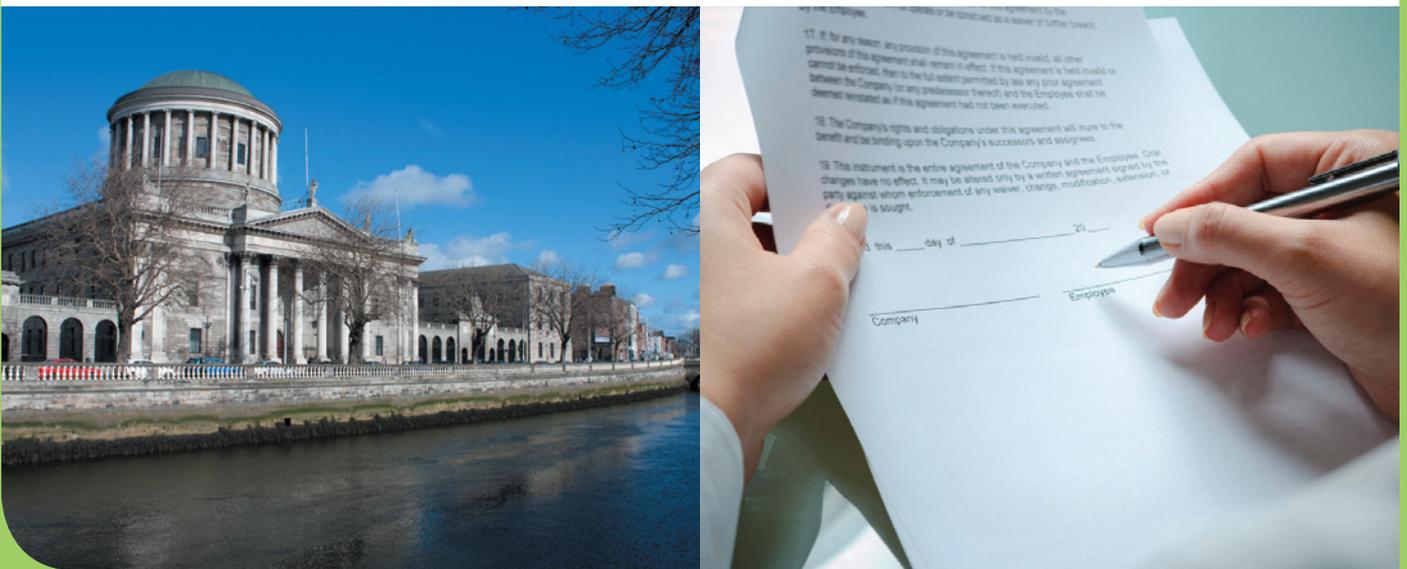


A Guide to...

Possession Proceedings in the High Court

October 2014



A Guide to... Possession Proceedings in the High Court

About the Guide

This guide provides information to individuals and families who are in mortgage arrears in relation to their family home and are now facing court proceedings for possession by their lender. To help you understand some of the key legal terms contained in the guide, there is a glossary at the back where you will also find some sample court documents and website addresses of organisations which might be able to assist you further.

About the Authors



**Community
Law & Mediation**

Community Law & Mediation (CLM), formerly known as Northside Community Law Centre, was established in 1975 as the first, independent, community-based Law Centre in Ireland. CLM works to empower individuals experiencing disadvantage by providing free legal, mediation and information services. At a national level, we seek to have a wider impact through our campaigns for law reform and by acting as a resource for other advocacy organisations. CLM has a number of services including two Community Law Centres: CLM Northside based in Coolock, Dublin and CLM Limerick. We also provide a free mediation service, community education and two key resources: 'Casebase', a social welfare decision database and the Irish Community Development Law Journal.



FLAC (Free Legal Advice Centres) is an independent human rights organisation which exists to promote equal access to justice for all. We undertake a range of activities in the pursuit of access to justice, the use of law in the public interest and advance international and national standards that promote human rights. FLAC operates a free and non-means tested telephone information & referral line that offers basic information on all areas of law to the public at 1890 250 350, as well as a countrywide network of legal advice centres where people can get confidential, basic legal advice for free from volunteer lawyers. We also produce legal guides and information sheets on a variety of topics - see www.flac.ie/help. In terms of advocacy and analysis, we concentrate on a restricted number of legal policy areas to advance access to justice: civil legal aid, social welfare law, personal debt law and consumer credit law. Our PILA project (www.flac.ie) carries forward FLAC's work on advancing law in the public interest in Ireland. Finally, as part of a network of independent law centres, we take strategic cases which we hope will not only benefit the individual client, but test and possibly change the law or practice for the benefit of others as well.



Phoenix Project New Beginnings is working every day with ordinary families across Ireland who are struggling with crippling debt problems. From our experience in the field, we understand very clearly the gravity of the current situation. Phoenix Project New Beginnings provide free, confidential, debt recovery support and advice to people experiencing extreme financial pressure such as self employed small business owners, farmers, professionals and former construction industry contractors.

Acknowledgements

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Legal Aid

You are entitled to apply for civil legal aid in relation to proceedings concerning mortgage arrears to your local Legal Aid Board law centre. Your application will be subject to a financial means test and an assessment of the legal merit of defending the case. You should also be aware that many of the law centres have quite lengthy waiting lists, so it is advisable to apply without delay. If your application is refused, you have a right of appeal. More information is available at www.legalaidboard.ie.

Disclaimer

The information in this document is not intended to provide, and does not constitute, legal or any other advice on any particular matter, and is provided for general information purposes only. The authors give no guarantees or warranties concerning the accuracy, completeness or up-to-date nature of the information provided in this guide and do not accept any liability arising from any errors or omissions. Please note that there are links provided to external sites over which the authors have no control and for which they accept no responsibility.



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Going to Court: Practical Tips

1

Going to Court can be very stressful given the pressure of dealing with mortgage arrears, the speed of Court proceedings, the formality of the hearing and even difficulties in being able to hear what's happening. Here we offer some useful tips on going to Court.

Talk to the Court Office:

If you have questions about how to file documents, ring the Court Office for the court you are due to attend and they will help you.

Get there early:

For cases in the High Court, the Special Summons will have the date and time that the Court will sit. The Master of the High Court sits at 10.30am and his Courtroom is located at the top floor of the Four Courts complex, in Dublin City Centre. If the matter is moved to the Chancery Special Summons list, you should consult the Legal Diary on www.courts.ie to find out which Courtroom it will take place in. Alternatively, you can speak to reception at the Roundhall of the Four Courts. The Chancery Special Summons List always takes place in the Four Courts complex in Dublin City Centre. It may also be useful to visit the Four Courts complex the day before to familiarise yourself with the surroundings.

Make yourself known:

Once you know which Courtroom you are in, you should speak with the Court Registrar. The Court Registrar sits at the desk below where the Judge or Master of the High Court will sit. They will have a list of the cases to be dealt with that day and will also have the Court file with them. You should tell them your name and what case you are involved in. The court list is available on www.courts.ie and it should also be on the main desk in the Courtroom.

Case being called:

If you have not entered an Appearance¹, your case will be called at the start of the list and the Court Registrar will ask *"Is there any Appearance by or on behalf of [your name]"*. You can then tell the Court that you are in attendance. The matter will be 'let stand' i.e. it will be dealt with in accordance with its place on the list and will most likely be adjourned to allow you to enter an Appearance. If you have entered an Appearance, then your case will be called as it appears in numerical order on the list. If any matters are not dealt with on the first calling they will be "put to second call" where the Court will go through the list again and deal with any matters outstanding. You should move near the top of the room as the list is approaching your case so that you can hear.

1 An Appearance is a Court document that a Borrower must fill out after being served with legal proceedings to be allowed to speak in Court and enter a defence.

Addressing the Court:

For many people, speaking in Court is a nerve racking experience. It is important to remember that, while there will be many other people in the room from other cases, when you are talking in Court you are really only speaking to two people – the Judge/Master of the High Court and the solicitor/barrister for the Lender. While possession cases can be stressful and emotional, it is always important to remain calm and courteous when speaking in Court. You can address the Master of the High Court as “Master” and the High Court Judge as “Judge”. There is no need to use such titles as “your Honour” or “my Lord”.

Paperwork:

Have all your paperwork in order. You should bring multiple copies of any documents you want to hand into the Court as the Lender’s solicitor will also need to see a copy.

Bring a Friend:

As Court proceedings can be fast paced and overwhelming, it is always advisable to bring a friend who can act as a second set of ears or can take notes on your behalf. Your friend cannot speak on your behalf however and the Court will not permit them to do so.

Communication with the Lender’s Solicitor.

If you are looking to postpone or adjourn the case to allow you to, for example, get legal advice or file court documents, it is a good idea to speak with the Lender’s Solicitor before Court to get their agreement or consent. It is also useful to write to the Lender’s solicitor after Court confirming what has been directed or agreed.

Evidence is on Affidavit:

It is important to remember that the Court will base its decisions on affidavit evidence, not solely on what you say in Court². If there are any specific factual allegations that you wish to make, these must be put on affidavit (see below).

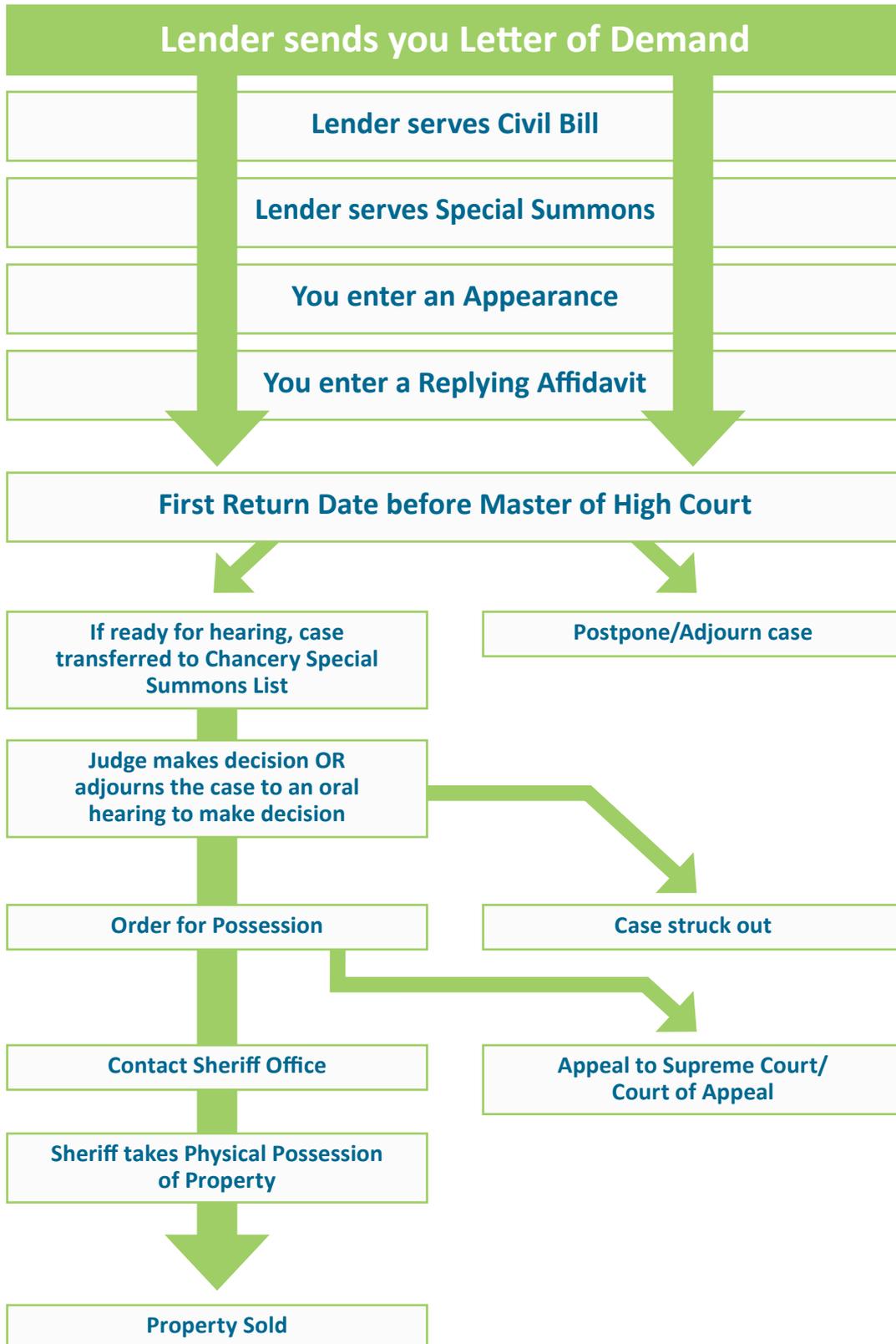
More information about going to Court can be obtained from The Courts Service Website www.courts.ie and this link:

<http://www.courts.ie/Courts.ie/Library3.nsf/0/00E7BD53F20B81FF802575FB00421C6F?OpenDocument>

2 An affidavit is a sworn statement of evidence made by a witness or party to legal proceedings.

Overview of the High Court Possession Process

2



What does a Lender have to do before going to Court?

3

3.1 If you, the Borrower, have fallen into arrears with the mortgage on your principal dwelling house, your Lender is obliged to comply with the rules of the Code of Conduct on Mortgage Arrears 2013 (CCMA 2013) before they go to Court to seek an Order for Possession of the property.⁴

3.2 The CCMA 2013 provides for a Mortgage Arrears Resolution Process (MARP). While there is no absolute requirement on a Lender to offer you an alternative repayment arrangement,⁵ the Lender must explore all options that it has chosen to offer for such an arrangement. Some examples of alternative repayment arrangements that are offered by Lenders include:

- Interest-only payments for a period of time;
- A temporary reduction in the interest rate;
- A permanent reduction in the interest rate;
- A payment of interest and a part of the capital for a period of time;
- A payment break (or 'holiday') for a period of time;
- Extending the term of the mortgage (in order to reduce the monthly instalments);
- Adding arrears and interest to the principal amount due;
- A split mortgage, where the mortgage is divided into two parts, one being paid in full by payment of capital and interest, the other part being 'warehoused' until some future date.⁶

What options are available will vary from Lender to Lender and should be contained in their MARP booklet which should have already been given to you. Remember, the lender does not have to explore all of the options contained in the CCMA 2013, but rather, only the ones that it chooses.

3 Download a copy here: <http://www.centralbank.ie/publicinformation/Documents/2013%20CCMA.pdf>

4 For assistance with dealing with Lenders in relation to the CCMA 2013, you should contact your local MABS office or call the Mortgage Arrears Information Helpline on 0761 072000.

5 Rule 39 CCMA.

6 Some lenders charge full or reduced interest on the warehoused part. It is important that you check the implications of this and get further advice.

3.3 In deciding whether to offer an alternative payment arrangement, the Lender must:

- Examine your case on its individual merits;⁷
- Take your full circumstances into account⁸ such as:
 - Your personal circumstances;
 - Your overall indebtedness;
 - The information contained in your Standard Financial Statement;
 - Current and future repayment capacity; and
 - Previous Repayment History.

3.4 There are certain rules on how a Lender must communicate with you.⁹

Some of these rules include:

- Informing you when they appoint a third party (such as a debt collection agency or a solicitor) to deal with your case and it must explain the role of the third party;
- Ensuring that the level of communications with you by it or the third-party is ‘proportionate and not excessive’;
- Giving you sufficient time to carry out any agreed action (e.g. filling out a Standard Financial Statement form), before it contacts you again;
- Agreeing future communication with you.

A Lender may also make an unsolicited visit to your home but only if other attempts to contact you have failed and only after they have given you five business days’ notice in writing and the option to meet at a local branch instead.¹⁰

3.5 For the Lender to start legal proceedings, it must have made **every reasonable effort...to agree an alternative arrangement** with you.¹¹ One of three things must also happen:

- a)** The Lender deems your mortgage to be “unsustainable”; **or**
- b)** The Lender deems you to be “not co-operating” under the terms of the CCMA 2013 (see glossary for CCMA 2013 definition of not co-operating); **or**
- c)** The Lender offers you an alternative repayment arrangement and you do not accept it.

Where your mortgage has been deemed unsustainable by the Lender or a repayment arrangement offered by the lender has been rejected by you, the Lender must still wait three months (or eight months from the time the arrears began, whichever is later) before going to Court. Where you have been deemed to be “not co-operating”, the Lender can, in theory at least, go to Court immediately.

7 Rule 36 CCMA.

8 Rule 37 CCMA.

9 Rules 21 & 22 of the CCMA 2013.

10 Rule 26 CCMA.

11 Rule 56 CCMA.

3.6 When declaring a mortgage unsustainable, your lender is obliged to inform you of other options available such as voluntary surrender, voluntary sale or mortgage to rent. These options are important to consider, particularly if you decide that you do not wish to oppose repossession.¹²

3.7 It is important to remember that even when a Lender decides you are not cooperating or your mortgage is unsustainable, you are entitled to appeal this decision to the Lender's Appeals Board.¹³ You should have **at least** 20 business days from the date of notification of the Lender's decision to do this. If you are not satisfied with the Appeals Board decision, you can refer the matter to the Financial Services Ombudsman. However, while you are waiting for your referral to the Financial Services Ombudsman to be dealt with, the Lender can commence Court proceedings seeking possession of your property, if the three months period referred to above has passed.

3.8 If you want to complain about how the Lender has treated you under the CCMA 2013 or you feel that the Lender has not complied properly with the CCMA 2013, you can lodge a complaint to the Internal Complaints body of the Lender who must deal with it under the Central Bank's Consumer Protection Code 2012 (CPC 2012). Again, if you are not happy with the outcome from the Internal Complaints body you may refer the matter to the Financial Services Ombudsman but this will not necessarily prevent a Lender from starting legal proceedings though it may assist you when defending the matter in Court.

3.9 Lastly, if you believe that the Lender has not complied fully with their obligations under the CCMA 2013, this should be stated in a "replying affidavit"¹⁴ defending an application to the Court by the Lender for possession of your home. This is dealt with in further detail below.

3.10 Two comprehensive guides to the CCMA 2013 and the obligations on Lenders and the Appeals and Complaints process are available from both FLAC and MABS and can be downloaded at the following links:

http://www.flac.ie/download/pdf/moving_out_of_mortgage_arrears_online_version_finaloct2013.pdf

https://www.mabs.ie/fileadmin/user_upload/documents/Information_Leaflets_and_Factsheets/14_07_01_MABS_Guide_to_CCMA_online.pdf

12 Rule 45 CCMA.

13 Rules 49 to 55 CCMA 2013.

14 A "Replying Affidavit" is a sworn statement of facts setting out the grounds for your defence.

What happens when the Lender starts legal proceedings?

4

4.1 First, the lender will formally seek repayment of the mortgage and any arrears that you owe them. This is known as a **“Letter of Demand”** and may have been sent to you when you first fell into arrears. Even after this letter, the Lender is still obliged to make **every reasonable effort** to agree an alternative repayment arrangement with you. Only then can the lender issue legal proceedings. It must also notify you in writing that it is intending to go to the Circuit Court to seek an order for possession of your home before commencing legal proceedings.¹⁵

4.2 Recent changes in the law mean that almost all repossession applications concerning principal private residences must now be brought in the Circuit Court. Legal proceedings to repossess investment or buy-to-let properties may still be brought in either the Circuit or High Court but the Circuit Court is now likely the preferred route for lenders.

4.3 If your case is issued in the High Court then the first Court document that you will receive is called a **“Special Summons”**.¹⁶ The Lender will also usually seek an **“Order for Possession”** and **“Order for Sale”** from the Court. The Special Summons will be served on you in person by a Summons Server. The front page of the Special Summons sets out:

- a)** That there is a case for possession taken by the Lender against you;
- b)** That you are to appear in Court before the Master of the High Court on a given date, called the return date;
- c)** That if you wish to attend and be heard in Court you are required to take certain steps in advance of the return date.

The title will have the Lender as the **“Plaintiff”** (the person bringing the case) and you, the Borrower as the **“Defendant”** (the person who the case is against).

¹⁵ Rule 58 CCMA.

¹⁶ Please see sections 8 & 9 for how you should respond to a Special Summons.

4.4 The next part of the Special Summons, the section with the heading “Special Indorsement of Claim”, sets out the Orders that the Lender is seeking from the Court. These usually will be:

- An Order for Possession;
- An Order for the sale of the property;
- “Further or other Orders” as the High Court will deem appropriate;
- The costs of the proceedings.

The next section of the Special Summons is a “**Schedule of Lands**” which sets out the formal and legal description of your property. This is usually the description of the property contained in the documents of ownership and lodged with the Property Registration Authority.

4.5 The Court rules provide that with the Special Summons, a “**Grounding Affidavit**” must also be served. This is a sworn statement of evidence from someone employed by the lending institution, who has knowledge about your account. The Grounding Affidavit will repeat a lot of what is contained in the Special Summons but forms the evidence upon which the Lender will ask the Court to make its decision. It is the same as if the person swearing the affidavit entered the witness box and took the oath to give oral evidence.

4.6 The Special Summons and the Grounding Affidavit are the main documents which the Court will base its decision on. Other documents that will be given to Court by the Lender will include a **statutory declaration (or affidavit) of service** that confirms that you have been served with the Court Proceedings.

What happens on the first date in Court and who is the Master of the High Court?



5.1 The Master of the High Court is a Court official and is not a Judge.

His role is to ensure that:

- You have been properly served with proceedings;
- The Lender has filed all the relevant documents for the case to the Court;
- The case is ready to be heard before a High Court Judge.

5.2 The date given on the Special Summons will be the date that you are required to appear before the Master of the High Court. There should be at least 7 days between when you receive the Special Summons and the date that you are to appear before the Master of the High Court. This will be the first day that you appear in court and it is known as the 'initial return date' or 'first return date'.

5.3 Once the matter is before the Master of the High Court, he or she may ask you a number of questions such as:

- Are you making any payments on the account/are the arrears being dealt with?
- Do you intend to defend the proceedings (i.e. file a replying affidavit)? (see below)
- Have you tried to negotiate with the Lender since the proceedings started?
- Is there anyone else living in the property with you such as children or tenants?

5.4 The Master of the High Court will also check to see if the Lender's solicitors have filed all the relevant documents or whether they have served the proceedings on other people with an interest in the property, such as a co-owner or tenants.

5.5 If you or the Lender need to file any more documents – or if there is still hope of an alternative repayment arrangement being agreed - the Master of the High Court can postpone or "adjourn" the case for a number of weeks, or even indefinitely if a new repayment arrangement has already been agreed before the matter goes before the High Court Judge's List.

5.6 However, if the Lender can show the Master of the High Court that all the relevant documents are before the Court- including any replying affidavit that you may have sworn- the Master of the High Court will transfer the case to the "**Chancery Special Summons List**" and a new date will be given.

What is the Chancery Special Summons List and what can happen next?



6.1 The case will be given a new date before a Judge of the High Court by the Master. How long this will take depends on how busy the High Court lists are but on average would take approximately 4-6 weeks. The list where possession cases are heard is called the “**Chancery Special Summons List**”.

6.2 When the matter is listed before the Judge of the High Court, the Lender may seek the following Orders (as set out in the Special Summons):

- An Order for Possession of the property in favour of the Lender;
- An Order for Sale of the property (to be supervised by the Court);
- An Order for costs.

6.3 As a general rule, the Court will not grant an Order for Possession on the first occasion but will adjourn the matter for a number of weeks. When deciding whether or not to grant the Orders, the Court will read the grounding affidavit (and any additional affidavits) of the Lender as well as any replying affidavit that you may have filed. Generally, the Court will not hear oral evidence (see below) but the Judge may wish to hear any legal arguments from either side including:

- Under which legislation is the Lender seeking to obtain their Orders?
- How has the CCMA 2013 been complied with?
- What steps have been taken to agree an alternative repayment arrangement?

6.4 Based on the evidence contained in the affidavits and the arguments put forward by yourself and the Lender, the Court may grant the Orders, strike out or dismiss the case or adjourn the case to allow both parties to come to an agreement.

What happens if the Court grants an Order for Possession and Order for Sale?



7.1 The Court may grant these Orders with or without a “Stay”. A Stay delays Orders coming into effect. Where the Court does grant a Stay, for example for 6 months, the Lender cannot seek to take possession or sell the property for at least 6 months. However, if there is no Stay granted, the Lender can seek to take possession once the Order for Possession has been drawn up and sent to the Sheriff (in Dublin or Cork) or County Registrar (all other counties). While the time taken to act on foot of the Order for Possession may vary from Lender to Lender, they can act on it once the Order has been granted.

7.2 Some examples of where a stay may be granted would be where there are others in the property who are:

- young children,
- elderly or infirm relatives,
- persons with a disability or medical issues.

A stay may also be granted where time is required to find alternative accommodation.

7.3 At this stage, you should make enquiries about being assessed by your local authority for appropriate housing. Indeed, you can now be assessed by your local authority following a decision by the Lender that your mortgage has been declared **unsustainable**, under the CCMA, even where legal proceedings have not yet commenced.¹⁷

7.4 The Order for Possession is directed at the Sheriff or County Registrar and is an Order from the High Court Judge telling them to take possession of the property in question and to deliver this to the Lender. Generally, the Sheriff or County Registrar will speak with you about taking possession in order to do so in a reasonable manner. It may be a good idea for you to make contact with the Sheriff’s office yourself to get some idea of the time frame involved. Where you do not agree to abide by the directions of the Order or the Sheriff or County Registrar, bailiffs and Gardaí may be required in order to enforce the Court Order and take physical possession of the property.

¹⁷ This is provided by Regulation 3 (g) (ii) of Statutory Instrument 321/2011 (Social Housing Assessment (Amendment) (No.2)Regulations) 2011.

7.5 The Order for Sale is lodged with the Examiner's Office of the High Court and the Lender proceeds with the sale under the supervision of the Examiner of the High Court. You will know that the sale is proceeding when a Notice to Proceed is served upon you. From that point on, the Lender and the Examiner of the High Court arrange the sale of the property, an independent valuer is appointed and the Lender nominates an auctioneer to carry out the sale of the property. The sale is then conducted by public auction. There is an obligation on the Lender to get the best price available for the property. If you feel that they have not done this, you can show this by, for example, getting an independent valuation of the property.

7.6 Following the sale of the property, all monies due to the Lender (including legal costs, stamp duty and costs of the sale) are deducted from the proceeds of sale. If the amount then owed to the Lender is greater than what is left, there is still a debt outstanding and this can then be pursued by the Lender as a 'stand-alone' debt.

7.6 If the property is in positive equity (i.e. the sale price is more than what is owed on your mortgage), then you are entitled to the balance of the proceeds of sale following all the deductions set out above.

When I receive a Special Summons, how do I respond?



8.1 How you choose to respond to legal proceedings will depend on what has happened between you and your Lender prior to that point. For example, if you are agreeing or consenting to the Order for Possession and Order for Sale, you may simply attend Court to give your agreement in person and there is no need to file any documents to the Court Office.

8.2 If you wish to contest the case however, you will need to enter an "Appearance". An 'Appearance' is a Court document that you must fill out after being served with legal proceedings. It allows you to speak on your own behalf in Court and to consider filing a replying affidavit.

8.3 Where you have been served with a Special Summons, you can enter an Appearance at any time, but you must enter one in order to be properly heard in Court. The form for an Appearance is available from the High Court Office or from the courts.ie website and there is a sample set out below. There is a charge of €60.00 for the filing of an Appearance in the High Court.

8.4 Following the filing of an Appearance, and if you wish to defend the case further, you are required to file a "**Replying Affidavit**", a sworn statement of facts setting out the grounds for your defence (see below for defences). This sworn statement has the same effect as if you entered the witness box and gave sworn evidence in Court.

8.5 The purpose of the replying affidavit is to set out the facts upon which you are basing your Defence (see below). A Replying Affidavit must meet certain formalities and must be sworn before a Commissioner for Oaths (or Practising Solicitor). The average cost of swearing an affidavit is €10 with €2 for every supporting document you wish to include. Once the affidavit is sworn, it must be stamped (i.e. stamp duty of €15.00 paid) and filed in the Court Office. A stamped copy of the affidavit should be served on the Lender's solicitors. While this can be done by ordinary post, it is better to serve it by registered post so there are no issues over whether or not they received the affidavit.

8.6 The Replying Affidavit should be filed at least four days before the first date before the Master of the High Court and a copy must also be furnished to the Lender's solicitors. If you do not file a Replying Affidavit within the time set out in the Special Summons, you should seek the consent of the Lender's solicitors for late filing. This will make it easier to apply to the Court to extend the time for filing and adjourn the matter for you to prepare, file and serve a Replying Affidavit. You may need to explain to the Court why you did not file the Replying Affidavit within the time allowed e.g. you did not have access to the services of a solicitor and were not aware of the legal procedures involved.

8.7 There is a sample affidavit set out in the Appendix.

The details that must be included in it are:

- The title of the case;
- The identity of the person making the affidavit (i.e. you) and the capacity you are acting in (i.e. defendant). It must state that you are over 18 years of age;
- It must be stated in the affidavit that you are making the affidavit from facts within your own knowledge and that where it appears that you are giving evidence on something outside your personal knowledge, you believe those facts to be true;
- **The evidence must be set out clearly in paragraph format. This is your opportunity to tell your side of the story and this can be done using plain English.**

Generally speaking the affidavit should set out:

- Anything in the Lender's affidavit that you disagree with or you believe to be inaccurate or incorrect;
- Your defence (see section 9) e.g. how the Lender has not complied with their obligations under the CCMA 2013 (see section 3).
- If you want to mention any letters or documents, the originals must be individually exhibited under separate sheets as exhibits A, B, C etc. with your' name & the Commissioner for Oaths' signatures on them;
- The affidavit must be dated and signed by you before a Commissioner for Oaths or Practising Solicitor.
- The Commissioner for Oaths must verify that the affidavit was properly sworn.

8.8 Prior to legal proceedings being issued, you can seek documents on your mortgage file, under the Data Protection Acts, at a cost of €6.35. This may assist you in drafting the replying affidavit. Such information would include emails and written correspondence between you and the Lender, notes of telephone calls and meetings that you may have had with the Lender etc. The Lender is obliged to keep full records of all communications made under the CCMA with you. If the Lender refuses to provide any such information, you can make a complaint to the Data Protection Commissioner who will investigate the matter.

8.9 It is always useful to keep copies of all correspondence sent by you to the Lender and vice-versa. Any correspondence you send to the Lender or its solicitors should also be by registered post so there is always proof that it was received.

8.10 If legal proceedings have already been commenced, you may also seek an order from the Court compelling the Lender to provide these documents to you. This is known as an “Order for Discovery” and is sought by making an application to the Court known as a “Motion” based on an affidavit that sets out why you need these documents and why they are relevant to your case.

8.11 As noted above, the Replying Affidavit (and any exhibits included in it) and the Grounding Affidavit will form the basis upon which the Judge will make their decision to grant an Order for Possession and an Order for Sale. The Court may grant the Orders, strike out or dismiss the case (see glossary) or adjourn the case to allow both parties to come to an agreement.

8.12 If there is a clear conflict of fact between you and the Lender, the Court may direct that the matter be heard by oral evidence, in which case both parties will have to call witnesses to Court to be examined and cross-examined.

8.13 Either party in the legal proceedings is allowed to serve a “**Notice to Cross-Examine**” of any person who swears an affidavit. The Notice of Cross-Examination should be served by registered post on the Lender’s solicitors. However, in practice you should have good grounds for seeking this i.e. serious inaccuracies or omissions in the Lender’s affidavit etc.

What sort of Defence do I have to Possession Proceedings?

9

9.1 The most basic defence to possession proceedings is that the arrears and the full amount claimed are not actually due by you. Another basic defence is that the property that is sought to be possessed by the Lender is not the actual property that had been offered as security for the mortgage.

9.2 However, these scenarios are extremely unlikely to occur in most cases and therefore you must look to other issues in an attempt to defend the proceedings. We have set out some types of defences below:

- a) Section 3 Family Home Protection Act 1976:** No mortgage or remortgage on a property can be made on a 'family home' without both spouses agreeing to it. This is the case even if only one spouse is the registered owner of the property. This piece of legislation can offer a Defence where one spouse has mortgaged or remortgaged a property without the consent or agreement of the other spouse.
- b) "Not My Deed" (*Non Est Factum*):** With any type of contract there is a general rule that the person who signs the contract is bound by that contract. This defence allows you to claim before the Court that you did not know what type of contract you were signing. However, if you are seeking to rely on this Defence, you must show that:
 - There was a fundamental difference between what you signed and what you thought you were signing;
 - The mistake was as to the general type of document;
 - There was a lack of negligence on your part i.e. that you took all reasonable precautions to find out what the document was such as asking questions about it or seeking legal advice.
- c) Technical arguments:** These may include proceedings not being properly issued and/or served. If you have not been properly served with the legal proceedings and you file an Appearance, then by doing so you have 'cured' this defect in service. An example of a technical defect is in the case of *ACC Bank v Ruddy*, where the High Court refused to grant an order for possession where a formal letter of demand had been sent to the wrong address and had not been received by the borrower.
- d) Non-Compliance with the CCMA 2013:** The Irish Courts, in the two cases of *Stepstone Mortgage Funding Ltd v Fitzell* and *Irish Life and Permanent plc v Duff*, have recently recognised that a Lender, when seeking an Order for Possession of a property based on a residential mortgage, must demonstrate compliance with the CCMA. Therefore, if you feel that a Lender has not complied with the CCMA 2013 (see section 3), you should bring this to the Court's attention by filing a replying affidavit setting out how they have not complied with the CCMA.

9.3 It may also be possible to seek to postpone or adjourn the case on the following grounds:

- a) Personal Insolvency:** If you have decided to enquire with a Personal Insolvency Practitioner about your eligibility for a Personal Insolvency Arrangement, Section 2 of the Land and Conveyancing Reform Act 2013 allows the Court to adjourn the possession proceedings so that this can be explored. In considering whether to grant the adjournment, the court will consider a range of issues including:
- Whether you have engaged in a process, approved by the Central Bank, relating to mortgage arrears e.g. MARP.
 - Whether you have made payments in the preceding 12 months
 - Whether your case has been adjourned previously and
 - The conduct of both you and the Lender in seeking to resolve arrear;
 - Whether the application for the adjournment may just be a delaying tactic.

A further adjournment may be granted if there has been significant progress in preparing the Personal Insolvency Arrangement. The length of this is at the court's discretion and the Court is not given any power to enquire into how the Personal Insolvency Arrangement negotiations fared. For further information on whether you are eligible for a Personal Insolvency Arrangement, please see <http://www.isi.gov.ie/en/ISI/Pages/PIA>

- b) S.101 (1) of the Land and Conveyancing Law Reform Act 2009:** If you can demonstrate to the Court that you will be able to pay any arrears (including interest) within a reasonable period, then under S.101 (1) of the Land and Conveyancing Law Reform Act 2009, a Court has the power to adjourn the case, or stay the enforcement of an order, or even suspend it, or merely postpone the date for delivery of possession of the property for such periods as the Court thinks reasonable.

9.4 If you feel that you may have a defence to the possession proceedings, it is always best to seek legal advice on it as to defend proceedings unsuccessfully is likely to add to the legal costs recoverable after the Order for Possession and Sale has been made. Also, while it is worthwhile setting out your personal and financial difficulties in a replying affidavit it is important to note that not having enough money to pay the arrears, the property being in negative equity or the 'recklessness' of the Lender in offering the initial loan **are not recognised by the Courts as legitimate defences.**

Appendix I

Glossary



- **Adjournment:** A postponement of Court proceedings for a limited period (e.g. two weeks) or indefinitely (i.e. “adjourn generally”).
- **Affidavit:** A sworn statement of evidence made by a witness or party to legal proceedings.
- **Appearance:** A Court document that a Borrower must fill out after being served with legal proceedings to be allowed to speak in Court and enter a defence.
- **Arrears:** The money that is owed under a mortgage (or other type of loan) when the instalments are not paid in time.
- **Code of Conduct on Mortgage Arrears 2013 (CCMA):** A Central Bank Code that sets out the rules that Lenders must follow in dealing with Borrowers who are in arrears with mortgage on their primary residence.
- **Consumer Protection Code:** A Central Bank Code that sets out the basic rules that providers of financial services must follow in their dealings with consumers of such financial services.
- **Dismiss:** An Order the Court makes once it has heard the facts of a case and decides in a Defendant’s favour. The Plaintiff bringing the case cannot bring the same case again.
- **Examiner of the High Court:** The official of the High Court that, amongst other things, supervises the Court-ordered sale of a property. The money arising from the sale of the property are first of all lodged with the Examiner who will then pay them out in priority to who is due the money. In a Court-ordered sale, once the legal fees, stamp duty and auctioneer fees have been deducted from the proceeds of sale, the Lender will receive what is due to them in accordance with the mortgage debt. If there is still money left over, then you, the borrower will be entitled to that balance.
- **High Court:** The High Court lies above the District and Circuit Court but below the Supreme Court in the hierarchy of the Irish Courts system.
- **Master of the High Court:** A quasi-judicial Court official who has responsibility for dealing with Special Summons when they first appear in the Court list. The Master cannot make any Order in relation to the proceedings, except for either adjourning the case or transferring it to the Chancery Special Summons list. He will transfer the case to the Chancery Special Summons List once he is satisfied that the Defendant has been properly served with the proceedings and that all parties have filed the relevant affidavits.

- **Not Co-Operating:** This is given a specific definition under the MARP process and is set out at page 4 of the CCMA 2013. You will be considered to be not co-operating with the Lender in MARP when:
 1. **Any of the following apply to your particular case:**
 - a) You fail to make a full and honest disclosure of information to the Lender, that would have a significant impact on your financial situation;
 - b) You fail to provide information, relevant to your financial situation, within the timeline specified by the Lender in accordance with Rule 34 of the CCMA 2013
 - c) A three month period elapses:
 - (i) a) Where you have not entered into an alternative repayment arrangement, and during which you:
 - (i) Have failed to meet your mortgage repayments in full in accordance with the mortgage contract; or
 - (ii) You have met your mortgage repayments in full in accordance with the mortgage contract but you have an arrears balance remaining on the mortgage; or
 - b) Where you have entered into an alternative repayment arrangement, and during which you have failed to meet in full repayments as specified in the terms of an alternative repayment arrangement;
- and**
2. **During which you:**
 - a) Have failed to make contact with, or respond to any communications from, the Lender or a third party acting on the Lender's behalf; or
 - b) You have made contact with, or responded to communication from, the Lender or a third party acting on the Lender's behalf but you have not engaged in such a way that enables the Lender to complete an assessment of your circumstances.

- **Notice to Cross-Examine:** A notice served by one party on the other party seeking to have a witness who has sworn an affidavit to be cross-examined and asked questions in Court.
- **Principal Dwelling House:** Also known as 'principal private dwelling', this means the place where you normally live i.e. your family home.
- **Record Number:** The number given to each individual legal case. It is usually at the top-right hand corner of the Civil Bill citing what number case it is and what year (e.g. Record No: 217/2013, being the 217th case issued in that High for 2013).
- **Strike-Out:** An Order the Court makes against a Plaintiff where there is a procedural or technical flaw in their legal proceedings and application before Court. The Court does not need to hear evidence to make the Order but the Plaintiff is entitled to bring the legal proceedings again once they have remedied the defect.

Appendix II

Sample Appearance



THE HIGH COURT

Record No: _____

**MEMORANDUM OF APPEARANCE
BETWEEN**

Plaintiff

AND

Defendant

ENTER AN APPEARANCE for [name], Defendant in this action.

Dated this _____ day of _____

The address of [name] is [address]

Signed _____

Defendant/Solicitors for the Defendant.

To: The Registrar of the Central Office,
 Four Courts,
 Dublin 7

And to: Plaintiff/Solicitor for the Plaintiff

TAKE NOTE that I/we have this day entered an Appearance at the Central Office, Four Courts, Dublin for [name], the Defendant to the Special Summons served on him on the ___ day of _____ 20 ____.

Dated this _____ day of _____

Signed _____

Defendant/Solicitors for the Defendant.

Appendix III

Sample Replying Affidavit



THE HIGH COURT

Record No: _____

**MEMORANDUM OF APPEARANCE
BETWEEN**

Plaintiff

AND

Defendant

Replying Affidavit of _____

I, [Name], [Occupation], of [Address] aged eighteen years and upwards MAKE OATH and say as follows:

1. I say that I am the Defendant in the above entitled proceedings and I make this affidavit from facts within my own knowledge save whereso otherwise appears and save whereso otherwise appears I believe the same to be true.
2. I beg to refer to the pleadings already had herein when produced. In particular I beg to refer to the affidavits of [Insert name of person who made affidavit on behalf of the Plaintiff and the date it was sworn].
3. I say that [insert details of personal circumstances and basis for defence in subsequent paragraphs, numbering each one separately]. [If relying on letters] I beg to refer to a copy of the said letter dated ___ day of _____ 20__ upon which marked with the letter 'A' I have signed my name prior to the swearing hereof.

SWORN by the said [name],

Before me a practicing solicitor/commissioner for oaths,

At _____

In the county of _____

And I know the deponent.

[Name]

PRACTISING SOLICITOR/COMMISSIONER FOR OATHS

Appendix IV

Useful Websites



- www.communitylawandmediation.ie Community Law & Mediation, formerly Northside Community Law & Mediation Centre.
- www.flac.ie Free Legal Advice Centre.
- www.phoenixproject.ie Phoenix Project.
- www.legalaidboard.ie Civil Legal Aid Board.
- www.keepingyourhome.ie Website of the Citizen's Information Board and MABS containing information on the services and entitlements available if you are having difficulties paying your rent or making your mortgage repayments.
- www.mabs.ie Money Advice Budgeting Service. MABS also host the Mortgage Arrears Information Helpline(MAIH). The number is 076 107 2000.
- www.courts.ie Courts Service Ireland.
- www.dataprotection.ie Data Protection Commissioner.
- www.isi.gov.ie Insolvency Service of Ireland.

Community Law & Mediation
Northside Civic Centre,
Bunratty Road, Coolock, Dublin 17

T (01) 847 7804 **F** (01) 847 7563
E info@communitylawandmediation.ie
W www.communitylawandmediation.ie

Flac
Free Legal Advice Centres,
13 Lower Dorset Street, Dublin

Information & Referral Line: 1890 350 250
T (01) 874 5690 **F** (01) 874 5320
W www.flac.ie

Phoenix Project
25 Kilminchy Court,
Portlaoise, Co. Laois

Helpline: 1850 20 30 40 **T** (057) 863 6830
E support@phoenixproject.ie
W www.phoenixproject.ie

Citizen's Information Board
George's Quay House,
Townsend Street, Dublin 2

T (01) 605 9000
W www.citizensinformationboard.ie

