

# Your EU Consumer and Human Rights

# A Guide for People in Mortgage Distress in Ireland



New Updated Edition 2020



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**CHRP**  
Centre for Housing Law, Rights and Policy

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## **Introduction**

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This guide is designed to help people in mortgage distress understand and advocate for their EU consumer and human rights. It is not a comprehensive guide to all of your rights as a borrower under EU or Irish law but rather focuses specifically on two legal requirements under EU law that have the potential to aid many borrowers facing the possibility of possession:

1. The requirement that courts assess mortgage contracts to determine whether there are any unfair terms and make needed adjustments, and
2. The requirement that courts determine whether possession is a proportional response to under/non-payment taking into account the impact of possession on the borrower's human rights.

This Guide was created as part of the Open Society Foundations' Abusive Lending Practices Project <http://abusivelending.org/>, which, in conjunction with the NUI Galway Centre for Housing Law, Rights, and Policy (CHLRP), Community Action Network (CAN) and a group of Irish lawyers and lay advocates, seeks to ensure that the human and consumer rights of borrowers are protected by courts in possession cases. It follows from a series of Seminars in 2017 setting out the EU consumer and human rights law applicable to mortgage possession cases. The presentation and papers from these seminars, organized with Irish Centre for European law, are available here; <http://www.icel.ie/UCTD>

We developed this Guide because we think that it is critical that you, as a borrower and a consumer, have the information that you need to understand and advocate for your rights. We note, however, that these arguments—and in fact, this entire approach—is new to Irish courts in possession cases. Therefore, these arguments may not initially be acknowledged by registrars, judges, and lawyers and it may require additional time and effort to persuade them to apply this body of law.

This Guide is for informational purposes only. It does not provide legal advice, and is NOT a substitute for consulting a lawyer. We encourage you to read this Guide and take it to your solicitor. Please bear in mind that the law is continually evolving and the arguments and citations in support of these arguments may have changed since these documents were produced in December, 2017 and updated in January, 2020 with assistance from Community Action Network. Part 1 of the Guide discusses your legal rights and Part 2 provides information on how you can advocate for your rights in your possession case. The Annexes contain more detailed information.

# Part 1. Your EU Rights in Possession Cases

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## A. Overview of the Law

### **1) The Unfair Contract Terms Directive**

The Unfair Contract Terms Directive (UCTD) is a European law (a directive) that EU member states are required to enforce on behalf of consumers. In fact, all EU Member States, including Ireland, made this law part of their domestic law since the 1990s. So, although the UCTD comes from European law, it is also part of Irish law. Unfortunately, this law is not commonly raised in courts on behalf of consumers facing possession in Ireland, and borrowers may not be aware of their rights under the UCTD or how this might afford a defence in possession proceedings.

The UCTD applies to all kinds of contracts—including mortgages where the contract is between a consumer and a business and the contract contains standard terms, that is, terms which you may not have had the opportunity or legal knowledge to negotiate. You are considered a consumer under this law if you borrowed money to purchase a home or borrowed against your home for personal expenses, such as renovations to your home or education. If you borrowed to purchase investment property or borrowed against your home to fund a business, your situation is more complex and you will need a lawyer to tell you whether this law applies in your particular case.

If you are a consumer, the UCTD requires that the court making the ruling on the possession order (a registrar or judge) assesses mortgage contracts and all other documentation provided to borrowers to determine whether any terms are unfair. The court is required to do this on their own motion, without being asked. If the court finds the terms to be unfair, it cannot enforce the term against you which MAY result in an adjustment of the amount owed. The contract will, however, continue to bind both parties, if it is possible, for the contract to continue without these terms. A court finding that one or more terms are unfair does NOT mean that the contract is invalid or unenforceable, it simply means that the particular term is unenforceable. Many if not most contracts are capable of continuing without terms the court has found unfair.

While it is the court's responsibility to determine whether there are unfair terms without being asked, you can look through your mortgage documents, make your own assessment of whether they contain any unfair terms, and bring these terms to the attention of your solicitor or the court if you do not have a solicitor. Part 2 provides more information about how to determine when a term may be considered unfair under the UCTD.

### **2) The EU Charter of Fundamental Rights**

As a citizen of the European Union, you are entitled to the full protection of the human rights conferred by the European Union Charter of Fundamental Rights (EUCFR). Irish courts are required to take these rights into consideration whenever they are acting within the scope of EU law—which they do when they enforce contracts covered under the UCTD—such as mortgage contracts.

The Court of Justice of the European Union (CJEU) interprets EU law and provides guidance to member states on how it should be enforced. The CJEU had held that your fundamental right to a home under Article 7 of the EUCFR must be taken into consideration before possession orders are ordered by a court in these cases. What this means is that before courts enter possession orders, they are required to consider the impact of possession on the rights of you and others in the household, and determine whether possession is a proportional remedy, taking into account the impact on other fundamental

rights under the EUCFR. The requirement that courts conduct proportionality assessments before granting possession orders was enacted into Irish law in 2019. Annex F contains a complete list of rights under the EUCFR, but, for example, in addition to the right to a home, the EUCFR include the rights of children, older people, and people with disabilities living in the home.

However, unlike the requirement that the courts assess for unfair terms on their own motion, you are required to specifically request a proportionality assessment and tell the court why possession is not a proportionate response in your case.

Section C2 below provides information on the criteria the court should apply in determining proportionality. But, as you will see, this requires making complex legal arguments and gathering and presenting evidence to support your claims. Once again, we strongly recommend that you engage a solicitor to represent you if at all possible. Information on how to find a solicitor is contained in Annex B.

## B. Remedies—What this Law Can—and Can’t—Do For You

### ***1. Unfair Terms Assessment***

As discussed above, if a court finds that a term is unfair, then that term is unenforceable. Finding that a term is unfair may have an impact on the overall amount that you owe (and, if so, will lead to an adjustment) but is unlikely to mean that the entire contract is unenforceable. It is in your best interest, however, to identify as many unfair terms in your documents as possible—even if they do not directly impact how much you owe—because this demonstrates to the court that the lender was acting in an unfair and irresponsible manner, factors that the court should consider in the second assessment for proportionality, discussed below.

### ***2. Proportionality Assessment—Impact on Human Rights***

If the court finds that a possession order is not proportionate in your case, it could adjourn your case for a specific period of time, suspend your case indefinitely, or dismiss your possession case. Even if the court dismisses your possession case, this does NOT mean that your contract is VOID or that you are no longer responsible for your arrears, it simply means that the lender cannot put you out of your home through a possession order at this time. The lender may still seek to collect arrears owed through another legal procedure, e.g. by enforcing its contractual rights. However, you can still raise the same defences should they try again to obtain possession of your home.

Caution: there is no guarantee that even if the court applies this law correctly it will decide that you can stay in your home. If you advocate for your rights and you are unsuccessful, you may increase the amount you owe because the court has the power to order you to pay for the other party's legal fees.

## C. Requesting an Unfair Terms and Proportionality Assessment in your case

While it is in your best interest to raise these arguments as soon as possible in your case, under EU law, you can request these assessments any time up until eviction regardless of Irish procedural requirements. It may also be possible to raise these arguments after eviction if the court gives you permission to reopen your case. However, any arguments that you make at any point in the proceedings must be put in writing to the court and must be in a specific form. **It is NOT enough to go into court and make these requests orally.** A list of template pleadings for making these arguments is provided in Annex G.

### 1. Potentially Unfair Terms Under the Unfair Contract Terms Directive (UCTD)

The UCTD provides a **legal definition** of what is considered an “**unfair term**” and cases from the Court of Justice of the EU (CJEU) interpret this definition. In order for you to claim that a term in your mortgage is unfair, you must first determine whether it meets the legal definition of an unfair term.

Under the UCTD, a term is unfair if it causes a **significant imbalance** in the rights and obligations of the parties to the disadvantage of the consumer in violation of the requirement that lenders act in **good faith**.

A **significant imbalance** can be due to:

1. Economic harm **and/or**
2. “Sufficiently serious” harm to your legal situation. This can include restricting your rights under the contract, limiting your ability to exercise those rights, or imposing another obligation that is not already required by Irish law.

**Importantly you do not have to show that you were ACTUALLY harmed or that the term was ACTUALLY enforced in your case. You simply have to show that the term has the potential to cause economic harm or sufficiently serious harm to your legal situation.**

There is no set definition of **good faith**. In general, it means that the lender must act honestly and not take advantage of consumers. In relation to **standard terms** in mortgages, courts are required to consider whether the borrower would have agreed to the term if he/ she was given the opportunity to negotiate the term. For both standard and core terms, the court must look at Irish law on the term, if there is any.

In addition, all terms must be in clear, **intelligible language**. This means that the terms of the contract should make sense grammatically to you and that the contract is transparent enough for you to be able to evaluate, on the basis of “clear, intelligible criteria” the economic consequences for you. When there is doubt about the meaning of a term, the interpretation most favorable to the consumer applies. Unclear terms are not necessarily unfair however. An unclear term must still be assessed for fairness in the normal way.

In assessing whether a term is unfair, courts are required to consider the circumstances under which the contract was concluded and all of the other terms in the contract or any related contract and any other materials provided by the lender related to the loan. Therefore, how you first interacted with the lender/mortgage broker (the time and place), how contact was initiated (did you contact him or did he contact you?), whether you met in person or just communicated through phone or email, and any exceptional circumstances could be relevant as well.

In order to identify possible unfair terms you are going to have to read through all of your mortgage documents and other communications from the lender at the time the loan was initiated, including any brochures and if possible, even publicity material - even a *paragraph in a brochure describing your mortgage options could be found unfair*. For a template pleading for obtaining your documents from the lender, see Annex G.

The UCTD contains a list annex of certain types of terms that could be considered unfair. This is a “grey list,” that is, these types of terms are not automatically considered unfair. Also, this list is not exhaustive — other types of terms not included in this list could also be found unfair. This grey list along with some examples of potentially unfair terms from Irish mortgages can be found in Annex E.

For example, a key term to look at is the term describing your interest rate. While this is a core term and will only be assessed for unfairness if it is unclear (see box below) if you have a variable interest rate and your documents do not explain how variations in the interest rate will be determined, that may be considered both an unclear and an unfair term. Likewise, a term that states that interest rate variations are at the sole discretion of the lender could also be considered unclear and unfair. If you were improperly steered away from a tracker mortgage, you may also be able to claim the terms related to your interest rate were unclear and unfair.

Once the court has assessed your mortgage for unfair terms, deleted those terms, and made any necessary adjustments, it must then determine whether the contract can continue without those terms. **As noted above, most mortgages will be able to continue with terms deleted.**

## An Important Difference between Standard Terms and Core Terms in Contracts

Standard terms are non-core terms that you did NOT have an opportunity to negotiate. These are terms that are contained in pre-formulated or form contracts. Almost all terms in mortgage contracts and supporting documents are standard terms.

Core terms are the main subject matter of the contract, relating to price of a good or service and the goods or services provided in return. They may or may not be individually negotiated. In a mortgage the initial interest rate, length of the loan and the amount of money borrowed are core terms.

The UCTD was specifically designed to cover standard terms in contracts under the rationale that this is where lenders and other sellers can take advantage of their superior knowledge and bargaining power. So, as a general rule, there is no requirement that courts determine whether core terms are unfair. But there is an exception to this rule—where a core term is not in clear, intelligible language, it can be evaluated for unfairness. So, for instance, while the amount borrowed is straightforward, the interest rate and how interest is calculated and compounded may be unclear.

## **2. The Criteria for Determining Whether Possession and/or Eviction are a Proportional Response**

Once you request a proportionality assessment, the court should then determine whether possession and/or eviction are a proportionate response to your breach of the mortgage terms. There are two legal bases on which to request a proportionality assessment. You can base your claim on one, the other, or both. It is here that the court should consider, among other things, the impact of possession and/or eviction on your human rights.

Under new legislation, since 1st August 2019, Irish courts are required to determine whether possession is a proportionate response before granting or refusing possession orders. The Land and Conveyancing Law Reform (Amendment) Act 2019 sets out the specific factors to be taken into account by the court. In order to qualify for this proportionality assessment under Irish law (and you do not have to rely on consumer law), you must demonstrate that you have either:

- (i) participated in good faith in a designated scheme; or
- (ii) engaged the services of a personal insolvency practitioner to assist in resolving mortgage arrears.

A “designated scheme” includes Mortgage-to-rent or the Abhaile scheme. These schemes, together with personal insolvency arrangements, are examined in more detail below.

Once you can show that you have attempted, even if unsuccessfully, to resolve your case under one or more of the schemes listed above, the court must take the following factors into account;

- (a) whether the making of the order would be proportionate in all the circumstances (To determine this the court may take into account: the total amount that remains to be paid to the mortgagee on foot of the mortgage or any associated loan agreement; the amount of arrears of payments due on foot of the mortgage; and the advised market value of the principal private residence on the date on which proceedings were commenced.)
- (b) the circumstances of the mortgagor and his or her dependants (if any) who live in the property that is the subject of the proceedings and which is their principal private residence;
- (c) 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 dependants referred to in paragraph (b) could remain in the principal private residence;
- (d) 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 dependants
  - (i) to remain in the principal private residence, including any proposal for participation by the mortgagor in a designated scheme, or
  - (ii) to secure alternative accommodation;
- (e) the response, if any, of the mortgagee to any proposal made by, or on behalf of, the borrower under paragraph (d)(i);
- (f) 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.

***In addition, the court must take into account “such additional matters as it considers appropriate.”***

It is, however, *your responsibility* to provide the court with evidence that the factors above apply in your case.

In determining whether a possession and eviction are a proportionate response to the breach in your case directly **under EU law, and specifically the EUCFR**, the court should consider whether:

- a) Possession and/or eviction pursue a **legitimate aim**; (that is, it is necessary in a democratic society);
- b) There is a **pressing social need** for possession and/or eviction; and
- c) Possession and/or eviction are **proportionate** to the legitimate aim pursued.

In determining whether possession and eviction are proportionate, the court must look at whether there **are other appropriate measures for achieving the aim**, and, if so, will only impose the least burdensome measure for you.

The court must also make sure that the **disadvantages** caused to you are not disproportionate to the aim pursued by the lender.

The following section provides some suggestions for the types of evidence you could present to support your argument that possession and/or eviction are NOT a proportional response to your breach of the contract under EU law.

#### **a) Is the Lender's Aim Truly Legitimate?**

- You could argue that evidence of misleading, reckless, irresponsible, dishonest, and/or illegal behaviour on the part of the lender reduces the legitimacy of their aim to enforce the contract. Evidence of lender behaviour that you could argue reduces legitimacy could include:
  - one or more unfair terms in the contract;
  - the lender steered you toward a type of loan that was not the most appropriate for you, such as a fixed term rather than a tracker mortgage;
  - the contract was entered under unusual circumstances (e.g. pressure sales tactics, coming to your home);
  - the decision to give you a loan under the circumstances at the time the loan was entered into was not reasonable (did the lender do a creditworthiness check? Did you have sufficient income to make the payments?);
  - The lender miscalculated the amount of interest you owe;
  - the lender did not adhere to the Code of Conduct on Mortgage Arrears;
  - The lender did not comply with obligations imposed on regulated lenders under European Union (Consumer Mortgage Credit Agreements) Regulations 2016 (S.I. No. 142 of 2016);

- the lender did not consider prevention measures set out in guidance on nonperforming loans published by the European Central Bank (including interest only payments, reduced payments, grace period/payment moratorium, arrears/interest capitalization, long term interest rate reduction, extension of maturity/term, additional security, sale by agreement, rescheduled payments, other alterations of contract, new credit facilities, debt consolidation, partial or total debt forgiveness);

Additionally, you could argue that the actual financial impact on the lender of your breach is much less than the amount **alleged**

**Evidence of actual financial impact on the lender could include:**

- the percentage of the principal that has already been paid back in relation to the amount borrowed;
- if the enforcing entity is not the original lender, the amount actually paid for your loan;
- the value of the loan or mortgage on lender's balance sheet, and the market value of the property at time of court hearing;
- the availability of bailouts or tax relief for the lender in relation to the relevant non- performing loan, or in respect of its nonperforming loans generally.

**b) Pressing social need**

It is for the lender to demonstrate that a pressing social need exists for them to obtain a possession order and/or evict you from the property. Pressing social need is a concept used by the European Court of Human Rights as the basis for assessing whether or not an interference with a qualified right is necessary in a democratic society.

**c) Possession/eviction is proportionate to the legitimate aim pursued**

**1. Are there other appropriate measures—options that are less burdensome than possession and eviction? Have these been considered by the lender?**

For examples see European Central Bank Guidance on Non-performing Loans.

**2. Are the disadvantages caused to you proportionate to the aim pursued by the lender**

- Evidence of the disadvantages caused to you and other living in the home could include:
- Evidence of the negative impact of possession and eviction on your human rights under the EU Charter of Fundamental Rights

A complete list your human rights under the Charter is contained Annex F.

*Below are some suggestions for rights contained in the EU Charter of Fundamental Rights that can be raised and evidence the court could consider.*

## **Article 7**

### ***The Right to Respect for Home, Privacy, and Family Life***

Issues to be considered here include the impact on the person's identity, self-determination, physical and moral integrity, maintenance of relationships with others, a settled and secure place in the community, and the extent of the intrusion into their personal sphere.

## **Article 24**

### ***The Rights of the Child***

In all actions relating to children, whether taken by public authorities or private institutions, the EU Charter requires that the child's best interests must be a primary consideration. Therefore, the impact of possession and eviction on any children in the home is relevant. This could include the psychological effects and the negative impact on their education.

## **Article 25**

### ***The Rights of Older People***

The EU Charter recognises and respects the rights of the older people to lead a life of dignity and independence and to participate in social and cultural life. Evidence of how possession and eviction would interfere with these rights would be relevant.

## **Article 26**

### ***Integration of Persons with Disabilities***

The EU Charter recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community. The definition of disability is quite broad. Again, evidence of how possession and eviction would interfere with these rights would be relevant.

## **Article 47**

### ***(2) &(3) Fair and Public Hearing and Legal Aid***

This Article states that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal and everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice. This Article will be relevant where there has been no legal assistance available in relation to defending the possession and/or eviction orders. See Annex B and C on how to access legal aid options in Ireland.

## **Other considerations**

Evidence of your alternative housing options—including the cost of rental housing in your area and the availability of social housing is also relevant.

### ***d. What to do if the court will not apply this law.***

If the court will not apply this law you can appeal from the Circuit Court to the High Court or seek leave to apply by way of judicial review in the High Court (see Annex G). You can also ask for a referral to the Court of Justice of the EU for a preliminary ruling. The court decides whether to make the referral and makes the referral itself.

More information about this process is available here

[https://europa.eu/european-union/about-eu/institutionsbodies/court-justice\\_en.](https://europa.eu/european-union/about-eu/institutionsbodies/court-justice_en)

## **Part 2. What You Can Do to Advocate for Your Rights**

### **A. Retain a solicitor if at all possible**

As you can see as you read through this Guide, these are complicated legal arguments that need to be supported by evidence. In addition, there are strict procedural rules governing these cases. The courts expect unrepresented litigants to follow all of these rules. For these reasons, it is essential they make every effort to obtain a solicitor. Document all of your efforts noting dates, names and title of people you speak with, and the result of your requests. Annex B provides more detailed information about how to go about finding solicitor, including a legal aid lawyer. You can, of course, share this guide with any solicitors you meet with and ask them to make these arguments on your behalf.

**CAUTION:** Over the last few years, many individuals and groups have emerged that claim to have legal knowledge in the area of possession law. Unfortunately, in cases where their information has not been confirmed by a practicing solicitor or barrister it may be inaccurate. Some of these individuals or groups charge a fee to help people with their cases. It is, in fact, a criminal offence for unqualified persons to draft legal documents for use in legal proceedings for reward. The rationale for this is to protect the public from unscrupulous persons who seek to exploit the vulnerability of those in financial distress by holding out hope of unrealistic outcomes for personal gain. While not charging directly, other individuals and groups may be accepting donations for giving legal advice and/or directing people to pay for services that promise unrealistic outcomes in the courts.

**Only practicing solicitors and barristers can provide legal advice — that is, apply the law to the specific facts of your case. Relying on inaccurate advice or information may have negative consequences for people hoping to retain their homes: it could increase costs and, at worst, delay or even prevent a positive outcome.**

*Whether or not you have a solicitor representing you, it is critical that you understand what is going on in your case.*

**1) Read every letter and document you receive and keep detailed records of all interactions with your lender**

- Keep a journal of all correspondence, dates, court appearances etc.
- The best way to keep track of documents is to keep them in a binder that you bring to court with you each time.
- Whenever you talk to the lender, their representative, or anyone else about your case (including your solicitor) take notes that include the date, the name and contact information for the person you spoke with.
- Send a follow-up email restating everything that they told you on the phone.
- If they say they will do something, check to see whether it was done by that date and if not, revert to them.
- Print out all email correspondence and put it in your binder.

**2) Attend all court dates**

It is critical that you attend all court dates - even if a representative of the lender tells you it is not necessary. Bring a family member or friend to provide support and take notes for you

**3) Continue to pay what you can**

If you or anyone else in the household is earning income, continue to pay what you can towards your mortgage each month, even if a representative of the lender, or anybody else tells you not to bother. This is very important as the lender DOES have a contractual right to repayment and the courts will look more favourably at a borrower who is making every reasonable effort to repay. A judge will assess the total income coming into the house, including income from any adult children still living at home and earning money. Here is a guide you can use to determine how much you can pay for housing based on your income and expenses [https://www.isi.gov.ie/en/ISI/Pages/Calculate\\_RLE](https://www.isi.gov.ie/en/ISI/Pages/Calculate_RLE)

**4) Learn about how the court system handles possession cases**

Even if you have a solicitor, it is important that you learn about how the court system works and how people behave in court. The best way to do this is to go and observe hearings before the registrar/judge you will be facing. There are a number online guides to the court process in possession cases listed in Annex D.

### C. Seek the help of your local Money, Advice and Budgeting Service (MABS)

MABS is the Irish State's money advice service, where money advisers provide information and assistance to people in debt. Money advisors are required to keep all of your information confidential and should never share your information without your permission. Money advisors can help you reach a voluntary arrangement with your lender and can also provide vouchers for you to get advice from a personal insolvency practitioner and/or lawyer (more on this in Annex B). It is important that you engage with your lender as soon as possible and take advantage of the services offered by MABS. MABS can refer you to a Money Advisor / Dedicated Mortgage Arrears Advisor / Personal Insolvency Practitioner or accountant for financial advice regarding resolution to a person's mortgage arrears, or to a member of the Abhaile solicitors panel for legal advice (discussed further in Annex C). However, it is important to remember that money advisers are NOT lawyers. Therefore, they CANNOT:

- give you legal advice,
- provide any opinion on whether there are legal defences in your case,
- predict how a registrar or judge will handle your case,
- step up in court to address the registrar without your consent.

It is important to note that if you do not try to come to an agreement with the lender and take advantage of all services offered by MABS, this will hurt your case. To ensure that your rights are protected, we suggest you bring one or more family members and/or friends with you when you meet with MABS/the lender's representative and ask them to take careful notes.

## **Key Points**

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1. You have a right to an assessment for unfair terms and proportionality before a possession order is entered.
2. If a possession order was entered without these assessments taking place, you can still ask the court to do them.
3. All requests you make of the court must be in writing.
4. We advise you to engage a solicitor if at all possible. You have a right to apply to legal aid for representation in your possession case.
5. Whether or not you have a solicitor, it is important to understand your case and engage with the court and the lender and pay what you can towards your mortgage.

### ***Final Note:***

We hope that you have found this guide useful. Your feedback on this guide and information on your results in court would greatly assist the Abusive Lending Practices Project in its efforts to help people in mortgage distress. Please contact us at [info@abusivelending.org](mailto:info@abusivelending.org)

For more information about the project and the law governing abusive lending practices, including relevant EU directives and caselaw, please go to our website, <http://abusivelending.org/>.

## **Annexes**

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- A. Glossary of Key Terms
- B. How to find a solicitor
- C. Referrals from MABs
- D. Links to other resources - Legal, Housing, Mortgage to Rent and Psychological
- E. Examples of unfair terms and “Grey List”
- F. Guide to Template Pleadings

## Annex A - GLOSSARY OF KEY TERMS

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**Affidavit** - is a sworn statement of factual evidence where the identity of the person making the statement (the deponent) is verified by a Commissioner for Oaths or practising solicitor.

**Consumer** - The UCTD defines a consumer as “any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession.” Core Terms- are the main subject matter of the contract, relating to price of a goods or service and the goods or services provided in return. They may or may not be individually negotiated. In a mortgage the initial interest rate, length of the loan and the amount of money borrowed are core terms.

**Court of Justice of the EU (CJEU or ECJ)** - The Court of Justice of the European Union (CJEU) interprets EU law and provides guidance to member states on how it should be enforced.

**EU Charter of Fundamental Rights (EUCFR or the Charter)** - As a citizen of the European Union, you have human rights under the European Union Charter of Fundamental Rights (EUCFR). Irish courts are required to take these rights into consideration whenever they are acting within the scope of EU law—which they do when they enforce contracts covered under the UCTD—such as mortgage contracts.

**Good Faith** - There is no set definition of good faith. In general, it means that the lender must act honestly and not take advantage of consumers.

**Lender** - in this guide we use the term “lender” to refer to the applicant in the case—that is, the party seeking possession. In some cases, that party will not be the initial lender but rather a corporate entity that has purchased your mortgage or obtained it through securitization.

**Means Test** - Services that have a “means test” are only available to people who are below a certain income level. To get civil legal aid and advice you will need to have an annual disposable income of less than €18,000 and disposable assets of less than €100,000. In both cases, the Legal Aid Board applies certain allowances when calculating these. They do not include the house you live in when calculating your assets.

**Merits Test** - Services that have a “merits test” are only available to people who meet requirements of the agency. For civil legal aid, this means determining whether an average person (not a wealthy person) would be willing to go to Court if they were paying for it with their own money. The Legal Aid Board also considers if a solicitor or a barrister acting reasonably would recommend that you go to court, knowing you were paying for it yourself and based on the facts of your case. Legal Aid may examine other factors such as: whether you have grounds for taking the case, or defending the case the other person is taking against you; whether this is the best way of solving your dispute; whether you would be likely to win your case; and the cost to the taxpayer against the benefit you might receive if you win.

**Motion** - a document filed in an existing case asking the Court to do something. For instance, a motion can ask the Court to extend the time to respond to a pleading.

**Pleading**- This is a general term that refers to documents filed in court to originate or respond to a legal action such as the Originating Civil Bill with the Indorsement of Claim.

**Standard Terms** - non-core terms of your mortgage that you did NOT have an opportunity to negotiate. These are terms that are contained in pre-formulated or form contracts. Almost all terms in mortgage contracts and supporting documents are standard terms.

**Template Pleadings** - these are forms for documents that you can fill out and file in court.

**Unfair Contract Terms Directive (UCTD)** - a European law (a directive) that EU member states are required to enforce that is also part of Irish law it is also part of Irish law where it is called European Communities (Unfair Terms in Consumer Contracts) Regulations 1995.

## Annex B. How to find a Solicitor?

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### 1. Legal Aid Board- Law Centre

You can go directly to a local Legal Aid Board Law Centre. Make contact with your local Legal Aid Board Law Centre and apply for Civil Legal Aid for your case.

You can apply for civil legal aid and advice by calling into, telephoning or writing to your nearest law centre or by applying online at [www.legalaidboard.ie](http://www.legalaidboard.ie).

Local law centres are in every county and are listed here:

<http://www.legalaidboard.ie/en/Contact-Us/Find-a-Law-Centre/>

Civil Legal Aid is available but there is a **means and merits** test. You must satisfy both tests for them to take your case. Your disposable income after allowances must be less than €18,000 and your disposable capital (other than your home) less than €100,000.

There is an application form available to download here:

<http://www.legalaidboard.ie/en/Our-Services/Legal-Aid-Services/Application-For-LegalServices-Form-October-2014.pdf>

There is an online guide to completion here: <http://www.legalaidboard.ie/en/Our-Services/Legal-Aid-Services/How-do-I-apply-for-civillegal-aid-/Guide-to-complete-the-application-form.pdf>

Civil legal aid in Ireland is not entirely free except for certain categories of case (home repossession are not among them), and you will need to make a contribution that the Legal Aid Board calculate in accordance with your means. The minimum contributions are €30 for advice and €130 for aid. It is possible to apply for a waiver if paying the contribution would cause you hardship.

### 2. Finding a Solicitor in private practice

The Law Society of Ireland has a website which lists solicitors in every county in Ireland who may take a case for you. This link allows you to search for a solicitor by geographic location:

<https://www.lawsociety.ie/Find-a-Solicitor/Solicitor-Firm-Search/>.

## Annex C. Referrals from MABS

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### 1. MABS- ABHAILE SCHEME

What is it? The **ABHAILE** scheme is available in all Circuit Court areas where repossession cases are heard.

It is **entirely free** to you if you are before a court or in difficulty with your mortgage payments.

MABS employees have a desk just outside the court and are available to help you at least one hour before the court starts opening your case. MABs can refer you to the Abhaile Duty Solicitor, described below.

#### A Duty Solicitor Service is available at the County Registrar's Court.

The Solicitor will provide assistance to you and advice in so far as they can, based on any documents you may have in your possession. They will seek to explain clearly your legal position regarding the repossession proceedings and answer questions.

The Duty Solicitor **cannot provide a defence on your behalf, but can speak for you**, always subject to the County Registrar's permission or discretion, and seek adjournments or settlements of your case. They are only available on the day and strictly speaking they do NOT act as your Solicitor and you are NOT their client. However, they can direct you to get or obtain more detailed legal advice via the Consultation Solicitor Service, as mentioned below, which is also available **free** under the **Abhaile** scheme.

They can also direct you should you wish to defend the proceedings to a Legal Aid Board (LAB) Law Centre, or if you do not satisfy the means and merits test, to a private practitioner.

In these circumstances they could seek an adjournment to allow you attend a LAB centre. An application form for Civil Legal Aid is available online at

<http://www.legalaidboard.ie/en/Our-Services/Legal-Aid-Services/Application-For-Legal-Services-Form-October-2014.pdf>.

This Duty Solicitor Service is **only available in the County Registrar's Court**, and not before a Judge of the Circuit Court.

### 3. A Consultation Solicitor service is also available and is free.

In short, it allows you to have independent legal advice from a Solicitor in relation to the best way to resolve the mortgage arrears on your home, and assess if any defences are open to you in your case. They will check your legal position and advise on any related legal complications. They will advise you on any issues relating to the financial advice received.

They may refer you to a Legal Aid Board Law Centre if they think you will satisfy the merits test of the Legal Aid Board, and they think you may have a good defence.

They will provide you with a written note of advice on your case.

Only ONE Consultation is available under this **Abhaile** scheme unless the Solicitor thinks that they can settle your case by negotiation. The Solicitor must get permission from the Legal Aid Board before they can do so, and this allows one further Consultation.

To get this free legal advice about your case you must firstly attend MABS, and complete their processes, which involves being allocated a reference number under the scheme and undergoing a complete financial assessment of your position by a financial adviser. Once this occurs, MABS will decide if legal advice is required. If MABS decide it is, then they will issue the person with a legal advice Voucher to access this aspect of the *Abhaile* Scheme.

#### 4. A Personal Insolvency Arrangement Review

This service is accessed after a person has attended a Personal Insolvency Practitioner (PIP) and where an arrangement or proposal has been refused by a person's creditors. It allows for a court to review this refusal and overturn it when certain criteria are met.

A PIP must set out their reasons why they think this is necessary and apply for a Legal Aid Certificate to avail of this service. When or if the Legal Aid Board grants a Certificate then the person may select a Solicitor from the Panel of *Abhaile* Solicitors to provide this service. There is no means test but the Legal Aid Board will apply the usual merits test to such application.

#### 5. How to make a Complaint and Appeal a MABS decision

##### MABS

MABS provides a service in accordance with a Customer Charter available here:

[https://www.mabs.ie/downloads/corporate/Customer\\_Charter.pdf](https://www.mabs.ie/downloads/corporate/Customer_Charter.pdf).

#### 6. LEGAL AID BOARD – Right to Appeal a Refusal of Civil Legal Aid in a Repossession Case

##### REVIEW

A decision to refuse you a service can be reviewed and/or appealed. You or your solicitor may request a review of a decision made against you. If you have new information you should include it. You must ask for a review within a month of the original decision being taken.

##### APPEAL

You may appeal a refusal to grant legal aid. Where an application for legal aid is refused, the applicant is entitled to be given reasons for the refusal in writing. If he/she is dissatisfied with the refusal, and wants to challenge it, it can be appealed.

You can request an appeal through your solicitor (or any member of staff in the law centre, if you have not been told who your solicitor is). You can also contact the Legal Aid Board Head Office directly to request an appeal. In the latter case you do not have to use a particular form to appeal – a letter will suffice.

However you **must request an appeal within 1 month** from the date of the original decision being taken, unless you have already requested a review. If you requested a review, the LAB has another month to tell you the outcome of the review. An appeal does not usually involve the submission of further information.

The decision of the appeal committee is final.

## **7. WHAT IS PERSONAL INSOLVENCY?**

The Insolvency Service of Ireland is a State body which has a major role in personal insolvency. There are four different solutions available for people in debt when that debt or loan has become too difficult to repay.

One such solution called a Personal Insolvency Arrangement (PIA) is when your debts are secured (even only in part) by a loan relating to a home/house or a mortgage. This allows you, the person who owes the money, to come to an agreed arrangement with that creditor or creditors over 72 months (6 years) with a possible one year extension. It can deal with secured and unsecured debts.

In order to come into effect a PIA must be put together by the Personal Insolvency Practitioner (PIP), agreed by the debtor, approved by a qualified majority of creditors voting at a creditors' meeting, processed by the Insolvency Service of Ireland (ISI), approved by the appropriate Court and details of it registered in a public Register maintained by the ISI.

Once agreed this PIA will protect a debtor and his/her assets from legal proceedings and other actions including enforcement of security during the period the PIA is in force, which could otherwise be taken by creditors including repossession proceedings.

A PIA which is successfully completed will discharge the debtor from his/her unsecured debts which are subject to the PIA.

A PIA which is successfully completed will discharge the debtor from his/her secured debts only to the extent provided for in the PIA.

There are many options available under a PIA and a PIP will always try so far as reasonably practicable to try to keep you in your home.

If creditors reject a PIPS proposal You now have a right of appeal of this refusal to the Circuit Court under S.115 A. – Please see above entitled, “A Personal Insolvency Arrangement Review Legal Aid Service. This service is available through the Abhaile scheme.

<http://www.irishstatutebook.ie/eli/2015/act/32/section/21/enacted/en/html> This is subject to another section of the Act S.104.

<http://www.irishstatutebook.ie/eli/2012/act/44/section/104/enacted/en/html>

## Annex D. Links to other resources Legal, Housing, Mortgage to Rent and Psychological

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### 1. Information about the Court Process

Guide to Possession in the Circuit Court, Courts Service

[http://www.courts.ie/Courts.ie/Library3.nsf/0/106357419C7B45F080257F990054B66F/\\$file/Guide%20to%20Possession%20in%20the%20Circuit%20Court%20-%20updated%20November%202015.pdf?openelement](http://www.courts.ie/Courts.ie/Library3.nsf/0/106357419C7B45F080257F990054B66F/$file/Guide%20to%20Possession%20in%20the%20Circuit%20Court%20-%20updated%20November%202015.pdf?openelement)

A Guide to Possession Proceedings in the High Court

<https://www.lawlibrary.ie/Access-to-Legal-Services/Voluntary-Assistance-Scheme/VASDownloads/PossessionHigh.aspx>

Home Repossession, Citizens Information Board

[http://www.citizensinformation.ie/en/housing/losing\\_your\\_home/home\\_repossession.html](http://www.citizensinformation.ie/en/housing/losing_your_home/home_repossession.html)

Facing Repossession, MABS

[https://www.mabs.ie/downloads/publications/14\\_09\\_23\\_Facing\\_Repossession.pdf](https://www.mabs.ie/downloads/publications/14_09_23_Facing_Repossession.pdf)

### 2. Housing- Social Housing Support- what is available?

Social housing support is provided to people who cannot afford housing from their own resources. It takes a number of different forms such as:

- Emergency accommodation to meet short-term housing need;
- A tenancy in a local authority property;
- A tenancy in an 'approved housing body' property;
- A tenancy in a property the local authority is managing or has leased from a private property owner through schemes such as the Rental Accommodation Scheme (RAS) or the Rental Accommodation Availability Agreement (RAAA), or;
- Private rented accommodation support in the form of Rent Supplement or now known as Housing Assistance Payment (HAP).

#### How to apply?

You can apply for social housing support, by completing an application form obtainable from the local authority in the area in which you wish to live, which must also be the area in which you normally reside or to which you have a local connection.

The application is then assessed by the local authority, which normally takes a 12-week period.

In deciding whether you the applicant are **eligible** for social housing support, the local authority will look at issues such as the income and residency status of you the applicant and whether you have suitable alternative accommodation available to you.

As part of this process to be **eligible** for social housing support your mortgage must be deemed *unsustainable* by your lender as part of the Mortgage Arrears Resolution Process (MARP) under the Code of Conduct on Mortgage Arrears ( CCMA).

If this has happened you should make sure your lender mentions this in a letter so you can include this in your application to the local authority/council. You do not need to wait until an order has been granted or proceedings have started.

The local authority will also look at whether you as the applicant are ‘in need’ of social housing. They look at the type of housing that you are currently occupying and whether your mortgage has been deemed unsustainable as part of MARP.

After the above and where they decide that you are both eligible for and in need of social housing, you are deemed to ‘qualify’ for social housing. At this point, you are placed on the waiting list – known as the ‘record of qualified households’ – for suitable accommodation that meets their needs.

While in theory the above options are available to you given the lack of housing stock available you are very likely to encounter HAP (previously known as rent supplement).

It is a new form of housing social support and allows local authorities provide support under part 4 of the Housing (Miscellaneous Provisions) Act 2014 and aims to allow local authorities to provide housing assistance for households with a long-term housing need.

#### 4. Psychological Support

The HAP scheme aims to allow you to be in full-time employment and keep their housing support. Under the HAP scheme, local authorities pay landlords directly and tenants pay a weekly HAP rent contribution to the local authority, based on their income and ability to pay.

However the draw -back is that you will ***no longer be on the local authority's standard housing list.***

You can still access other forms of social housing supports, such as local authority housing or housing provided by approved housing bodies, by applying for a transfer.

#### 5. Mortgage to Rent (MTR) Scheme

The MTR scheme allows you to stay in your home if you voluntarily surrender your home to your mortgage lender who immediately sells it to a housing association who will then rent it to you.

You will no longer own your property but you can continue living in your home as a social housing tenant and have a tenancy agreement with the housing association.

Your lender will give you an application form and MABS and the Citizens Information Services will also give you forms. Delays exist in this process and many difficulties remain. Further information is available here: [\*\*https://www.housingagency.ie/Housing-Information/Mortgage-to-Rent-Scheme\*\*](https://www.housingagency.ie/Housing-Information/Mortgage-to-Rent-Scheme)

There are no specific organisations that provide counselling or psychological support for those experiencing emotional difficulties as a result of mortgage distress but there are many charities that provide counselling in general.  
Pieta House - contact page

[\*\*http://www.pieta.ie/contact-us\*\*](http://www.pieta.ie/contact-us)

Samaritans – contact page

<https://www.samaritans.org/your-community/samaritans-work-ireland/samaritansbranches-ireland>

Shine – counselling

<https://www.shine.ie/services/counselling/>

St Patrick's Hospital Dublin – referral by doctor and also information service.

<https://www.stpatricks.ie/support-information-service>

## Annex E. Examples of unfair terms and “Grey List”

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The following are examples from an actual Irish mortgage with explanations of which UCTD Annex term they correspond to.

These are examples of what are known as acceleration clauses from an actual Irish mortgage:

b) In the event of any repayment not being paid on the due dates or any of them or any breach of the Conditions of the Loan or any of the covenant or conditions contained in any of the security document referred to in clause 2(a), the Lender may demand an early repayment of the principal and accrued interest or otherwise alter the Conditions of the Loan.”

Covenants for Payment, 3.02 “All moneys remaining unpaid by the Borrower to the Lender and secured by this Mortgage shall immediately become due and payable on demand to the Lender on the occurrence of any of the following events that is to say: (a) on the happening of any event of default other than an event specified in paragraph (i) of subclause 9.01 hereof, or (b) on the death of the assured or where two or more persons constitute the assured the death of any such persons;...”

9.01 The Lender shall not exercise any of the powers provide for in clause 8 hereof or conferred by statute until any of the following events shall occur:

(a) default is made in payment of any monthly or other periodic payment or in payment of any other of the secured moneys hereunder; or

(b) there is a breach by the Borrower of any covenant, condition or agreement contained in this Mortgage, or in any offer letter or other credit agreement in respect of any secured loan or implied by statute herein and on the part of the Borrower to be performed and observed other than the covenant for the payment and discharge of the secured moneys; or

(c) any representation, warranty or undertaking from time to time made to the Lender by the Borrower is or becomes incorrect or misleading in any material respect; or

(d) any building on the Mortgaged Property is pulled down or injured or damaged so as to materially depreciate the value of the security hereby constituted;”

8.01 “At any time after the execution of the Mortgage the Lender may without any further consent from or notice to the borrower or any other person enter into possession of the Mortgaged Property or any part thereof or into receipt of the rents and profits of the Mortgaged Property or any part thereof.”

9.01 (a) combined with 8.01 says that when a payment is missed or there is any other breach of the contract, the lender can take immediate possession without giving anyone any notice.

***UCTD Annex term (1)(e) “requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation”***

11.7 (a) The Lender may at any time and from time to time transfer or enter into contractual arrangements concerning all or part of the legal or equitable benefit of this Mortgage including the security hereby created on the Mortgaged Property, the Lender's estates, rights, title and interests in the Mortgage and the Lender's rights and interest (whether legal or equitable) under, or legal or equitable benefit of, any secured loan to any person (including, without prejudice to the generality of the foregoing, any subsidiary or associated company of the Lender) on such terms as the Lender may think fit, without notice to the Borrower or any other person, whereupon all powers and discretions of the Lender on all other estates, rights, title and interest shall, for so long and to the extent as provided for in or on such transfer, be held and be exercisable by the person to whom the Mortgage is transferred.

11.8 Without prejudice to the generality of sub-clause 11.07 the Lender may (a) at any time securitise this Mortgage without any consent of the Borrower save as is contained in sub-clause

11.09 hereof and without further notice to the Borrower or any other person; and (b) at any time collateralize this Mortgage without any consent of the Borrower save as is contained in sub-clause 11.09 hereof and without further notice to the Borrower or any other person.

11.9 (i) Without prejudice to the generality of the foregoing, the Borrower hereby irrevocably consents to: (a) all or any future transfer of the legal or equitable benefit of this Mortgage including the security hereby created on the Mortgaged Property the Lender's estates, rights, title and interests in the Mortgage and the Lender's rights and interests (whether legal or equitable) under, or legal or equitable benefit of, any secured loan as part of any securitisation scheme or in connection with any transfer under sub-clause 11.07(a); (ii) The Borrower hereby irrevocably consents and agrees to be bound by: (a) the provisions of any securitization scheme; (b) the provisions of any collateralization scheme;

***UCTD Annex term 1.(p) “giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter’s agreement”***

9.02 Without prejudice to the provision so sections 21 and 22 of the Act of 1881 and section 5 of the Conveyancing Act 1911 so far as the same are for the protection and safety of purchasers it is hereby agreed that upon any sale purporting to be made in pursuance of the aforesaid power of sale the purchaser or purchasers shall not be bound to see or enquire whether any of the Lender's powers has arisen or become exercisable or as to the necessity or expediency of the conditions subject to which any sale is made or otherwise as to the regularity of any such sale or be affected by express notice of any irregularity whatsoever therein and notwithstanding any such irregularity every such sale shall so far as regards the safety and protection of the purchaser or purchasers be deemed to be within the aforesaid power in that behalf and be valid and effectual accordingly and the remedy of the Borrower in respect of any breach of said power of sale or any irregularity in any such sale shall be in damages only.

**UCTD Annex term 1. (q) “excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should like with another party to the contract”**

12.01 A Certificate in writing of the Designated Officer shall be conclusive evidence of the following matters of fact and binding on the Borrower:

- (a) the date of drawdown of any secured loan;
- (b) the due date for payment of any of the secured moneys;
- (c) the applicable rate of interest for the relevant account from time to time and at any time;
- (d) the amount of any monthly or other periodic or other payments payable by the Borrower to the Lender under the provisions hereof and under the provisions of any secured loan;
- (e) the amount of the secured moneys or any part of the secured moneys at any time; and
- (f) any determination made by the Lender or any other person entitled under the provisions of this Mortgage to make such determination in relation to any matter which by virtue of any provision of the Mortgage is at the absolute discretion of the Lender or such other person.

**Annex term 1.(m) “giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract”**

An example of core terms that could be unclear and considered unfair are the following terms governing a variable interest rate mortgage:

Term 1 in “Part 2 – Standard Conditions” states: “The rate of interest applicable to this loan will be variable for the term specified in Part 1 of the loan offer letter.” Further, Term 7(a) in “Part 4 – General terms and conditions” states: “Subject to clause 6(b), at all times when a variable interest rate applies to the loan the initial rate of interest will be the current rate charged at the date the loan cheque is issued and subsequently the interest rate charged will vary at the lender’s discretion upwards or downwards” Section 5 General Interest Rate Provisions states that (a) interest rate compoundable at monthly, quarterly or other periodic...at the lender’s absolute discretion (b) how variations of interest rates are accommodated are up to the lender.

Terms Referred to in Article 3(3) of the UCTD

## **The Grey List from the UCTD TERMS REFERRED TO IN ARTICLE b3 (3)**

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### **1. Terms which have the object or effect of**

- (a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;
- (b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the (b) option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;
- (c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his own will alone;
- (d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;
- (e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;
- (f) authorizing the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;
- (g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;
- (h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early;
- (i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;
- (j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;
- (k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;
- (l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed

when the contract was concluded;

- (m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;
- (n) limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality;
- (o) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his;
- (p) giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement;

## 2. Scope of subparagraphs (g), (j) and (1)

- (a) Subparagraph (g) is without hindrance to terms by which a supplier of financial services reserves the right to terminate unilaterally a contract of indeterminate duration without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof immediately.
- (b) Subparagraph (j) is without hindrance to terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately.
- (c) Subparagraph (j) is also without hindrance to terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract.
- (d) Subparagraphs (g), (j) and (1) do not apply to: transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the seller or supplier does not control;
- (e) Subparagraph (1) is without hindrance to price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described.

## Annex F. Template Pleadings

The chart describes the pleading templates produced by Gary Fitzgerald, BL and updated by David Browne, BL. These pleadings are available at <http://abusivelending.org/> for downloading and use in your case.

Please note:

1. The legal system is very complex and there are a very large number of variations possible in each document. It is NEVER advisable to enter a legal dispute without being represented by experienced lawyers.
2. These pleadings are for legal information only and do not constitute legal advice in a particular case.
3. The law is continually evolving and the arguments and citations in support of these arguments may have changed since these documents were produced in December, 2017.

| Proceeding                                     | Document                  | Details   |
|--|---------------------------|---|
| Circuit Court                                  | TP 1-Grounding Affidavit  | Main document setting out case when there is no possession order in place   |
| High Court Judicial review                     | TP 2-Statement of Grounds | Main document setting out case when there is a possession order in place. Lists the orders that are sought (quashing the repossession order and remitting it to the lower court) and the grounds that those orders are based on. Leave has been granted on these grounds in <i>Grant v Laois County Registrar</i> . |
|  | TP 3-Grounding affidavit  | Affidavit setting out facts on which the judicial review is based. It needs to set out terms that may be unfair and factors that might be considered in any proportionality assessment.   |
|  | TP 4-Ex parte docket      | Motion paper to allow the High Court to grant leave to take a judicial review.  |
| High Court appeal                              | TP 5-Notice of appeal     | Appeal a repossession order of the Circuit Court to the High Court on two grounds – lack of own motion assessment for fairness of terms and lack of proportionality assessment.   |
| Extension of time to appeal from Circuit Court | TP 6-Notice of motion     | There is a 10 day time limit from the date on which judgment is pronounced in open court to lodge an appeal but this can be extended. This the main document setting out the reliefs sought.  |

|   |  |  |
|---|--|--|
|   | TP 7-Grounding   | This affidavit avers to all the necessary facts to be granted leave to appeal. It must exhibit a draft Notice of Appeal.   |
| Circuit Court Appeal                              | TP 8-Notice of appeal                                      | Appeal a repossession order of the Circuit Court to the High Court on two grounds – lack of own motion assessment for fairness of terms and lack of proportionality assessment.  |
| Extension of time to appeal from County Registrar | TP 9-Notice of motion                                      | There is a 10 day time limit to lodge an appeal but this can be extended. This is the main document setting out the reliefs sought.  |
|   | TP-10 Grounding affidavit                                  | This affidavit avers to all the necessary facts to be granted leave to appeal. It must exhibit a draft Notice of Appeal.   |
| Circuit Court                                     | TP-11 Notice for Particulars                               | It is common for lenders to fail to set out clear the contractual or legislative basis for taking possession of a home. This notice demands that the claim be properly particularised. It is sent to the lender's solicitors and if particulars are not provided then it is necessary to issue a motion grounding on an affidavit. The court can strike out the repossession claim if no particulars are provided. |
| All disputes                                      | TP 12-Data access request in relation to value of mortgage | This request seeks a number of pieces of information from the lender that it will not want to disclose but may be obliged to do so under data protection laws. If the loan was sold to the current lender then this value might be relevant to a proportionality test. This request will certainly be refused and this refusal must be appealed to the Data Protection Commissioner.                               |

### **Open Society Justice Initiative**

The Open Society Justice Initiative uses law to protect and empower people around the world. Through litigation, advocacy, research, and technical assistance, the Open Society Justice Initiative promotes human rights and builds legal capacity for open societies. Our staff is based in Abuja, Brussels, Budapest, The Hague, London, Mexico City, New York, Paris, Santo Domingo, and Washington, D.C. [www.justiceinitiative.org](http://www.justiceinitiative.org)

### **Open Society Foundations**

The Open Society Foundations work to build vibrant and tolerant societies whose governments are accountable and open to the participation of all people. Working with local communities in more than 70 countries, the Open Society Foundations support justice and human rights, freedom of expression, and access to public health and education. [www.opensocietyfoundations.org](http://www.opensocietyfoundations.org)

**Centre for Housing Law, Rights and Policy, NUI Galway**

The Centre's aim is to contribute to the development of housing law, rights and policy through conferences, lectures, training, advocacy, publications and specialist research support. Current areas of research include mortgage market regulation and consumer protection, independent living for people with disabilities, housing rights in the EU Charter of Fundamental Rights, regulation of housing systems and implementation deficits in housing law, rights and policy. <https://www.nuigalway.ie/chlrp/>

**Community Action Network (CAN)**

Community Action Network (CAN) is a social justice NGO working within civil society to tackle issues of inequality and social exclusion, and to support marginalised groups and communities. It has extensive experience in working with communities on securing housing rights.

