EU Banking Regulations

Contributory Negligence

CORMAC BUTLER

Summary Hearings

Complaints to Land Registry

Prior to the recent **Fannon judgement** lay litigants had a very difficult task convincing judges through summary hearings that the PRA were not authorised to cure a lack of evidence of transfer of title by automatically registering a charge without examining proof that a valid transfer took place. Judges placed too much reliance on Section 31 of the Registration of Titles Act.

Supervisory rules and company law

Judges are through, summary hearings, making assumptions that banks comply with company law and European Supervisory rules and therefore are dismissing, potential contributory negligence, interest rate hedges, unauthorised loan transfers and flawed securitisations.

Pressure on the PRA has helped; similar complaints to the Corporate Enforcement Authority may assist lay litigants in summary cases. Vulture funds must now prove (presumably through unredacted contracts that valid loan transfers have taken place and must also particularise debts and not rely on hearsay evidence. Whilst I may address legal matters, separate legal advice is advised.

Section 62(7) Registration of Titles Act, 1964

When repayment of the principal money secured by the instrument of charge has become due, the registered owner of the charge or his personal representative may apply to the court in a **summary manner** for possession of the land or any part of the land, and on the application the court may, if it so thinks proper, order possession of the land or the said part thereof to be delivered to the applicant, and the applicant, upon obtaining possession of the land or the said part thereof, shall be deemed to be a mortgagee in possession.

Obligations on Vulture Fund to Disclose proof of Legal Interest

"23. As a condition of granting the plaintiff loan facilities Ulster Bank Ireland Limited required the plaintiff to agree that Ulster Bank Ireland Limited could transfer his loans and the security provided in respect thereof, to whoever it wished, whenever it wished, without his consent and without notice to him. This is a significant power contractually granted by the plaintiff to UBIL. If, as in this case, it purports to exercise that right of transfer, then a complete stranger with whom the plaintiff has no connection can come knocking on his door claiming an entitlement to possession of his property. **It appears to the Court that before ceding possession of his property, the plaintiff is entitled to insist that the stranger prove its entitlement to possession by showing that it duly acquired the interest of the bank** in his loans and the security underpinning those loans, in particular, the mortgage on the property."

(Denis English v Promontoria Aran 2016)

Conclusiveness of Title

Old position

24. Where the land in issue is registered land, proof of ownership is straightforward in that the register is conclusive as to title. If the stranger is registered as owner of the first legal charge then he has all the rights and entitlements that flow from the charge.

25. The position in respect of unregistered land is not so straightforward. Registration of a mortgage transfer in the Registry of Deeds is not an assurance of good title. Registration in the Registry of Deeds may confer some priority on a valid mortgage transfer but it is not a warranty of the validity of the transfer.

Fannon Judgement

New Position

“However, s. 31(1) provides that the register shall be “conclusive evidence of the title of the owner to the land as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon ”, it is not evidence, still less conclusive evidence, of the terms of any transfer or assignment under which the owner may have become entitled to the benefit of any charge registered on the folio. **The provisions of s. 31 of the Registration of Title Act 1964, do not cure this evidential deficit** as that section does not provide that the entry on the register is conclusive evidence of the terms of the alleged assignment and of whether it is “absolute” or not.”

(Fannon v Ulster Bank)

“Registration of a charge as a burden on registered land is not evidence of its ownership, it is evidence only that the charge is an encumbrance on the estate of the registered owner.”

- RETIRED DEPUTY REGISTRAR, JOHN DEENEY

Failure to Comply with European Supervisory Rules & EU Company Law

Non-compliance creates the following complexities:

- Contributory Negligence at the date the loan was advanced
- Cost of Funds & Discretionary Interest rates
- Fixed Rate Hedges (Cost of Funds reference, hidden margins, fluctuations in value)
- Loss of Legal Rights when loan is sold (ability to compete against the vulture funds)
- Securitisation - bank loses bankruptcy remote status

Solution

Original bank must appear in court to explain these matters even if the loan is allegedly sold on

Flawed Accounting

Ireland central bank governor Patrick Honohan attacks 'unsatisfactory' accounting rules for banks

The Governor of the central bank of Ireland has described the accounting rules for British and Irish banks as "unsatisfactory" in a speech that will be used to back the argument for some of the standards to be scrapped.

By Louise Armitstead

25 November 2010 • 8:16pm

Contributory Negligence KBC Bank v BCM Hanby Wallace

Extract from Paragraph 104

The appellant is entitled to argue for the obligation of the bank, in accordance with the **European Communities (Licensing and Supervision of Credit Institutions) Regulations 1992 (S.I. No. 395 of 1992)** (as amended), to manage its businesses "in accordance with sound administrative and accounting principles and [to] put in place and maintain internal control and reporting arrangements and procedures to ensure that the business is so managed."

NAMA Statement

I unequivocally stand over all the replies to questions and queries which I made at the committee meeting of 18 November last. One of the main points I made, and which Deputy McGrath correctly questioned me on, was that the information put into the public domain by the listed financial institutions in autumn 2009, before the NAMA legislation was enacted, anticipated that the haircut they expected to receive on their loans transferring to NAMA was actually going to be less than the 30% estimate in the Minister's September announcement. As it transpired, the real discount that has been applied across all five institutions to date is an average of 58%. **The respective discounts applied up to the end of 2010 are: AIB - 54%; Bank of Ireland - 42%; Anglo Irish Bank - 62%; EBS - 60%; and Irish Nationwide Building Society, INBS, - 64**

(Brendan McDonagh 13 January 2011)

NAMA interpretation of Accounting Standard IAS 39

“Following the banking crisis in 2008/2009, it was widely accepted among accounting practitioners that the **IAS 39 impairment methodology did not appropriately reflect potential losses** in a loan portfolio or did not do so on a timely basis. As a result, the International Accounting Standards Board has redrafted IAS 39 and the new standard (IFRS 9) will, when implemented later in this decade, change the impairment methodology to allow for future expected credit losses to be reported on a more timely basis.”

Warnings to IASB

VIA FACSIMILE

Sir David Tweedie
Chairman
International Accounting Standards Board
1st Floor
30 Cannon Street
London EC4M 6XH

23 August 2001

Dear Sir David,

The Basel Committee on Banking Supervision appreciates the opportunity to comment on the proposed IAS 39 Implementation Guidance (Batch VI). You will find our comments in the enclosed note. The Basel Committee's Task Force on Accounting Issues, chaired by Dr Arnold Schilder, Executive Director of De Nederlandsche Bank, has prepared the note.

Dr Schilder has drawn my attention to the topic of accounting for impairment of financial assets (question 112-3), an area of obvious importance to the Basel Committee. Specifically, as discussed more fully in the note, the suggested approach may cause a delay in loss recognition, resulting in an overstatement of assets and a reduction in the relevance of the accounting measure; as well as being contrary to a measurement methodology already accepted in major countries.

Concealed Accounting

The suggested answer is not consistent with the standard

The suggested answer lacks consistency with the standard itself, especially after the changes made in October 2000 to IAS 39.112. As a starting point, it may be useful to repeat the measurement principle as outlined in IAS 39.109:

"An enterprise should assess at each balance sheet date whether there is any objective evidence that a financial asset or group of assets may be impaired. If any such evidence exists, the enterprise should estimate the recoverable amount of that asset or group of assets…"

Further, IAS 39.112, as revised, now states (the changes made October 2000 are marked below):

> "Impairment and uncollectability are ~~may be~~ measured and recognised individually for financial assets that are individually significant. Impairment and uncollectability may be measured and recognised on a portfolio basis for a group of similar financial assets that are not individually identified as impaired."

Central Bank of Ireland misled

Banc Ceannais na hÉireann
Central Bank of Ireland
Eurosystem

7 December 2010

Directorate-General Internal Market and Services
European Commission
B – 1049 Brussels
Belgium

Re: The European Commission's Green Paper on Audit Policy

Dear Sir/Madam

The Central Bank of Ireland (the Central Bank) welcomes the opportunity to comment on the European Commission's Green Paper on *"Audit Policy: Lessons from the Crisis"* (the Green Paper). We would also like to commend the European Commission for issuing the Green Paper and in particular for taking the lead in opening up the debate on the role and scope of the audit.

As with other Regulators worldwide, the Central Bank uses the audited financial statements as a primary tool in its supervision of regulated firms. As a result, it is a concern to the Central Bank that similar to the experience in other jurisdictions Irish firms, specifically Irish credit institutions, were receiving "clean" audit reports in the years leading up to the banking crisis even though these institutions were running significant funding mismatches, were not perfecting their security when providing loans, had significant weaknesses in their corporate governance structures and were under-providing for impairments. The Central Bank acknowledges that it was not only this failure that led to our banking crisis however, we feel had these issues been identified and reported in the audit report by the external auditor, the magnitude of the current difficulties in the Irish banking system may have been diminished.

Central Bank warning 2010

"As with other Regulators worldwide, the Central Bank uses the audited financial statements as a primary tool in its supervision of regulated firms. As a result, it is a concern to the Central Bank that similar to the experience in other jurisdictions, Irish firms, specifically Irish credit institutions, were receiving "clean" audit reports in the years leading up to the banking crisis. Even though these institutions were running significant funding mismatches, were not perfecting their security when providing loans, had significant weaknesses in their corporate governance structures **and were under-providing for impairment."**

Financial Times article 2018

In the summer of 2015, at a session of Ireland's marathon parliamentary inquiry into the causes of that country's banking crisis, a senior auditor at PwC made a startling admission.

John McDonnell had since 2010 led the Big Four firm's team on the audit of Bank of Ireland, the country's biggest financial institution.

He was there to answer questions about the auditor's role in the bank's rescue during the financial crisis. PwC, then as now its auditor, had given the bank's accounts a clean bill of health in the summer of 2008, just months before it turned to the state for a bailout that ultimately ran to almost €5bn.

The politicians wanted to know why Bank of Ireland had not disclosed billions in losses that must have been foreseeable, thus overstating its capital and lulling investors to imperil their cash by putting it into the troubled institution. How, they asked, could these accounts have fulfilled the legal requirement to represent a "true and fair" picture of its financial position?

Mr McDonnell did not deny that losses might not have been included. Instead, he said the level of provisions was in effect dictated by the new international

Company Law

The originating bank can only enforce the recoverable value of the loan, not the amount lent

Banks cannot charge a ‘Cost of Funds’ rate if they are a registered company and have followed ICAEW advice.

If a loan was previously securitised, and the bank follows ICAEW advice, the legal interest may have been lost automatically

Under unfair terms legislation, banks cannot charge a variable rate that is not linked to an external verifiable rate

Banks may face damages for forced sale of collateral previously

Banks who forced their customers into GRG or entered into a fixed rate hedging product, are also exposed

Banks cannot sell a distressed loan at a discount without firstly offering the loan to the customer

https://www.frielstafford.ie/vulture-funds-could-this-be-the-beginning-of-the-end-for-them-possible-new-strategy-to-force-the-vulture-funds-to-do-a-deal/

FT Article 1

PwC

Irish eyes are frowning

Unlike subatomic particles, banks typically cannot exist in two states at once. But that hasn't stopped the finest scientific minds at PwC from trying to prove otherwise. In the long-running saga of compensation for Anglo Irish Bank shareholders, after its emergency nationalisation in 2009, PwC's David Tynan was appointed by the Irish government to assess the claim. And he has concluded that no payments are due because, in the depths of the financial crisis, AIB was "both cash flow and balance sheet insolvent". That's a blow for shareholders. It's even worse for the European and Irish central banks — which lent billions to AIB during the crisis, even though they are not meant to lend to insolvent institutions. So why did they? Accounting expert

FT Article 2

Cormac Butler points City Insider to a 2015 inquiry in which former Irish Central Bank governor John Hurley said AIB could not have been insolvent at the time, because a big accountancy firm had "examined the books of AIB some months later and didn't come to that view". That firm? The mercurial PwC. Butler claims: "PwC knew in 2008 that Anglo Irish Bank was insolvent yet advised the ECB and the government otherwise." PwC Ireland declined to comment. To City Insider, though, it looks black and white. Or, rather, black is white.

Central Bank concealment of losses

CB points city insider to a 2015 inquiry in which former Irish central bank governor John Hurley said AIB could not have been insolvent at the time because a big accountancy firm had examined the books of AIB some months later and didn't come to that view. That firm the mercurial PwC.

Deputy Kieran O’Donnell

And looking back everything that we know now in hindsight, do you still believe that it was solvent on the night of the guarantee?

Mr. John Hurley

On the basis of the information we had, yes, but I can’t say when it became insolvent, and … Pricewaterhouse examined the books of Anglo Irish Bank some months later and didn’t come to that view [that it was insolvent].

Blind Compliance with Accounting Standards

43. In my view a seeker after such certainty, whether in relation to IAS individual accounts or Companies Act individual accounts would be confusing outcome with process. In the case of IAS, any such suggestion is clearly contradicted by the fact that IAS I expressly provides for IFRS standards to be departed from and that the effect of the legislation is to require compliance with adopted IAS. In the case of individual accounts prepared under the Companies Act 2006, the same conclusion applies by virtue of section 396(5) ..

(Legal Opinion Martin Moore KC 2008)

Institute of Chartered Accountants contradictory opinion

[The Chartered Accountants Regulatory Board] believes it unfortunate that compliance with an accounting standard is deemed of itself to result in a true and fair view of a company's financial position. Accordingly, CARB believes that in the future the first principle that should apply is true and fair; followed then by adherence to the individual standards. CARB appreciates that there may be difficulties in moving to what would essentially be a principles-based system rather than the more accepted rules-based system that has emerged over the last decade. However, notwithstanding this CARB believes that all interested stakeholders should discuss how a principles-based framework for the future could be developed to ensure that lessons are learned from the past and that current rules are not simply replaced by another set of rules.

Admission by Chartered Accountants Institute that it ignored the law.

A 2005 paper by the Institute of Chartered Accountants in England and Wales (ICAEW, the body responsible for producing the Guidance referred to by Sarasin above) outlined how IFRS [as interpreted by ICAEW] is not aligned with the law. It explained that the transition to IFRS was creating “serious concerns” and “many issues” about the lawful payment of dividends under the capital maintenance regime. And yet, ICAEW did not side with the law, arguing instead that the rules were flawed and needed to be adapted to IFRS:

Expert evidence given to Parliamentary Committee

Cormac Butler @Cormacbutler · Feb 11, 2019

Awkward pauses before answers! Capital Maintenance law prevents banks from hiding losses. Some big four auditors reluctantly claim/admit that if they follow audit and accounting processes devised by lobby groups, they can ignore the law. (11.44 onwards) goo.gl/LHGw4Q

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Cormac Butler @Cormacbutler · Feb 9, 2019

Business interview: Police and Crime Commissioner Anthony Stansfeld standard.co.uk/business/busin...

1 2 3

Cormac Butler @Cormacbutler · Feb 9, 2019

UK audit regulator accused of brushing off HBOS whistleblower ft.com/content/ef9c01... via @financialtimes

1 10 8

Cormac Butler @Cormacbutler · Feb 8, 2019

Accounting Institute admitted it was a lobbyist while guiding members on company law compliance - a dangerous conflict. It failed to remove Capital Maintenance law but advised Irish bankers to ignore it anyway and conceal losses. (see 11.16 onward goo.gl/gQLNrL

George Bompas KC

Are International Accounting Standards illegal?

Posted on July 22 2013

The Telegraph has just reported that:

> The Financial Reporting Council (FRC) has ordered an urgent review of the legality of Britain's accounting rules in a move that points to a deepening fiasco at the heart of the regulatory regime.

> The authority responsible for accounting rules has asked "a number of parties" to investigate whether the International Financial Reporting Standards (IFRS) are actually consistent with UK company law.

As they rightly note:

> IFRS, which has governed UK company reporting since 2005, has been highly criticised by experts who claim the rules dangerously distort bank accounts in particular. Despite their campaign to scrap IFRS, which *The Daily Telegraph* has supported, the FRC has dismissed most of the concerns until now.
>
> Last month a group of powerful investors demanded an urgent review of IFRS after they commissioned a legal opinion by George Bompas, QC, that said the standards had "substantial legal flaws". The bombshell opinion was submitted to the Parliamentary Commission on Banking Standards which has called for further investigation into the chaotic state of UK accounting standards. The Commission said it found that auditors and their standards were responsible for "dismal" failures that resulted in "questionable" bank accounts .

Where the matters raised by Mr Kavanagh and Mr Butler relate to the statutory mandate of the Central Bank, as set out by the Oireachtas, we can assure you that they have been examined by us. Based on these examinations, we have previously concluded that there is no basis for the Central Bank to act further on the matters being raised, and in the absence of new information being received, we continue to hold this view. As such, the Central Bank does not have anything further to add to our previous responses.

With reference to the comments in the July correspondence that the Central Bank "endorses the concealment of losses", or that the Central Bank "is in a very serious conflict of interest", we must emphatically reject such statements. At all times, the Central Bank acts

independently, transparently and in good faith, working in the public interest, and we will continue to do so.

Conclusion

The PRA is not empowered to cure ‘evidential deficits’. Vulture funds must now rely on the production of unredacted loan sale and transfer documents to prove that they have acquired the legal interest in certain loans.

Similarly, regulators such as the Central Bank and the Corporate Enforcement Authority can cure a situation where accounting standards are written in a manner that contravenes the law. A company law failure can arise from blind compliance with an accounting standard or from failure to interpret an accounting standard correctly. Vulture funds are unable to prove that they have acquired the legal interest in a loan unless they can prove that the seller complied with company law and the European Supervisory mechanism.

Section 15 Subsection 2 Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020

(2) A party to the proceedings on whom a notice has been served pursuant to *subsection (1)* shall not, without the leave of the court, object to the admissibility in evidence of

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Pt.3 S.15 [No. **13.**] *Civil Law and Criminal Law (Miscellaneous Provisions) Act* 2020. [2020.]

the whole or any specified part of the information concerned unless, not later than 7 days before the commencement of the civil trial, a notice objecting to its admissibility is served by or on behalf of that party on each of the other parties to the proceedings.