

Unfortunately, in the current recession, the problem of mortgage arrears has become very common. This leaflet is designed to provide some information to those in arrears with their mortgages.

What should I do if I have fallen into arrears or if I think I will fall into arrears with my repayments?

- ★ Firstly, it is extremely important that you **make your mortgage lender aware** of the reasons for an arrears problem as soon as possible and this should be done in writing. Any telephone conversations where agreements are made should be followed up in writing. It is crucial that you do not ignore any contact from your lender. It is vitally important that you keep copies of all correspondence between you and the lender and from the lender to you.
- ★ You may be eligible for **Mortgage Interest Supplement (MIS)**. A person who is unemployed or working part time (29 hours or less) may be entitled to this support payment. In the case of a couple, if one is in full time employment (i.e. working 30 hours or more), both will be excluded from the payment. MIS may be claimed from the Community Welfare Officer at the local Health Services Executive Office. A number of conditions apply to obtain this payment, e.g. that the mortgage was affordable in the first place, that the interest being paid is reasonable to meet residential needs of the applicants and that the house is not up for sale at the time of applying for the MIS. It is hoped that some of these conditions will be relaxed in the future. More details of the scheme are available from the [Department's website](#). If your application for MIS is refused, you may appeal to the [HSE Regional Appeals Officer](#). If this is then refused, you may appeal to the [Social Welfare Appeals Office](#). In addition to MABS, your local [Citizens Information Services](#) may be able to help with this process.
- ★ It is recommended you get in contact with the **Money Advice and Budgeting Service (MABS)**. They have a comprehensive leaflet on the steps to take in a situation of mortgage arrears, which is available on their [website](#) or at any one of the MABS offices around the country. You may also make an appointment with a MABS money advisor to look at your financial situation with a view to negotiating a more realistic and affordable repayment plan with your creditors. Be aware that some MABS services in certain centres have a waiting list. MABS helpline can be contacted at 1890 283 438.
- ★ You should also look at [FLAC's leaflet](#) that sets out a checklist of steps that you can take if you have lost your job. The **Citizens Information Board** also has a [specific website](#) (www.losingyourjob.ie) which contains more detailed information on your rights and entitlements if you have become unemployed or had your hours of work reduced.

What are the implications of negative equity?

Negative equity occurs when the amount of money you owe your mortgage lender is greater than the current estimated value of the property concerned. A question from many people in serious mortgage arrears is whether they would be better off handing back the keys of the property right now (also known as *voluntary surrender*) rather than waiting for a repossession case to be brought against them, given the legal costs involved.

There is no easy answer to this question. Generally speaking, in Ireland the mortgage lender will look to be paid the difference between what is owed and what the house sells for if the latter is less, i.e. negative equity. When the borrower is not able to pay the shortfall, s/he may be sued separately for this amount. A court may grant a judgment for this sum and the lender may then pursue repayment of it. Also, when the house is voluntarily surrendered, the borrower loses control over the sale, added to which the costs of sale (solicitors, auctioneers etc) are generally greater than if the borrower were trying to sell it him/herself. It is also likely that the lender will get less for the house. Thus, what you gain in not incurring legal fees, you may lose in other costs.

Another question surrounds what would happen if the borrower abandoned the property and emigrated, leaving it all behind. Some commentators have speculated that this might be a possible course of action. However, it should be noted that it is now much easier to enforce court judgments across borders within the European Union, including the UK. It must also be remembered that a person will have personal and family ties in this country and may want to return to Ireland at some point in the future, but may still be liable for the debt or debts concerned. This is therefore not a course of action that should be taken lightly.

What can I do if I feel debt collectors are harassing me constantly to collect the debt?

Some lenders engage debt collection companies to try to collect debts on their behalf and some collect on their own behalf. There is no system of regulation of debt collection at present in Ireland so that a license is not needed to operate as a debt collector though the [Law Reform Commission](#) has recently recommended that the system should be licensed.

At present, anyone attempting to collect a debt is subject to the criminal law in relation to issues such as trespass on property and intimidation generally. There is also a section in a piece of legislation called the *Non-Fatal Offences against the Person Act 1997* that is relevant to debt collection. It can be used by a borrower to protect themselves against too much contact by lenders. Section 11 of this Act creates an offence of 'demands for payment of debt causing alarm' under four headings:

- ★ The frequency of the contact by the collector with the borrower is calculated to subject the debtor (or his/her family) to alarm, distress or humiliation, or
- ★ The debt collector makes a false representation that a criminal charge may be brought against the borrower for not paying the debt, or
- ★ The debt collector makes a false representation that s/he is authorised in an official capacity (for example by a Court or State Enforcement Authority) to enforce payment of the debt, or
- ★ The debt collector makes a false representation that a document issued by him or her is issued in an official capacity (for example, a summons from a Court)

A borrower who is unhappy with the number or contacts or the type of communication made by a lender or their representative in connection with the collection of a debt can make a complaint to the Gardaí.

What can I do if the lenders are making constant contact with me about repayments?

Unfortunately some lenders have become aggressive in recent times in the way that they make contact with borrowers who are in arrears with their repayments. The rules on contact by lenders with borrowers during the course of loans are set out in Section 46 of the *Consumer Credit Act 1995*. Please note that these rules only apply to loans made by lenders to 'consumers', i.e. they do **not** apply to loans that were taken out for business purposes.

- ★ **Visits or telephone communications by the lender to the borrower at his/her place of employment or business are prohibited unless the borrower consents to them.** However, if the borrower also lives at his/her place of employment or business and all reasonable efforts to make contact with him/her have failed, consent is not needed. The Act does not specify that the consent has to be in a signature in writing and, in practice; a tick in a box on the loan agreement often passes as consent. As a result, many borrowers give consent to be contacted at work at the time the loan is made without necessarily realising that they have done so. If you are finding contact with you at work embarrassing, it is worth writing to the lender to say that your consent to contact at work was not an informed one and you want to withdraw any alleged consent.
- ★ **Visits or telephone communications to the borrower are also prohibited at any place, including the consumer's residence or place of business (unless the consumer consents, though again this does not have to be specifically in writing)** between 9.00 in the evening on any week day (including Saturday) and 9.00 in the morning of the following day. Similarly, visits or telephone communications are prohibited at any time on a Sunday or Public Holiday.
- ★ **Visits or telephone calls by the lender to the borrower's employer or family members are prohibited** except where the employer or family member is a party to the loan agreement, for example, has gone guarantor for a loan, unless the borrower consents in writing to such contact separate from any other term of the agreement.

A breach of these rules by a lender is a criminal offence and if you think these standards have been breached, you should get in contact with the Central Bank/Financial Regulator which is generally responsible for policing the consumer credit legislation.

Please note that the service of documents in connection with legal proceedings is the general exception to these rules.

What is the *Code of Conduct on Mortgage Arrears*?

In February 2009, [The Financial Regulator](#) put in place a [Code of Conduct](#) for dealing with "mortgage arrears of consumers in respect of their principal private residence". A brief summary of the general principles set out in this Code is as follows:

- ★ As soon as an arrears situation develops, the mortgage lender must bring it to the borrower's attention and attempt to address the situation;
- ★ Where arrears continue, the lender must keep up contact with the borrower and attempt to develop a plan for clearing the arrears;
- ★ If a third repayment is missed, the lender may issue a formal demand to repossess the property but this must include details in writing of the amount of arrears, any penalty interest and the possibility of a legal case for repossession;
- ★ **As of February 2010, all lenders must wait for a minimum of 12 months from the time arrears first arise before bringing a repossession case against the borrower.**

In terms of addressing an arrears problem, the Code broadly sets out the following guidelines:

- ★ Lenders must distinguish between those who can and cannot pay and must handle cases sympathetically to assist the borrower in meeting his/her obligations;
- ★ Alternative repayment measures must be explored, such as, for example, extending the term of the mortgage, reducing the monthly payment (for example through an interest-only arrangement) or allowing a temporary payment break. If any of these options are agreed, the details must be put in writing by the lender to the borrower;
- ★ Borrowers should be told by lenders that advice on maximising income and budgeting is available from MABS and the lender must liaise with any representative of the borrower, such as a MABS money advisor or other third party;
- ★ The lender must not seek the repossession of the property until every reasonable effort has been made to agree an alternative repayment schedule;
- ★ If legal action is taken, the lender must still maintain contact with the borrower and seek to reach an agreement. If the borrower is to be liable for any outstanding debt after the property is sold, then the lender must inform him/her about this.

A borrower who feels that any rule in this Code has been broken may make a complaint to the lender and follow it with a complaint to the

[Ombudsman for Financial Services](#). The Financial Regulator does not, according to itself, deal with complaints from individuals on the Code. However, given that the Code is issued by the Regulator's Office, FLAC suggests that it be kept informed of any complaint to the Ombudsman. The Financial Regulator does have the power to investigate the practices of lenders.

What are the legal procedures for repossession?

If none of the above steps succeed in sorting out the situation, legal action may be taken against you. This action may be brought either in the Circuit Court or the High Court, depending on the value of the property and the approach of the lender. The Circuit Court legal document is called an *Application for a Possession Order* and a High Court case is brought by a document called a *Special Summons*.

To protect your position after receiving these documents, you may fill out a document called an *Appearance*, send it in to the relevant Court office and send a copy to the lender's solicitor. This means the Court will be aware that you have received the documents and intend to state your position. It does not mean that you intend to defend the case against you in a legal sense, for example by claiming that the mortgage was invalid. However, it will give you the opportunity to appear in court on the date set out in the court document (generally called the 'return date') to explain how the arrears came to be and what you now intend to do about it. The Court will listen to what you have to say. If there is some kind of proposal to pay the mortgage and to start clearing the arrears, it will normally grant an adjournment to see how that goes. Another date will be set where the situation will be reviewed.

If progress is not made, the lender will eventually look for an *Order* to be granted and this will generally be made by a judge rather than a court official. Such orders are generally made with what is called a 'stay of execution'. This means that the *Order* is granted in principle but the judge is still leaving some time for a solution to be found. However, you should bear in mind that each appearance in Court is likely to push up the legal costs that may have to be paid to the lender if and when the repossession goes through. If you have 'equity' in your home, i.e. it is worth more than you owe the lender and depending on how serious the arrears situation is, you may want to consider whether it might be better to look at the option of selling the property and reduce the legal costs, or of fighting to hold onto it with the chance that the legal costs may be pushed up as a result.

What if I can't afford a lawyer to get legal advice?

- ★ [FLAC](#) operates a network of voluntary legal advice centres across the country and you can contact FLAC (LoCall) at 1890 350 250 for details of the centre nearest to you. It is important to understand that **this is not a legal representation service**. However, you can get free advice in connection with a legal matter, for example, if you are served with legal papers in connection with the repossession of your home and want to get some initial information about procedures.
- ★ You can also apply for legal advice from the State's network of law centres run by the [Legal Aid Board \(LAB\)](#), provided you pass a financial means test. These law centres will also help you take your case to court provided you pass a 'merits' test. In simple terms, this means that there must be a fair chance that you can win the case against you. In the vast majority of mortgage repossession cases, the borrowers are not claiming that the money is not owed, they are saying that a change in financial circumstances means they are now unable to pay. In practice, this means that legal representation is unlikely to be given in a repossession case unless you are claiming the mortgage was not valid in the first place or the arrears are not owed.

- ★ Reduced rates;
- ★ Longer maturity dates;
- ★ Rolling up outstanding interest;

- ★ Bank taking equity in the property;
- ★ Bank taking ownership and leasing back to the resident with rent payments coming off the loan.

It is also said that the renewed programme will look at ways that other countries have tried to deal with this problem in order to 'examine ways of expanding its own mortgage support measures'. As of January 2010 no firm proposals have yet been made, but a number of government spokespersons have repeated that this is being investigated. FLAC will update this factsheet if and when there is something positive to report.

Meanwhile, if you feel you have exhausted all the avenues of action but still cannot find a solution to your arrears problem, contact your local representative to explain the situation and call for urgent action from Government. Keep us informed!

It is also worth noting that the Master of the High Court (the person who hears the application to repossess a house first in the High Court) has recently made it clear to mortgage lenders that they must be able to show that they complied with the Code in order to be allowed to continue with their application in Court to repossess a dwelling.

In November 2009, the Irish Banking Federation (IBF) published a 'Statement of Intent' setting out the approach its members would take in relation to those with mortgage arrears, in addition to the limited protections already set out under the Code. It reads as follows:

"... IBF mortgage lenders have as their goal to work with their customers who face genuine difficulties in order to find solutions that do not involve legal action. The basis for such solutions is for the customer to talk to his/her lender at the earliest opportunity so that a mutually-acceptable arrangement can be agreed, implemented and reviewed thereafter on a six-monthly basis. Provided the customer maintains this arrangement, IBF mortgage lenders will not initiate any form of legal action against them in relation to their mortgage. An IBF Oversight Committee, with representation from the Money Advice and Budgeting Service (MABS), will monitor the application of this Statement of Intent."

This is a helpful addition but it remains to be seen what a 'mutually-acceptable arrangement' might be given the financial circumstances of any particular case. It is also critical to note that this commitment only applies to [IBF member institutions](#) and not to sub-prime mortgage lenders. Informally, the largest sub-prime lender, Start Mortgages, has indicated that it would be prepared to sign up to these commitments.

If your proposal of what you consider to be a mutually acceptable arrangement – for example, paying to the best of your ability in your current financial situation – is rejected by an IBF member, please feel free to contact us at info@flac.ie to discuss the matter further.

Possible future changes to debt law

You should bear in mind that the Government's 2009 'Renewed Programme for Government' proposed to 'introduce new measures to protect families having difficulty with their mortgage payments'. It says that 'the existing statutory Code of Conduct on mortgage arrears will be reviewed' and that 'more flexible mechanisms to avoid foreclosure' (in other words repossession) will be examined. These include: