisions and actions in this area should accompany the Quarterly Statistics on Mortgage Arrears. Central Bank Reports and research must respect the equality and human rights obligations of a State body, especially the disproportionate effect on women of their supervisory actions.
- Greater transparency is need in relation to the compilation of statistics on arrears and possession by the Central Bank with independent verification and respect for human rights and equality integrated into the framework.
- The Central Bank & Financial Services Authority Ireland, Allied Irish Banks (including its subsidiaries), Permanent TSB, and all public sector bodies in Ireland involved in home possession cases must address their public sector duty to protect human rights, under Section 42 IHREC Act 2014.⁴³

⁴³ See Central Statistics Office (CSO) 2016 Register of Public Sector Bodies (including General Government Bodies) in Ireland, October 2017: http://www.cso.ie/en/media/csoie/methods/nationalaccountsoutputandvalueaddedbyactivity/Register_of_Public_Sector_Bodies_in_Ireland_2017_October.pdf

4. Access to Justice and Mortgage Possession Cases in Ireland

While private debt is selectively coded by legal instruments – recognized by courts internationally, mortgage contracts exist in a broader legal and economic universe, in which human rights law interacts with (and limits) the rights of creditors.⁴⁴

Although generally perceived as not dealing with human rights matters per se, financial consumer protection laws and bankruptcy regulations have important roles to play in this regard. Such laws should allow for the protection of individual facing overindebtedness or abusive lending and collecting practices, with have a potential impact on human rights. Consumer and bankruptcy frameworks should thus be envisaged as a means to prevent possible abuses, to safeguard the human rights of borrowers and to compensate for the inherent power imbalance between the parties to a lending contract. Such an endeavour should include –and even encourage–the possibility for financial consumers to organize and negotiate collectively to compensate the power imbalance between lenders and borrowers.⁴⁵

In her Final Report to the UN Human Rights Council in 2020, Leilani Farha, UN Special Rapporteur on adequate housing highlighted the need to ensure the regulation of businesses in a manner consistent with State obligations and address the financialisation of housing.

67. A change in direction is urgently needed, and a new relationship between governments and the investors currently dominating the housing landscape must be forged. The Committee on Economic, Social and Cultural Rights has clarified that States violate their obligations with respect to the right to housing by failing to regulate the real estate market and the financial actors operating on that market so as to ensure access to affordable and adequate housing for all.⁴⁶

68. The obligations that States must impose on businesses directly involved in the development or ownership of housing are different in kind from those that apply to other businesses...⁴⁷

Access to justice is one of the most basic rights enjoyed in civilized societies. It is underpinned in Ireland by international, European, constitutional and national law. Access to justice is particularly important in situations where people are at risk of losing their homes.

⁴⁴ See Pistor, K. (2019) *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press, Princeton).

⁴⁵ See UN Doc. A/HRC/43/45, para 87. Juan Pablo Bohoslavsky. *Private debt and human rights, Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights*. Available at <https://undocs.org/A/HRC/43/45>.

⁴⁶ General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, para. 18.

⁴⁷ UN Doc. A/HRC/43/43; Guidelines for the Implementation of the Right to Adequate Housing available at: <https://undocs.org/A/HRC/43/43>. See also The Shift - a new worldwide movement to reclaim and realize the fundamental human right to housing – to move away from housing as a place to park excess capital, to housing as a place to live in dignity, to raise families and participate in community. See <http://www.unhousingrapp.org/the-shift>

The banking crash of 2008, generated an unprecedented increase in the caseload of Irish courts, as property values dropped and mortgages became unsustainable. Some commentators have described this as a “tsunami” of home possession cases. This phenomenon coincided with a restructuring of mortgage law arising from the Land and Conveyancing Law Reform Act 2009, shifting these cases to Irish Circuit Courts. In this arena Irish homeloan debtors are pitched against the legal resources of major corporate financial entities, often in what appears like a *David v Goliath* encounter. As Irish courts address these increased caseloads over the past 10 years, access to justice for homeloan debtors has never been more important.

Loss of home can amount to a violation of human rights. Indeed, victims of home loss experience a range of reactions, such as feelings of painful loss, a continued longing, a depressive tone, frequent symptoms of psychological, social or somatic distress, the active work required in adapting to the altered situation of losing home, the sense of helplessness and expressions of direct and indirect anger.⁴⁸ One study showed that those evicted were approximately four times more likely to commit suicide than those who had not been exposed to this experience.⁴⁹

There are particularly negative consequences for children in the loss of home and any experience of homelessness.⁵⁰ Research shows that even two years after their eviction from home, mothers still experienced significantly higher rates of material hardship and depression than peers.⁵¹ *Foundation Abbé Pierre* and FEANTSA have described eviction from home as:

...one of the worst forms of violence that can afflict someone. It is not one of life's ups and downs; it is a mark of infamy inflicted by society through institutions such as the police force and the legal system. Eviction is not only a punishment, it is a collective abandonment of other people; prioritising one individual's right to own property over another individual's most basic needs... but also psychologically in that the outside world invades the private sphere. Eviction is a humiliating and traumatising experience, which risks pushing the victim down a slippery slope towards destitution and poor self-esteem. It constitutes a violent rupture of one's home life that directly feeds into the problem of homelessness.⁵²

The Community Action Network Report *House Hold: Life in Mortgage Distress - A preliminary report on the experiences of people in mortgage distress and at risk of losing their homes* (2018) showed that almost all Irish State and Central Bank Reports

⁴⁸ See Fox-O' Mahony, L. (2007) *Conceptualising Home; Theories, Laws and Policies*. Oxford: Hart Publishing, p. 110.

⁴⁹ Rojas, Y. & Stenberg Sten-Åke, Evictions and suicide: a follow-up study of almost 22,000 Swedish households in the wake of the global financial crisis, *J. Epidemiol Community Health* 2016; 70: 409-413. <http://jech.bmj.com/content/70/4/409>

⁵⁰ Fox (2007), pp. 440-441.

⁵¹ Desmond, M. & Kimbro, R. T. 'Eviction's Fallout: Housing, Hardship, and Health' *Social Forces*, Volume 94, Issue 1, September 2015, 295–324. Compared to matched mothers who were not evicted, mothers who were evicted in the previous year experienced more material hardship, were more likely to suffer from depression, reported worse health for themselves and their children, and reported more parenting stress.

⁵² The *Foundation Abbe Pierre* – FEANTSA, (2017) *Second Overview of Housing Exclusion in Europe 2017* – chapter 3, *Evictions in Europe: Useless, Expensive and Preventable*, p. 82.

on the mortgage crisis failed to address the interests of households in mortgage distress, particularly children.⁵³

The Irish tracker mortgage scandal revealed that many people experienced wrongful, court approved, loss of home, and while consumers were being wrongly taken to court, Irish courts were unable to uncover any wrongdoing.⁵⁴

In relation to loss of home arising from homeloan mortgage arrears in Ireland, the critical decision makers are the courts – mainly Circuit Court Judges and County Registrars. The State and the public has entrusted to these the specialized and complex role of examining and balancing the interests of indebted households with those of corporate financial entities – at that crucial time – the granting or execution of a possession order on their home.

Since 2014, the main euro-area banks are supervised directly from the ECB in Frankfurt, in relation to macro and micro-prudential rules and capital requirements, under the Single Supervisory Mechanism (SSM).⁵⁵ The ECB directly supervised entities are engaged in half of home possession cases in Irish courts, with detailed communication taking place through the supervisory asset management process.

It is a bitter irony that homeloan debtors usually end up paying the costs of the financial entities' legal actions, although they themselves cannot afford such representation. Such unfair terms are common within Irish mortgages, yet these clauses are not examined for compliance with EU law in the Irish courts. Instead, Irish courts focus only on one or two of the main or core terms, such as amount of loan, period, interest rate and agreement to create security for the loan – holding that once these are notified to the borrower in the presence of their solicitor, then there is no defence to losing a home. Most judgments now refer to the obligation on solicitor to advise on the presence or absence of unfair mortgage terms as part of the conveyancing process – such liability disputed by many.⁵⁶

A semi-feudal judicial approach to banking and the legal systems can, in some cases, create a court environment more akin to a criminal trial, than the civil law dispute which is a mortgage consumer case. The experiences of unrepresented distressed debtors in the courts has been recounted by legal writers:

When cases hit court, this inequality of resources is so blatant that it unintentionally serves to infantilise the debtors and gives the proceedings a bizarre classroom quality.⁵⁷

⁵³ Available at: <http://www.nuigalway.ie/media/housinglawrightsandpolicy/files/Life-in-Mortgage-Distress-Report.pdf>

⁵⁴ Some 40,100 customers were paid €683 million in redress and compensation while 99 families lost their homes as a consequence of being denied or moved from a tracker rate. See Joe Brennan, 'How Irish tracker mortgage scandal costs have topped €1.5bn', *The Irish Times* 4 February 2020. <https://www.irishtimes.com/business/financial-services/how-irish-tracker-mortgage-scandal-costs-have-topped-1-5bn-1.4161355>

⁵⁵ Regulation 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions - The SSM Regulation, OJ L287, 29 October 2013, 63–89.

⁵⁶ See Kenna, P. & Sadlier, J, (2019) EU law and mortgage possession cases – what's it all about? *Irish Judicial Studies Journal* <https://www.ijsj.ie/editions/2019-edition-01#eu-law-and-mortgage-possession-cases-what-is-it-all-about>

⁵⁷ See Francesca Comyn, *The Sunday Business Post*, July 9, 2017.

The Review Group on the Administration of Civil Justice, was established in 2017 to make recommendations for changes with a view to improving access to civil justice in the State, promoting early resolution of disputes, reducing the cost of litigation, creating a more responsive and proportionate system and ensuring better outcomes for court users.⁵⁸

a. Legal Aid

Access to justice is a core fundamental human right and a central concept in the broader field of justice. Access to justice as a fundamental right is recognized in a range of international human rights instruments, including Art 6 of the European Convention on Human Rights⁵⁹, Art 47 of the EU Charter of Fundamental Rights of the European Union, and Art 14(1) of the International Covenant on Civil and Political Rights.⁶⁰

In Ireland, in 2017, the Chief Justice, Mr Frank Clarke stated in relation to access to justice in Irish courts:

*[B]ut there is little point in having a good court system, likely to produce fair results in accordance with law, if a great many people find it difficult or even impossible to access that system for practical reasons. A high priority must, therefore in my view, be accorded to questions relating to practical access to justice. I emphasise the practical because there are few formal legal barriers to access to justice in the Irish legal system. But it has increasingly become the case that many types of litigation are moving beyond the resources of all but a few.*⁶¹

At the same time, Article 40.5. of *Bunreacht na hÉireann* states: *The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law.*

The Legal Aid Board provides negligible levels of legal representation in these cases. Civil legal aid is not normally available for 'property related' disputes. Section 28 of the Civil Legal Aid Act, 1995, precludes legal aid from being granted in proceedings which are 'disputes concerning rights and interests in or over land,' save if any of the exceptions in s. 28(9)(c) where it 'may' be granted. These exceptions include family law-type disputes around the household main residence. However, legal advice may be provided, and occasionally, a mortgage repossession may be regarded as involving contractual or debt enforcement issue (and limited legal aid may be granted). Any eligibility must satisfy a merits test and a means test, and no class or representative actions are supported in Irish courts in this area.

⁵⁸ See <http://www.civiljusticereview.ie/> The aim of the Review is to examine the current administration of civil justice in the State with a view to improving access to justice and other matters, including the identification of steps to achieve more effective outcomes for court users with particular emphasis on vulnerable court users including children and young persons, impecunious litigants who are ineligible for civil legal aid and wards of court.

⁵⁹ *Airey v. Ireland*, App. No.6289/73 [1979] 2 EHHR 305 (9 October 1979), [1981] ECHR1 (6 February 1981).

⁶⁰ European Union Agency for Fundamental Rights (2016) *Handbook on European law relating to access to justice*, available at: <http://fra.europa.eu/en/publication/2016/handbook-european-law-relating-access-justice> See also <http://fra.europa.eu/en/theme/access-justice>.

⁶¹ Statement of the Chief Justice for the New Legal Year 2017, 3 October 2017 - <http://www.courts.ie/Courts.ie/Library3.nsf/pagecurrent/B137A31686073CA5802581A800536B5E?opendocument>

Figures produced by the Legal Aid Board in response to a Parliamentary Question on 03/10/2019 (40182/19) by the Department, Justice and Equality showed the number of financially eligible applications for legal services received by the Legal Aid Board where the applicant was in potential danger of losing their family home, and the number of cases where legal aid was granted in connection with the defence of possession proceedings.

These show 59 applications in 2014 with legal aid granted in 7 cases; 108 applications in 2015 with legal aid granted in 9 cases; 66 applications in 2016 with legal aid granted in 6 cases; 35 applications in 2017 with legal aid granted in 6 cases; 37 applications in 2018 with legal aid granted in 7 cases, and 24 applications up to the date of the question in 2019, with legal aid granted in 8 cases.

Some Lists may indicate that debtors have legal representation, but this may not occur on the day for reasons of cost, or other reasons. Equally, MABS/Abhaile or some other agency may offer assistance (but not legal representation) on the court day.

The outcome of all this involves many distressed home loan borrowers being forced to 'represent' themselves and a great many of these are women.⁶²

b. Lay Litigants and 'McKenzie Friends'

There are many accounts in the media of 'lay litigants' or people offering assistance to borrowers in Circuit Court possession cases – a concept known as a 'McKenzie Friend'.⁶³ However, in the context of the extraordinary high levels of non-representation among mortgage debtors, and the relatively low number of 'lay litigants' evidenced in this study (7% of cases), it is perhaps appropriate to recognize the issue of 'McKenzie Friends'. The Courts Service has issued Practice Directions for the Circuit Court,⁶⁴ the High Court and Court of Appeal⁶⁵ on 'McKenzie Friends' which came into effect on 1st October 2017.

Irish courts and lawyers are strongly influenced by the legal approaches of England and Wales rather than other EU Member States. In that context, it is worth considering the Report and Series of Recommendations to the Lord Chancellor and to the Lord Chief Justice of England and Wales (2011) on *Access to Justice for Litigants in Person*

⁶² Comparisons may be made with the iconic book, Andy Wightman (2013) *The Poor had No Lawyers* (Edinburgh, Birlinn), where the political and legal processes which pitted many thousands of people against a small number of property owners in Scotland are recounted.

⁶³ The 'McKenzie friend' concept – acceptance by a court of the intervention of a non-legally qualified person who assists a lay litigant and who may take notes and quietly make suggestions and give advice in a court. See *McKenzie v McKenzie* [1970] 3 WLR 472. See also *Start v. Kavanagh* [2017] IEHC 433, *KBC v. Flynn* [2017] IEHC 79 and *Fox v. McDonald* [2017] IECA 189.

⁶⁴ See

<http://www.courts.ie/courts.ie/library3.nsf/16c93c36d3635d5180256e3f003a4580/8b0cf6b80f56429c802581a90048dad6?OpenDocument>

⁶⁵ See

<http://www.courts.ie/Courts.ie/Library3.nsf/pagecurrent/49D88B362F44CF2780258170005BCEF2?opendocument>. The Practice Directions state "Litigants may obtain reasonable assistance from a lay person, sometimes called a McKenzie friend (MF). Litigants assisted by MFs remain litigants in person. MFs have no independent right to provide assistance. They have no right to act as advocates or to carry out the conduct of litigation. They have no entitlement to payment for their services."

(or self-represented litigants), suggested that the guiding framework of principle should be that:

- Self-represented litigants are users of the civil justice system, and the system exists for its users;
- Judges can be at the heart of addressing what needs to be done; and in creating solutions rather than dealing with imposed solutions;
- The most important thing for self-represented litigants is access to objective advice that can be trusted. Above all, advice about merits, and risks (including costs), but also about process. As a result every effort should be made to increase the availability and accessibility of early advice of this type, including on a paying basis for those litigants who can afford a piece of advice but not to engage lawyers for the whole case;
- Everything must be done to simplify and demystify the law and the system, including its language. This includes Court forms, procedures and hearings;
- As far as possible the fullest assistance (from legal aid, from the courts and court staff, from advice agencies and -within obvious limits -from the pro bono sector) should be reserved for those with the most complex personal needs, but available from the earliest point possible so that problems do not escalate unnecessarily or begin to cluster;
- While technology and improved written materials are essential, they are not alone sufficient to achieve the support required. People are the most important resource for all self-represented litigants, but especially the most vulnerable.

A type of 'McKenzie Friend' arrangement is facilitated by Irish courts under the *Abhaile* scheme whereby MABS staff and solicitors from a panel accompany debtors into court, while not actually providing formal legal representation. The State *Abhaile* scheme, operated by MABS, offers vouchers to borrowers at risk of home loss, for free legal advice from a solicitor, or a consultation with a Personal Insolvency Practitioner (PIP). The objective of this State backed service is to ensure that a person in serious mortgage arrears can access free, independent expert financial and legal advice and support. Priority is given to finding solutions, which will allow the person to remain in their home, wherever that is a sustainable option.⁶⁶ There is no detailed data on the outcomes of all these cases.

In 2020, MABS entered an Operational Protocol 'Working Together to Help Customers/Clients in Financial Difficulty' with the Banking and Payments Federation of Ireland.⁶⁷ This is intended to "help personal customers/clients to address and manage debt problems and to formulate a mutually-acceptable, affordable and sustainable repayment plan." However, there is no reference to any consumer, constitutional or human rights in the document, which adds another layer of procedure to the resolution process and requires full disclosure by the borrower (but not the financial entity) of all the circumstances around the loan. Of course, the beneficial interest in these loans is not questioned in Irish courts, who rely on the formal legal equality between large scale financial entities on the one hand, and ordinary householders on the other, to 'objectively' process these cases of home loss.

The Irish Human Rights and Equality Commission (IHREC) Act 2014 at section 42

⁶⁶ Department of Justice and Equality, Scheme of Aid and Advice on Home Mortgage Arrears, available at http://www.justice.ie/en/JELR/Pages/Scheme_of_Aid_and_Advice_on_Home_Mortgage_Arrears;

⁶⁷ <https://www.bpfi.ie/customer-assist/personal-customers/debt-management/>

provides that a public body (such as the Central Bank of Ireland or Court Service of Ireland) “shall, in the performance of its functions, have regard to the need to protect the human rights of its members, staff and the persons to whom it provides services”. The IHREC Guide on the Public Sector Duty, under the legislation of 2014, sets out the types of measures which can be taken.⁶⁸ All State bodies involved in the home loss/mortgage possession process, including Directors and senior management of the Central Bank must address these human rights obligations.

c. Personal Insolvency

The Land and Conveyancing Law Reform Act 2013 enabled courts to adjourn possession proceedings to facilitate the making of a Personal Insolvency Arrangement (PIA) – an arrangement established in the Personal Insolvency Act 2012, where both secured (up to €3m) and unsecured debts can be restructured or settled, with some protections for the distressed borrower to remain in the home, which can be approved by the court.

The PIA must ensure that the household has enough income to cover the statutory reasonable living expenses, published by the Insolvency Service of Ireland.⁶⁹ Arrears/repayments can only be made from any income above that level.⁷⁰

Insolvency Service of Ireland (ISI) figures show some 8,000 arrangements since the scheme began in 2013.⁷¹ These involved extensions or restructuring of mortgages, and in some cases, to partial reductions in the principal sum, and 95% of those entering a PIA remained in their home.

A review process, introduced in 2015, permits the Court to review a creditor-rejected PIA proposal, and, where satisfied as to its reasonableness, make an order confirming the PIA. However, according to the ISI, financial entities are using technical arguments to object to PIAs, resulting in a number of High Court cases.

Section 104 of the Act of 2012 provides that in formulating a PIA the Personal Insolvency Practitioner (PIP) shall insofar as reasonably practicable, formulate the PIA on terms which will not require the debtor to dispose of or cease to occupy all or part of the principal private residence and the PIP shall consider all alternatives, including the costs of remaining in the home, debtors circumstances, ability of others in the home to contribute, reasonable living costs and cost of alternative accommodation. Where the costs of remaining in the home are disproportionately high, the PIP will not be required to prepare a PIA on terms, that will require the debtor to leave the home. A PIA shall not contain terms providing for the disposal of the debtors interest in the home, unless the debtor has received legal advice and all relevant provisions of the Family Law Acts are complied with.

⁶⁸ <https://www.ihrec.ie/our-work/public-sector-duty/>

⁶⁹ <https://backontrack.ie/rle-calculator/>

⁷⁰ The Land and Conveyancing Law Reform (Amendment) Act 2019 provides an added layer of protection requiring a prescribed form of proportionality assessment of any eviction order to be conducted.

⁷¹

[https://www.isi.gov.ie/en/ISI/Annual%20report%20\(eng%20version\)%202018.pdf/Files/Annual%20report%20\(eng%20version\)%202018.pdf](https://www.isi.gov.ie/en/ISI/Annual%20report%20(eng%20version)%202018.pdf/Files/Annual%20report%20(eng%20version)%202018.pdf)

Table 9. Personal Insolvency Arrangements Approved 2014-2019⁷²

2014	2015	2016	2017	2018	2019
126	619	697	733	959	1,055

Clearly, this option, developed by the Irish legislature since 2012, offers a valuable solution to distressed home loan mortgage court proceedings.

⁷² See Insolvency Service of Ireland Statistics:
<https://www.isi.gov.ie/en/ISI/2019%20Q4%20ISI%20Statistics%20Report.pdf/Files/2019%20Q4%20ISI%20Statistics%20Report.pdf>

5. The *Grant* case

The case of *Grant v. The County Registrar from the County of Laois and Pepper Finance Corporation (Ireland) Designated Activity Company* [2019] IEHC 185, established that County Registrars and Circuit Court Judges in mortgage possession cases must examine all mortgages of their own motion for unfair contract terms, and strike out any unfair terms found.

This case also established that Irish courts must address the proportionality of making possession orders in the light of Article 7 of the EU Charter of Fundamental Rights (worded similarly to Article 8 of the European Convention on Human Rights - ECHR) although unlike Article 8 ECHR having the effect of binding EU law. This arises from the effects of the application of the EU Unfair Contract Terms Directive in Irish law, which had not been applied in Irish courts comprehensively until that case.⁷³

Mr. Justice McDermott stated that County Registrars have the jurisdiction and the obligation to conduct own motion assessments for unfair terms (Para. 84) The decision provides guidance on the role of the Registrar in these cases stating that if the Registrar finds that there may be a defence to the defendants due to a potential unfair term in the contract, the Registrar should direct the case to a Circuit Court Judge. In the *Grant* case, however, the own motion assessment for unfair contract terms had not been carried out.

The court is not satisfied on the evidence that it was at the time this order was made the practice of the County Registrar to consider the unfairness of terms within the scope of the directive and regulations of its own motion as required by the jurisprudence of the CJEU or that he did so in this case. Consequently, I am satisfied that the respondent [Registrar] failed to take a step which was a necessary pre-requisite to a lawful order for possession in the circumstances. The remaining question to be considered is whether notwithstanding this conclusion the court should exercise its discretion to refuse the relief sought by the applicants on the various grounds advanced by the notice party (para 87).

This decision acknowledges that the EU Charter of Fundamental Rights and European Convention on Human Rights must be taken into consideration when the loss of the home is at stake in mortgage possession cases (paras. 129 – 130). This means that possession must be a proportionate response to the interference with the right to respect for home of the borrower. The Court dealt with the application of the proportionality requirement in two ways. Firstly, it looked at whether the nature and extent of the *judicial process and review* available to the financial entity in Ireland was proportionate to the remedy (ie. taken from the view of the financial entity). Then, it discussed factors that Courts should take into consideration in determining *whether possession is a proportionate remedy* in particular cases.

The Court did not, however, consider in detail whether the eviction would be an interference with the right to respect for home of the borrower, unlike the European courts approach to these human rights. **It did not carry out any detailed proportionality assessment at all** of the situation of the Grants – on the basis that **they had not**

⁷³ Article 7 of Directive 93/13 states that EU Member States have a duty to ensure that adequate and effective means exist to prevent the continued use of unfair terms. See Case C-415/11 *Aziz v Caixa d'Estalvis de Catalunya*, para 50.

requested such an assessment at the original hearing (where they were unrepresented).

The Judge supported the view that the Irish mortgage enforcement process protected the right to a home because Irish Courts have jurisdiction to consider all the evidence including:

- the terms of the contract;
- the amount and duration of the loan;
- the amount outstanding;
- the extent of the arrears;
- the nature and extent of default;
- the steps taken to facilitate the borrowers to address their default before seeking possession (e.g. under the Code of Conduct on Mortgage Arrears (CCMA));
- the extent, if any, to which the borrowers have engaged with the lender or are financially capable of doing so;
- all relevant evidence concerning the financial and personal history of the borrowers. (para. 130).

Significantly, in his determination that Ireland adequately protects borrowers' rights, the Judge held that the CCMA should be fully considered by the Court - by relying on the "requirements of the lenders to comply with the CCMA and their obligation to provide the borrowers with an adequate, practicable, and effective means of avoiding either the calling in of the loan or the issuing of possession proceedings by engaging in an effective way with the borrowers within the code" (Para. 130).

The Judge concluded that the Court may receive and consider all relevant evidence concerning the financial and personal history of the borrowers, stating that although the court cannot act solely on the basis of "sympathetic factors" such as ill health or old age," it *will* (emphasis added) have regard to all other relevant matters as set out above" (Para. 130). Mr. Justice McDermott found that a limited proportionality assessment was conducted by the Registrar in the Grants' case as evidenced by the fact that the Registrar granted a stay of nine months on the order (Para. 131). He further noted that despite the "extensive procedural safeguards" for borrowers (noted above), the Grants did not avail of them except to seek a stay of the execution of the possession order (Para. 135).

Since that Judgment in April 2019, County Registrars and Circuit Court Judges are required to conduct, on their own initiative, an examination of mortgage contracts, including Deeds of Mortgage for unfair terms, and strike out any unfair terms. They must also determine whether possession is a proportionate remedy in cases where the borrower has specifically made such a request and provided evidence to support it. However, a full and proper proportionality assessment of the interference with the right to respect for home has yet to be carried out in any reported Irish mortgage possession cases.

6. The Land and Conveyancing Law Reform (Amendment) Act 2019

The Land and Conveyancing Law Reform (Amendment) Act (LCLRAA) 2019, which commenced on 1st August 2019, significantly amends the law in Ireland on mortgage possession cases. It obliges courts dealing with all mortgage possession cases to consider a set of factors, including the proportionality of granting a possession order on the principal private residence of the mortgagor or his/her spouse/civil partner. Clearly, this amounts to an interference with the right to respect for home of the borrowers and their dependents. The legislation draws on extensive human rights law, as well as the protection of children and other provisions.

The LCLRAA amends part of the Land and Conveyancing Law Reform Act 2013, which already permits a mortgage eviction case to be adjourned for a period up to two months to allow a party to the proceedings to put in place a personal insolvency arrangement (PIA).

This legislation, which began as the *Keeping People in their Homes Bill*, builds on the existing institutional and legislative protections for home loan borrowers in mortgage distress by adding a new section to the Land and Conveyancing Law Reform Act 2013. While the proportionality of interference with the right to respect for home had been addressed by Irish courts in relation to evictions from State housing,⁷⁴ Irish courts had adopted the England and Wales approach, holding that proportionality assessments were not applicable in private party (non-State) eviction proceedings.

The LCLRAA applies to all proceedings involving mortgages on principal private residences. This is particularly relevant for those households in long term mortgage arrears, where other solutions have proven ineffective. These accounts comprise almost half of all arrears cases, and 90% of arrears balances outstanding.

The amended legislation applies to proceedings for possession of land or housing which is the principal private residence of the mortgagor or his/her spouse or civil partner) and which were:

- adjourned to allow a person to put in place a PIA, and a PIA was not made or has come to an end;
- an application was made for an adjournment to put in place a PIA and that application was refused;
- the person participated in good faith in a "designated scheme" [*Abhaile* or Mortgage to Rent];⁷⁵ or,
- the person engaged a PIP to help them resolve their arrears, and a PIA was not made or has come to an end.

The legislation sets out the list of matters which the Court must take into account, namely:

- whether the making of the order would be proportionate in all the circumstances;

⁷⁴ *Donegan v Dublin City Council* [2012] IESC 18.

⁷⁵ Designated Scheme - where the mortgagor has participated in "good faith" are *Abhaile* and Mortgage to Rent - see S.I. No 399/2019.

- the circumstances of the mortgagor and his or her dependents (if any) in respect of whom the principal private residence the subject of the proceedings is their principal private residence;⁷⁶
- whether the mortgagee has made a statement to the mortgagor of the terms on which the mortgagee would be prepared to settle the matter in such a way that the mortgagor and his or her dependents could remain in the principal private residence;
- the details of any proposal made, whether prior to or following the commencement of the proceedings by, or on behalf of, the mortgagor to enable the mortgagor and his or her dependents to remain in the principal private residence, including any proposal for participation by the mortgagor in a designated scheme, or to secure alternative accommodation;
- the response, if any, of the mortgagee to any such proposal; and
- 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.

When considering whether or not a repossession of a mortgaged home is proportional the Court should have regard to the amount of the principal and arrears remaining, and the market value of the home at the **date the proceedings began**.

The LCLRAA commenced on 1st August 2019 under SI. No. 397/2019, and is therefore applicable in Irish Courts from that date. The key question is whether it has been used in the courts. Analysis of the Listed cases before and after the commencement of the Act seems to indicate some noticeable change in the pattern of cases. There were 1,425 cases where the Circuit Court Judge could have applied the statutory proportionality test to the case and drawn matters to a conclusion.

This also raises a question as to whether Irish courts are willing to apply socio-economic rights protections, whether established in legislation (such as any potential right to housing)⁷⁷, or even constitutional provisions (such as Article 42A of *Bunreacht na hEireann*.)⁷⁸

⁷⁶ This part of the Act is intended to ensure that the best interests of any children and person with disabilities residing in the home are adequately considered by Irish courts in mortgage possession cases.

⁷⁷ In *Fagan v Dublin City Council* [2019] IESC 96 the Supreme Court refused to interpret the Housing (Miscellaneous Provisions) Act 2009 as creating enforceable rights to housing for children where the parents were separated. This was based on a somewhat dated model whereby the State directly provides homes for people in need, rather than the contemporary situation whereby the State provides a subsidy payment to people to participate in the private rental market.

⁷⁸ This states that: "The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights."

Table 10. Numbers of cases Listed before 1st August 2019

Institution	Pre LCLRAA (1 Aug 2019)	County Registrar	Callover	Circuit Court
Permanent TSB	953	771	80	102
EBS	815	579	76	160
Start Mortgages	808	596	82	130
AIB	701	468	73	168
Bank of Ireland	676	371	98	207
KBC	401	229	72	99
Ulster Bank	547	431	39	77
Promontoria	407	306	23	78
Mars	302	187	41	74
Pepper	244	176	19	49
Tanager	170	136	15	19
Shoreline	139	90	14	35
Haven	76	50	11	15
Stepstone	39	29	7	3
Havbel	48	32	4	12
Springboard	31	23	2	6
Bluestone Finance	21	18	1	2
Bank of Scotland	13	5	3	5
Others	72	39	14	13
Total	6,463	4,536	674	1,254

Table 11. Numbers of cases Listed after 1st August 2019

Institution	Post LCLRAA	County Registrar	Callover	Circuit Court
Permanent TSB	1,413	1,072	80	261
EBS	664	451	73	140
Start Mortgages	899	507	154	238
AIB	534	303	87	144
Bank of Ireland	498	234	109	155
KBC	287	132	68	87
Ulster Bank	537	421	33	83
Promontoria	391	250	52	89
Mars	263	145	45	73
Pepper	194	124	25	45
Tanager	114	81	17	16
Shoreline	150	116	11	23
Haven	65	39	10	16
Stepstone	11	4	3	4
Havbel	65	39	10	16
Springboard	24	10	5	9
Bluestone Finance	15	13	0	2
Bank of Scotland	6	1	2	3
Others	57	27	9	21
	6,187	3,969	793	1,425

There is some difference in the relative numbers of cases on the Registrars and Judges Lists before and after 1st August 2019 when the new legislation on

proportionality assessments came into force. Some 70 of Listed cases before that date were recorded in the Registrars Lists and 19% in the Judges Lists. However, after that date, some 64% of cases were recorded in the Registrars Lists, and 23% in the Judges Lists. Without more detailed research it is not possible to state that this is a significant change, but it does mean that more households are having the opportunity for a judicial assessment of the proportionality of the interference with their rights to home.

Clearly, there is a need for training for lawyers and Judges into how the proportionality of the interference with the right to respect for home can be assessed under this legislation.

7. Mortgage Arrears and Repossessions overview

The Central Bank of Ireland Statistical Release shows that at September 2019, there were 742,075 mortgage accounts related to principal dwellings (PDH), with a value of €98.1bn.⁷⁹ Some 60,596 were in arrears, of which 42,065 (5.7%) were in arrears over 90 days. Some 85,315 accounts had been restructured to deal with arrears.

One major weakness in the Central Bank reports is that they do not provide a comparative breakdown of arrears statistics across the financial entities engaged in court proceedings – only aggregated figures are provided based on the data provided to the Central Bank by the entities themselves. There is no independent verification and the detailed data is not published.

However, the Central Bank reports state that Non-bank entities accounted for 12% of PDH mortgages, with 19% in arrears over 90 days and 15% in arrears over two years. There were 27,085 accounts in arrears over 720 days.

The following Chart from the Central Bank Report on Mortgage Arrears shows that the levels of long term arrears – over 720 days is hardly declining at all – despite the range of ‘solution’ such as *Abhaile* Scheme and insolvency arrangements. This represents the cohort of homeloan borrowers who are most likely to be included in the court statistics.

Central Bank of Ireland *Residential Mortgage Arrears and Repossession Statistics* show that in the period from September to December 2019 courts granted possession orders over 150 PDH accounts, with 102 properties taken into possession by financial entities with 65 of these “voluntarily surrendered or abandoned” and 37 ‘repossessed’ on foot of a court order. In the quarter, according to the Central Bank, some 315 accounts had legal proceedings concluded, but with arrears remaining outstanding.

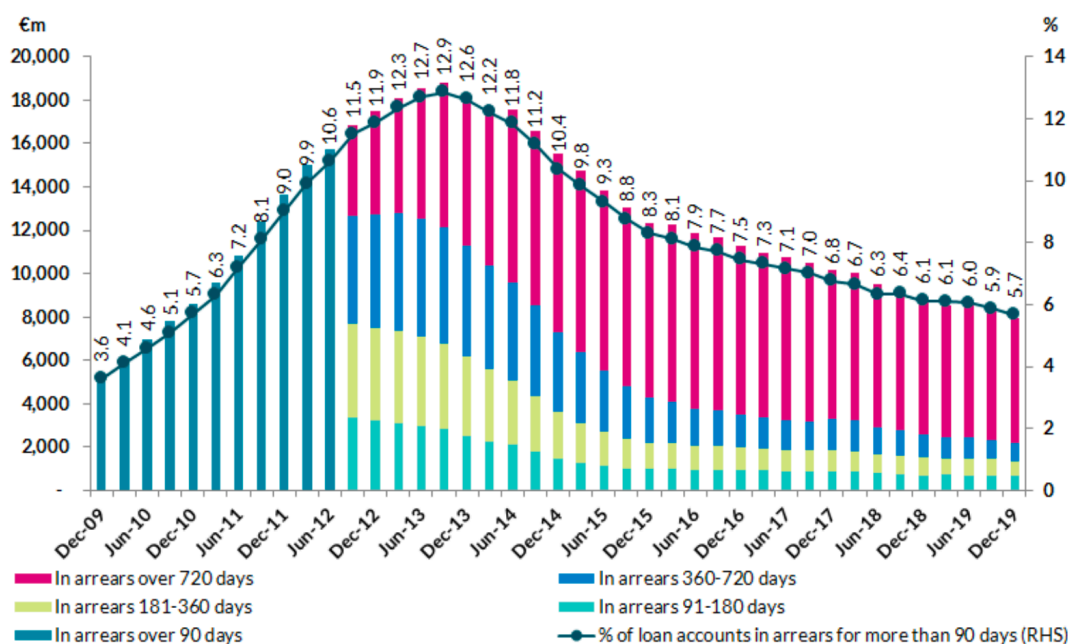
There is no reliable research on the personal outcomes for those who lost their homes in these circumstances in Ireland.⁸⁰

⁷⁹ Central Bank of Ireland, Statistical Release December 2019 (latest available at time of publication: <https://www.centralbank.ie/docs/default-source/statistics/data-and-analysis/credit-and-banking-statistics/mortgage-arrears/residential-mortgage-arrears-and-repossession-statistics-december-2019.pdf?sfvrsn=4>). According to the Central Bank of Ireland - mortgage account means an account which records loans to individuals for house or apartment purchase, renovation, improvement or own construction of housing fully or completely secured by a mortgage on the residential property which is or will be occupied by the borrower as his/her principal private residence. “Top up” of existing mortgages and remortgages should also be recorded in this category. Mortgages secured on properties located in the State only should be included. This means that there may be more than one account per property, for example if a single property relates to a mortgage account and a separate top-up account.

⁸⁰ There is some discrepancy between Central Bank data based on returns from lenders, and Court Service of Ireland data, in relation to numbers of actions commenced and numbers of possession orders granted.

Chart 6. Principal Dwelling House (PDH) mortgage accounts in arrears 2009 – 2019 (Central Bank of Ireland)

Figure 1: PDH Mortgage Accounts in Arrears over 90 Days



Note: The breakdown of arrears greater than 90 days is not available pre-September 2012.

Clearly, the risk of mortgage repossession or loss of home is much greater for those in arrears for over two years. A 2015 study of 21,000 households, based on Central Bank of Ireland loan-level data and borrowers' Standard Financial Statements, showed that those with long-term mortgage arrears (LTMA) (over one year) were often single parent households with children – a cohort with women as head of household. A Central Bank research report shows that:

Those in long term arrears who are most at risk of repossession are significantly more likely to have the following characteristics: lower income, higher mortgage burdens relative to income, larger mortgage affordability shocks, unemployment shocks and divorce since origination. They are also more likely to have accumulated large stocks of non-mortgage debts, such as Buy-to-Let mortgages, credit card, auto loans and other consumer debt. We also show that LTMA borrowers face higher interest rates, and that LTMA are more prevalent among more vulnerable family types, such as single borrowers with multiple children.⁸¹

⁸¹ Kelly, R. and McCann, F. (2015) 'Households in long-term mortgage arrears: lessons from economic research', Central Bank of Ireland, Economic Letter Series, Vol. 2015, No. 11, p. 2. Available at <https://www.centralbank.ie/docs/default-source/publications/economic-letters/economic-letter--vol-2015-no-11.pdf?sfvrsn=10>. Remarkably, the report ignored the equality and gender dimension in its analysis, although the Central Bank is challenging supervised firms over lack of diversity at board and management levels. See <https://www.centralbank.ie/news/article/central-bank-will-challenge-supervised-firms-on-board-management-diversity-levels-deputy-governor-donnery-4-May-2018>

A Study by South Mayo Money Advice and Budgetting Service (MABS) of 50 households in mortgage arrears published in 2016,⁸² showed that the average age of distressed mortgage clients was 50 years. Family sizes were also larger than average, and household income was relatively low, with poverty rates and unemployment rates relatively high. Some form of assistance, scheme, pension or welfare payment was the main source of household income for most, with only very few having any 'realisable asset' at all to fall back on. Significantly, most encountered payments difficulties in the early years of the loan, "often where brokers, sub-prime lenders and subsequently wound-up institutions were involved". Most borrowers in the study had been offered loans based on 'precarious' income, related to construction or services industry work. The research also showed that although there is a willingness by lenders to restructure, this was only when lenders expected to recoup the full amount of capital and interest, and in no case had a write-down been proposed.

In a follow-up study 18 months later, some arrears had been settled and repayments commenced. However, in addition to the households who had lost their homes in the earlier study, loss of family home was identified as imminent or likely outcome in some 20% of cases, in the foreseeable future.⁸³

This MABS study provided valuable data on the outcomes of repossession hearings by the County Registrar in Castlebar Circuit Court between January and July 2017. Of some 504 cases, some 67% were adjourned, some 7% were struck out, and a possession order was granted in 3.3% of cases.⁸⁴ The *Abhaile* Scheme, Personal Insolvency Practitioner or MABS assistance was only available in 9% of cases.⁸⁵

⁸² Stamp. S., & Joyce, P. (2016) *Analysis of Mortgage Arrears Among South Mayo MABS' Clients*, South Mayo MABS, available at: https://www.mabs.ie/downloads/news_press/South_Mayo_MABS_Mortgage_Research_August2016.pdf

⁸³ Stamp. S., & Joyce, P. (2017) *Analysis of Mortgage Arrears Among South Mayo MABS' Clients, April 2016 v September 2017*, South Mayo MABS. http://www.citizensinformationboard.ie/en/news/2017/news20171212_1.html

⁸⁴ The figures were recorded by the dedicated Mortgage Arrears Adviser at South Mayo MABS, Vivienne Molloy, at each sitting over that time.

⁸⁵ These were mainly cases where a PIP was involved or where the outcome was *Abhaile*-related.

8. The Courts Process, Court Lists and the Methodology for the Research

In Ireland, almost all home loan mortgage possession cases are heard in the Circuit Court, or by the County Registrar following the changes introduced by the Land and Conveyancing Law Reform Act 2009. There are eight Circuit Areas, Dublin, Cork, Midland⁸⁶, South Eastern⁸⁷, Eastern⁸⁸, Northern⁸⁹, South Western⁹⁰ and Western.⁹¹ There can be an appeal to the High Court, which also deals with commercial mortgages (and sometimes home loss can be linked with these loans). The High Court cases are not included in this study, but can add further to the numbers of possession orders granted.

Proceedings for possession or sale on foot of a mortgage require a non-exhaustive list of proofs, including sworn statements by financial entities verifying factual matters, such as the details of the security and the arrears, and that the entity has complied with any code of conduct of the Central Bank.⁹²

The Civil Bill is then usually published in a List, with other cases, by the Courts Service of Ireland, publicly, online, and with a record number, name of Plaintiff and Defendant(s), and whether and if they are represented legally, or by representing themselves (when they, personally, file an Appearance). Where no Appearance has been filed, the List records either nothing, or 'unrepresented'. Invariably, the financial entity /plaintiff is represented by a Solicitor, and mostly at this level, by a Barrister also.

This initial list is dealt with by the County Registrar, the Court Service Official, appointed to run the Circuit Court office. His/her role and function is determined by the Circuit Court rules. This essentially involves the administration of a judicial function at a basic level. But where there is a defence filed, or generally speaking, where controversy arises (or other judicial intervention in the opinion of the County Registrar is required in accordance with the Circuit Court Rules and Directions) the matter is referred into the Circuit Court Judges list. This has more recently interpreted to include any potential defence arising from the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 implementing Directive 93/13 (UCTD) on unfair terms in consumer contracts - a minimum harmonising consumer law measure.⁹³

⁸⁶ Counties Laois, Roscommon, Longford, Sligo, Offaly and Westmeath.

⁸⁷ Counties Carlow, Tipperary, Kilkenny, Waterford, and Wexford.

⁸⁸ Counties Louth, Meath, Wicklow and Kildare.

⁸⁹ Counties Leitrim, Donegal, Cavan and Monaghan.

⁹⁰ Counties Limerick, Kerry and Clare.

⁹¹ Counties Galway and Mayo.

⁹² In *Irish Life and Permanent v Dunne and Irish Life and Permanent v Dunphy* [2015] IESC 64, the Supreme Court held that the Code of Conduct on Mortgage Arrears (CCMA) did not to create any new legal rights for mortgagors. An *affidavit* by the lending institution to the effect that proceedings were commenced outside the moratorium period is sufficient to establish lender compliance with CCMA. This case was decided before the transposition of the EU Mortgage Credit Directive in 2016. See also *Grant v. The County Registrar from the County of Laois and Pepper Finance Corporation (Ireland) Designated Activity Company* [2019] IEHC 185 which seems to suggest that compliance with all elements of the CCMA was required. See also *Promontoria (Aran) Ltd v Burns* [2020] IECA 87.

⁹³ Council Directive [93/13/EEC](#) of 5 April 1993 on unfair terms in consumer contracts, OJ L 095, 21 April 1993. European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, SI 1995/27.

While the Registrar's and Circuit Court Lists are open to the public, the files are not, and are regarded as the private information of the parties. All three Lists – Registrars, Callover and Judges are published online by the Courts Service of Ireland. It is important to note that these Lists can change right up to the hearing, and cases may be withdrawn, or settled. Thus, cases can appear on the County Registrars or Callover Lists, or alternately appear on the Judges List, before being withdrawn or settled.

The Judges List consists of a List of cases sent forward by the County Registrar. Possession cases are sometimes heard alongside other civil matters. A Circuit Court Judge can also proceed to hear a case or decide to adjourn matters. In the nature of possession proceedings, the trauma associated with possession orders is distressing, and the Courts are anxious to be seen as facilitating debt resolution by other means, where possible.

The case Lists used in this research were published online by the Courts Service of Ireland and divided into three categories:

- The County Registrars' List
- The Circuit Civil Court or Judge's List
- The County Registrars Callover List.

This latter List is an overview List of the County Registrar of cases ready to be dealt with by a hearing, where the parties are required to attend to confirm whether the case is ready to proceed, all submissions have been lodged, and other matters. These cases overlap with the Registrar's or Judges' Lists, since it is for the purpose of compiling those Lists that the "Callover" List is required. The result is a duplication of cases Listed between the three Lists, or on any one List, where a case is adjourned.

The Lists are removed from the Courts Service website after 30 days. For this study the Courts Service Lists were downloaded at monthly intervals to capture most, if not all, cases. Contact was made with the Courts Service of Ireland statistical section to clarify issues in relation to the publication of Lists, and the reliability of these.

The Lists record the names of the parties and the legal representatives of each party, if any. Non-representation is evidenced by the absence of any legal representatives in the List. Self represented/lay litigants are shown on the court lists as "self," "lay litigant," "in person," "defendant in person," or the person's name.

The cases listed include principal dwelling house and buy to let mortgages, although no breakdown is possible between these. It is important to acknowledge that these Court Lists change regularly – even on the date of the court. However, by examining a regular sample of the published Lists over a nine-month period, it is possible to get an overall picture of the activity taking place in Irish courts.

9. Direct Supervision of Significant Institutions by the ECB

All of the possession/home loss cases examined in this study took place in Irish courts. However, there is an overarching EU dimension. The great majority of home possession cases, examined in this study, involved ECB directly supervised lenders enforcing the security on the homeloan mortgages. Major questions arise on how the EU consumer and human rights of those at risk of losing their homes are being protected in these proceedings. These rights flow from the role and obligations of the ECB, as an EU institution, in the prudential direct supervision of credit institutions and mortgage lenders in Ireland.

The Single Supervisory Mechanism (SSM) conferred specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions in Ireland and other EU Member States.⁹⁴

For SSM purposes, credit institutions have been separated into 'significant' or 'less significant.' Significant credit institutions are directly supervised by ECB staff, together with national supervisors (such as the Central Bank of Ireland). The ECB directly supervised significant credit institutions involved in mortgage possession proceedings at the time of this research in Ireland were:

- Allied Irish Bank (which includes EBS and Haven);
- Bank of Ireland;
- Ulster Bank;
- KBC Bank Ireland;⁹⁵

Permanent TSB is regarded as one of the 'less significant institutions' and supervised by the Central Bank of Ireland.

The application of the EU Charter of Fundamental Rights to this process is examined in detail in a Set of Briefing Papers at <http://www.nuigalway.ie/chlrp/news/this-time-it-will-be-different.html>

⁹⁴ Regulation 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions - The SSM Regulation, OJ L287, 29 October 2013, 63–89.

⁹⁵ ECB, List of supervised entities. Cut-off date for changes in group structures: 1 December 2019.

https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.listofsupervisedentities202001_en.pdf

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